

SURFACE TRANSPORTATION BOARD

215572

FINANCE DOCKET

31/852



PETITION OF TRI-STATE BRICK AND STONE OF NEW YORK, INC. AND TRI-STATE TRANSPORTATION INC. FOR A DECLARATORY ORDER

Summary

Petitioners, Tri-State Brick and Stone of New York, Inc. (hereinafter "Tri-State Brick") and Tri-State Transportation (hereinafter "Transportation") are rail customers located in the City of New York. Upon the declarations of Robert J. Turzilli, Fred Krebs and Willaim B. Galligan and the exhibits submitted herewith, the petitioners seek an order declaring that they are entitled to receive rail service at the 65th Street rail Yard in Brooklyn, New York, a facility owned by the City of New York on which the New York and Atlantic Railroad has the right to provide common carrier rail services and that all terms and conditions of that service, including any land use charges payable to the land owner, are to be set, in the absence of a private agreement, by the Surface Transportation Board.

PRIOR PROCEEDING

The petitioners sought a preliminary injunction to prevent the City of New York from terminating or interfering with the use of the 65th Street Rail Yard as a rail transloading facility. The Court denied the motion without prejudice to the petitioners refiling after obtaining a ruling from the Surface Transportation Board or in the event that the City should obtain an eviction order.

OFFICE OF THE SECRETARY OF TRANSPORTATION

U.S. DEPARTMENT OF TRANSPORTATION

FACTS

Petitioners currently access rail service offered by the New York & Atlantic Railroad (hereinafter "NY&A") via a transload facility located within the 65th Street Rail Yard in Brooklyn ("The Yard"). The Yard and the transload facility are owned by the City of New York. The facility includes tracks, platforms, roadways and ground designed for transloading cargos between the highway and the rail modes of transportation. The City's property is managed by the New York City Economic Development Corporation (hereinafter "EDC") which, in this case, had delegated that task to Apple Industrial Development Corp. a subsidiary. In this petition both will be referred to as EDC.

In 2001, the Canadian Pacific Railroad¹ (hereinafter "CPR") entered into an Operating Agreement with the EDC (Exhibit A) through its subsidiary the Delaware and Hudson Railroad Company. It also entered into a haulage agreement with the NY&A. By these agreements the CPR extended the reach of its direct line haul rail services from the end of its trackage rights at Fresh Pound Junction in Queens County to The Yard, located at Bay Ridge on the Brooklyn waterfront in Kings County, a distance of about 9.5 miles. By gaining access to The Yard CPR gained the ability to provide transload terminal services directly to rail customers at The Yard. Prior to the Operating Agreement, CPR had no access to any team track or other facilities in the City of New York, which would allow it to provide direct rail services to customers. Its franchise was limited to providing bridge service via trackage rights over Metro North and CSX Transportation owned tracks between the NY&A in Queens and its own trackage at

¹ The agreement is in the name of the Delaware and Hudson Railroad, but it provides that CPR is responsible for all the railroad's obligations under the Operating Agreement.

Mechanicsville, New York. The Operating Agreement makes it clear that the intent of both the EDC and CPR was to provide rail services to the general public by use of the facilities within The Yard.

Under the haulage agreement, the NY&A provided all services between Fresh Pond and The Yard as the agent of the CPR. CPR then entered into an "Ancillary Agreement" with petitioners, agreeing to provide them with line haul rail service including the non-exclusive use of transloading facilities within The Yard (Exhibit B). The Ancillary Agreement was co-terminus with the CPR's Operating Agreement. Each agreement had similar renewal clauses.

Effective on July 31, 2004 the CPR terminated its Operating Agreement and terminated its services to Brooklyn. NY&A has continued to provide rail services to and into The Yard and has stated that it intends to continue to provide those services, Declaration of Fred Krebs ("Krebs") ¶10 nor has the EDC sought to terminate rail service per se, *id.* However, the EDC seeks to evict the petitioners unless they agree to an increase of the user charges over those set in the Ancillary Agreement, an increase of 2,400%, Declaration of Robert J. Turzilli ("Turzilli") ¶6. The EDC's demand is based upon its determination of the rental value of the land when used for non-rail transportation commercial purposes, Declaration of Joan McDonald ("McDonald") ¶¶37 and 38, an increase in user charges from \$1,394 per month to \$44,921.25 per month. The petitioners handle 300 cars per year. EDC thus demands an access fee of \$1,796.85 per car unloaded at the yard.

The transloading operation performed at The Yard is the unloading of rail cars, the storage of brick and stone products on the ground and the loading of those products

on customer and common carrier trucks. Neither Petitioner owns the products in issue as they are sold by Tri-State Brick, FOB point of origin, Declaration of R. Turcilli ¶9. Petitioner, Transportaiton, a separate entity from Tri-State Brick, performs all transloading operations.

The Yard is on a parcel of real property devoted to rail use since the 1870's, Declaration of W. B. Galligan ¶5. Until the 1960's The Yard was a major facility serving car floats providing service across New York Harbor. That service ceased in the mid 1960's id. The property was redeveloped as a rail terminal by the City of New York after it was not included in the United States Railroad Authority's Final System Plan which created Conrail id. ¶9. The Yard was first acquired by the State of New York which then transferred it to the City, id.

The Ancillary Agreement grants Tri-State Brick the non exclusive use of 4.1 acres of the 34 acre yard to transload cargos delivered by CPR's rail services, See Exhibit B ¶1. While that agreement was co-terminus with the Operating Agreement each provided for extensions of the agreement on terms to be mutually agreed, id. ¶2.

On May 21, 2004 the CPR, apparently in default under the Operating Agreement, and thus in violation of the Ancillary Agreement, in violation of the Andellary Agreement asked the City to cancel the Operating Agreement. In early July, 2004 the CPR entered into an agreement with the EDC terminating its rail service to The Yard as of July 31, 2004. Neither the City nor the CPR obtained approval of the Surface Transportation Board for termination of CPR service from Fresh Pond, Jt. in Queens County, to Bay Ridge in Kings County, a service reaching a borough and county with

2,475,290 residents and 38,782 employers employing 437,905 persons as of 2004,(See U.S Census Bureau at <http://quickfacts.census.gov/qfd/states/36/36047.html>).

Immediately upon the termination of the Operating Agreement the City demanded that the plaintiffs vacate The Yard or agree to pay the increased fees outlined above in order to continue to access rail service via that facility.

The extension of CPR service from Fresh Pond Junction to Brooklyn caused CPR services to reach an area, including the Brooklyn Waterfront, previously served only by the New York Cross Harbor Railroad and Norfolk Southern Railroad. The purpose of the CPR extension, as stated in the Operating Agreement, was to promote "...the transportation of freight at the premises and providing equal commercial access to other companies that desire to utilize the rail freight facilities at the premises." (Operating Agreement Pg. 1 Exhibit A). Thus, this extension was to provide common carrier service on the line via the terminal to the general public including many of the 38,782 employers in Kings County of which Tri-State Brick and Transportation are two.

Transportation engages only in receiving freight in rail cars, unloading that freight and loading it onto trucks dispatched by or for the cargo owners at The Yard. While petitioner Tri-State Brick customers account for about 90% of the cargos handled by Transportation, about 10% are consigned to customers of other merchants or to other merchants themselves Turzilli ¶ 7. Transportation has offered its services to both the CPR and to the NY&A stating that its services are available for a reasonable fee to any rail customer *id.* Transloading is the only means available in New York City for most potential rail customers to access rail service as few rail customers, and no customers of petitioners, have access to a rail siding (Fred Krebs ¶ 4). Holding cargo for delivery is

necessary as trucks carry about one fifth to one tenth of the capacity of a rail car (Turzilli ¶ 15).

Plaintiffs received notice of CPR's termination of service in late June of 2004, Exhibit C. Petitioners received a notice to quit from the City in September of 2005, Exhibit D. Plaintiffs sought court intervention, but the Court informed the petitioners that absent an actual eviction notice, it would not act until the Surface Transportation Board determined the scope of its jurisdiction and if it has jurisdiction, the rights of the parties.

From July of 2004 to date the petitioners have been attempting to find an alternate location at which they could receive rail service Turzilli ¶17. The Plaintiffs also engaged in discussions with the EDC on their future right to use the facility and to receive rail service. *id* 20 and proposed to assume CPR's role as terminal operator, Exhibit E. EDC's demands for access fees for continued use of the facility were and remain unreasonable *id* 21. On January 24, 2005 the defendants released an RFP seeking an industrial use of the land which would maximize the financial return to the EDC. No decision on the future use of the yard has apparently been made, or announced, Turzilli ¶21 Krebs P 13.

The demand for a 2,400% increase in the user charge for The Yard jeopardizes the plaintiff's existence and renders the further use of rail terminal service by anyone at The Yard highly improbable. Such demands for fees by EDC and other obstruction of access is the major reason that rail carriers are not operating rail facilities built by the City of New York, Galligan ¶14. The EDC argues that it can lease the land for industrial and commercial purposes at high rates and has demanded similar fees for the use of its rail facilities, see: Affidavirt or Joan McDonald Exhibit F ¶¶35, 36 & 37. CPR

had negotiated a high land use fee for its operation of the yard with per car charges added to this base fee. The resulting financial burden, combined with the obstruction of all marketing efforts by the EDC's denying access, illegally ended that use. Now, terminating the use of the land as a public freight terminal, either by evicting the plaintiffs or by forcing them to pay unreasonable land use fees will place up to ten trucks on the Hudson River crossings to replace each of the 300 railcars petitioners now handle at The Yard. If the petitioners can not find a rail served facility in New Jersey, each railcar will also be replaced with five to six long haul trucks loaded with an average of 30,000 lbs. of material, traveling an average distance of over one thousand miles, Turzilli ¶10. This equates annually to up to 1,800,000 loaded truck miles or over 27,000,000,000 ton miles and 1,800,000 empty truck miles to bring cargo into the region. It will take and about 10,800 trucks crossing of the Hudson River due to the relocation of petitioners transloading operation to the west, as no facility is available East of the Hudson where most of Tri-States customers are located, (Turzilli ¶ 15). However, sufficient trucking capacity is not available either nationally or locally to replace the rail operation which now serves the petitioners, Turzilli ¶22.

The Yard is the southern most terminal of the entire rail system serving the region east of the Hudson River. Without the terminal, the rail lines from Fresh Pond to Bay Ridge can serve only as a bridge route for cars bound for the few rail customers still located on the New York Cross Harbor Railroad and the fewer which still use that railroad's cross harbor car float services. Few industries on the Bay Ridge Line retain sidings due to years of poor or no service. All other yard and terminal facilities on that

line and indeed elsewhere in the region, all owned by governmental entities have already been devoted to alternate uses Krebs ¶¶ 6, 11 Galligan ¶ 19.

Studies by the EDC establish that proper use of the Bar Ridge line and The Yard would alone divert another 459,000 annual tons of freight from the region's highways Galligan ¶14, See Exhibit G. Currently the plaintiffs handle 300,000 tons a year, Turzilli ¶22. Other shippers have sought to use the yard but have been blocked by the EDC;s irrational demands for user fees and limitations on trucks, Galligan ¶16.

Prior to the Operating Agreement the NY&A had no terminal at Bay Ridge. Its track is graded separated across Brooklyn and it had few sidings, Krebs ¶3. When it was granted access to The Yard in its own right upon the withdraw of CPR, its service expanded and gained the potential to serve the entire Brooklyn Waterfront. This placed it into a market it did not previously serve, *id.*, a market then served exclusively by the NYCH and Norfolk Southern, Galligan ¶11. The NY&A's efforts to market its services in Brooklyn have been unsuccessful solely due to interference from the EDC which, in all cases, is demanding user fees and imposing terms which are unreasonable and short term contracts with draconian termination clauses, Galligan *id.* ¶16.

THE EDC AS A LAND OWNER WHICH HAS DEVOTED ITS LANDS TO RAIL
COMMON CARRIER PURPOSES MAY NOT OBSTRUCT THE RAIL COMMON
CARRIER'S FULFILLMENT OF ITS OBLIGATIONS

In The New York City Economic Development Corp-Petition for Declaratory Order, FD 34429 Decided: July 15, 2004, the Board, at the request of EDC, held that rail lines and facilities built by and owned by the EDC and which were to be operated as part of the national rail system were under the Board's exclusive jurisdiction. In that case the

facility was a branch of the Staten Island Rapid Transit Line which was being restored by EDC to carry waste to be transported by the Department of Sanitation of the City of New York. The branch and the facility in issue were not to be used for common carriage, but for the exclusive use of another department of, or entity of, the City of New York. Here, in marked contrast, the facility in issue was created by EDC to serve the general public. It was devoted by EDC to common carriage rail service in 2002 and at that time it became a critical link to common carriage rail service and became a part of the national railway network.

While CPR has ceased its operations, without Board approval, the NY&A has continued all rail services and has no intention of terminating those services. Indeed the EDC has taken the position that it has no intention of attempting to terminate NY&A's service to The Yard. Therefore, the facilities in issue here are common carrier railroad facilities currently being used by a rail carrier. All issues related to their use are within the exclusive jurisdiction of the Surface Transportation Board, 49 U.S.C. § 10501(b).

In Orange County Transportation Authority, Riverside County Transportation Commission, San Bernardino Associated Governments, San Diego Metropolitan Transit Development Board, North San Diego County Transit Development Board—Acquisition Exemption—The Atchison Topeka and Santa Fe Railway Company, FD 32173, (March 12, 1997. pg 5 of 12 and footnote 12) (hereinafter “Orange County”) the Board stated that a non common carrier owner of rail facilities being operated by a rail common carrier can not unreasonably obstruct the operation of the Carrier. In U. S. v. Baltimore & O. R. Co. 333 U.S. 169 (1948) the Supreme Court held that a land owner may not terminate rail access to rail customers by forcing a rail carrier to impose an unreasonable fee for service

to customers who utilize a track over the owner's land. Therefore, The Yard and the services rendered therein are within the exclusive jurisdiction of the Surface Transportation Board which has jurisdiction to set all terms applicable to the provision of rail service.

ACCESS TO RAIL SERVICE IS A PART OF THAT SERVICE AND CAN NOT BE
ADVERSELY WITHDRAWN WITHOUT THE APPROVAL OF THE BOARD

Plaintiffs are members of the public who have the right to access the rail service which the NY&A is providing and which NY&A seeks to continue to provide. Here the facilities in issue are the only facilities available to anyone who wishes to use NY&A rail services in Bay Ridge or near the Brooklyn Waterfront, See Declaration of Fred Krebs ¶ 3. In 1954 the Supreme Court held that terminal facilities needed to provide access to rail service in New York City are scarce and therefore such facilities and the services to render them useable are inseparable from trunk line service, Secretary of Agriculture v. United States, 347 U.S. 645, 647 (1954).

In Meyers v. Jay Street Connecting Railroad, 262 F. 2d 676, 678, (2d, Cir 1959), similarly dealing with the scarcity of rail facilities in New York, the court held that spur tracks which are the only means of access to rail service, are part of the main line and can not be abandoned without Board approval. In 1959 the Board's predecessor, Interstate Commerce Commission, did not have jurisdiction over spur tracks. However, the court held that where a track is the only means of access to trunk line service, the ICC had exclusive jurisdiction as, similarly to the situation in Secretary of Agriculture, supra, the spur tracks were inseparable from line haul service as without them customers would

have no access to that service. In Nordgrad v. Marysville & N. RY. Co. 218 F. 737,742-43 (9th Cir 1914) the court reached the same conclusion for the same reason.

Currently, the Second Circuit has found that services identical to those provided by Transportation at The Yard are within the definition of rail transportation contained in the act:

Green Mountain serves industries that rely on trucks to transport goods from the rail site for processing; so the proposed transloading and storage facilities are integral to the railroad's operation and are easily encompassed within the Transportation Board's exclusive jurisdiction over "rail transportation."

Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 466 (2d Cir. 2005).

49 U.S.C. § 10102(5) which defines a rail carrier as "a person providing common carrier railroad transportation for compensation"; 49 U.S.C. §10102(6)(C) a railroad includes a "... terminal, terminal facility, depot, yard and ground, used or necessary for transportation", (emphasis added). The statute goes further to declare that transportation includes a "...property, facility, instrumentality or equipment of any kind related to the movement...of property by rail regardless of ownership or an agreement concerning use..." (emphasis added) 49 U.S.C. §10102(9)(a). The Interstate Commerce Commission in Association of P&C Dock Longshoremens v. The Pittsburgh and Conneaut Dock Company, et al, FD NO. 13363 (SUB.-NO. 1), 8 I.C.C. 280, 1992 WL 30836 (I.C.C. 1992) dealt with a non railroad operating a dock on which it handled product for the railroad's customers. The ICC concluded:

We find that P & C Dock conducts rail operations--it operates a dock that uses rail equipment and track to receive, interchange, transfer, store, and handle property that is being transported--and makes that service publicly available to all who employ B & LE.(the railroad) Accordingly, under the statute and governing precedent, defendant is a rail carrier.

In United States v. Brooklyn Eastern Dist. Terminal, 249 U.S. 296, 304 (1919)

(hereinafter "BEDT") the court stated that:

(t)he transportation performed by the railroads begins and ends at the Terminal. Its docks and warehouses are public freight stations of the railroads. These with its car floats, even if not under common ownership or management, are used as an integral part of each railroad line, like the stockyards in United States v. Union Stockyard, 226 U. S. 286, and the wharfage facilities in Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498. They are clearly unlike private plant facilities. Compare Tap Line Cases, 234 U. S. 1, 25. The services rendered by the Terminal are public in their nature; and of a kind ordinarily performed by a common carrier.

Therefore, common carrier rail terminal services, such as those conducted by Transportation, whether conducted by a railway or a non-rail carrier, are part line haul transportation by rail where those services are indispensable. In BEDT the court, as did Congress in the ICCTA, made it clear that neither ownership nor control of such facilities or the services conducted therewith is material to the issue of jurisdiction if the services rendered are integral to common carrier rail transportation service².

Indeed, service which is integral to rail transportation is whatever is required to fulfill the obligations of a common carrier:

The duty of unloading carload freight ordinarily rests with the shipper or consignee. Pennsylvania R. Co. v. Kittaning Co., 253 U.S. 319, 323. But it is a transportation service within the meaning of the Interstate Commerce Act. Atchison, Topeka & Santa Fe Ry. Co. v. United States, 295 U.S. 193, 200, 55 S.Ct. 748, 752, 79 L.Ed. 1382; Barringer & Co. v. United States, 319 U.S. 1, 6, 729, 63 S.Ct. 967, 971, 87 L.Ed. 1171. Its cost may be included in the line-haul tariffs or separately fixed or allowed as an additional charge. , 410-415, 52 S.Ct. 589, 592-594, 76 L.Ed. 1184; Loading and Unloading Carload Freight, 101 I.C.C.

² Two cases hold that a merchant operating a rail facility for its own product is not within the Board's jurisdiction, CFNR v. City of American Canyon, 282 F.Supp.2d 1114 (N.D. Ca. 2003) and Florida East Coast Railway Co. v City of West Palm Beach, 266 F.3d 1324 (11 th Cir 2001). Both, however, involve operations handling only their own product and clearly not open to the general public. Here Transportation is a common carrier, handling product for Tri State Brick's customers and other brick and stone merchants and customers.

394; Berg Industrial Alcohol Co. v. Reading Co., 142 I.C.C. 161, 163-164; Livestock Loaded and Unloaded at Chicago, 213 I.C.C. 330, 336, 337.

Railroad Retirement Board v. Duquesne Warehouse Co., 326 U.S. 446, 453 (1946).

Most of the NY&A's traffic increases since that company took over the freight service of the Long Island Railroad in 1997 has been traffic utilizing transloading, Krebs ¶4. Describing precisely the situation addressed by the Supreme Court in 1954, Krebs states that due to the scarcity of sidings available to customers, transloading services are necessary to get cargo from the highway to the railway, i.e. to safely and efficiently connect the railway services to the customer. He confirms that prior to becoming CPR's agent to operate The Yard, NY&A had no ability to directly serve customers in the Bay Ridge area of Brooklyn, including the waterfront. Secretary of Agriculture v. United States, *supra* 648 and 654 holds that due to exactly that scarcity, access to service was a part of the rail line haul service into New York City. Mr. Krebs confirms that such service is indeed the only means by which NY&A can access any new customer. Mr. Galligan states that access to rail service in New York City now is much more limited than that reviewed by the Supreme Court in Secretary of Agriculture, Supra.

A rail common carrier must "...furnish reasonable trackage facilities and means to serve the consignees at the particular station as measured by the volume of business handled in and out of the station. Each consignee and shipper at the station is entitled to the service which reasonable facilities ought to afford him." St. Louis, Southwestern Railway Co. v. Mays, 177 F. Supp. 182, 184-85 (D. Ark. 1959). The City can not obstruct the carrier's fulfillment of its obligations, Orange County, etc. supra.

Transportation has held itself out to serve any consignee or shipper which needs access to NY&A or, before that, CPR rail services. About 10% of its traffic is handled,

for a fee, for non Tri-State Brick customers and merchants. The petitioner is therefore providing common carrier service, United States v. Louisiana P&R, 234 U.S. 1, (1914) (referred to above as the Tap Line Cass and interpreting language incorporated in to the ICCTA without change):

It is insisted that these roads are not carriers because most of their traffic is in their own logs and lumber, and that only a small part of the traffic carried is the property of others. But this conclusion loses sight of the principle that the extent to which a railroad is in fact used does not determine the fact whether it is or is not a common carrier. It is the right of the public to use the road's facilities and to demand service of it, rather than the extent of its business, which is the real criterion determinative of its character.

The facilities the petitioners use at The Yard are therefore integral to rail transportation and as they are indispensable to that service. They are therefore part of the line haul and are under the jurisdiction of and within the regulatory power of the Board.

THE EXTENSION OF CPR SERVICE FROM FRESH POND TO AND INCLUDING THE YARD AND THAT OF NY&A INTO THE YARD IS A LINE OF RAILROAD SUBJECT TO REGULATION BY THE SURFACE TRANSPORTATION BOARD

Before the CPR entered into the Operating Agreement it had overhead trackage rights over CSXT and Metro North to Fresh Pond Jt. in the Borough and County of Queens. The Operating Agreement and the subsequent Haulage Agreement, extended its line haul services about nine miles from that junction. Until that agreement CPR had no direct access to rail customers. The extension provided it with access to a public rail transload facility located in the sixth largest population center in the nation, the Borough of Brooklyn. This extension was not a yard or spur track which is not subject to regulation pursuant to 49 U.S.C. §10906. The extension of service in issue allowed CPR

and NY&A to directly service an area of Brooklyn which was until then served only by Norfolk Southern via the Cross Harbor Railroad and the Cross harbor Railroad.

In Texas & Pacific Ry. v. Gulf, Colo. & S. F. Ry., 270 U.S. 266, 278 (1926) (Texas & Pacific), the United States Supreme Court found that a track should be considered to be a line of railroad “where the proposed trackage extends into territory not theretofore served by the carrier, . . . particularly where it extends into territory already served by another carrier.” This extension of service clearly meets the criteria for a regulated rail line or service as frequently articulated by the Board. See, e.g., Park Sierra Corp. — Lease & Operation Exemption — Southern Pacific Transp. Co., STB Finance Docket No. 34126, slip op. at 5 (STB served Dec. 26, 2001) (Park Sierra); Grand Trunk Western R.R. — Pet. for Declaratory Order — Spur, Industrial, Team, Switching or Side Tracks in Detroit, MI, STB Finance Docket No. 33601, slip op. at 2 (STB served July 30, 1998); Chicago South Shore & South Bend Railroad — Petition for Declaratory Order — Status of Track at Hammond, IN, STB Finance Docket No. 33522, slip op. at 6 (STB served Dec. 17, 1998). Rail service cannot be abandoned or curtailed by the last carrier to have the obligation to provide service. See Smith v. Hoboken Shore Warehouse and SS Connecting Railroad, 328 U.S. 123, 130 (1945) and similarly a land owner may not obstruct the carrier’s discharge of its duties. Orange County, Supra.

As the Board has recognized that it has a “statutory duty to preserve and promote continued rail service,” Western Stock, 1996 WL 366394, *12; see Salt Lake City, 2002 WL 368014 at *4; Chelsea, 8 I.C.C.2d at 779; and,” that one of its “function[s] ... is to provide the public with a degree of protection against the unnecessary discontinuance, cessation, interruption, or **obstruction of available rail service.**” (emphasis added)

Waterloo Ry., 2004 WL 941227, at *3; see Western Stock, 1996 WL 366394, at *12; Modern Handcraft, 363 I.C.C. at 972.10. Therefore, The Yard's facilities are an integral to line haul service and the Board has full authority to regulate that service.

EDC IS ENTITLED TO A REASONABLE FEE FOR THE USE OF THE TERMINAL, BUT THE AMOUNT OF THAT FEE MUST BE DETERMINED BY THE BOARD.

The EDC is entitled to be paid for the use of its land. The Board, in determining land use charges applicable to railway facilities in the City of New York, has based those charges on the value of the land as used for railway purposes and the stand alone cost to the owner of the facility, See CSX Corporation and CSX Transportation Inc. Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corporation, FD 33388 (Sub-No. 69)(109) (December 18, 1998) (footnote 17). In a subsequent decision the STB determined that the value of East of Hudson freight assets would be 8.97 times the annual before tax revenue earned **from the rail operation**. The rental value was then set at the rail cost of capital for that value. CSX Corporation and CSX Transportation Inc. Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating Lases/Agreements—Conrail Inc. and Consolidated Rail Corporation, FD 33388 (Sub-No. 69)(123) May 18, 1999 pg. 11 of 22. The industry cost of capital as of June 5, 2005 was determined by the STB to be 10.1%, Railroad Cost of Capital — 2004, STB Ex Parte No. 558 (Sub-No. 8) (June 21, 2005).

It is respectfully submitted that the EDC's demands for fees are unreasonable. The fact that these lands devoted to other uses could generate significantly more revenue to the EDC is irrelevant. In fact, rail lands can not be devoted to other purposes.

Tri-State entered into a contract with Canadian Pacific which includes an agreed upon fee for the non-exclusive use of the facilities at 65th Street. That contract has an escalation clause in it. Tri-State has tendered that fee to the defendants. It has been refused. The STB should continue the user fee set in the agreement between Canadian Pacific Railroad and the plaintiffs which should be paid from August 1, 2004 until a new rate is set by agreement between the parties or by order of the STB. The STB in its decision on this petition should reaffirm the applicable standards for setting railway and facility user fees. While such advice will not bind the Board, as the final decision must be based upon a second application to the Board for that type of assistant, the advice should assist the petitioners and the EDC to compromise on the issue.

THE FACT THAT THE CPR TERMINATED ITS OPEARATING AGREEMETN IS
IRRELIVANT

A rail carrier may not enter into any agreement which will cause it to terminate service without Board approval.

“(O)nce a party acquires, through the continuous performance of carrier services for the public, the status of a 'carrier by railroad,' thus subjecting itself to the provisions of the Act . . . it cannot absolutely terminate such status and the duties thereof by leasing its railroad facilities to another; once the lease is terminated or the lessee obtains permission to abandon its operations, the lessor is under a revived obligation to operate its railroad properties until it too receives an abandonment order from the Commission.

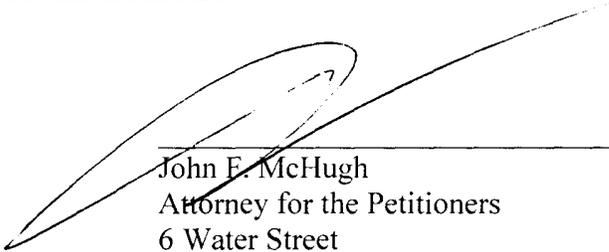
CF Meyers v. Famous Realty, Inc. 271 F.2d 811, 814 (2d Cir 1959). Here the CPR granted the NY&A the right to provide services in its stead. The NY&A's services can not be terminated by any third party including the land owner, EDC, due to the expiration of an operating agreement, See: New York Cross Harbor R.R. v. Surface Transp. Bd., 374 F.3d 1177, (D.C. Cir. 2004). 49 U.S.C.§11101 provides in relevant part that “Commitments which deprive a carrier of its ability to respond to reasonable requests for

common carrier service are not reasonable.” The Canadian Pacific agreement to abandon its rail service to Brooklyn, and the agreement to vacate The Yard on a date certain are each illegal. See: Railroad Ventures, Inc. v. Surface Transportation Board, 299 F.3d 523 (6th Cir.2002) (voiding contract entered into by an abandoning rail carrier which obstructed efforts to restore of rail operations).

Conclusion

EDC seeks to deny the petitioners access to rail services. Unobstructed participation in interstate commerce is a federally and constitutionally guaranteed right. To guarantee those rights are equally available everywhere within the nation Congress has given the Board exclusive jurisdiction over all issues related to rail services and rates. Petitioners are entitled to an order declaring that the 65th Street yard and the facilities built thereon to facilitate public access to the national rail system, which are currently in service and served by a rail carrier, are all within the exclusive jurisdiction of the Surface Transportation Board and the EDC, a non carrier land owner, may not interfere with access to rail services being provided by a rail carrier, including but not limited to the barring or imposing unreasonable terms for access.

Dated, New York, N.Y.
January 13, 2006



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DECLARATION OF ROBERT J. TURZILLI

Robert J. Turzilli, declares under penalty of perjury pursuant to 28 U.S.C. §1746 as follows:

1. I am the president of Tri-State Brick and Stone of New York, Inc. ("Tri-State") and as such am personally familiar with the facts asserted here and if called to testify in this matter would testify competently as follows:

2. This declaration is in support of this Petition for a Declaratory Order to establish that the facilities petitioners must use to access the rail services now provided by the New York & Atlantic Railroad ("NY&A") at the 65th Street Yard in Brooklyn are an indispensable part of common carrier rail service and that the required facilities are within the exclusive jurisdiction of the Surface Transportation Board which alone can set the terms for their use in the absence of an agreement between the parties.

3. Tri-State sells brick and stone products used in the construction of buildings and structures. Tri-State Transportation ("Transportation") is a corporation organized to operate a transloading service at the 65th Street Rail Yard in Brooklyn ("The Yard"), a facility owned and developed by the City of New York since 1970. The New York City Economic Development Corporation is an entity created by the City of New York which manages The Yard. The Canadian Pacific Railroad ("CPR") is a rail service provider

which entered into an Operating Agreement with the EDC in 2002 to provide rail service to the public via The Yard (See Operating Agreement Exhibit A). The NY&A is a rail service provider which entered into a haulage agreement with CPR in 2002, extending CPR trunk line rail service from the end of its trackage rights at Fresh Pond Jt. in Queens County, New York to The Yard, located on the Brooklyn Waterfront at Bay Ridge in Kings County, New York, a distance of about 9.5 miles. NY&A, provided all rail services at The Yard after the Operating Agreement went into effect. From 1970 through 2002 The Yard was not in service.

4. Transportation provides transloading services primarily for Tri-State's customers. However, about 10% of Transportation's services are rendered for a fee to other brick and stone merchants and their customers. Transportation has informed both the CPR and the NY&A that Transportation's transloading services are available to any rail customer. Transportation was once approached to provide transloading service for a rail customer who wanted to unload salt and hold it for local truck delivery. While that customer did not ultimately use rail services, it was welcome to demand service from Transportation which holds itself out to the public as providing general transloading services on reasonable request.

5. Petitioners are currently provided with rail service at The Yard by the NY&A. On July 27, 2005 Tri-State received a Notice to Quit The Yard from an entity representing the EDC (Exhibit B). Petitioners use facilities at The Yard on a non-exclusive basis to access NY&A's line haul rail service. It has the right to do so pursuant to an Ancillary Agreement it entered into in 2002 with the CPR (Exhibit C).

6. The initial terms of the Operating Agreement and the Ancillary Agreement expired on February 28, 2005, however each included renewal clauses for additional terms. Notwithstanding its obligation not to do so, the CPR surrendered its rights under the Operating Agreement as of July 31, 2004 and ceased providing rail services to the petitioners. However, NY&A continued rail services in its own right and continues to do so. Upon the termination of the Operating Agreement. The EDC immediately demanded a 2,400% increase in the user charges petitioners were paying for their use of facilities at The Yard under the Ancillary Agreement. All efforts to negotiate a reasonable user fee for the continued use of The Yard's facilities have failed as the City has determined that it can obtain rent for the land at the rates it is demanding if the land is leased for non-rail purposes. The EDC refuses to recognize the user fee previously agreed to as the basis for a reasonable increase in user fees. I understand that the fee we agreed to in 2002 was based upon user fees the City had then agreed to with CPR for its use of the entire yard.

7. Petitioners under the Ancillary Agreement have only a non-exclusive right to use four acres solely to transload cargos. The Yard itself consists of 34 acres. Petitioner's non-exclusive rights do not block any other rail use of The Yard.

8. Tri-State is in the business of selling high quality architectural brick and stone. Our customers are entities in the construction business. They require a continuous supply of materials, ordered months in advance. Tri-State has reliably filled their needs for this unique product line for years and has developed an excellent reputation within the building design and construction industry.

9. Tri-State provides both quality products, sold FOB at their point of origin, and arranges for transportation services from the point of sale to The Yard. The customer is responsible for pick up and local delivery of its cargo.

10. Quality brick is available only where there are sources of quality clays and useable stone is also found in remote locations. Tri-State obtains product from as far away as Washington State. Brick and stone are both heavy products which lend themselves to rail transport particularly where the distances we deal with are involved. Approximately 40% of the product we obtain for our customers is obtained from quarries or manufacturers in Washington, Utah and Nebraska and nearly all our product is delivered by rail to the New York Metropolitan Region. The average distance traveled by product bound to The Yard is over one thousand miles.

11. In June of 2002, in an effort to reduce truck mileage between rail heads and our customers, the majority of whom are located East of the Hudson, we entered into the Ancillary Agreement with the Delaware and Hudson Railroad, d/b/a CPR. Under that agreement we would receive carloads of material via the CPR and transload cargos to trucks on four acres of The Yard. The CPR had the right to terminate on sixty days notice on November 30, 2003. It did not. However, on July 31, 2004 CPR gave up The Yard and ceased providing service to us.

12. CPR served the facility via the haulage agreement with the NY&A. CPR locomotives and crews hauled CPR trains to Fresh Pond Junction in Queens. From that junction, the NY&A would haul CPR cars, our cars, to The Yard and place them at the transloading facility. However, we remained at all times a CPR customer and all bills for

transportation were paid to CPR. Only CPR had the contractual right to service The Yard.

13. Despite the fact that CPR surrendered its rights under its Operating Agreement on July 31, 2004, the NY&A has continued to provide us with rail service at The Yard, charging us directly for that service. Upon the termination of the Operating Agreement the EDC has taken the position that petitioner's right to use The Yard terminated also. It has therefore demanded that petitioners enter a new agreement, canceling all rights it has attendant to the Ancillary Agreement and agree to an increase in user fees of 2,400%.

14. Tri-State assigned its rights under the Ancillary Agreement to Transportation. That corporation is solely in the business of providing transload services at The Yard. It unloads inbound cars of product and either loads that material on customer's trucks or on common carrier trucks which deliver the rail cargos to our customers and others. Over 90% of the cargo handled by Transportation is owned by customers of Tri-State. The balance of its services is rendered for other merchants and their customers. Indeed, Transportation was approached by the railroad to handle salt for one of the railroad's other customers. Transportation agreed to do so but that cargo did not arrive. Transportation has made it clear to NY&A as well as to CPR previously that Transportation is available to any customer of the railroad if its services would be useful and that it would charge a fee which was reasonable.

15. The capacity of a rail car ranges between 150,000 lbs. and 180,000 lbs. This far exceeds the 42,000 lb. capacity of a heavy truck, reduced in this case by the weight of the unloading equipment the truck must carry. Therefore, it takes about ten truck trips to

deliver the contents of one fully loaded rail car. Therefore, in most cases Transportation unloads the freight onto the ground so that the rail cars could be released back to the railroad, even though the connecting truck could not deliver all the brick or the customer could not receive it at that time. Transportation does not own any cargo in its custody and Transportation does not own any trucks. Its services are limited to unloading rail cars, holding cargo between modes and loading customer or common carrier trucks for completion of the transportation of the goods from the manufacturer to the customer.

16. Tri-State's business is now running at the rate of 300 rail car loads per year. That is equal to the capacity of approximately 1,900 separate long haul trucks and 3,000 local delivery trucks.

17. Since we were first informed of CPR's termination of its Operating Agreement, petitioners have sought suitable substitute facilities. We contacted CSX and Norfolk Southern, the two major carriers owning or controlling the main truck lines and terminals serving this region. We looked for facilities in New Jersey. They have nothing available. We contacted, we believe, every short line in New Jersey with no result. The carriers who returned our calls or attempted to work with us at all simply knew of no space on their lines which was available. East of the Hudson, due to the public ownership of all railway lines in the City of New York and on Long Island and indeed in Westchester County and the policy of the Metropolitan Transportation Authority (which owns and manages all New York State owned rail facilities) of eliminating sidings used in the past by freight shippers. The Yard is now one of the very few locations East of the Hudson River where rail freight service can be accessed by the public and all others are fully occupied. We have been in extensive discussions with the NY&A, but they also

have not been able to lead us to an alternate facility as they have been forced to surrender major facilities, reducing their ability to meet the public's needs considerably since they took over the freight services formerly operated by the Long Island Railroad in 1997.

18. The EDC's actions here will effectively bar Tri-State and indeed all other industry in the region from any practical access to rail transportation. That appears to be EDC's objective. At a meeting last summer EDC invited us to relocate to New Jersey, the only possible alternative at this time. Simply by moving our operation to New Jersey would result in placing not less than three thousand heavy brick hauling delivery trucks on the Hudson River crossings and associated highways every year assuming that we could locate such a facility. If we were to find a facility which was not rail served the line haul from the manufacturer to the region could be replaced by 1,900 one way heavy truck hauls of an average of over one thousand miles (assuming we could find sufficient trucks) local delivery trucks are smaller and carry a crane to load and unload the truck. But, the local delivery is far less efficient and would extend 3000 local truck haul far to the west, placing a tremendous burden on the local highway system particularly on Hudson River Crossings. Our initial move to Brooklyn was to shorten that local segment of the trip to the extent allowed by the region's infrastructure. We moved as we believed the City shared that goal and would maintain The Yard as a rail cargo trainload facility offering its services on reasonable terms. Now having been attracted by that assertion set forth in the Operating Agreement, we find ourselves with no place to go due to the City's change of direction.

19. Neither Tri-State nor Transportation have been notified of any proceeding before the Surface Transportation Board to abandon CPR rail service to The Yard (i.e. to

Brooklyn). I am informed that NY&A has no desire to abandon the service it is providing and indeed is eager to assume control of The Yard and to market it as a rail common carrier intermodal terminal open to the non-siding-served public. Indeed, Tri-State also offered to take over the CPR's responsibilities at the terminal and to market common carrier rail services utilizing that facility. If abandonment were authorized by the Board, petitioners would make a formal offer of financial assistance to take over and maintain the service. Petitioners are financially responsible persons.

20. The EDC demands a rent at \$33,486.75 per month or \$8,371.69 per acre per month. Under our agreement with CPR the use charge is \$340 per acre per month or \$1,360 per month. As stated above the EDC's demand is for an increase of just over 2,400%.

21. We continued to negotiate with the EDC through January of 2005. On January 20, 2005 Tri-State offered to take over the entire yard and manage and market it as a common carrier freight terminal on terms which would be reasonable. That was rejected without discussion by the EDC and a Request for Proposals was issued for other uses of The Yard. The EDC has not informed us or the public in general if any entity submitted a conforming proposal or if EDC intends to devote this facility to other uses. At that same time, I understand that the NY&A also offered to take over The Yard and to manage and market it as a common carrier freight terminal.

22. We understand that CPR was unable to attract customers other than petitioners due to EDC's obstruction of access by any entity which would increase truck traffic through the adjacent Brooklyn Army Terminal, the only access to The Yard from the streets.

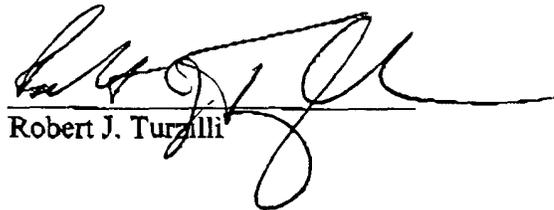
23. There a national shortage of trucks, there is a national shortage of truck drivers. Each railcar of our type of product replaces approximately six separate long haul trucks. Assuming we move to the available rail served facility in New Jersey, each rail car we now handled in Brooklyn will generate not less than ten local truck trips over the areas few cross harbor highway connections. Plus, our move would, it would appear, occupy the last rail accessible property in the entire Metropolitan Region and allow The Yard to return to the state of disuse which preceded the Operating Agreement for nearly thirty years, effectively blocking any further increase in rail use East of the Hudson.

24. Rail movement uses 40% less fuel and generates nearly 80% less dangerous pollution than a truck. Thus, the EDC's eviction of the petitioners will ultimately result in a significant increase in pollution, highway congestion and maintenance costs. This result would be entirely inconsistent with the supposed purpose of the City's development of rail facilities.

24. The EDC claims that it is entitled to collect user charges at rates which would be generated by non-rail commercial uses of this land. I understand that the Board sets land use fees based upon the going concern value of the land as a railway, not as an automobile dealership's set up and new car storage facility (a comparison upon which the EDC has based its demands). It is submitted that the value of the entire rail development program the EDC has undertaken for the last thirty years has been destroyed by the EDC's absolutely unrealistic demands for user fees for the use of such facilities. There can be no diversion of freight traffic from highways to railways in the City of New York until its land use demands are brought into line with the realities of the transportation marketplace.

Wherefore, as the actions of the EDC will effectively terminate access to common carrier rail service within New York City and as rail service cannot be terminated without approval of the Surface Transportation Board and as no such approval has been obtained or sought, the Board should declare that The Yard is within the exclusive jurisdiction of the Board, that EDC as the owner of facilities which are inseparable from line haul rail service can not obstruct that service and that any dispute as to user fees to be paid to EDC for use of The Yard must be resolved by the Board.

Dated, New York, N.Y.
January 12, 2006


Robert J. Turzilli

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TRI-STATE BRICK AND STONE OF NEW YORK, INC.
D/B/A TRI-STATE BRICK & BUILDING MATERIALS
And TRI-STATE TRANSPORTATION, INC.

Plaintiffs,

Declaration of Fred L. Krebs

v.

NEW YORK CITY ECONOMIC DEVELOPMENT
CORPORATION and APPLE INDUSTRIAL
DEVELOPMENT CORP.

Defendants,

Fred L. Krebs, declares under penalty of perjury at Glendale, New York pursuant to 28 U.S.C §1846:

1. I am the president of the New York & Atlantic Railway Company. I have been subpoenaed to testify in this matter, but I understand that the parties have agreed to accept my testimony by this declaration. I am personally familiar with the matters related below through personal knowledge, and if called I would testify as follows.

2. The New York & Atlantic Railway Company ("NYA") is the rail common carrier which is currently providing service to and within the 65th Street Rail Yard in Brooklyn. NYA was created in 1997 to lease the freight operations of the Long Island Railroad ("LIRR"), a railroad then owned by the State of New York in its Metropolitan Transportation Authority ("MTA"). The grant of the operating rights to the NYA was an attempt by the State to reverse the erosion of freight service on Long Island. It was believed that a private company dedicated solely to providing freight service for a profit

would be more likely to achieve the State's goal of getting trucks off the highways than a continuation of the service by the LIRR, a commuter services operator.

3. In 1997, the Bay Ridge line was a part of the LIRR entirely used for freight. The line ran from Fresh Pond Jct. in Queens to the end of LIRR ownership, at the edge of the 65th Street Yard in Brooklyn. NYA interchanges with the New York Cross Harbor Railroad (NYCH). The NYCH operates the only cross harbor railcar float operation in the region. Via the NYCH our Bay Ridge Line is connected to the rail terminal facilities of both Norfolk Southern Railroad and CSX Transportation Company in New Jersey. NYA has no terminal at Bay Ridge or on the Brooklyn waterfront and therefore cannot directly serve customers at those locations. Further, a good part of the Bay Ridge Line is grade separated and therefore there is limited access to our service from the streets.

4. Before NYA took over the operation of freight rail service on Long Island, that service was poor and unreliable. Also, LIRR has imposed high maintenance charges on siding switches on its passenger lines, so many potential shippers who do not currently use rail service, have opted to let LIRR remove their sidings rather than pay the maintenance charges. Therefore, when NYA took over freight service, there were few customers with direct rail service, and traffic was low as the result. Today it is very hard to restore or commence direct service to customers on the lines used by LIRR for commuter purposes because there is very little available land adjacent to the tracks, and because there are limited windows in which the commuter tracks can be used for freight service.

5. Since NYA took over the LIRR freight operations, we have doubled freight traffic on the system. Most of that increase has been through the use of transloading

facilities i.e. facilities where trucks can gain access to railway cars, either across a loading dock, via a transloading facility where machinery moves freight between truck and rail car, or where trucks pull directly up to the side of a rail car and cargo can be moved between these vehicles. This dependence on transloading is due to the fact that a very large proportion of NYA's traffic base is in single carload lots, and because most freight sidings which once provided direct freight service to customers on the Island had been removed prior to 1997.

6. Since NYA took over the LIRR freight infrastructure; the facilities have been further reduced due to the actions of the State and the City taking land for other uses. NYA had to yield the large "Yard A" freight yard in Long Island City to the East Side Access project, a LIRR commuter service project. NYA was forced out of the Garden City freight terminal by neighbors displeased with freight trains passing their houses. Each reduction in physical plant further limits our ability to provide freight rail service.

7. In 2001, the Canadian Pacific Railroad ("CPR"), a major transcontinental rail common carrier leased the 65th Street Yard in Brooklyn from New York City. NYA actually provided the service into 65th Street as agent for CPR under a haulage agreement. CPR did try to attract business at first, but very little rail traffic was generated at the 65th Street Yard.

8. Tri-State, however, was CPR's one success. It transloads brick and stone products. Rail service to TriState was a significant improvement over truck service because their cargo is very heavy and the weight limits on the LIRR and Hell Gate Bridge are the only constraints on the weight it can ship by rail.

9. Tri-State Transportation, Inc. ("Transportation") is the company which actually operates facilities for Tri-State Brick within the 65th yard. It unloads material from cars, holds it on the ground and then loads trucks as consignees called for their cargos. Transportation has informed NYA that it is willing to transload cargos for other customers for a reasonable fee, similar to the arrangements we have with other siding operators.

10. CPR relinquished its rights in the 65th Street Yard on July 31, 2004 without seeking approval from the Surface Transportation Board. However, NYA has continued to serve TriState, and we would readily serve any other facility in the Yard. However, NYA has no formal "right" to operate in the Yard and is doing so now at the sufferance of New York City. NYA has no intention of abandoning service to TriState, and the City has never advised NYA that it intends to seek the abandonment of rail service at the 65th Street Yard.

11. The 65th Street Yard is the only public rail terminal available in New York City today through which rail service can be expanded without the development of new terminals. An entirely new facility would either need to replace some other current land use or provide a connection to the street from the few patches of land available on the Bay Ridge Line. Both processes would be major undertakings due to the land acquisition costs or the cost imposed by grade separation and due to potential conflicts with surrounding uses. On the other hand, the 65th Street terminal is already in place. New terminals can not be placed in service immediately, and the cost of developing them is significant.

12. We offered to try to find substitute facilities for TriState's transfer operation, and we have attempted to do so but have had no success.

13. We have encouraged the City to continue the use of the 65th Street Yard as a rail-truck transload terminal, with open access to all shippers. The Yard has the potential for greatly increasing rail use by Brooklyn industry, at significant savings in transportation costs and taking thousands of trucks a year off the highway crossings. However we are unaware of the City's plans for this property.

14. NYA has had meetings, exchanged correspondence and/or discussions with the New York City Economic Development Corporation concerning operations at the 65th Street Yard. Those meetings began as early as July 2004 and have continued through November 2005. In those meetings NYA has proposed: a) potential customers at the 65th Street Yard; b) improvements to the 65th Street Yard; c) the framework of a term sheet outlining an ongoing relationship between NYA and the City; d) the maintenance costs for the 65th Street float bridges; and e) a car storage agreement and potential operating agreement for 65th Street Yard between NYA and the City. To date, the City has responded to the portion of NYA's proposal concerning storage of railcars.

15. On or about November 11, 2005 the City forwarded to NYA a draft of a License Agreement between NYA and the City concerning the 65th Street Yard for NYA's review and comment. The draft was not acceptable to NYA as written. The City has indicated that it will be ready to meet again on this matter after December 7, 2005.

Dated, New York, N.Y.

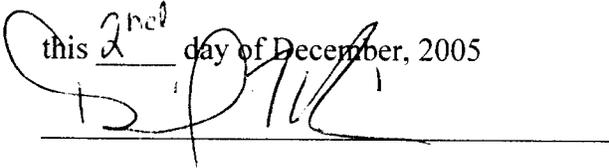
December 02, 2005

I have read the foregoing and it is true and correct to the best of my knowledge and belief.



Fred L. Krebs

Signed and subscribed to before me

this 2nd day of December, 2005


Notary Public

DANIEL T. RIVERA
Notary Public, State of New York
No. 01RI6084287
Qualified in Queens County
Commission Expires December 2, 20 06

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET _____

PETITION OF TRI-STATE BRICK AND STONE OF NEW YORK, INC. AND TRI-STATE TRANSPORTATION INC. FOR A DECLARATORY ORDER

DECLARATION OF WILLIAM B. GALLIGAN

William B. Galligan declares under penalty of perjury pursuant to 28 U.S.C. § 1746 as follows:

1. I am a Transportation Consultant specializing in the railroad industry. I have been asked to comment on issues raised in this request for a declaratory order within the context of the local and national significance of the facilities in issue here.

2. I have been involved with the railroad industry for 41 years. I am currently operations manager of the East of Hudson Rail Freight Task Force, a group organized pursuant to a settlement agreement between 24 members of Congress and Norfolk Southern and CSX Transportation resolving an appeal of the Boards Decision in FD 33388 Decision No. 89 as it effected competitive access to the area East of the Hudson River in New York State and Southern New England. The Task Force, which includes all of the region's rail carriers and governmental entities concerned with freight transportation as members, was established to facilitate a shift of freight movements in the New York City Metropolitan Area East of the Hudson River from the current over dependence on trucks, to the railway system by encouraging cooperation between carriers with the assistance of governmental agencies. Previously I have held numerous management and non-management positions with the Santa Fe, the Illinois Central, the Detroit Toledo and Ironton railroads in finance, marketing and both train and intermodal

operations. As a Transportation Consultant I have worked on assignments for individual railroads, private companies, state and local governments and transportation associations. I have a national reputation, having been twice awarded the prestigious industry Golden Freight Car (one for developing freight traffic out of Brooklyn) and having been selected to Co-Direct the National Intermodal Demonstration Project, a US Department of Transportation Project established to develop new intermodal train services with the equal involvement of rail labor. The other Co-Director was a railroad union officer.

3. In all these capacities I have become familiar with the North American railway system and in particular the railway network east of the Hudson including in particular the Bay Ridge Line and the 65th Street Yards at issue here. I have studied the history of that line extensively and have reviewed every public and many private studies completed over the past 20 years evaluating the potential for freight traffic over the line and yard. I am familiar with the environmental facts related to various modes of transportation and the environmental effects of truck traffic within the New York Metropolitan area.

4. The Bay Ridge Line from Fresh Pond Junction in Queens to Bay Ridge, including the 65th Street Yard is the rail line in the United States with the greatest potential to develop traffic and to have a major economic and environmental effect. However, it can not achieve its full potential if the 65th Street Yard is removed from the nation's rail system directly or due to demands for user fees made by New York City which render their rail use impractical. Trains must have a place to connect to customers and this City and region are extremely short of the terminal facilities required for modern intermodal freight transportation. That fact leads directly to the grossly inappropriate use

of trucks in this region and to the high, directly related, incidence of cardio-pulmonary disease we find in this City.

5. The Bay Ridge Line, the 65th Street Yard and Float Bridges¹ at 65th Street were first devoted to railway use by the Manhattan Beach Railroad in the 1870's. This line was leased to the Long Island Railroad in 1882 and fully merged into it in 1925. In the early 1900's the Bay Ridge Line and 65th Street Yard were expanded by the Long Island Railroad and the Pennsylvania Railroad to meet growing demand for railcar float service to connect Long Island to the trunk line national rail system which terminated on the New Jersey side of New York Harbor. In 1918, with completion of the Hell Gate Bridge, the Bay Ridge Line and its extensive car float system, became the main rail link between the Middle Atlantic/South East and New England even though there existed several alternate all rail routes. Even though it required railcar floats to connect the lines east of the Hudson with those to the west and south, over ten one hundred car trains a day used this line in each direction as late as the early 1960's. It was to remain the major north-south rail link for 45 years until its then owner, the New Haven Railroad, followed by most of the railroads in the Northeast collapsed financially.

6. When the Long Island Railroad was acquired from the Pennsylvania Railroad, by the State of New York, the Bay Ridge Line was not included in the purchase but was folded into the New York Connecting Railroad a company jointly owned by the New Haven Railroad and Pennsylvania Railroads originally established to build and operate

¹ A railway float bridge is a dock at which rail cars can be rolled onto and off of car floats, barges with railway tracks installed on them. This system was used by all railroads serving New York Harbor to move cars across the Harbor until the late 1960's. After all major carriers terminated such services, one such carrier survived, the New York Cross Harbor Railroad, which operates from Jersey City, New Jersey to 51st Street, Brooklyn.

the Hell Gate Bridge. The insolvent New Haven was merged into the Penn Central, itself a merged company including the former Pennsylvania Railroad, in 1968.

7. In a futile attempt to remain solvent, the Penn Central began routing north-south traffic over the all land routes previously thought to be inadequate. They quickly abandoned all rail-marine service and float facilities in New York Harbor, including the 65th Street float bridges. The bridges and their ancillary yard facilities, used to load and unload railway cars onto railcar floats for the trip across New York Harbor were torn up. In 1971, the City of New York purchased the 65th Street Yard from Penn Central. Penn Central filed for bankruptcy in 1972. In 1973, the United States Congress responded to the Northeast Railroad Melt Down centered on Penn Central by creating the United States Railroad Administration ("USRA") to redesign the rail system in the North Central and Northeastern states. The result was a paired down rail system called Conrail. The Bay Ridge Line and the 65th Street Yard were not included in Conrail because the USRA wanted all rail freight in the New York Metropolitan Area to terminate and originate at facilities in Northern New Jersey. USRA was supported in this thinking at the time by the East of Hudson political leadership because powerful real estate interests wanted to acquire the abandoned land and public transportation advocates wanted to use the abandoned lines and track exclusively for commuter trains.

8. The Bay Ridge Line from Fresh Pond Junction to the end of track, a few feet east of the 65th Street Yard property was purchased from Conrail by the New York State Metropolitan Transportation Authority in 1984. Train operations were taken over by the Long Island Railroad, a New York State owned railroad.

9. Beginning in the late 1970's with funding which was part of the New York State Full Freight Access Program, the City of New York completely rebuilt the 65th Street Yard providing facilities for various intermodal freight services to be rendered to the general public. The work was completed in 1985. Strangely, The Yard was not reconnected to the Bay Ridge line for several more years. After that connection was put in place the only use for that connection, and the only activity on The Yard, was an interchange between the Long Island Railroad's freight service and that of the New York Cross Harbor Railroad, which operates the only remaining cross harbor railcar float service from 51st Street, Brooklyn to Greenville Yard in Jersey City, N.J. Eventually the EDC added a float bridge, re-establishing the possibility of a direct link to New Jersey by railcar float from the Bay Ridge Line. But, no carrier has been granted the right to use that float bridge facility. Thus, until the Operating Agreement here in issue was signed in 2002 the 65th street facility lay fallow.

10. In March of 2002, the City, through EDC and its subsidiary Apple Industrial Development Corp., signed an Operating Agreement with the Delaware and Hudson Railroad, a subsidiary of the CPR. That railroad had acquired trackage rights into New York City from Mechanicsville, New York as part of the acquisition of the assets of Conrail by Norfolk Southern and CSX Transportation. The trackage rights were imposed by the Surface Transportation Board at the request of the State of New York to provide competition between two Class 1 national rail carriers within New York City. However, those trackage rights were bridge rights only to a connection with the NY&A at Fresh Pond. The CPR was granted no terminal access anywhere on those rights and had to rely entirely upon its connecting carrier, the NY&A.

11. With that Operating Agreement, CPR extended common carrier rail service from Fresh Pond to the 65th Street Yard via a haulage agreement with the NY&A. The CPR extended its lines and services into an area of the City previously served only by NYCHR and Norfolk Southern. It also obtained facilities with which it could directly serve rail customers. However, the only customer it was able to attract was the petitioner, Tri-State Brick and Stone.

12. The NY&A had acquired the franchise to operate the freight services on the State owned Long Island Railroad in 1998. The exclusive franchise included freight service on the Bay Ridge Line. However, as the current yard at 65th Street had not existed when that line was purchased by the New York State Metropolitan Transportation Authority, the NY&A's operating rights did not then reach the 65th Street Yard except to interchange across the eastern tip of The Yard with the NYCHR. Until the agreements at issue here, NY&A's track ended just outside the yard, in a cut with no access to the street or to any customer, a condition which extended back toward Fresh Pond for a few miles. By commencing service to 65th Street the CPR extended its service into that area and by retaining NY&A as its agent to provide actual service it extended that railway's services also into the area formerly served only by NYCHR and Norfolk Southern. Brooklyn is a station which Norfolk Southern also reaches via a Marketing Agreement. The NYCHR links the NS to Brooklyn via rail car floats from Jersey City, New Jersey.

13. CPR's efforts to build traffic on this line were hampered at every turn by the EDC. Two constraints were imposed. First, the EDC refused to allow waste to be handled at this facility. Waste is one of the largest commodities exported from this city at this time. EDC also would not allow new traffic which generated significant local

truck traffic. EDC limited truck volume through the Brooklyn Army Terminal. Auto and truck access to The Yard is only via that Complex because the EDC has not built the access road as called for in the original plan. The 65th Street Yard was designed to be a mixed use rail - truck Intermodal Transfer Facility and Reload Center. The restriction on truck access severely limited the ability of the CPR to attract traffic.

14. In the past dozen years numerous studies have been conducted by the EDC that have shown high potential for rail and maritime freight along the South Brooklyn Waterfront. They have all established that the potential for rail traffic on this line or on any line with capacity is tremendous. The New York Metropolitan area is the largest freight market in the world and two thirds of that market lies east of the Hudson in an area now poorly served by rail. In the US about 40 percent of all intercity freight moves by rail, east of the Hudson the percentage moving rail is less than 2 percent. Any reliable service connecting this region with the nation will be used if it is priced reasonably and is unrestricted. The City has generally not been an adequate custodian of the 65th Street Yard. The Yard acquired in 1971 took 14 years to rebuild and another 17 to lease largely due to the City's unrealistic view of what the applicable land use fees should be. It took 21 years to build a set of new float bridges and the direct connection to the street is still not in place. The float bridges have not been put in use despite requests for access by two railroads.

15. Additional studies conducted by the City, the Army Corps of Engineers and others have revealed a severe shortage of deepwater maritime facilities, particularly on the East Coast and particularly in the Port of New York. This shortage is forcing freight to be handled inefficiently nation wide and indeed world wide as this City and its region

is the largest market on earth. The Bay Ridge Line has been identified in all of these studies as a key asset needed to rationalize world wide cargo routing as the port area of Brooklyn is a deepwater port with a sand bottom, quickly able to accommodate the world's largest ships if appropriate land transportation facilities are provided. Two proposals have been made to the EDC, each authored by ocean carrier- terminal operators offering to develop the South Brooklyn waterfront into a major ocean terminal. Both proposals project traffic volumes of up to and over a million containers annually on the Bay Ridge Line. That traffic alone would generate 13 trains a day carrying 200 containers per train, 365 days per year.

16. Just over two years ago, EDC issued a Draft Environmental Impact Statement for a proposed Cross Harbor Rail Freight Tunnel. As an alternative the City considered the potential for improved float service based at the 65th Street Yard and using the Bay Ridge Line to access users on geographic Long Island. The Study concluded that 459,000 tons of current highway freight could be diverted to rail using a rail-marine service between Brooklyn and New Jersey. Truck miles traveled would be reduced by 8 million. (Brochure, New York City Economic Development Corporation, *et al.* Cross Harbor Freight Movement Project insert "The Alternatives" Exhibit G to the Petition. The petitioners here move 300,000 tons a year utilizing only four acres of the 34 acre terminal, thus the potential for an additional 459,000 tons is probably very conservative. However, the City's demands for unreasonable fees render all projections academic.

17. In the railroad industry it is well known that in any abandonment application made to the Surface Transportation Board a rail carrier must include the reasons for the lack of traffic as well as establish that the line has no traffic potential and that the

continuation of service impacts adversely on the national rail transportation system due to the financial drain involved. Here, while CPR has walked away from its responsibilities, the NY&A has continued service. It has no agreement with the EDC, but as in the recent case in which EDC also sought to evict the NYCHR also from facilities on the Brooklyn Waterfront, a carrier who's contract with the EDC had expired and which was apparently in default, adverse abandonment was deemed forbidden by the Appellate Court as it would not serve the public convenience and necessity. Since the EDC actively obstructed CPR in its efforts to attract traffic, and has ignored offers by both Tri-State and NY&A to continue full common carrier service on reasonable terms to be agreed to, or set by the Surface Transportation Board, a process mandated in any abandonment proceeding, it would appear that any effort to terminate service would be rejected. Indeed, the benefits to be derived from proper use of this facility are largely environmental or accrue to the economic viability of the City, which is the line owner. Thus, while the CPR may be excused from the task made difficult by the EDC, the EDC should not be excused or allowed to continue to bar access to rail services by city transportation customers due to its pursuit of unrealistic fees. If the price the EDC seeks to exact from such carrier is the factor blocking such a carrier from volunteering, the Board now has the power to set those fees at reasonable levels.

18. In January of 2005 the EDC issued a request for proposals for a rail related or maritime related use of the 65th Street Yard, or a large part of it. I understand that there were responsive proposals. I also understand that the NY&A submitted a letter indicating its desire to continue common carrier rail freight service at the yard, including the Transloading operations needed to attract any traffic to rail services. Although eight

months have passed since this RFP was issued, there has been no information as to the EDC's intentions or as to the nature of any proposal the EDC prefers. The Notice to Quit here in issue is the only indication as to EDC's intentions which are clearly to end common carrier service to Brooklyn via this facility.

19. Transloading is the act of moving freight from one mode to another in the course of transport from one place to another. Today, this process has become vastly more important to the nation than in the past. Railroads, in financial trouble since the mid 20th Century due to vast public subsidy of all their competition and discriminatory taxes, pulled up vast stretches of track, particularly the branch lines and spurs with which they served industry directly. As the result of fifty years of wholesale scrapping of physical plant, few industries still have direct rail service. Thus, the beginning and end of most rail service is provided by a truck connection between the customer and a centralized rail terminal where the cargo is transferred between modes. It can be transferred in a trailer or container for high value goods or it can be transferred in bulk or by the piece or pallet as is the case with Tri State. A discontinuance of such a common carrier facility in a major city denies rail freight service to the entire community, not just to the few directly effected present customers of the facility.

20. The petitioners here use 300 rail cars traveling from as far as Washington State, thus an average one way trip of well over one thousand miles. Terminating the petitioners access to rail service will generate about 1,800 loaded trucks on the highway. Assuming that each loaded truck traveled an average of one thousand miles, 1,800,000 truck miles one way is generated. However, those 1,800 trucks must return for a new load. Thus the public injury is essentially doubled. The public cost is astronomical.

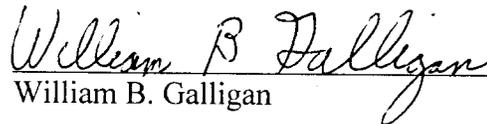
Using statistics compiled from the Victoria Transportation Policy Institute (www.vtpi.org) an entity which is relied upon by environmental consultants working on transportation related projects, the public cost per truck mile is between \$.612 and \$2.170. The public cost of EDC's action by the defendants runs between \$1,101,600 and \$3,906,000 per year.

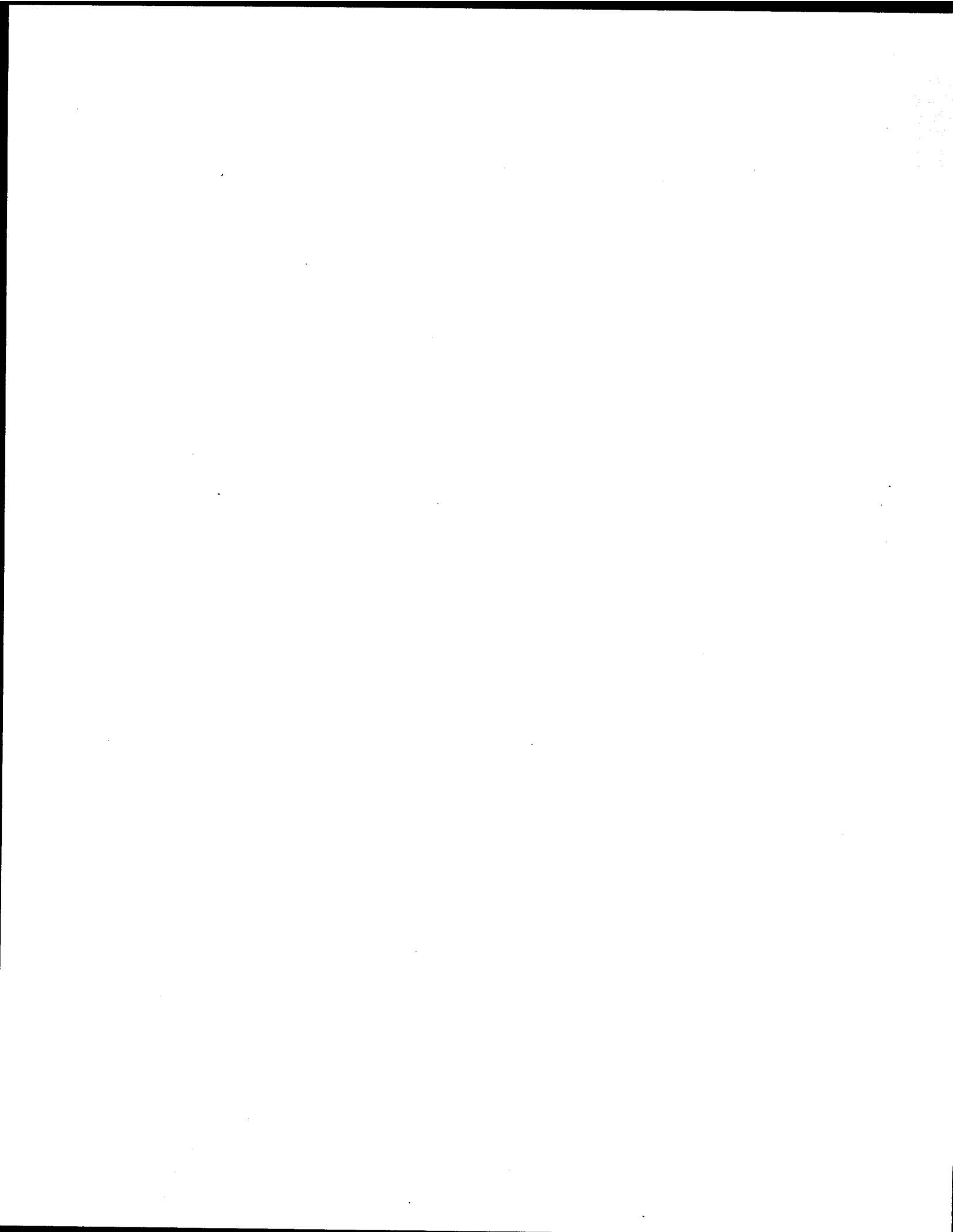
21. In spite of all of the studies done by government over the half century establishing beyond reasonable doubt the need for increased access to and use of rail freight services, the City and State of New York have relentlessly pursued a policy of devoting rail lands to other uses. The 59th Street Freight Yards in Manhattan were sold to Donald Trump for apartments, the Harlem River Yard in the Bronx was leased to an industrial park developer who has leased most of the yard to a newspaper printing plant and a waste transfer station. High Bridge Yard also in the Bronx is now a car service facility for Metro North commuter cars. The Sunny Side freight yards (officially Yard A) in Queens has been closed to make way for subway improvements. The New Lots Avenue Yard in Brooklyn is a storage area for the MTA maintenance materials. Even the small yard in Garden City, N.Y. was closed due to powerful neighbor's complaints about freight trains operating near their expensive homes. In addition, both the Long Island Railroad and Metro North have aggressively closed freight spurs and side tracks by assessing high maintenance charges for main line switches. Once a switch is removed the cost of reinstallation is high. Therefore, in spite of the vast amount of information on the necessity for better access to the rail system for freight, each independent state and city governmental agency, each pursuing its singular purposes in isolation, is aggressively destroying rail access as quickly as they can.

22. The result of this history is that there is no alternative to the 65th Street Yard for the services required by these petitioners. Beyond that, there is no other facility anywhere in the City of New York which can be used to establish a public transload facility of any size. Precisely the kind of narrow interest at issue here, i.e. bettering the appearance of one agency's bottom line, has adversely affected the nation's transportation system as most rail services can not reach New York City's transportation service customers. In effect, lack of access bars rail service from the largest transportation market on earth. That fact has nationwide mode choice ramifications.

23. Therefore, the Surface Transportation Board must assert its jurisdiction in this matter.

Dated: New York, New York.
January 12, 2006


William B. Galligan



OPERATING AGREEMENT

THIS AGREEMENT (the "Agreement") made as of this 1st day of March, 2002, among **APPLE INDUSTRIAL DEVELOPMENT CORP.**, a New York not-for-profit corporation, having an address at 110 William Street, New York, New York 10038 ("Apple"), **DELAWARE AND HUDSON RAILWAY COMPANY, INC.**, a New York corporation, d/b/a Canadian Pacific Railway, having a corporate address at 200 Clifton Corporate Park, Clifton Park, New York 12065 ("Operator") and **CANADIAN PACIFIC RAILWAY COMPANY**, having an address at 401 - 9th Avenue S.W., Calgary, Alberta T2P 4Z.

RECITALS:

WHEREAS, the City of New York (the "City") owns the premises delineated in Exhibit A hereof, being Block 5804, Lot 2 and Block 5806, Lot 2 on the Tax Map for the Borough of Brooklyn, commonly known as the 65th Street Railroad Yard;

WHEREAS, pursuant to the annual amended and restated maritime contract (the "EDC Contract") between the City and New York City Economic Development Corporation ("EDC"), the City has retained EDC to engage in, *inter alia*, various activities intended to promote the economic development of the City's waterfront property and related transportation facilities, including the operation of the Premises;

WHEREAS, EDC, has delegated its duties for the administration of the Premises to its property management affiliate, Apple Industrial Development Corp. ("Apple");

WHEREAS, Apple desires to engage Operator to manage the Premises and Operator desires to manage the Premises on the terms and conditions set forth herein; and

WHEREAS, the purpose of this Agreement is to grant the right to Operator to conduct and operate such freight operations on a non-exclusive basis for the purpose of promoting the transportation of freight at the Premises and providing equal commercial access to other companies that desire to utilize the rail freight facilities at the Premises;

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

ARTICLE I. DEFINITIONS.

Section 1.01 **Definitions.** Unless otherwise noted, the following definitions shall apply throughout this Agreement:

- (a)
- (b)
- (c) "Affiliate" means with respect to any Person, any Person controlled by, controlling or under common control with such Person. "Person" shall mean any corporation, partnership, joint venture, joint stock company, limited liability company, trust, unincorporated organization or other entity. "Control" of a Person shall exist only when either of the following criteria are met: (i) the possession, directly or indirectly, of the power to direct or cause the direction of management and policies of such Person, whether through the ownership of voting securities, by contract or otherwise; or (ii) the ownership, either directly or indirectly, of 10% or more of the voting stock or other equity interest of such Person.
- (d) "Ancillary Agreement" shall have the meaning set forth in Section 2.04(a)(iv) hereof.
- (e) "Annual Period" means the one year period commencing on the Commencement Date and ending on the day before the anniversary of the Commencement Date, and each succeeding one-year period thereafter, including each Extension Period through the termination of this Agreement.
- (f)
- (g) "CFR" means the United States Code of Federal Regulations, as amended.
- (h)
- (i)
- (j)
- (k) "Custody" means, with respect to Rolling Stock, having legal or contractual responsibility for the care, keeping, possession, and/or handling of such Rolling Stock, notwithstanding that such Rolling Stock unit or its contents may be owned by another party.
- (l) "DOT" means the United States Department of Transportation or any successor agency performing the same or similar functions.
- (m) "Employee" means an officer, director, agent, employee, or contractor of any of the parties while engaged in any activity related to the Agreement.
- (n)

- (o) _____
- (p) "FRA" means the Federal Railroad Administration and any successor agency performing the same or similar functions.
- (q) "Freight Operations" means all operations related to ordinary line hauling services, transloading facility handling, switching, intermodal services, providing terminal access and required handling equipment, personnel, actual transfer of product from Rolling Stock to trucks, Rolling Stock inspection, truck inspection, quality control, on-site management, security, grounds maintenance, truck weighing, inventory reports, related administrative assistance, order rail cars in/out and sampling.
- (r)
- (s)
- (t)
- (u) "Loss or Damage" means all claims, liabilities, costs and expenses of every kind or nature, including amounts paid under any State or Federal compensation law, and costs and attorneys fees incurred in the investigation, defense, or settlement of any actual or threatened legal proceeding related to personal injury or property loss or damage (including environmental loss or damage) arising under or related to this Agreement. Property loss or damage includes loss or damage to real property and improvements thereon, and personal property of any party or third persons. Personal injury includes injury to or illness or death of persons including employees of any party or third persons.
- (v) _____
- (w) "NY&A" means New York & Atlantic Railway, having an address at 68-01 Otto Road, Glendale, New York 11385, and its Affiliates and successors.
- (x)

NY&A to unaffiliated third parties for such use at the Premises.

- (y) "Parent" means Canadian Pacific Railway Company, having an address at 401 - 9th Avenue S.W., Calgary, Alberta T2P 4Z, and its successors.
- (z) "Person" as used in the definition of Prohibited Person herein shall mean any natural person, or any firm, partnership, corporation, association or other legal entity.
- (aa) "Premises" means the real property identified on Exhibit A hereto, including, tracks, appurtenances, buildings, facilities, other physical plants, and improvements thereto used by Operator pursuant to this Agreement.
- (bb) "Prohibited Person" shall mean: Any Person (A) that is in default or in breach, beyond any applicable notice and/or grace period, of its obligations under any material written agreement with the City or Apple, or (B) that directly or indirectly controls, is controlled by, or is under common control with a Person that is in default or in breach, beyond any applicable notice and/or grace period, of its obligations under any material written agreement with the City or Apple, unless such default or breach has been waived in writing by the City or Apple, as the case may be.

Any Person (A) that has been convicted in a criminal proceeding for a felony or any crime involving moral turpitude or that is an organized crime figure or is reputed to have substantial business or other affiliations with an organized crime figure, or (B) that directly or indirectly controls, is controlled by, or is under common control with, a Person that has been convicted in a criminal proceeding for a felony or any crime involving moral turpitude or that is an organized crime figure or is reputed to have substantial business or other affiliations with an organized crime figure.

Any government, or any Person that is directly or indirectly controlled (rather than only regulated) by a government, that is finally determined to be in violation of (including, but not limited to, any participant in an international boycott in violation of), the Export Administration Act of 1979, as amended, or any successor statute, or the regulations issued pursuant thereto, or any government that is, or any Person that, directly or indirectly, is controlled (rather than only regulated) by a government that is subject to the regulations or controls hereof.

Any government, or any Person that, directly or indirectly, is controlled (rather than only regulated) by a government, the effects or the activities of which are regulated or controlled pursuant to regulations of the United States Treasury Department or executive orders of the President of the United States of America issued pursuant to the Trading with the Enemy Act of 1917, as amended.

Any Person that is in default in the payment to the City of any real estate charges totaling more than \$10,000 (or any person that directly controls, is controlled by, or is under common control with a Person in such default), unless such default is then being contested in good faith in accordance with the law.

Any Person (A) that has owned at any time during the three (3) years immediately preceding a determination of whether such Person is a Prohibited Person any property which, while in the ownership of such Person, was acquired by the City by in rem tax foreclosure, other than a property in which the City has released or is in the process of releasing its interest pursuant to the Administrative Code of the City or (B) that, directly or indirectly controls, is controlled by, or is under common control with, such a Person.

✓ (cc)

(dd) "Solid Waste" means garbage, refuse, sludge and other discarded solid materials, including solid waste materials resulting from industrial, commercial, medical and agricultural operations and from community activities, but excluding construction and demolition waste.

✓ (ee)

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

✓ (gg)

✓ (hh)

✓ (ii)

✓ (jj)

ARTICLE II TERM; GRANT OF RIGHTS TO USE.

Section 2.01 Term. The term of this Agreement (the "Term") shall commence on March 1, 2002 ("Commencement Date"), and shall end on the third anniversary of the Commencement Date, unless sooner terminated in accordance with the provisions hereof, or unless extended by mutual agreement of Apple and Operator for up to two Annual Periods. Any such extension shall be by agreement of both parties and shall be on one-year basis (as such, an "Extension Period"). Prior to issuing a Request for Proposals for the Premises to another party, Apple will negotiate the terms of the Extension Period exclusively with Operator during the twenty-fifth through thirtieth months of the Term of this Agreement. During any (or each) Extension Period, this Agreement shall be extended on such terms and conditions as are agreed upon by the parties. This Agreement shall expire on the third anniversary of the Commencement Date or the last day of any Extension Period or on the date this Agreement is otherwise terminated by Apple in accordance with Section 7.03 hereof (such date is hereinafter referred to as the "Expiration Date").

Section 2.02 Scope of Services. Operator shall perform or cause to be performed the following services:

- (a)
- (b) Designate and maintain a track for rail access through the Premises for users of the Transfer Bridges to facilitate equal commercial access for cross-harbor railcar float operators, provided that the track so designated for such purposes may be changed from time to time;
- (c) Allow Transfer Bridge users to use their own power engines to load and discharge rail barges at the Transfer Bridges;
- (d) Use best efforts to support and increase cross harbor railcar float operations through the Premises;
- (e) Structure rail yard operations to facilitate equal commercial access for all rail operators and potential third party logistics providers to promote transload operations at the rail yard;
- (f) Interchange rail equipment and traffic with all connecting rail carriers;
- (g)
- (h)

Section 2.04 Limitations on Grant

(a) The grant of rights in Section 2.03 is specifically subject to all of the following:

(i) The terms and provisions of the Maintenance Agreement attached hereto as Exhibit B. Operator acknowledges and agrees that it will perform or cause to be performed all of the obligations applicable to "Tenant," as such term is defined in the Maintenance Agreement. The obligations of Tenant set forth in the Maintenance Agreement, including, but not limited to, the payment of fees, are in addition to, and not in lieu of the obligations set forth herein. To the extent that either this Agreement or the Maintenance Agreement imposes a higher standard of performance on Operator with respect to a particular non-monetary obligation (e.g. with respect to maintenance obligations), Operator agrees to fulfill such higher standard of performance, except as otherwise agreed to in writing by Apple.

(ii) All utility occupancies currently located on the Premises.

(iii) Any rights to the property encumbered by encroachments, tenants, licensees, or other occupancies currently on the Premises. There shall be no obligation on the part of the City or Apple to take any action to remove the same.

(iv) Operator may not enter into any agreements that permit a third party to use or operate any portion of the Premises (each, an "Ancillary Agreement") for non-Freight Operation purposes except by written consent of Apple, which may be granted at the sole discretion of Apple. Operator may, subject to the conditions below, with the prior written notice to Apple, enter into Ancillary Agreements relating to the Premises with shippers or others directly involved in the furtherance of Freight Operations at the Premises. In all cases, such Ancillary Agreements:

- 1) shall be subordinate and subject to the terms and conditions of this Agreement;
- 2) shall not purport to license, lease or convey any real property interest in the Premises;
- 3) shall provide for insurance and indemnification of the City, Apple and EDC to the same extent as provided under this Agreement;
- 4) shall not relieve Operator of any obligations or duties imposed on it by this Agreement; and
- 5) shall be provided to Apple.

Subject to the terms and conditions of this Agreement, Apple consents to Operator entering into an Ancillary Agreement with NY&A as an independent contractor to perform switching operations at the Premises.

(v) The EDC Contract remaining in effect during the Term, provided that upon any such termination or non-renewal of the EDC Contract, Apple shall make best efforts to assign this contract to the government agency or other entity then having jurisdiction over the Premises.

(b) Without limiting Operator's maintenance obligations under this Agreement, Apple retains the right to use or to allow third parties to use the Premises to operate (with respect to the Transfer Bridges), construct, inspect, repair and maintain the Transfer Bridges, tracks and other structures or construct utilities with reasonable notice to Operator. Operator will cooperate in allowing the City or Apple to effectuate or permit any work described in this Section 2.04. All persons and parties entering the Premises pursuant to this section shall comply, at their own expense, with Operator's safety rules and policies, attached hereto as Exhibit C. Apple agrees that it will cause all such persons and parties to become familiar with such rules and policies prior to entering upon the Premises.

(c) Truck Traffic Volume and Access Limitations. Operator acknowledges and agrees to comply with the following limitations and restrictions on truck volume and access in and to the Premises:

- (i) Ingress and egress of all trucks (hereinafter, "Trucks") to the Premises shall be through the gate on 58th Street;
- (ii) Prior to completion of the proposed truck ramp at 65th Street, the Operator shall not permit Truck trips to or from the Premises through the 65th Street gate, unless Apple otherwise gives its prior written consent;
- (iii) If Apple elects, at its sole discretion, to complete the 65th Street truck access ramp, then all Trucks entering the Premises will utilize this access ramp. No Truck ingress or egress shall be permitted through the Brooklyn Army Terminal ("BAT") following completion of such ramp; and
- (iv) Apple, at its sole discretion, may require Operator to comply with reasonable additional Truck traffic and access limitations in order to accommodate operations at BAT. Operator acknowledges that due to ferry operations at BAT, the City of New York, or any State or Federal agency, may impose additional measures that delay or divert Truck traffic in the immediate vicinity of the Premises.

→ This will be removed as we will take back
50' on north side of the fence.

ARTICLE III. FEES.

✓ (d) [Intentionally Omitted]

✓ (e)

✓ (f)

(h) Payment of Taxes and Assessments. Operator shall promptly pay any license fees or other charges, properly levied or assessed against the Premises or against Operator by virtue of Operator's use of the Premises; provided, however, that this section shall not obligate operator to pay any property taxes or special assessments levied or assessed against the Premises.

(i) Utilities. Operator must provide and pay for its utilities including all sewer charges and for all water, gas, heat and electricity consumed and used in the Premises, and Operator, at its sole cost and expense, shall maintain and repair all meters and procure all permits, approvals and licenses necessary to effectuate this provision.

(j) Late Payment Penalty. If Operator fails to pay Apple on the due dates specified in Article III hereof, it will pay Apple interest on the payments due, from the due date of payment, at a monthly rate of 2%, compounded monthly.

✓ (k)

✓ (l)

✓

ARTICLE IV. MAINTENANCE; CAPITAL IMPROVEMENTS.

Section 4.04 Condition of Premises. Operator acknowledges that it has inspected the condition of the Premises and conducted due diligence to its satisfaction prior to signing this Agreement. Operator acknowledges and agrees that its right to manage and use the Premises are granted hereunder on an "as is/where is" basis and Operator shall be responsible for the condition of the Premises as of the Commencement Date, provided, however, that this assumption of responsibility by Operator shall not serve as the basis for the imposition of environmental liability against Operator for conditions predating the Commencement Date. Neither Apple nor the City has made or makes any representation or warranty as to the condition of the Premises or its suitability for any particular use or as to any other matter affecting this Agreement. Operator is prohibited from selling, salvaging, demolishing or removing any part of the Premises, including but not limited to the track, ties, ballast and track supports, without the prior written consent of Apple.

Section 4.05 Capital Improvements.

(b) Operator, at its expense, shall supply and install at the Premises, the equipment and materials reasonably necessary for use of Operator in the operation of the Premises, it being understood and agreed that to the extent that this equipment and material becomes an integral part of the Premises, it shall become and at all times remain the sole property of the City.

(c) Operator, at its expense, may, with the prior written consent of Apple, make any alterations or improvements to the Premises that, in its opinion, are required or desirable to conduct its operations.

(d) Operator shall obtain the prior written approval from Apple for the selection, design and implementation of any material improvements (i.e. the cost of which exceeds \$10,000) to the Premises, including without limitation, appurtenances to the Premises, repairs, replacements and improvements to the Premises, operating equipment, security equipment and signage, and shall respond to any objections to design or selection which may be raised by Apple and modify the plans as ultimately agreed to by Apple. Operator acknowledges that consistent with Section 4.05(a), improvements, materials and equipment installation, may become the property of Apple or Apple's permitted assignee hereunder, and further that neither Apple, nor the City shall be liable to any contractor or materialman for any improvements and betterments made to the Premises.

(e) Upon the expiration or earlier termination of this Agreement, Operator shall restore the Premises to its condition as of the Commencement Date (other than with respect to capital or other improvements approved by Apple pursuant to this Section 4.05), at Operator's sole cost and expense, to the reasonable satisfaction of Apple. In the event Operator fails or neglects to do so, Apple and the City shall have the right to remove any structures and improvements and affect restoration of the Premises or any part thereof at the sole cost and expense of Operator.

(f) Upon reasonable notice to Operator, Apple reserves the right to enter the Premises to make capital improvements to the Premises, subject to compliance with Section 2.04(b).

Section 4.06 Procurement of Bids, Services and Goods.

(a) Independent Contractor. Operator agrees to enter into, or cause to be entered into, all contracts for goods or services in connection with the Premises independently and not as agent of Apple or the City. During the Term of this Agreement, Operator shall manage and operate the Premises as an independent contractor for Apple.

(b) **Prohibited Persons.** Operator shall not enter any contract with a Prohibited Person with respect to the Premises.

Section 4.07 **Sidetrack Agreements.** Operator may enter into industry sidetrack agreements and all other agreements it deems necessary to perform normal railroad operations. Operator will be responsible for all arrangements with third parties concerning existing and future Team Tracks, including their use and maintenance.

Section 4.08 **Abandonment of Operations.** To the extent legally required, Operator must obtain permission of the STB for any abandonment of any service or operations prior to such abandonment, or obtain an exemption from abandonment in respect thereof and shall furnish Apple with prior written notice of any request therefore, as well as notice of receipt of any such permission. In the event Operator fails or ceases to provide freight services, the responsibility for any abandonment proceeding before the STB in respect thereof shall be borne by Operator. Apple reserves the right, at its option, to participate in any such proceeding, provided that Apple shall not oppose Operator in such proceeding. The abandonment of any service or operations shall not affect whether any property is or is not included as part of the Premises.

Section 4.09 **Hazardous Materials.** Subject to its obligations as a common carrier, Operator shall take all actions legally permissible to prevent the transportation or storage of any Class 7 Hazardous Materials (as defined in 49 C.F.R. Section 173.2), at, on or through the Premises without the prior written approval of Apple. Without limiting the foregoing, any transporting or storage of Hazardous Materials (as such term is defined in Section 5.01 hereof) at, on or through the Premises by Operator shall be subject to the conditions that: (i) with the exception of Hazardous Materials contained in an appropriate rail car in accordance with the provisions of the Hazardous Materials Transportation Act, 49 U.S.C. section 5101 et seq., no Hazardous Materials shall be stored on the Premises for more than 24 hours; (ii) Operator shall take steps consistent with those taken on its other rail properties to prevent the use, handling, transport, disposal or release of Hazardous Materials by unauthorized persons; (iii) all handling of Hazardous Materials at the Premises shall be performed in compliance with all applicable laws and regulations. In the event of any release of Hazardous Materials occurring on any segment of the Premises from Freight Rolling Stock or freight facilities and regardless of the cause of such release, Operator at its sole expense shall immediately: (a) make any and all reports required by federal, state or local authorities; (b) advise both the owner/shipper and Apple of the Hazardous Materials in the release and their location; and (c) arrange for and perform or cause the performance of any appropriate response action in connection with any release of Hazardous Materials from the Premises, in accordance with all federal, state, or local laws, rules or regulatory requirements, provided, however, that the foregoing shall in no way limit Operator's ability to seek recovery from any responsible third parties of the costs incurred by Operator.

Section 4.10 **Solid Waste.** Operator shall not have the right to transport, or permit to be transported, any Solid Waste, at, on or through the Premises, except with the prior approval of Apple, at its sole discretion, after consultation with, and the approval of, the Deputy Mayor for Economic Development and Finance of the City of New York; provided, however, that the restrictions set forth in this Section 4.10 shall not infringe upon Operator's obligations to conduct its operations in compliance with the laws, rules and regulations governing interstate commerce

and the duties of common carriers.

Section 4.12 No Discrimination. Operator covenants that it will not violate any laws concerning discrimination, including but not limited to Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act, as amended, Americans With Disabilities Act, Section 1981 of the Civil Rights Act of 1870, Section 1983 or 1985 of the Civil Rights Act of 1871, Equal Pay Act, Executive Order 11246, Rehabilitation Act of 1993, Vietnam-Era Veterans' Readjustment Assistance Act, Immigration Reform and Control Act of 1985, the New York State Human Rights Law, the New York City Human Rights or Civil Rights Law, Executive Order 50 or any other federal, state or local laws, statutes, regulations, ordinances or orders concerning discrimination (the "Discrimination Laws"). Operator further covenants to require any subcontractor to comply with the Discrimination Laws. Operator shall post conspicuously employment non-discrimination notices at the Premises. In all advertisements for employment at the Premises, Operator shall state expressly that it is an equal opportunity employer.

Section 4.13 Prohibition on Liens

(a) Operator shall not create, cause to be created or allow to exist (i) any lien, encumbrance or charge upon the Premises or any part thereof, (ii) any lien, encumbrance or charge upon any assets of, or funds appropriated to, Apple or the City, or (iii) any other matter or thing whereby the estate, rights or interest of Apple in and to the Premises or any part thereof might be impaired. If any mechanic's, laborer's, vendor's, materialman's or similar statutory lien is filed against the Premises or any part thereof, or if any public improvement lien is created, or caused or suffered to be created by Operator shall be filed against any assets of, or funds appropriated to, Apple or the City, then Operator shall within thirty (30) days after receipt of notice of the filing of such mechanic's laborer's, vendor's, materialman's or similar statutory lien or public improvement lien, cause it to be vacated or discharged of record by payment, deposit, bond,

order of court of competent jurisdiction or otherwise, subject to Operator's right to dispute the validity of the lien, as addressed in Subsection (b) below.

(b) Should Operator elect to dispute the validity of any such lien or charge placed, filed or recorded against the Premises, in lieu of canceling or discharging the same, Operator (i) shall furnish to Apple or the City a bond or bonds in connection therewith in such form and amount as shall be approved by Apple and (ii) shall bring an appropriate proceeding to discharge such lien and shall prosecute such proceeding with diligence and continuity; except that if, despite Operator's efforts to seek discharge of the lien, Apple or the City reasonably believes such lien is about to be foreclosed and so notifies Operator, Operator shall immediately cause such lien to be discharged as of record or Apple or the City may use the bond or other security furnished by Operator in order to discharge the lien.

Section 4.14 Prohibition on Security Interests. Operator shall not pledge as security for any loan any of the assets or interests in the Premises.

Section 4.15 Access. Operator upon reasonable notice, shall permit inspection of the Premises by Apple's agents, employees, consultants and representatives (and the City, and its agents, employees, consultants and representatives) and shall permit inspection thereof by or on behalf of prospective future operators, subject to compliance with Section 2.04(b).

Section 4.16 Delegation. Apple may delegate its rights and obligations hereunder to its Affiliate.

ARTICLE V. INDEMNIFICATION AND CASUALTY.

Section 5.01 **Indemnification.** Operator and Parent, jointly and severally, shall forever defend, indemnify and hold harmless EDC, Apple, the City, and The State of New York (the "State"), and their respective officers, agents, representatives and employees (collectively the "Indemnified Parties") from and against any and all liabilities, claims, demands, penalties, fines, settlements, damages, costs, expenses and judgments of whatever kind or nature or unknown, contingent or otherwise (a) arising from injury to any person or persons, including death, or any damage to property of any nature, to the extent said injury is the result of any act(s) or omission(s) of Operator, or of Operator's employees, guests, contractors, subcontractors, representatives or agents (including, but not limited to, NY&A) occurring on or in proximity to the Premises, or arising out of or as a result of actions taken by Operator pursuant to this Agreement or operations conducted on the Premises, including, without limitation, any personal injury, including death, or property damage caused by any collapse or failure of all or any part of the Premises which Operator is obligated to maintain, or (b) relating to or arising from any and all liens and encumbrances which may be filed or recorded against the Premises or any public improvement lien filed against any funds of EDC, Apple, the City or the State as a result of actions taken by or on behalf of Operator, its contractors, subcontractors, agents, representatives, employees, guests or invitees, including, but not limited to, NY&A, or (c) arising out of, or resulting from the presence, storage, transportation, disposal, release or threatened release of any Hazardous Materials (as hereinafter defined) over, under, in, on, from or affecting the Premises or any persons, real property, personal property, or natural substances thereon or affected thereby during the Period of this Agreement, to the extent said presence, disposal, release or threatened release is the result of any act(s) or omissions(s) of Operator or Operator's employees, guests, contractors, subcontractors, representatives or agents (including, but not limited to, NYSA).. For purposes of this paragraph "Hazardous Materials" means (i) any "hazardous waste" as defined under the Resource Conservation and Recovery Act, 42 U.S.C. Section 9601 et seq., or (ii) "hazardous substance" as defined under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601 et seq., or (iii) "hazardous materials" as defined under the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801 et seq., or (iv) "hazardous waste" as defined under New York Environmental Conservation Law Section 27-0901 et seq., or (v) "hazardous substance" as defined under the Clean Water Act, 33 U.S.C. Section 1321 et seq., or (vi) "Petroleum" as defined in N.Y. Environmental Conservation Law §15.0514, and any regulations promulgated thereunder, each as it may be in effect from time to time, or (vii) asbestos, or (viii) polychlorinated biphenyls. For purposes of this Section 5.01, the term CP shall mean the Parent and each of its Affiliates, including, but not limited to, Operator, jointly and severally. The provisions of this Section 5.01 shall survive the Expiration Date or other termination hereof.

Each Party shall provide written notice to the other Party of the receipt of any notice of any claim or threatened claim, and provide to the other Party a copy of the notice, any additional or other documents provided by the person making the claim, and any response to the claim. For any claim under this Section 5.01, Operator shall have the sole duty to defend or respond to any claim, and to take all actions required by applicable law, ordinance or governmental rule, regulation or order to respond to any such claim or the events leading to such a claim, all at its sole and exclusive cost. Subject to taking all actions necessary to maintain any applicable

privilege, Operator shall promptly provide the City, the State, EDC and Apple with a copy of all studies, expert reports, and other documents related to such claim, and shall consult with the City, the State, EDC and Apple concerning any response. The City, the State, EDC and Apple may be represented at their own expense in a proceeding related to the claim by counsel or other representative, and Operator (and its agents, consultants and counsel) shall cooperate with the City, the State, EDC and Apple regarding such participation.

Section 5.02 Reporting of Accident/Incidents. In addition to notifying the appropriate police and other agencies, Operator shall promptly report to Apple any FRA reportable Accident/Incident or crime which arises in connection with the Premises. Operator will comply with all rules and regulations issued by the FRA and other agencies concerning the reporting of Accidents/Incidents.

ARTICLE VI. INSURANCE.

Section 6.01. Insurance. Operator shall maintain at all times during the Term of this Agreement the following insurance:

- (a) Operator shall provide Railroad & general liability insurance with a combined single limit per occurrence of at least \$3,000,000 per occurrence with an annual aggregate of not less than \$10,000,000, which shall provide coverage for personal injury, bodily injury, death, property damage, Federal employers liability act liability and bill of lading and foreign rolling stock liability, with respect to all operations of operator, and which shall include blanket contractual coverage; furthermore the policy shall not incorporate any exclusion or condition of any nature that precludes indemnity being granted for claims arising from operations undertaken in the railroad right-of-way or waterfront activities.
- (b) Operator shall provide Automobile Liability Insurance for bodily injury and property damage with a combined single limit of \$1,000,000 per occurrence and annual aggregate of \$5,000,000. Such insurance must be comprehensive and cover all autos.
- (c) [Intentionally Omitted]
- (d) Operator shall provide an Excess Liability Umbrella policy or Bumbershoot policy in the amount of \$25,000,000.
- (e) [Intentionally Omitted]
- (f) Notwithstanding compliance with these insurance provisions, Operator shall be, continue and remain liable for any uninsured destruction, loss or damage resulting from Operator's breach of the covenants of the several articles of this Agreement. In the event of any such loss or damage for which Operator becomes liable as aforesaid, Operator shall, at its sole cost and expense, promptly repair or replace the property so lost or damaged in accordance with plans and specifications approved by Apple; provided, however, that such plans and designs shall be substantially identical to the original design of the applicable property. Notwithstanding the foregoing, Apple and the City, at their sole discretion, may elect to receive either the actual cash value of the damages or request Operator to rebuild the property to its original condition and design.
- (g) All policies of insurance required by this article shall contain a written waiver of the right of subrogation with respect to all of the named insureds and additional insureds, including Apple and the City. The liability insurance policies shall name the City, EDC and Apple as additional insureds, and specifically state that it is issued "in accordance with the Agreement dated as of March 1, 2002 among New York City Economic Development Corporation, Delaware and Hudson Railway Company, Inc., and Canadian Pacific Railway Company". Should other or additional types of insurance or clauses thereafter become available, Operator agrees to furnish such new certificates on demand of EDC, Apple or the City. Operator further agrees to execute and deliver any additional instruments and to do or cause to be done all acts and things that may be requested by

Apple properly and fully to insure EDC, Apple and the City against all damage and loss as herein provided for and to effectuate and carry out the intents and purposes of this Agreement.

- (h) Certificates of insurance shall be provided by insurers reasonably acceptable to the City and Apple. Certificates of Insurance evidencing the issuance of all insurance required by this Article, and guaranteeing at least thirty (30) days prior notice to EDC, Apple and the City of cancellation or non-renewal, shall be delivered to EDC, Apple and the City prior to execution of this Agreement, or, in the case of new or renewal policies replacing any policies expiring during the Period, no later than thirty (30) days before the expiration dates of such policies.
- (i) All policies shall be primary protection and none of EDC, Apple or the City will be called upon to contribute to a loss that would otherwise be paid by Operator's insurer.
- (j) All certificates of insurance shall name EDC, Apple and the City as additional insureds.
- (k) Subject to Section 6.02 below, provided that CP maintains a consolidated net worth of not less than \$40,000,000 U.S. (the "Minimum Net Worth"), determined in accordance with generally accepted accounting principles, as evidenced by certified financial statements prepared by a nationally recognized independent accounting firm, Parent and Operator shall be permitted to self-insure a \$7,000,000 (CDN) retention under the liability policies identified in clauses (a), (b), and (d) above. If, on the basis of CP's most recent consolidated annual audited financial statements, which Operator shall provide to Apple within 90 days of the end of CP's fiscal year, it is determined that CP does not meet the Minimum Net Worth requirement, then the \$7,000,000 (CDN) retention shall not be permitted hereunder, and the maximum deductible under each policy shall be \$50,000 per occurrence and \$150,000 on an annual aggregate basis.

Section 6.02 Worker's Compensation Insurance. At its sole cost and expense, Operator will procure and maintain, during the period of this Agreement, New York State Workers Compensation & Employers Liability Insurance or Federal Employer's Liability Insurance or Federal Employer's Liability Act Coverage - as required by law. FELA coverage may be self-insured with proof of financial competency.

Section 6.03 [Intentionally Omitted]

Section 6.04 No Modification. Nothing in this Article VI shall be deemed or construed to modify the obligations imposed by Article V hereof.

ARTICLE VII. TERMINATION.

Section 7.02 Expiration. In addition to Apple's right to terminate this Agreement under Section 7.03 and notwithstanding any other provision of this Agreement:

(a) Upon the Expiration Date, Operator shall vacate the Premises. In the event that Operator abandons the Premises or permits the same to become vacant during the Period of this Agreement, this Agreement shall terminate upon the date of such abandonment or vacatur as fully and completely as if that were the date originally set in this Agreement for such termination. Nothing herein contained shall be construed to prevent Apple from maintaining an action for damages against Operator by reason of such abandonment or vacatur. In the event that Operator so abandons the Premises, Operator shall be liable for any and all damages to Apple resulting therefrom, including, without limitation, reasonable attorney's fees, and any other

monies paid or incurred by Apple, for service of process, marshall's fees, and all other costs incurred in summary proceedings and the like.

(b) In the event that Operator tenders any partial payments of fees or any additional charges to Apple for a period subsequent to the Expiration Date, the same shall under no circumstances be construed to create or revive any right on the part of Operator to perform services under this Agreement.

(c) In the event that Operator leaves any of its property including, without limitation, trade fixtures, in or upon the Premises after the Expiration Date, Apple may dispose of same and charge Operator for the cost of such disposal, or keep the property as abandoned property.

Section 7.03 Remedies. The non-defaulting Party may terminate this Agreement if the defaulting Party fails to cure an Event of Default as defined in Section 7.01 hereof within thirty (30) days after a written notice of such Event of Default is given to the defaulting Party. If this Agreement is terminated under this Article VII, Operator shall, subject to applicable law, immediately cease performing all obligations under this Agreement upon the termination date specified in the notice of termination. The failure to give notice of an Event of Default, or to terminate this Agreement for failure to timely cure an Event of Default, shall not constitute a waiver of any right afforded under this Agreement, nor shall any such failure constitute an approval of or acquiescence in any default, except as may be specifically agreed to in writing. The provisions of this Article are in addition to and not in a limitation of any other right or remedy the Parties may have under this Agreement, at law or in equity, or otherwise.

Section 7.04 Termination Option. On or prior to the first anniversary of the Commencement Date, Operator shall have the right, at its sole discretion, to terminate this Agreement, effective as of the last day of eighteenth month following the Commencement Date.

ARTICLE VIII. COMPLIANCE WITH LAW, VENUE AND APPLICABLE LAW.**Section 8.01 Compliance with Law.**

- (a) Operator covenants that it will comply, solely at its Operator's cost and expense, with all Federal, state and municipal laws, ordinances and regulations (whether imposed upon Operator, Apple or the City) pertaining to the Premises and the maintenance and operation of the Premises, including, without limitation, laws relating to sanitation, fire code, environmental quality, equal opportunity employment and Federal, state and municipal tax and withholding laws, except to the extent any such law, ordinance or regulation is preempted by State or Federal law. If steps are taken to enforce any law, ordinance, or regulation relating to the safety of any persons or property located in the vicinity of the Premises, and Operator in good faith believes such law, ordinance or regulation is preempted, the Parties agree to meet promptly and Operator will take such measures that will adequately address any legitimate safety concerns.
- (b) Operator shall make any and all structural and non-structural improvements, alterations or repairs of the Premises that may be required at any time hereafter by any present or future law, ordinance or regulation, except to the extent such law, ordinance or regulation is preempted by State or Federal law.
- (c) Operator shall inspect all Rolling Stock and trains in compliance with FRA and AAR rules and regulations prior to their departure from the Premises to ensure compliance with FRA and AAR rules and regulations. Operator will keep records of all such inspections to the extent, and for the duration, required by FRA and AAR rules and regulations and Operator will dispatch Rolling Stock only if all relevant FRA and AAR rules and regulations are satisfied.
- (d) Operator shall, at its own expense, procure from all governmental authorities having jurisdiction over the operations of Operator hereunder and shall maintain in full force and effect throughout the Term of this Agreement all licenses, certificates, permits or other authorizations which may be necessary for the conduct of such operations.
- (e) The obligation of Operator to comply with governmental requirements is provided herein for the purpose of assuring proper safeguards for the protection of persons and property on the Premises. Such provision is not to be construed as an admission by Apple that such requirements are applicable to it.
- (f) The Parties shall, during the Term of this Agreement, for one another's information, deliver to one another, promptly after receipt of any notice, warning, violation, order to comply or other document in respect of the enforcement of any laws, ordinances, and governmental rules, regulations and orders, a true copy of the same.
- (g) Operator shall furnish to Apple upon its written request copies of any studies or tests conducted to achieve or determine compliance with laws, ordinances and governmental rules, regulations and orders during the Term of this Agreement.

(h) Operator shall notify Apple promptly of any inspections of the Premises by the municipal authorities (including the Department of Transportation), and whenever possible, shall notify Apple in advance of any scheduled inspections so that a representative of Apple may be present. Operator shall deliver copies of any violations to Apple within five (5) days of receipt.

Section 8.02 Governing Law; Venue. This Agreement will be performed in the State of New York and the parties consent to its interpretation according to the law of the State of New York. The parties agree to be subject to and submit to personal jurisdiction in the State and Federal Courts located in New York City in connection with any action, suit or proceeding arising out of this Agreement. To extent permitted by law, the parties shall waive trial by jury in any action or proceeding or counterclaim brought on any matter whatsoever arising out of or in any way connected with this Agreement, or the use or occupation of the Premises. This provision shall survive the expiration or earlier termination of this Agreement.

Section 8.03 Governmental Approval. Operator shall, at its own cost and expense, initiate by appropriate notice, application or petition and thereafter diligently and in good faith prosecute proceedings for the procurement of all necessary and appropriate consents, approvals, or authorizations (or exemptions therefrom) from any governmental agency for the sanction of this Agreement and the Freight Operations to be carried on by Operator hereunder. Operator shall deliver such notice, application or petition to Apple, for its comments thereon in order to facilitate such filings or approvals, within three (3) days after Apple's execution of this Agreement. Operator shall submit such notice, application or petition to the applicable governmental agency within seven (7) days of receipt of such comments or if Apple has no comments, promptly following notice thereof. Operator shall diligently make and pursue such applications and petitions before the STB.

Section 8.04 Noise Control; Nuisance.

(a) Operator shall comply with 24.201 et.seq. of the Administrative Code of the City of New York (the "Noise Control Code") except to the extent preempted by State and/or Federal law.

(b) Operator shall not permit or cause to be permitted, operated, conducted, constructed or manufactured on the Premises devices and activities which would cause a private or public nuisance; provided, however, that nothing herein precludes Operator from taking the position that any action alleging private or public nuisance is preempted by federal law.

(c) At the request of Apple, Operator shall make good faith efforts to implement any measures reasonably necessary to mitigate any impacts on quality of life affecting the areas adjacent to the Premises, including, but not limited to, measures to further reduce odors, truck traffic, noise and any other concerns related to the freight handling operations on the Premises.

Section 8.05 Investigation.

(a) The parties to this Agreement agree to cooperate fully with any investigation, audit, or inquiry conducted by a State of New York ("State") or City of New York ("City") governmental agency or authority that is empowered directly or by designation to compel the attendance of witnesses and to examine witnesses under oath, or conducted by the Inspector General of a

governmental agency that is a party in interest to the transaction, submitted bid, submitted proposal, contract, permit, lease or license that is the subject of the investigation, audit or inquiry.

(b) If any person has been advised that his or her statement, and any information from such statement, will not be used against him or her in any subsequent criminal proceeding and still refuses to testify before a grand jury or other governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to examine witnesses under oath concerning the award of or performance under any transaction, agreement, lease, permit, contract or license entered into with the City, the State or any political subdivision or public authority thereof, or the Port Authority of New York and New Jersey, or any local development organization within the City, or any public benefit corporation organized under the laws of the State, then Operator may be subject to a hearing or penalties as set forth in Sections (d) and (e) herein or;

(c) If any person refuses to testify for a reason other than the assertion of his or her privilege against self incrimination in an investigation, audit or inquiry conducted by a City or State governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to take testimony under oath, or by the Inspector General of the governmental agency that is a party in interest in, and is seeking testimony concerning the award of, or the performance under, any transaction, agreement, lease, permit, contract or license entered into with the City, the State, or any political subdivision thereof or any local development corporation within the City, then Operator may be subject to a hearing or penalties as set forth in Sections (d) and (e) herein.

(d) (i) The agency head (the "Commissioner") whose agency is a party in interest to the transaction, submitted bid, submitted proposal, contract, lease, permit or license may convene a hearing, upon not less than five (5) days' written notice to the parties involved to determine if any penalties should attach for the failure of a person to testify.

(ii) If any non-governmental party to the hearing requests an adjournment, the Commissioner or the agency head who convened the hearing may, upon granting the adjournment, suspend any contract, lease, permit or license pending the final determination pursuant to paragraph (e) below without the City incurring any penalty or damages for delay or otherwise.

(e) The penalties that may attach after the final determination by the City may include, but shall not exceed:

(i) The disqualification for a period not to exceed five (5) years from the date of any adverse determination for any person or any entity of which such person was a member, shareholder, officer, director, employee or agent at the time the testimony was sought, from submitting bids for, or transacting business with, or entering into or obtaining any contract, lease, permit or license with or from the City; and/or

(ii) The cancellation or termination of any and all existing City contracts, leases, permits or licenses that the refusal to testify concerns and that have not been assigned as

permitted under this Agreement, nor the proceeds of which pledged to an unaffiliated and unrelated institutional lender for fair value prior to the issuance of the notice scheduling the hearing, without the City incurring any penalty or damages on account of such cancellation or termination; monies lawfully due for goods delivered, work done, rentals, or fees accrued prior to the cancellation or termination shall be paid by the City.

(f) The Commissioner or agency head shall consider or address in reaching his or her other determination and in assessing an appropriate penalty the factors in paragraphs (i) and (ii) below. He or she may also consider, if relevant and appropriate, the criteria established in paragraphs (iii) and (iv) below, in addition to any other information that may be relevant and appropriate.

(i) The party's good faith endeavors or lack thereof to cooperate fully and faithfully with any governmental investigation or audit including, but not limited to the discipline, discharge, or disassociation of any person failing to testify, the production of accurate and complete books and records, and the forthcoming testimony of all other members, agents, assignees or fiduciaries whose testimony is sought.

(ii) The relationship of the person who refused to testify to any entity that is a party to the hearing, including, but not limited to, whether the person whose testimony is sought has an ownership interest in the entity and/or the degree of authority and responsibility the person has within the entity.

(iii) The nexus of the testimony sought to the subject entity and its contracts, leases, permits or licenses with the City.

(iv) The effect a penalty may have on an unaffiliated and unrelated party or entity that has a significant interest in an entity subject to penalties under (e) above, provided that the party or entity has given actual notice to the Commissioner or agency head upon the acquisition of the interest, or at the hearing called for in (d) (i) above gives notice and proves that such interest was previously acquired. Under either circumstance the party or entity must present evidence at the hearing demonstrating the adverse impact such a penalty would have on such person or entity.

(g) (i) The term "license" or "permit" as used herein shall be defined as a license, permit, franchise or concession not granted as a matter of right.

(ii) The term "person" as used herein shall be defined as any natural person doing business alone or associated with another person or entity as a partner, director, officer, principal or employee.

(iii) The term "entity" as used herein shall be defined as any firm, partnership, corporation, association or person that receives monies, benefits, licenses, leases or permits from or through the City or otherwise transacts business with the City.

(iv) The term "member" as used herein shall be defined as any person associated with any other person or entity as a partner, director, officer, principal or employee.

(h) In addition to and notwithstanding any other provision of this Agreement, the Commissioner or the agency head may, at his or her discretion, terminate this permit upon twenty four (24) hours' written notice in the event Operator fails to promptly report in writing to the Commissioner of Investigation of the City of New York any solicitation of money, goods, requests for future employment or other benefit or thing of value, by or on behalf of any employee of the City, Apple, or other person, firm, corporation or entity for any purpose which may be related to the procurement or obtaining of this Agreement by Operator, or affecting the performance of this Agreement.

Section 8.06. Review and Approval. The granting of this Agreement is subject to the applicable government review and approval process including, but not limited to, approval of Operator based upon the information provided in either the required Business Disclosure Statement or the required Business Entity Questionnaire and the Principal Questionnaire, whichever is applicable. The aforementioned documents shall be completed by Operator and submitted to Apple prior to or upon execution of this Agreement. In the event, subsequent to the execution of this Agreement, approval is not granted by the applicable authority, this Agreement shall be terminated upon twenty-four (24) hours' notice to Operator.

Section 8.07 Conflict of Interest. Operator warrants and represents that no officer, agent, employee or representative of the City or Apple has received any payment or other consideration for the granting of this Agreement and that no officer, agent, employee or representative of the City or Apple has any interest, directly or indirectly in Operator, this Agreement, or the proceeds thereof. Operator acknowledges that Apple is relying on the warranty and representation contained in this Section 8.07 and that Apple would not enter into this Agreement absent the same. It is specifically agreed that, in the event the facts hereby warranted and represented prove, in the opinion of Apple, to be incorrect, Apple shall have the right to terminate this Agreement upon twenty-four (24) hours' notice to Operator and to rescind this transaction in all respects.

ARTICLE IX. MISCELLANEOUS PROVISIONS.

Section 9.02 Security. Neither the City nor Apple shall have an obligation to provide police protection or security services on the Premises. Operator shall provide adequate security for the Premises. Nothing in the foregoing shall be construed to limit any right City police, investigators or other law enforcement persons may otherwise have to enter the Premises at any time for official purposes in the exercise of their public duties, including but not limited to investigations, searches, inspections and examinations.

Section 9.03 Binding Effect. Subject to the specific restrictions and limitations set forth in other provisions herein, this Agreement shall be binding upon and inure to the benefit of the parties hereto, their respective successors, lessees, assign, grantees, and legal representatives, but no sale, assignment, mortgage, grant, or lease by Operator of any interest or right given it under this Agreement shall be valid or binding without the prior written consent of Apple.

Section 9.04 Beneficiaries. This Agreement and each and every provision hereof is for the exclusive benefit of Apple and Operator and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right in any third person to recover by way of damages or otherwise against either of the parties hereto.

Section 9.05 Waivers. No consent or waiver, express or implied, by any party to this Agreement to or of any breach or default by another party to this Agreement in the performance of its obligations hereunder, shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance by the breaching party of the same or any other obligations hereunder. Failure on the part of any party to complain of any act or failure to act by another party, irrespective of how long such failure continues, shall not constitute a waiver of any rights hereunder.

Alberta T2P 4Z. Each party may designate by notice in writing a substitute party or a new address to which any notices, demands, request, submissions, or communications shall thereafter be served.

Section 9.07 Severability. If any covenant or provision of this Agreement, or any application thereof, shall be invalid or unenforceable, the remainder of this Agreement, and any other application of such covenant or provision, shall not be affected thereby. No controversy concerning any covenant or provision shall delay the performance of any other covenant or provision.

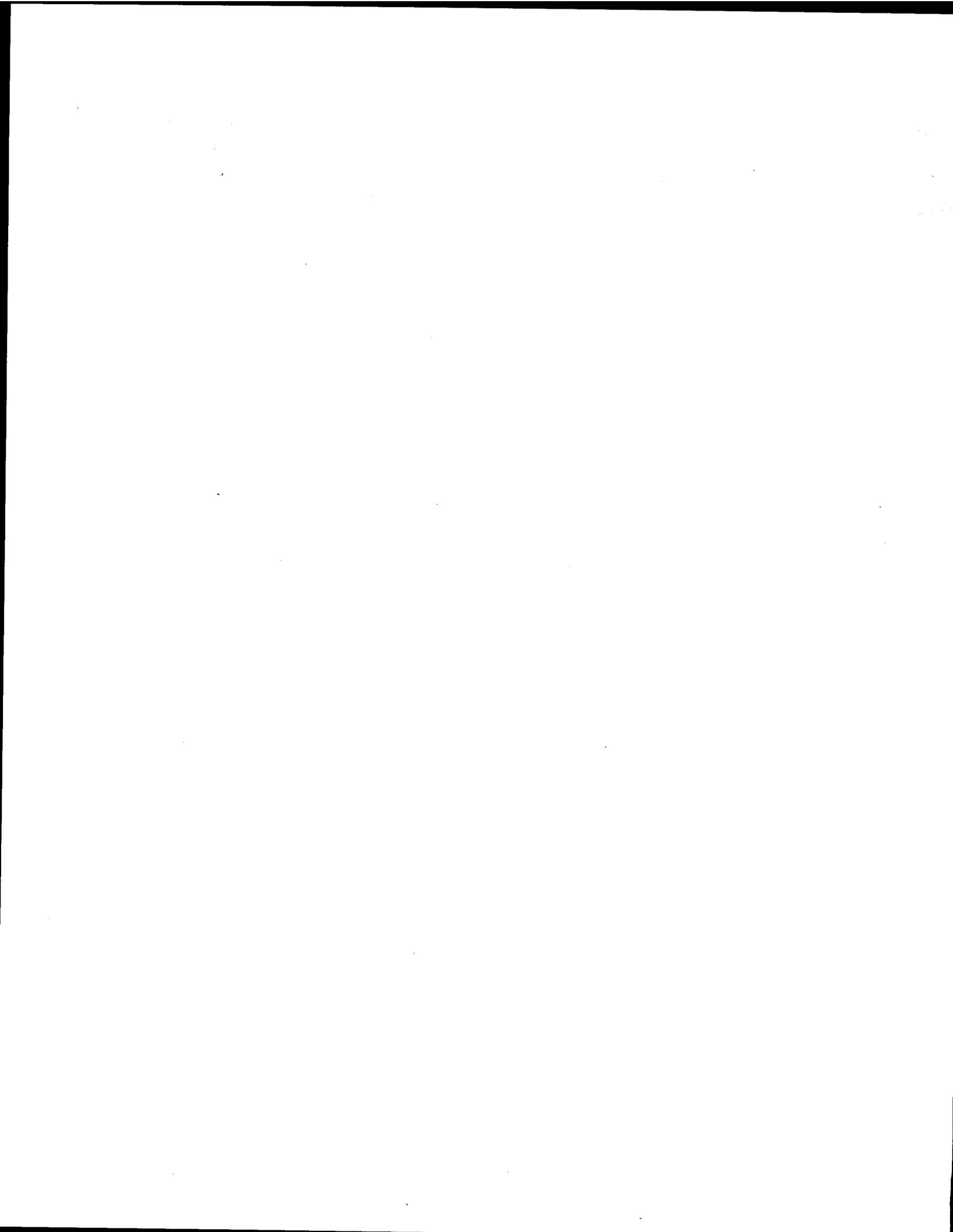
Section 9.08 Headings. All headings and titles in this Agreement are for purposes of identification and convenience only and shall not affect any construction or interpretation of this Agreement.

Section 9.09 Entire Agreement. This Agreement (including the exhibits referred to in this Agreement, which are incorporated in and constitute a part of this Agreement) sets forth the entire understanding of the parties and supersedes all prior and contemporaneous oral or written agreements and understandings with respect to the subject matter. This Agreement may not be amended or modified except by a writing signed by the parties.

Section 9.10 Assignability. The rights and obligations under this Agreement may not be assigned by Operator without the prior written consent of Apple. If operator makes such an assignment without the prior written consent of Apple, Apple shall have the right, but not the obligation, to terminate this Agreement.

Section 9.12 Parent Indemnity. Parent covenants and agrees that it shall be jointly and severally liable for the obligations of Operator under Section 5.01 of this Agreement.

Section 9.13 Representation and Warranties. Each of Operator and Parent hereby represents and warrants to Apple, as of the Commencement Date, that it is a corporation duly organized, validly existing and in good standing under the laws of the state or country of its incorporation; and has all necessary corporate power and authority to execute, deliver and perform its obligations under this Agreement and this Agreement shall be enforceable against it in accordance with its terms.



ANCILLARY AGREEMENT

THIS ANCILLARY AGREEMENT ("**Agreement**") is entered into this 18th day of June, 2002, by and between Delaware and Hudson Railway Company, Inc., a New York corporation, d/b/a Canadian Pacific Railway ("**D&H**"), and Tri-State Brick & Stone of New York Inc., a New York corporation, d/b/a Tri-State Brick & Building Materials ("**Tri-State**").

RECITALS

A. The City of New York (the "**City**") owns the premises commonly known as the 65th Street Railroad Yard, legally described as Block 5804, Lot 2 and Block 5806, Lot 2 on the Tax Map for the Borough of Brooklyn, which premises is comprised of approximately 33 acres, as more particularly described in the Operating Agreement as hereinafter defined (herein the "**Premises**"). The City retained New York City Economic Development Corporation ("**EDC**") to promote the economic development of the City's waterfront property and related transportation facilities, including the operation of the Premises. EDC delegated its duties regarding the administration of the Premises to Apple Industrial Development Corp. ("**Apple**").

B. D&H operates the Premises pursuant to a certain operating agreement dated March 1, 2002 entered into by and between D&H, Canadian Pacific Railway Company, Inc., as D&H's parent company, and Apple (the "**Operating Agreement**"). A redacted copy of the Operating Agreement is attached hereto and made a part hereof as Exhibit A.

C. Tri-State desires to use a portion of the Premises for the purposes of receiving shipments of brick by rail, storing brick on the Premises, and distributing brick from the Premises by truck.

D. D&H desires to grant Tri-State the non-exclusive right to use and occupy a portion of the Premises for its desired purpose subject to the terms and conditions set forth in this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained the parties hereto agree as follows:

1. **RIGHT TO USE**. In consideration of the fees, terms, provisions, and covenants in this Agreement, D&H does hereby grant unto Tri-State the non-exclusive right to use the Loading Dock on the Premises and approximately 4.1 acres on the north side of the Premises, in the location depicted on Exhibit B, (collectively, the "**Tri-State Premises**") for the purposes of receiving freight by rail, storing brick, and distributing brick by truck, all in accordance with the uses allowed under the Operating Agreement. The Tri-State Premises will be made available for possession by D&H to Tri-State effective June 15, 2002. The right to use the Tri-State Premises shall not be a real property interest, but rather shall be deemed to be an agreement by D&H to allow Tri-State to enter the Tri-State Premises to perform the purposes provided in this

Agreement. Tri-State agrees to use the Tri-State Premises in a careful and proper manner, and in compliance with all applicable Federal, State, and local laws, ordinances, and regulations (whether imposed upon Tri-State, D&H, Apple, or the City) pertaining to the Tri-State Premises and the maintenance and operation of the Tri-State Premises.

2. **AGREEMENT TERM.** D&H shall allow Tri-State and its agents, contractors, and representatives access to the Tri-State Premises immediately upon commencement of the term. The term of this Agreement ("*Agreement Term*") shall commence on June 15, 2002 ("*Agreement Commencement Date*"). D&H and Tri-State may agree to an extension of the Agreement. Any such extension shall be for a one-year period (an "*Extension Period*"). During any (or each) Extension Period, this Agreement shall be extended on such terms and conditions as are agreed upon by the parties. This Agreement shall end on February 28, 2005 or the last day of any Extension Period (the "*Termination Date*"), unless sooner terminated in accordance with the provisions of this Agreement and the Operating Agreement. D&H may terminate this agreement on November 30, 2003, upon sixty days (60) written notice from D&H to Tri-State, pursuant to the procedures provided in this Agreement and the Operating Agreement. If D&H terminates the Operating Agreement pursuant to the terms in that Agreement, D&H shall use its best efforts to ensure that a leasehold interest in the Tri-State Premises is transferred to Tri-State from EDC.

3. **FEES.** Tri-State shall pay D&H a base fee (the "*Base Fee*") during the Agreement Term as described herein.

a. **Base Fee.** Commencing July 1, 2002, Tri-State agrees to pay a Base Fee in the sum of \$290.00 per acre per month until March 1, 2003. Commencing March 1, 2003, Tri-State agrees to pay a Base Fee in the sum of \$315.00 per acre per month for the second year of this Agreement. Commencing March 1, 2004, Tri-State agrees to pay a Base Fee in the sum of \$340.00 per acre per month for the third year of this Agreement. Payment of Base Fees shall be due and payable by Tri-State at the office of D&H (as set forth in Section 14, "Notice and Payments", below) or at such other place as D&H may designate in writing. Monthly payments of Base Fees shall be made in advance, without notice, demand, setoff or counterclaim, on or before the first day of each month during the Agreement Term. D&H reserves the right to reasonably adjust Base Fees based on D&H's increased fees in the Operating Agreement due to expansions of the Premises.

d. **Utilities.** Tri-State shall pay for the cost of all electricity consumed at the Tri-State Premises.

c. **Sanitation.** The Tri-State Premises will be equipped with one chemical toilet for Tri-State's use. Tri-State shall arrange for periodic servicing of the toilet and Tri-State shall be responsible for all costs related to such service.

d. **Drinking Water.** The Tri-State Premises is not equipped with plumbing and there is no water supply available. Tri-State shall be responsible for providing drinking water for its own use and Tri-State shall be responsible for all costs associated with such service.

e. Office Trailer. Tri-State shall provide an office trailer for its own use on the Tri-State Premises. Tri-State shall pay for any and all costs associated with the office trailer. Tri-State shall be responsible for all maintenance of the office trailer.

f. Security. Tri-State shall provide its own around-the-clock security and shall be responsible for all costs associated with such security.

4. COMPLIANCE WITH OPERATING AGREEMENT. This Agreement is subject and subordinate to the terms of the Operating Agreement. All applicable terms and conditions of the Operating Agreement are incorporated into and made a part of this Agreement as if D&H were Apple thereunder, Tri-State were the operator thereunder, and the Tri-State Premises were the Premises; except that the parties acknowledge that D&H shall assume the rights of Apple, but not those obligations of Apple specified in the Operating Agreement which Apple reserves the right to perform and furnish with respect to the Premises, that Tri-State shall have no right to enforce any of D&H's rights under the Operating Agreement against Apple.

Tri-State assumes and agrees to perform D&H's obligations under the Operating Agreement during the Agreement Term to the extent that such obligations are applicable to the Tri-State Premises, and not excepted from application to the Tri-State Premises and/or Tri-State as provided in this Section, except that the obligation to pay Fees to Landlord under the Operating Agreement shall be considered performed by Tri-State to the extent and in the amount fees are paid to D&H in accordance with this Agreement. D&H agrees to keep the Operating Agreement in full force and effect with respect to the Tri-State Premises so that D&H will keep and retain all its rights to grant to Tri-State the rights and obligations under this Agreement. Except as otherwise agreed with Apple or D&H, if the Operating Agreement terminates, this Agreement shall terminate and the parties shall be relieved of any further liability or obligation under this Agreement, provided, however, that if the Operating Agreement terminates as a result of a default or breach by D&H or Tri-State under this Agreement and/or the Operating Agreement, then the defaulting party shall be liable to the non-defaulting party for the damage suffered as a result of such termination.

5. CONFLICT WITH OPERATING AGREEMENT. If any term or condition of this Agreement is in conflict with any term or condition of the Operating Agreement, the term or condition of the Operating Agreement shall prevail insofar as it affects Apple's rights; however, any term or condition of this Agreement shall prevail as between D&H and Tri-State. This Agreement is subject and subordinate to the Operating Agreement, and all of Tri-State's rights with respect to the Tri-State Premises shall only survive so long as the Operating Agreement survives. This Agreement shall terminate on the date immediately preceding the date of termination or cancellation of the Operating Agreement for any reason without notice to Tri-State.

6. LIMITATIONS ON RIGHTS. The grant of rights in this Agreement are specifically subject to the following:

Apple and D&H retain the right to use or to allow third parties to use the Tri-State Premises to operate, construct, inspect, repair, and maintain the Transfer Bridges, Loading Dock, tracks, and

other structures, construct utilities, or otherwise make improvements with reasonable notice to Tri-State. Tri-State will cooperate in allowing the City, Apple, or D&H to effectuate or permit any work described in this Section 6.

7. **MAINTENANCE.** Tri-State shall keep the Tri-State Premises reasonably clean and orderly and shall regularly remove shrubbery, other vegetation, and all debris, including all banding and dunnage removed from rail cars. Tri-State shall also perform all snow and ice removal (using sand, calcium chloride, or another salt substitute) at Tri-State's own expense. D&H, Apple, and the City have the right to inspect or have the Tri-State Premises inspected.

8. **CONDITION OF TRI-STATE PREMISES.** Except as provided herein, Tri-State agrees to take the Premises in an "as is" condition. Tri-State acknowledges that it has inspected the Tri-State Premises and has found the condition to be satisfactory and is not relying on any representations of D&H, its agents, representatives, or employees as to such condition. Tri-State shall not make any alterations or improvements to the Tri-State Premises costing in excess of \$10,000 without the prior written consent of Apple and D&H.

9. **SURRENDER OF TRI-STATE PREMISES.** Upon termination or expiration of this Agreement, Tri-State shall remove all of its installations, alterations or additions (as required by the Operating Agreement), and equipment from the Tri-State Premises and will quietly yield and surrender the Tri-State Premises to D&H in as good a condition as the Tri-State Premises were in when it took them, normal wear and tear and damages from the elements excepted. In the event Tri-State fails to restore the Tri-State Premises to its condition as of the Commencement Date, D&H shall have the right to remove any structures and improvements and affect restoration of the Tri-State Premises or any part thereof at the sole cost and expense of Tri-State. As between D&H and Tri-State, Tri-State shall not be required to remove any installations, alterations or additions performed by D&H prior to the Commencement Date or to restore the Tri-State Premises to their condition prior to the making of such installations, alterations or additions. If, however, the term of the Agreement expires at or about the date of the expiration of the Operating Agreement, and if D&H is required under or pursuant to the terms of the Operating Agreement to remove any installations, alterations, or additions performed prior to the Commencement Date, Tri-State shall permit D&H to enter the Tri-State Premises commencing five (5) business days prior to the expiration of the Agreement, subject to such conditions as Tri-State may reasonably impose, for the purpose of removing its installations, alterations or additions and restoring the Tri-State Premises as required.

10. **D&H REPRESENTATIONS AND WARRANTIES.** D&H represents and warrants to Tri-State that (a) D&H has delivered to Tri-State a full and complete copy of the Operating Agreement and all other agreements between Apple and D&H governing the use and occupancy of the Premises, (b) the Operating Agreement is, as of the date hereof, in full force and effect, and (c) no event of default has occurred under the Operating Agreement and, to D&H's knowledge, no event has occurred and is continuing which would constitute an event of default. Each party agrees that it will not, by its act or omission to act, cause a default under the Operating Agreement. Provided Tri-State shall timely pay all Base Fees when and as due under this Agreement, D&H shall pay, when and as due, all base fees and other charges payable by D&H to Apple under the Operating Agreement.

11. **INDEMNIFICATION**. Tri-State shall make no claim or demand against D&H, Apple, EDC, the City, or the State of New York or any of their employees for any injury, including injury resulting in death, loss or damage to property suffered or sustained by Tri-State or its employees or by any other person or corporation which is based upon, arises out of or is connected with this Agreement or anything done or maintained hereunder or anything not done or maintained as required hereunder and hereby waives as against D&H and its employees all such claims or demands.

Tri-State shall indemnify and save harmless D&H, Apple, EDC, the City, and the State of New York from and against any of the following:

- a. any and all claims, demands, awards, actions and proceedings by whomsoever made, brought or prosecuted;
- b. any and all loss, damages or expenses suffered or incurred by D&H, Apple, EDC, the City, and the State of New York or their employees including injuries, as well as those resulting in death, and damage to its property, which are based upon, arise out of or are connected with this Agreement or anything done or maintained hereunder or anything not done or maintained as required hereunder, whether caused by negligence of Tri-State or its officers, employees, agents or otherwise.

The waiver and indemnity given by Tri-State hereunder shall apply except for those claims that result from the negligence of D&H or its employees.

12. **INSURANCE**. Tri-State shall obtain and maintain the following forms of insurance:

Tri-State shall, at its sole cost and expense, obtain and maintain comprehensive general liability insurance with a policy limit of not less than five million dollars (\$5,000,000.00) per occurrence for bodily injury, death and damage to or destruction of property, including the loss of use thereof. The policy shall, by its wording or by endorsement:

- a. include D&H, Apple, EDC, the City, and the State of New York as additional insureds;
- b. provide a "severability of interests" clause which shall have the effect of insuring each person, firm, or corporation named in the policy as an insured in the same manner and to the same extent as if a separate policy had been issued to each;
- c. extend to cover the liabilities assumed by Tri-State under this Agreement;
- d. provide non-owned auto liability coverage;
- e. extend to cover products and completed operations for twelve (12) months.

In the event any work or occurrence in connection with this Agreement would be excluded from coverage by a "railway," "railroad," or "railroad property" exclusion or limitation in the comprehensive general liability policy, Tri-State shall procure and maintain in effect (or shall cause its contractor to procure and maintain in effect), for the duration of such work or occurrence, railroad protective liability insurance, in the name of D&H, with a single limit (personal injury and property damage combined) of not less than five million dollars (\$5,000,000.00) per occurrence and six million dollars (\$6,000,000.00) aggregate. Tri-State may satisfy the requirements of this clause by having the "railway," "railroad," or "railroad property" exclusion or limitation deleted from the comprehensive general liability policy, providing evidence thereof and in a form acceptable to D&H. The work or occurrence shall not commence until such time as the evidence is received and approved by D&H.

Tri-State shall obtain and maintain, at its sole cost and expense, automobile public liability and property damage insurance in an amount not less than five million dollars (\$5,000,000.00) all inclusive covering the ownership, use and operation of any motor vehicles and trailers licensed for use on public highways and which are owned, leased, or controlled by Tri-State;

Tri-State shall obtain and maintain "All Risk" Contractors' Equipment Insurance covering the Equipment used by Tri-State for the performance of the work and shall be in a form acceptable to D&H and shall not allow subrogation claims by the insurer against D&H.

Tri-State shall, at its sole cost and expense, obtain and maintain Employers Liability Occupational Disease Insurance with limits of not less than five million dollars (\$5,000,000.00) each accident/each employee. Such policy shall include a waiver of subrogation in favor of D&H, Apple, EDC, the City, and the State of New York (per the indemnification agreement).

Any insurance coverage acquired hereunder shall in no manner restrict or limit the liabilities assumed by Tri-State under this Agreement.

The form of said insurances shall be acceptable to D&H and shall be maintained continuously during the term of this Agreement. The policies shall contain an endorsement which provides that D&H shall be given not less than thirty (30) days notice in advance of cancellation, termination, change or amendments restricting coverage. Further that in the event said insurance policies are allowed to lapse during the term hereof, this agreement shall, subject to all the rights and privileges of D&H under this agreement and notwithstanding any other clause herein, forthwith terminate at the option of D&H without any notice whatsoever being given to Tri-State. Tri-State shall provide D&H with certified evidence of the above policies of insurance.

13. **ASSIGNMENT OR AGREEMENT.** The rights and obligations under this Agreement may not be assigned by Tri-State without the prior written consent of D&H and Apple. If Tri-State makes such an assignment without the prior written consent of D&H and Apple, D&H shall have the right, but not the obligation, to terminate this Agreement.

14. **NOTICES AND PAYMENTS.** Whenever any notice, consent, approval, or authorization is required or permitted under this Agreement, the same shall be in writing and

shall be sent by hand delivery or by registered or certified mail (return receipt requested), postage prepaid, as follows:

To D&H: Delaware and Hudson Railway Company, Inc.
200 Clifton Corporate Park
Clifton Park, New York 12065
Attn: David Marsh

To Tri-State: Tri-State Brick & Stone of New York Inc.
151 West 25th Street
New York, NY 10001
Attn: Louis Formica

Each party may select a different address for the receipt of notices and shall so notify the other party in writing. All Base Fees shall be delivered by Tri-State to D&H at the above address as required pursuant to Section 3, above.

15. **DEFAULT.** In addition to the occurrence of any of the events of default defined under the Operating Agreement, if Tri-State fails to perform or observe any term or condition of this Agreement or the Operating Agreement, then after any applicable notice or cure period required by the Operating Agreement for the same or substantially similar default, it shall be an event of default under this Agreement. Upon the occurrence of any one or more such events of default, D&H may exercise any remedy against Tri-State which Apple may exercise for default by D&H under the Operating Agreement. D&H acknowledges that Apple is not obligated to send default or other notices to Tri-State, and D&H agrees to immediately deliver to Tri-State any notice relative to the Operating Agreement or this Agreement.

16. **ACCESS.** Ingress and egress to the Tri-State Premises shall be restricted to the gate in the northeast corner of the Tri-State Premises. All vehicles entering the Tri-State Premises must pass through the Brooklyn Army Terminal security gates. D&H may require Tri-State to comply with additional reasonable access limitations.

17. **ATTORNEYS' FEES.** If D&H or Tri-State shall commence an action against the other arising out of or in connection with this Agreement, the prevailing party shall be entitled to recover its costs of suit and reasonable attorneys' fees.

18. **TRANSPORTATION AGREEMENT.** Tri-State agrees to meet the minimum shipping volumes as established in the Transportation Agreement between D&H and Tri-State, which is attached hereto and made a part hereof as Exhibit C (the "*Transportation Agreement*"). If Tri-State fails to meet the minimum shipping volume requirements, D&H shall have the right, but not the obligation, to terminate this Agreement.

19. **GENERAL PROVISIONS.**

a. All representations, agreements, terms, and conditions, verbal or otherwise, between the parties are contained within the provisions of this Agreement, the Operating Agreement, the

Maintenance Agreement, and the Transportation Agreement as incorporated herein. This Agreement is the entire and complete agreement between D&H and Tri-State concerning the Tri-State Premises. No amendment or change to this Agreement shall be binding upon either party unless executed in writing by both parties and approved in writing by Apple.

- b. This Agreement shall be governed by the laws of the State of New York.
- c. Unless otherwise noted, all terms not otherwise defined herein shall have the meaning given to such terms in the Option Agreement. The headings used in this Agreement are for purposes of convenience only and shall not be used to limit the interpretation of any section.
- e. The Agreement shall benefit and bind the parties hereto and their respective heirs, successors, and assigns.
- f. Tri-State represents and warrants to D&H that it is a corporation, duly formed, validly existing and in good standing under the laws of the State of New York. Tri-State covenants, represents and warrants that it is, and shall remain throughout the Agreement Term, current on all filings and registrations required to maintain good standing in such State.
- g. D&H represents and warrants to Tri-State that it is a corporation, duly formed, validly existing and in good standing under the laws of the State of New York. D&H covenants, represents and warrants that it is, and shall remain throughout the Agreement Term, current on all filings and registrations required to maintain good standing in such State.
- h. D&H represents that it has full power and authority to enter into this Agreement, subject to the consent of Apple. So long as Tri-State is not in default in the performance of its covenants and agreements in this Agreement, Tri-State's quiet and peaceable enjoyment of the Tri-State Premises shall not be disturbed or interfered with by D&H, or by any person claiming by, through, or under D&H.
- i. This Agreement and the obligations of the parties hereunder are expressly conditioned upon D&H's obtaining prior written consent hereto by Apple. Tri-State shall promptly deliver to D&H any information reasonably requested by Apple (in connection with Landlord's approval of this Agreement) with respect to the nature and operation of Tri-State's business and/or the financial condition of Tri-State.
- j. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original and all of which when taken together shall constitute one binding agreement.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement as of the date set forth herein.

D&H:

Delaware and Hudson Railway Company, Inc.

By: _____
Name: _____
Its: _____

TRI-STATE:

Tri-State Brick & Stone of New York Inc.

By: _____
Name: Louis J. Formica, CPA
Its: CFO

**EXHIBIT A
TO AGREEMENT**

COPY OF OPERATING AGREEMENT

**EXHIBIT B
TO AGREEMENT
TRI-STATE PREMISES**

**EXHIBIT C
TO AGREEMENT**

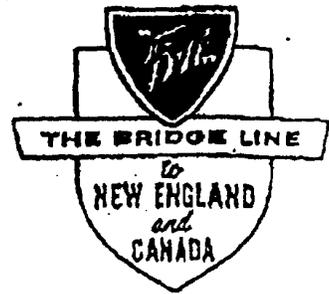
COPY OF TRANSPORTATION AGREEMENT





CANADIAN PACIFIC RAILWAY

Delaware & Hudson Railway Company
200 Clifton Corporate Parkway
P.O. Box 8002
Clifton Park, NY 12065



Transmittal Cover Sheet

To: Mr. Lou Formica

From: DAVE MARSH

Date: 06/14/04

Fax: (518) 383-7250

Phone: (518) 383-_____

Number of pages: 3 (including this cover sheet)

Message: Lou: The following letter was received today from
NYCEDC. The letter shows the terms for which CPR
would exit the Agreement to operate the 65th Street
Yard. No Decision has been made at this time by
CPR.

Thank You
DAVE MARSH



New York City
Economic Development
Corporation

June 14, 2004

Delaware and Hudson Railway Company, Inc.
D/b/a Canadian Pacific Railways
200 Clifton Corporate Parkway
Clifton Park, NY 12065
Attn: Steven J. Lawrance, Director National Sales East

Re: 65th Street Railyard
Brooklyn, NY

Dear Mr. Lawrance:

The following is a response to your emails of May 21, 2004 and June 1, 2004 in which you asked for a proposal to vacate the subject property with respect to the Amended and Restated Operating Agreement (the "Agreement") among Apple Industrial Development Corp. (the "City"), Delaware and Hudson Railway Company, Inc. and Canadian Pacific Railway Company ("Canadian Pacific"), dated June 1, 2002.

The proposal is that if Canadian Pacific will agree, in writing by June 30, 2004, to surrender its rights to use of the premises by July 31, 2004, we are willing to accept it, pursuant to the following conditions.

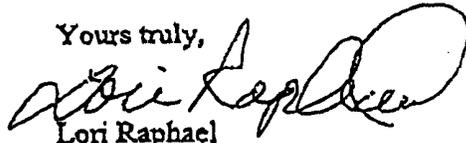
We would require that Canadian Pacific:

- Pay rent through June 30
- Participate in an orderly transition
- Provide the City with any information or agreements in Canadian Pacific's possession with respect to any other entities remaining on the premises
- Provide financial statements detailing all income received from the site, both for through-put and for any sublease revenue or other operating revenue received with respect to the premises
- Provide payment to the City under Section 3.01 of the Agreement, calculated pursuant to Exhibit D of the Agreement, if such payment is due and owing

If Canadian Pacific remains in default of the Agreement or fails to meet the conditions required herein for early termination of the Agreement, the City will pursue all legal remedies at its disposal.

Please contact me as soon as possible, and in any event by June 30, 2004, and let me know how you plan to proceed.

Yours truly,



Lori Raphael
Assistant Vice President
Property Management and Leasing

Cc: Canadian Pacific Railway Company
401 9th Avenue S.W.
Calgary, Alberta T2P 4Z

Tanya K. Tesa, EDC
Robert LaPalme, EDC
Joan McDonald, EDC

Steven Lazarus, EDC
Jack Powers, EDC
Alice Cheng, EDC

D



THE CITY OF NEW YORK
DEPARTMENT OF SMALL BUSINESS SERVICES

ROBERT W. WALSH
COMMISSIONER

Notice to Quit

To: Tri-State Brick and Stone of New York, Inc., d/b/a Tri-State Brick & Building Materials ("XYZ Corp." or John and Jane Doe, said name(s) being fictitious or unknown and referring to occupants of the premises)

at the premises described herein

and to all persons occupying the premises with or through you:

The Premises, which are shown highlighted in yellow on the annexed Exhibit 1, are described as follows:

Block 5804, p/o Lot 2 and 5806, p/o Lot 2 on the Tax Map for the Borough of Brooklyn, known as the 65th Street Railyard (located west of 2nd Avenue, proximate to the area from 63rd Street, to 65th Street, Brooklyn, New York 11220) ("Premises"). The Premises is approximately 5.5 acres.

PLEASE TAKE NOTICE that the City of New York ("City"), the owner of the Premises, hereby elects to terminate any tenancy you may claim to have as of August 31, 2005. Your right to use the Premises was pursuant to an agreement entered into with Delaware and Hudson Railway Company, Inc, d/b/a Canadian Pacific Railway ("Agreement"), which terminated as of July 31, 2004. In addition, the Agreement would have expired by its own terms on February 28, 2005.

PLEASE TAKE FURTHER NOTICE that unless you remove yourself from the Premises, along with all your personal property, on or before August 31, 2005, that being at least 30 days from the date of service of this notice upon you, the City will commence an action to recover possession of the Premises

Dated: New York, New York
July 20, 2005

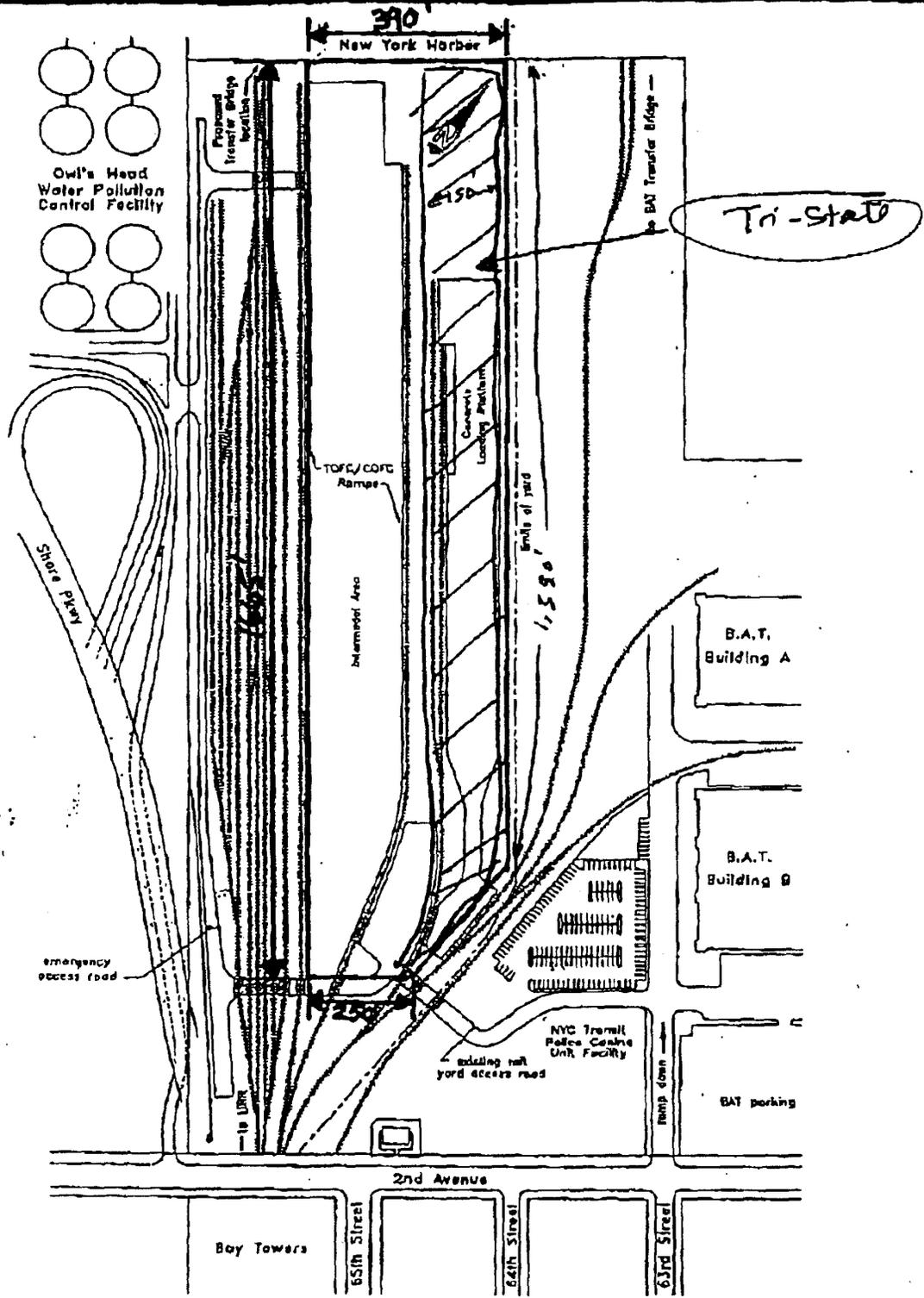
THE CITY OF NEW YORK

By: ANDREW SCHWARTZ,
First Deputy Commissioner
DEPARTMENT OF SMALL BUSINESS SERVICES

Tri-State Brick & Stone of New York, Inc.
151 W. 25th Street
New York, New York 10001.

110 William Street • New York, NY 10038
Tel. 212.513.6300 • FAX 212.818.8865 • TDD 212.513.6306
www.nyc.gov

65TH STREET RAILROAD YARD - Site Map



E

Subj: **TSB letter to Lori Raphael in response to the EDC letter dated 1-12-05.doc**
Date: 1/20/2005 2:56:58 P.M. Eastern Standard Time
From: LFormica@tristatebrick.com
To: JFMcHughPC@aol.com

Ms. Lori Raphael
Vice President
Property Management and Leasing
NYC EDC

Via Fax 212-312-3919 and email to lraphael@nycedc.com

Dear Ms. Raphael:

This letter is pursuant to our telephone conversation on January 18, 2005 and in response to your letter of January 12, 2005.

Rather than send to you the response letter that was prepared by our council, I decided instead to send you my letter wherein I would like this opportunity to more positively present to you (EDC) in greater detail, two concepts I have for our use of the 65th Street yard.

First, with regards to our present situation -

If I look at our physical space needs critically, I believe that with circumstances as they are, we can consolidate the size of our footprint in the yard to just about half of our originally designated space.

In addition to reducing our occupancy area, I am keenly aware of EDC's desire to increase the square foot rental. In attempt to be fair to all parties, I am prepared to pay \$5,000 per month for use of 2 acres. This would represent a significant increase from our present rate and represents a substantial premium when compared to what other similar facilities are paying for similar brick landing sites in the New York area, namely the Bushwick Terminal occupied by Kings Material Handling and another facility commonly referred to as "JJT" in Long Island City. Both of these sites handle brick traffic now (near their capacity), and are similarly serviced by the NY and Atlantic Railway. Rents at 65th Street, in excess of this, will be incongruent with the market for similar properties and put my business at a competitive disadvantage, having a devastating effect on our business.

I would like to point out again that the present yard remains unfilled, not because the rates were too low, but for other reasons. Increasing the rent to a reasonable rate is fair, but an excessive rate will only further aggravate the more pervasive problems.

Another Idea -

As an alternative or perhaps in conjunction with the above proposal, I would also like to further the idea of becoming the operator-developer of the 65th Street Yard in entirety.

I believe that the success of the yard and the original vision that those before us had for the property focuses on the float bridge.

I understand many of the problems that existed with and perhaps still exist with Cross Harbor. Where things stand today, significant logistic problems still remain wherein their NY rail traffic is diverted onto city streets, in an increasingly busy area. In my pursuit of alternative properties to relocate to, none of which have come to fruition, I initiated discussions with Cross Harbor, wherein they have indicated a willingness to give up their NY current traffic pattern and withdraw from direct Brooklyn activities in favor of handing off their floated rail cars to a newly formed corporation controlled by Tri-State Brick/Transportation, who would be governing the entire 65th St Yard. I have had similar conversations with NY and Atlantic Railway in this regard and they too have also confirmed their desire to work with me in bringing this property to its potential.

(Cross Harbor traffic alone would account for approximately 2,700-3,000 immediate railroad cars through the float bridge.)

I cannot and would be suspect of anyone else providing you specifics property revenue projections as we all know of the many years of dormancy and unsuccessful attempts to activate this property. The most recent was Canadian Pacific Railroad, a very large, well respected major railroad company.

What the property needs is a strong local business with an entrepreneurial spirit that can proactively solicit business in the NY region. We live here and this is what we do. What I can presently assure you of are a few very important things. First, I already have the commitments from parties important to both ends of the yard, Cross Harbor and NY and Atlantic Railway. (Getting the floating bridge operating and taking Cross Harbor off the Brooklyn streets is worthy enough for your consideration of the proposal). Secondly, we already operate in the yard and can easily expand our loading and unloading services to others that we expect to bring into the yard. And third, our efforts to attract new customers will be very proactive, utilizing our sales staff and aggressive advertising.

What we all need to keep in mind is that unlike a national rail carrier, the likes of a Canadian Pacific Railroad, the revenue and expenses of the yard must make business sense unto itself. A national railroad operating the yard would otherwise collect sufficient rail revenue moving the railcars across the country to subsidize the cost of operating the yard. The New York and Atlantic Railway and even Cross Harbor are "Short Line" carriers fighting to earn only a small portion of the rail revenue. They have little to no

extra revenue to subsidize the cost of running the yard, therefore the users of the property will need to pay accordingly. It is therefore critically important that we keep this perspective in mind as ultimately, market conditions will determine the success in filling the yard with customers.

Graduated rents would be something I would like to talk about further with you. Once the yard is in full operation it will be a lot easier to raise rent rates, where replacing one customer from a large rent roll would be a lot more forgiving than presently having none.

It is in our mutual best interests to make a success out of the City's 65th Street Yard project. I have put the big pieces together and would like to incorporate your thinking and ideas into this as well. If this sounds interesting to you, I propose that we meet as soon as possible to rapidly bring it to fruition. After our initial meeting to share ideas, I will move to firm up arrangements with Cross Harbor and New York and Atlantic and put a management team together to specifically develop this facility.

I hope these ideas meet your approval and I look forward to your reply.

Sincerely,

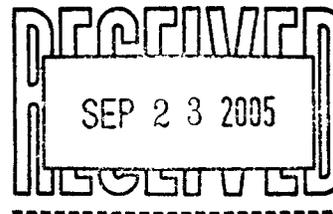
Louis J. Formica, CPA
Ptrn, CFO
Tri-State Brick & Stone of New York, Inc.

F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

TRI-STATE BRICK AND STONE OF NEW YORK, INC.
d/b/a TRI-STATE BRICK & BUILDING MATERIALS
And TRI-STATE TRANSPORTATION, INC.



Plaintiffs,

v.

Civil Action No. 05-7561
Judge George B. Daniels

THE CITY OF NEW YORK, THE NEW YORK CITY
ECONOMIC DEVELOPMENT CORPORATION, and
APPLE INDUSTRIAL DEVELOPMENT
CORPORATION,

Defendants.

----- x

I, Joan McDonald, declare under the penalty of perjury pursuant to 28 U.S.C. §
1746 as follows:

1. I am a Senior Vice President of the Defendant New York City Economic Development Corporation ("EDC").
2. I have personal knowledge of the facts contained in this declaration.
3. I have served as a Senior Vice President of EDC from June 23, 2003 to the present day.
4. My duties as Senior Vice President include overall responsibility for managing EDC's Transportation Department, including developing and implementing citywide transportation policies in the areas of Rail Freight; Port and Waterfront Development; Passenger Ferry Service; Air Cargo;

Aviation and Lower Manhattan redevelopment. I am also responsible for overseeing the operations of City-owned freight rail facilities (including Staten Island Railroad ("SIRR"), 65th Street Yard, First Avenue Rail); City-owned Helicopter facilities (E. 34th Street and Wall Street); City owned Airports (JFK and LaGuardia through a 50-year lease with the City-of New York) and Cruise Terminal operations and capital construction.

5. This declaration is in support of Defendants' The City Of New York ("City"), EDC, and Apple Industrial Development Corp. ("Apple") (collectively "Defendants") Memorandum In Opposition To Plaintiffs' Memorandum Of Law In Support Of A Preliminary And A Permanent Injunction ("Memorandum") and is in support of Defendants' request for compensation for Plaintiffs' interim use and occupancy of a portion of the Premises (as defined in paragraph 6 below) or in the alternative the posting of an undertaking.
6. The City owns certain real property known as the 65th Street Rail yard and located west of 2nd Avenue, proximate to the area from 63rd Street, to 65th Street, Bay Ridge, New York, identified on the Kings County Tax Map as Block 5804, Lots 2, and Block 5806, Lot 2 ("Premises").
7. The City owns the Premises in fee simple, pursuant to a deed dated April 27, 1981 ("Deed"), by which the City acquired title to the Premises from the State of New York ("State"). The Deed was recorded on May 6, 1981,

at Reel 1234, Page 1101, in the Office of the City Register of the County of Kings.

8. The Premises is a rail yard, which encompasses approximately 33 acres of property.
9. On or about August 28, 2000, EDC, on behalf of the City, issued a Request for Proposals ("RFP"), seeking an entity, to operate the Premises.
10. On or about December 20, 2001, Canadian Pacific Railroad ("CP"), and its subsidiary, Delaware and Hudson Railway Company, Inc. ("D&H") ("D&H, together with CP, the "Operator") were awarded the contract to operate the Premises.
11. By an operating agreement, dated as of March 1, 2002 ("Original Operating Agreement"), Apple, as administrator, and CP and D&H, as Operator, agreed that Operator would operate the Premises for a period of three years, ending on the third anniversary of the commencement date of March 1, 2002, unless sooner terminated, or extended by Apple and Operator for up to two annual periods.
12. The Original Operating Agreement was amended and restated as of June 1, 2002 to, among other things, increase the acreage to be included within the Premises. (The agreement as amended and restated is hereinafter referred to as the "Operating Agreement").
13. As of June 1, 2002, the Operating Agreement was the only operating agreement in effect with respect to the Premises.

14. Operator entered into an Ancillary Agreement with Plaintiff Tri-State Brick and Stone of New York, Inc. ("Tri-State") for the non-exclusive right to use the loading dock on the Premises and 4.1 acres on the north side of the Premises ("Tri-State Contract Area"), for the purposes of receiving freight by rail, storing brick, and distributing brick by truck ("Tri-State Ancillary Agreement"). A copy of the Tri-State Ancillary Agreement is attached to *Plaintiffs' Memorandum of Law in Support of a Preliminary and a Permanent Injunction* at Exhibit B.
15. Neither the City, EDC nor Apple was a signatory to the Tri-State Ancillary Agreement.
16. On July 31, 2004, Operator CP voluntarily agreed to the termination of the Operating Agreement, as it claimed that it could not generate the business it had anticipated.
17. The Tri-State Ancillary Agreement stated that it would terminate at the same time as the Operating Agreement. As a result, the Tri-State Ancillary Agreement terminated on July 31, 2004, the date the Operating Agreement was terminated. In any event, the Tri-State Ancillary Agreement would have expired, by its terms, on February 28, 2005.
18. Rather than vacate the Tri-State Contract Area, as required by the Tri-State Ancillary Agreement, Tri-State remains there without Defendants' permission.
19. In fact, Tri-State is now using an additional approximately 1.4 acres of the Premises to, among other things, warehouse bricks and other materials.

The approximately 1.4 acres not covered by the Tri-State Ancillary Agreement and is hereinafter referred to as the "Tri-State Non-Contract Area."

20. On February 10, 2005, EDC received a check from Tri-State in the amount of \$9,758. On that same date, EDC returned the check to Tri-State, by mail, as EDC did not have a contractual relationship with Tri-State with respect to the use of the Premises.
21. There is no agreement between Plaintiffs and Defendants for the use of the Premises and Defendants have never accepted monies from Plaintiffs in connection therewith.
22. Plaintiffs have been using the City's premises without paying use and occupancy since August 2004.
23. On July 27, 2005, Defendants served Tri-State with a notice to vacate the Tri State Contract Area and the Tri-State Non-Contract Area ("Notice").
24. Pursuant to the Notice, Tri-State was required to vacate the Tri-State Contract Area and the Tri-State Non-Contract Area no later than August 31, 2005.
25. Notwithstanding service of the Notice, Tri-State remains on both the Tri-State Contract Area and the Tri-State Non-Contract Area without Defendants' permission.
26. Plaintiff Tri-State and Plaintiff Tri-State Transportation, Inc. ("Tri-State Transportation") (collectively "Plaintiffs") state in this proceeding that "City now seeks to force the abandonment of all common carrier rail

service provided to the general public via the Yard.” This statement is false.

27. Plaintiffs state in this proceeding that Defendants intend to terminate the Premises use “as a common carrier public terminal.” This statement is false.
28. Plaintiffs state in this proceeding that Defendant EDC has a policy “of abandonment of all public rail terminal facilities” in the City. This statement is false.
29. Defendants have not attempted to limit the service to the Premises provided by New York & Atlantic Railroad.
30. Defendants are involved in a construction project involving the addition of spur and/or switching track (“New Track”) to the SIRR. The SIRR segment on which the New Track is being built is owned by the City and is managed by EDC. This construction project is one part of a multi-phase and multi-party plan for reactivation of the operations of the SIRR.
31. Furthermore, EDC and the Port Authority of New York & New Jersey (“PANYNJ”) are in the process of completing major upgrades to the SIRR to enable freight rail movements between Staten Island and freight rail lines in New Jersey.
32. The City is planning on making an investment of approximately \$17 million in projects earmarked to improve rail service on the Brooklyn waterfront.

33. The projects, termed the Brooklyn Waterfront Rail Improvements, will consist of several coordinated projects to modernize rail freight trackage stretching from the Premises to the South Brooklyn Marine Terminal ("SBMT"). The improvements primarily consist of the following: 1) Elimination of 1,200 linear feet of an antiquated street track connection between the First Avenue rail yard and SBMT on 41st Street and 2nd Avenue; 2) Construction of new connection between First Avenue Rail yard and SBMT along new street rail between 41st and 39th Street; 3) Reconstruction of South Brooklyn Railway track at SBMT; 4) Construction of a new rail spur within SBMT to serve warehouses and at an industrial building on First Avenue north of 41st Street; 5) Rehabilitation of tracks at the Brooklyn Army Terminal; and 6) Various spot repairs to street tracks and improved pavement adjacent to the new rail lines.
34. If the Court grants Plaintiff's request for a preliminary injunction, Defendants are entitled to compensation for the interim use and occupancy of a portion of the Premises at the current rental market rental value.
35. Recently, EDC has entered into a permit, on behalf of the City for use and occupancy within the 65th Rail yard, and has negotiated a renewal of a permit on property that is adjacent to the Rail yard. One permit was entered into with an entity named J.L.J. IV Enterprises, Inc. ("J.L.J Permit") and concerns use and occupancy of space actually within the 65th

Rail yard. The permit fee set forth in the J.L.J Permit for May 1, 2005 through April 30, 2006 is \$2.25 per square foot, per annum.

36. The renewal permit has been negotiated with an entity named All Types Auto who has an existing permit (the "2001 Permit") to use and occupancy of space located within the south western portion of the Brooklyn Army Terminal, at 58th Street in Brooklyn, adjacent to the 65th Street Rail yard. Although the new permit has not yet been signed, there is an agreement between the parties that the new permit fee for the period of June 1, 2005 through June 31, 2006 is to be \$2.35 per square foot, per annum. A copy of both the J.L.J Permit and the 2001 Permit (which provides for use and occupancy at a rate of \$2.25 per square foot, per annum) with a letter to All Types Principal setting forth proposed new use and occupancy rate (with handwritten note that principal has agreed to proposed permit rate) are annexed together hereto as Exhibit A.
37. Therefore, should the Court grant Plaintiff's request for a preliminary injunction, Defendants request that the Court order interim use and occupancy at the current market value of \$44,921.25 per month. This amount is derived by taking the current market value of \$2.25 per square foot per month and multiplying that figure by the 5.1 acres or 239,580 square feet occupied by Tri-State (combined Tri-State Contract Area and Tri-State Non-Contract Area).
38. If the Court is not inclined to grant interim use and occupancy at the current market value of the Premises, then, in the alternative, the Court

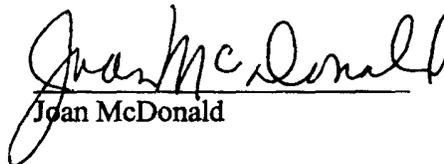
7

should set the interim use and occupancy using the rate set forth in the Tri-State Ancillary Agreement. Tri State was required to pay \$340 per acre per month or \$1,394 per month for the Tri-State Contract Area (4.1 acres). *See Plaintiffs' Memorandum of Law in Support of a Preliminary and a Permanent Injunction* at Exhibit B. Applying this rate to the Tri-State Non-Contract Area (1.4 acres), Tri-State would owe an additional \$476 per month for a total use and occupancy fee of \$1,870 per month, which should be without prejudice to Defendants' right to claim use and occupancy at a higher rate.

39. If the Court grants Plaintiffs' request for a preliminary injunction, but is not inclined to set interim use and occupancy, the Court should require Plaintiffs to furnish an undertaking in the amount of use and occupancy for the period of August 1, 2004, the date after CP relinquished its Operating Agreement, and for a one year period from the date the preliminary injunction is granted, through October 31, 2005, at the current market rate of \$44,921.25 per month. The total amount of the bond should therefore be set at \$1,212,873.70.

40. If the Court is not inclined to set the bond using the current market rate, the bond should be set using the rate set forth in the Tri-State Ancillary Agreement or \$50,490 (for the 27 month period for the use of the Tri-State Contract and Non-Contract Areas), without prejudice to Defendants right to claim use and occupancy at a higher rate.

Dated: September 21, 2005


Joan McDonald

ND: 4830-7271-8848, Ver 1

EXHIBIT A

RESOLUTION

FRANCHISE AND CONCESSION REVIEW COMMITTEE

JULY 13, 2005

(Cal. No. 1)

BE IT RESOLVED that the Franchise and Concession Review Committee hereby authorizes the New York City Economic Development Corporation, on behalf of the New York City Department of Small Business Services ("DSBS" or "Permittor"), to use different procedures, pursuant to Section 1-13 of the Concession Rules, for DSBS to enter into a sole source Occupancy Permit with JLJ IV Enterprises Inc., having its principal office located at 213-19 99th Avenue, Queens Village, New York 11429, for approximately 10,000 square feet of upland, unimproved lot, situated within the area known as the 65th Street Rail Yard ("65th Street Rail Yard"), to be used for the temporary storage of equipment and new supplies for use in the Reconstruction of the Washington Street Project.

The premises is a portion of that certain property situated west of Second Avenue between 64th Street and Wakeman Place, within the area known as the 65th Street Rail Yard ("65th Street Rail Yard"), in the County of Kings, City of New York, described as approximately 10,000 square feet of upland, unimproved lot, that is approximately 40 feet wide and 250 feet long, and which is approximately 60 feet from the New York Upper Bay, and forming a part of Block 5804, Lot 1, in Community Board #7, on the tax map for the Borough of Brooklyn.

The term shall be for a period of one year commencing on May 1, 2005 to April 30, 2006 plus two one-year renewal options from May 1, 2006 to April 30, 2007 and May 1, 2007 to April 30, 2008, to be exercised at the sole discretion of the Permittor.

J.L.J. IV Enterprises Inc., shall pay the City \$22,500.00 annual charges for the Premises. If the renewal options are exercised, annual charges for each renewal shall increase to \$23,625.00 and \$24,806.25, respectively.

A TRUE COPY OF RESOLUTION ADOPTED BY
THE FRANCHISE AND CONCESSION REVIEW COMMITTEE ON

July 13, 2005 (CAL. NO. 1)
Jaqueline Galoy
CLERK

OCCUPANCY PERMIT
The City of New York

DEPARTMENT OF SMALL BUSINESS SERVICES
110 William Street, New York, New York 10038

JLJ IV Enterprises, Inc.
Portion of 65th Street Rail Yard
May 2005

Whereas, JLJ IV Enterprises, Inc. is currently engaged in performing work on a project known the Reconstruction of the Washington Street Project;

Whereas, JLJ IV Enterprises, Inc. has requested the temporary right to occupy an area of approximately 10,000 square feet within the 65th Street Rail Yard to be used for the temporary storage of equipment and new supplies for use in the Reconstruction of the Washington Street Project;

Whereas, JLJ IV Enterprises, Inc. acknowledges and understands that this Occupancy Permit is temporary and may be terminated at any time, upon thirty (30) days' notice (or less pursuant to the terms of the Permit), with or without any reason, including, but by no means required nor limited to, the selection of an operator and/or other user of the 65th Street Rail Yard or portion thereof, upon notice of which JLJ IV Enterprises, Inc. agrees to immediately vacate the 65th Street Rail Yard.

Permitter and Permittee agree to:

Articles:

1. Definitions:

- (a) Occupancy Permit: This revocable occupancy permit, dated as of May 1, 2005, is hereinafter referred to as the "Occupancy Permit".
- (b) Permitter: The City of New York ("City"), acting through its Department of Small Business Services ("DSBS") is the permitter ("Permitter"). DSBS has its offices at 110 William Street, New York, New York 10038. Notices and correspondence for the Permitter should be addressed in accordance with Article 32 below and to the attention of: Commissioner.
- (c) Permittee: J.L.J. IV Enterprises, Inc. ("Permittee")
213-19 99th Avenue
Queens Village, New York 11429
Attention: James Juliano, President

Notices and correspondence for the Permittee should be addressed in accordance with Article 32 below. Permittee was awarded a contract (referred to herein as the Reconstruction of the Washington Street Contract") by the New York City Department of Design and Construction ("DDC") that involves the reconstruction of Washington Street, New York (referred to herein as the "Reconstruction of the Washington Street Project").

(d) Permit Administrator: The New York City Economic Development Corporation ("NYCEDC") is designated by the City to administer, manage and assume responsibility for this Occupancy Permit pursuant to the amended and restated Maritime Contract between the City and NYCEDC dated as of June 30, 2004 (as amended and restated from time to time), or such successor administrator as the Permitter or NYCEDC, with the Permitter's approval, may designate (the "Permit Administrator"). Some or all of Permit Administrator's functions hereunder may, in NYCEDC's sole discretion, be performed by Apple Industrial Development Corp. ("Apple"), a not-for-profit corporation that is an affiliate of and manages properties on behalf of NYCEDC. NYCEDC and Apple have their offices at 110 William Street, New York, New York 10038. Notices and correspondence for the Permit Administrator and/or Apple should be addressed in accordance with Article 32 below and to the attention of: Senior Vice President, Property Management.

(e) Premises: The Premises is a portion of that certain property situated west of Second Avenue between 64th Street and Wakeman Place, within the area known as the 65th Street Rail Yard ("65th Street Rail Yard"), in the County of Kings, City of New York, described as follows:

Consisting of approximately 10,000 square feet of upland, unimproved lot, that is approximately 40 feet wide and 250 feet long, and which is approximately 60 feet from the New York Upper Bay; and

Forming a part of block 5804, Lot 1, in Community Board #7, on the tax map for the Borough of Brooklyn, all as shown on the diagram attached hereto and made a part hereof as Exhibit A (hereinafter the "Premises"). The Premises is accessed via the main gate at the Brooklyn Army Terminal, 140 58th Street, Brooklyn, New York ("BAT") and through BAT, as directed by BAT personnel, to the Premises.

2. Use: Permittee may enter upon, occupy and use the Premises only for those purposes specifically authorized by this Occupancy Permit. The Premises shall be used for no other purpose than the temporary storage of equipment and new supplies (e.g., new water pipes, new sewer pipes and miscellaneous other new items) for use in the Reconstruction of the Washington Street Project which is being performed by Permittee and for no other purposes.

The Permittee shall operate the Premises to the satisfaction of the Permitter and the Permit Administrator. Permittee expressly represents and agrees that excavated material may NOT be stored NOR screened at the Premises. The term "excavated material" means any matter that is dug up and removed from below the street level grade.

3. Period:

- (a) Initial Period, Commencement Date, Expiration Date, and the Period: The initial period of this Occupancy Permit (the "Initial Period") shall begin on May 1, 2005 ("Commencement Date") and expire on April 30, 2006, subject to termination on any earlier date in accordance with the terms of this Occupancy Permit (such expiration or termination date is hereinafter referred to as the "Expiration Date"). The Initial Period, together with the First Renewal Period and Second Renewal Period, if either or both are exercised pursuant to the following subsection (b) of this Article 3 pertaining to the Period, shall collectively be referred to as the "Period")
- (b) First Renewal Period and Second Renewal Period: Permitter, at its sole discretion in each instance, may, upon written notice, elect to renew the Occupancy Permit for up to two (2) consecutive one year periods; the first renewal period being from May 1, 2006 to April 30, 2007 ("First Renewal Period") and the second renewal period being from May 1, 2007 to April 30, 2008 ("Second Renewal Period"). Permittee shall have ten (10) business days after delivery of Permitter's notice to reject such renewal, and if such notice is not received by Permitter within said ten (10) day period, then the renewal period shall be deemed and become binding and effective

THIS IS A SHORT TERM REVOCABLE OCCUPANCY PERMIT, TERMINABLE AT WILL AT PERMITTOR'S OPTION. PERMITTEE AGREES TO PROMPTLY VACATE THE PREMISES UPON THIRTY (30) DAYS' WRITTEN NOTICE OF TERMINATION FROM PERMITTOR. NO OWNERSHIP, LEASEHOLD OR OTHER PROPERTY INTEREST SHALL VEST IN PERMITTEE BY VIRTUE OF THIS OCCUPANCY PERMIT.

4. Charge for Period:

- (a) Base Monthly Charge: The charge to Permittee for each month of the Initial Period of May 1, 2005 to April 30, 2006 of this Permit shall be One Thousand Eight Hundred Seventy-Five Dollars (\$1,875.00) (the "Base Monthly Charge") (which is the equivalent of an annual charge of Twenty-Two Thousand Five Hundred Dollars (\$22,500.00)) due and payable monthly, in advance, on the first day of each month, regardless of receipt by Permittee of a charge invoice and without set off or deduction or prior notice or demand.

In the event that the Permittee takes possession of the Premises on any day other than the first day of a month, Permittee shall pay a pro rata partial charge for that month in addition to the Base Monthly Charge for the following month.

In the event that the First Renewal Period option is, or the First and the Second Renewal Period options are, exercised pursuant to the subsection (b) of Article 3 pertaining to the Period, then the Base Monthly Charge in effect immediately preceding the exercise of that option to renew shall automatically be increased by five (5) percent. Therefore, (i) for the First Renewal Period of May 1, 2006 to April 30, 2007, the Base Monthly Charge shall be increased to One Thousand Nine Hundred Sixty-Eight Dollars and Seventy-Five Cents (\$1,968.75) (which is the equivalent of an annual charge of Twenty Three Thousand Six Hundred Twenty-Five Dollars (\$23,625.00) and (ii) for the Second Renewal Period of May 1, 2007 to April 30, 2008, the Base Monthly Charge shall be increased to Two Thousand Sixty-Seven Dollars and Nineteen Cents (\$2,067.19) (which is the equivalent of an annual charge of Twenty Four Thousand Eight Hundred Six Dollars and Twenty-Five Cents (\$24,806.25).

- (b) Additional Charges: All additional charges (charges other than the Base Monthly Charge) due and payable by Permittee pursuant to the terms of this Occupancy Permit ("Additional Charges") shall be billed to Permittee and shall be paid in full by Permittee on the first (1st) day of the next month following notice of the Additional Charges.
- (c) Payment of Base Monthly Charges: Permittee shall pay the Base Monthly Charge in full, with no amount deducted from it, on the first (1st) day of each month, in advance, at Permit Administrator's address set forth above.
- (d) Late Payment: If Permittee fails to pay any Base Monthly Charge and/or Additional Charges, if any, in full by the tenth (10th) day of any month, Permittor, at its sole discretion, may accelerate the entire outstanding balance of Base Monthly Charges for the remainder of the Period or may impose a late payment charge for that monthly period equal to two percent (2%) of any Base Monthly Charges and Additional Charges due, but not less than a minimum charge of ten dollars (\$10.00). Such late payment charges shall be compounded monthly and shall be collectible as Additional Charges. Failure to demand a late payment charge shall not waive Permittor's or Permit Administrator's right to collect it at a later date. In the event Permittee fails to pay Permittor any Base Monthly Charge and/or Additional Charges, any subsequent payments shall first be applied for Base Monthly Charges and/or Additional Charges past due.

Base Monthly Charge and Additional Charges shall be payable by check or money order, accepted subject to collection, to the order of the Apple Industrial Development Corp., or such other entity as Permittor or Permit Administrator may designate in writing.

5. Security Deposit: At the time of execution of this Occupancy Permit, Permittee shall have posted a security deposit with Permit Administrator in the amount of Seven Thousand Five Hundred Dollars (\$7,500.00) by certified check or N.Y.C. Bond, payable to the Apple Industrial Development Corp. Without limiting their respective rights and remedies hereunder or at law or in equity, Permitter or Permit Administrator or Apple may use, retain or apply any part of the security deposit to satisfy any default of Permittee and any expenses arising from such default, provided that the application of any security deposit proceeds to the cure of any default of Permittee hereunder shall not be deemed to have cured such default unless the entire outstanding amount due or damages suffered by Permitter or Permit Administrator or Apple shall have been paid in full. If (a) Permitter or Permit Administrator or Apple uses or applies any part or all of the security deposit to satisfy such default and/or (b) in the event that the Base Monthly Charge shall increase, then Permittee shall immediately post an additional security deposit in the manner provided in the first sentence of this Article 5 in an amount that is sufficient to replenish the full amount of the original security deposit. Solely for the purposes of this Article 5, "default" shall mean the breach of any covenant of Permittee contained in this Occupancy Permit which, after five (5) days' notice from Permitter or Permit Administrator or Apple to Permittee, remains uncured; provided, however, where notice to Permittee would adversely affect Permitter, no such notice will be required. If Permittee shall comply with all of the terms of this Occupancy Permit, the security deposit shall be returned to the Permittee within thirty (30) days after the Expiration Date, without interest.
6. Utilities, Maintenance and Service: There are no utilities at the Premise or provided by the Permitter to the Premises. Permittee must provide for all of its utilities, if any, and pay for utility costs including all water and sewer charges, and gas, heat and electricity costs incurred during the Period in connection with Permittee's use of the Premises, and Permittee, at its sole cost and expense, shall provide for, maintain and repair all utilities, utility connections, conduits and equipment (including without limitation any meters) and procure all permits, approvals and licenses necessary to effectuate this provision.
7. Insurance:
- (a) Permittee shall provide and maintain commercial general liability insurance with a combined single limit per occurrence of three million dollars (\$3,000,000) for bodily injury and death and for property damage and with any pollution exclusions deleted (including without limitation deleting exclusions for pollution conditions and pollution legal liability). The liability policy must specifically state that it is being issued "in accordance with the Occupancy Permit commencing May 1, 2005 between The City of New York, acting through its Department of Small Business Services, as Permitter, and J.L.J. IV Enterprises, Inc., as Permittee, with respect to contractual liability coverage in accordance with New York State Policy Forms".
- (b) Permittee shall provide and maintain Automobile Liability Insurance for bodily

injury, death and property damage with a combined single limit of one million dollars (\$1,000,000) per occurrence. Such insurance must be comprehensive and cover all vehicles used in connection with this Occupancy Permit or the Premises.

- (c) Permittee shall provide and maintain Statutory Worker's Compensation Insurance and Employer's Liability Insurance, as required by applicable Law, covering all persons employed by the Permittee in connection with this Occupancy Permit. The Employer's Liability Insurance shall be in the amount of at least one million dollars (\$1,000,000) per accident for all of its employees in, on or at the Premises and/or any vehicles used in connection with Permittee's operations hereunder.
- (d) Notwithstanding any other provisions of this Article 7 ("Insurance"), Permittee shall be, continue and remain liable for any uninsured destruction, loss or damage to the Premises. In the event of any such loss or damage for which Permittee becomes liable as aforesaid, Permittee shall, at its sole cost and expense, promptly repair or replace the property so lost or damaged in accordance with plans and specifications approved by Permitter and Permit Administrator. Notwithstanding the foregoing, Permitter and Permit Administrator in their reasonable discretion after consultation with Permittee prior to the Expiration Date and, at their sole discretion after the Expiration Date, may elect to receive in cash the value of repairs or rebuilding by the Permittee in lieu of performance of such repairs to or rebuilding of the Premises.
- (e) All policies of insurance, except worker's compensation/employer's liability, required by this Article shall contain a written waiver of the right of subrogation with respect to all of the named insureds and additional insureds, including Permitter, Permit Administrator and Apple. Should other or additional types of insurance or clauses thereafter become available, Permittee agrees to furnish such new policies on demand of the Permitter or Permit Administrator. Permittee further agrees to execute and deliver any additional instruments and to do or cause to be done all acts and things that may be requested by Permitter to insure Permitter and Permit Administrator against all damage and loss as herein provided for and to effectuate and carry out the intents and purposes of this Occupancy Permit.
- (f) Policies providing for applicable insurance shall be issued only by insurance companies that are licensed or authorized to do business in the State of New York and that have a rating in the latest edition of "Bests Key Rating Guide" of "A:VII" or better, or another comparable rating reasonably acceptable to Permit Administrator and Permitter. Certificates of Insurance evidencing the issuance of all insurance required by this Article, and guaranteeing at least thirty (30) days' prior notice to Permitter and Permit Administrator of cancellation or non-renewal, shall be delivered to Permitter and Permit Administrator prior to execution of this Occupancy Permit, or, in the case of new or renewal policies replacing any policies expiring during the Period, no later than thirty (30) days before the expiration dates of such policies. At

Permitter's or Permit Administrator's request, Permittee shall submit the entire original policy.

- (g) Permittee shall not violate or permit to be violated any of the conditions, provisions or requirements of any insurance policy required by this Article 7 ("Insurance"), and Permittee shall perform, satisfy and comply with or cause to be performed, satisfied or complied with all conditions, provisions, requirements of all such insurance policies.
- (h) Each policy of insurance required to be carried pursuant to the provisions of this Article 7 ("Insurance"), except worker's compensation/employer's liability, shall contain a provision that no act or omission of Permittee shall affect or limit the obligation of the insurance company to pay the amount of any loss sustained by Permitter, Permit Administrator, or Apple.
- (i) All policies shall be primary protection and neither Permitter, nor Permit Administrator nor Apple will be called upon to contribute to a loss that would otherwise be paid by Permittee's insurer.
- (j) **All certificates of insurance, except worker's compensation/employer's liability, shall name Permitter, Permit Administrator and Apple as additional insureds.**

8. Indemnification: Permittee assumes the risk of, and shall be fully responsible for and reimburse fully Permitter and Permit Administrator and Apple for any loss, cost or expense arising out of any personal or bodily injury, death, or loss or damage to any property arising out of this Occupancy Permit or Permittee's operations hereunder or any Environmental Claims or any of the acts, omissions, events, conditions, occurrences, or causes described in clauses (a), (b), and (c) of the next sentence, provided that Permittee shall not be liable to Permitter to the extent such loss, cost or expense arising out of any personal or bodily injury or death is caused by or resulting from the gross negligence or intentional misconduct of the Permitter.

Permittee shall forever defend, indemnify and hold harmless Permitter, Permit Administrator and Apple, and their respective officers, directors, members, officials, agents, representatives and employees from and against any and all liabilities, claims, Environmental Claims, demands, penalties, fines, settlements, damages, losses, costs, expenses and judgments of whatever kind or nature, known or unknown, contingent or otherwise:

- (a) for injury to any person or persons, including death, or any damage to property of any nature in connection with or arising out of in whole or in part, (i) any event which occurred on, in, at or upon the Premises, BAT, 65th Street Rail Yard or the marginal and adjacent streets or the adjacent water or the adjacent land under water during the Period or any renewal period, or (ii) any act(s) or omission(s) of Permittee or of the employees, guests, invitees, customers, contractors, subcontractors,

representatives or agents of Permittee occurring on or in proximity to the Premises, or (iii) this Occupancy Permit, including, without limitation, any personal injury, including death, or property damage related to any collapse or failure of all or any part of the Premises, or (iv) in addition to and without limiting any other subsections herein, any omission, breach, default or failure of the Permittee or of the employees, guests, invitees, customers, contractors, subcontractors, representatives or agents of Permittee to comply with the obligations, covenants, terms and conditions of this Permit, including but not limited to, the requirements of Articles 2 ("Use"), 12(d) and (e) ("Premises 'As Is'"), 13(b) ("Legality of Use"), 22 ("License Required") and 23 ("Compliance with Authorities"), pertaining to the use of the Premises or to the presence, storage, screening, processing, handling, placement, containment, transportation, movement, removal, relocation, disposal or any equipment or supplies or any other materials brought to, on or in the Premises,

and/or (b) relating to or arising from any and all liens and encumbrances which may be filed or recorded against the Premises or any public improvement lien filed against any funds of Permitter, or Permit Administrator or Apple as a result of actions taken by or on behalf of Permittee, its contractors, subcontractors, agents, representatives, employees, guests, customers or invitees,

and/or (c) arising out of, or in any way related to the presence, storage, screening, processing, handling, placement, containment, transportation, movement, removal, relocation, disposal, Release or threatened Release of any Hazardous Materials (as hereinafter defined) over, under, in, on, from or affecting the Premises, or any persons, real property, personal property, or natural substances thereon or affected thereby in connection with the Permittee's use of the Premises, BAT, 65th Street Rail Yard, New York Upper Bay or any work performed or activities conducted on or at the Premises during the Period of this Occupancy Permit.

For purposes of this Occupancy Agreement, in general, and this Article 8 ("Indemnification"), in particular:

"Hazardous Materials" means (i) any "hazardous waste" as defined under the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901 et seq., or (ii) "hazardous substance" as defined under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601 et seq., or (iii) "hazardous materials" as defined under the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801 et seq., or (iv) "hazardous waste" as defined under New York Environmental Conservation Law Section 27-0901 et seq., or (v) "hazardous substance" as defined under the Clean Water Act, 33 U.S.C. Section 1321 et seq., or (vi) "petroleum" as defined under the New York State Navigation Law, Chapter 37, Article 12, Section 172 (15), or (vii) petroleum or petroleum products, crude oil or any by-products thereof, natural gas or synthetic gas used for fuel; any asbestos, asbestos-containing material or polychlorinated biphenyl; and any additional substances or materials which from time to time are classified or considered to be hazardous or toxic or a

pollutant or contaminant under the laws of the State of New York, the United States of America, or regulated under any other Requirements, or (viii) any "hazardous waste", "hazardous substance" or "hazardous material" as defined under Reconstruction of the Washington Street Contract.

"Requirements" means: (i) the zoning Resolution of the City of New York (as the same may be amended and/or replaced) (the "Zoning Resolution") and any and all laws, rules, regulations, orders, ordinances, statutes codes, executive orders, resolutions and requirements of all federal, state and local authorities (currently in force and hereafter adopted) applicable to the Premises or any land, street, road, avenue, service area, sidewalk, water, lands under water, Environment, or other area comprising a part of, lying in front of, or adjacent to, the Premises, BAT, 65th Street Rail Yard, New York Upper Bay, or any vault in or under the Premises (including, without limitation, the Building Code of New York City, and any applicable equivalent, and the laws, rules, regulations, orders, ordinances, statutes, codes and requirements of any applicable Fire Rating Bureau or other body exercising similar functions) and (ii) any and all provisions and requirements of any property, casualty or other insurance policy required to be carried by Permittee under this Permit and (iii) any and all provisions and requirements of Reconstruction of the Washington Street Contract.

"Environmental Claims" means any and all actions, suits, orders, claims, liens, notices, investigations, proceedings or complaints, whether any of the foregoing are administrative, judicial or otherwise, brought, issued, asserted or alleged by: i) a federal, state or local governmental authority or a citizen or citizen group for compliance, injunctive relief, damages (including but not limited to natural resource damages), penalties, removal, response, remedial or other action pursuant to any applicable laws, rules, regulations, requirements, Requirements, ordinances, resolutions and orders set forth or referred to in this Article 8 ("Indemnification") or in Article 23 ("Compliance with Authorities") or elsewhere in this Permit; and/or ii) a third party seeking damages and/or injunctive relief related to actual or alleged personal injury, medical monitoring, wrongful death, and/or property damage resulting from a Release of, or exposure to, a Hazardous Materials.

"Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, migration, leaching, dumping or disposing of a Hazardous Materials into the Environment, including, without limitation, the abandonment, discarding, burying or disposal of barrels, containers and other receptacles containing any Hazardous Materials.

"Environment" includes but is not limited to all air, surface, water, air surface water, groundwater, land, land under water, including land surface and subsurface, all fish, wildlife, -biota, flora, fauna and all other natural resources and includes the interiors of buildings and structures.

The provisions of this Article 8 ("Indemnification") shall survive the termination and expiration of this Occupancy Agreement.

9. Possession: Permitter and Permit Administrator shall not be liable for failure to give possession of the Premises on the Commencement Date of this Occupancy Permit. If possession is delivered after the Commencement Date, in no part due to any act or omission of Permittee, all Base Monthly Charges and Additional Charges required to be paid under Article 4 hereof will commence on the date that Permitter notifies Permittee of availability of the Premises and will be apportioned. Notwithstanding the foregoing, in no event shall Permitter be obligated to extend the Period.

10. Repairs, General Maintenance and Removal:

(a) Repairs - Permittee, at its sole cost and expense, at all times during the Period, shall put, keep and maintain the Premises and every part thereof, and the equipment, supplies, and other material, fill or structures thereon, brought thereto, or to be erected thereon, in good and sufficient repair and condition. Permittee shall provide written notice to Permitter and Permit Administrator within twenty-four (24) hours of any significant damage to the Premises. Permitter or Permitter's designee may inspect the Premises during the Period and may direct Permittee to repair or perform maintenance work reasonably required on the Premises. Permitter shall be the sole judge of the amount of repairs and maintenance required under the terms of this Occupancy Permit. Under no circumstances shall Permitter or Permit Administrator be obligated to maintain or repair the Premises at any time.

(b) General Maintenance - In addition to the repairs and maintenance set forth in the subsection (a) of this Article, General Maintenance by Permittee shall include, without limitation, and at its own expense, cleaning the Premises, regularly removing trash, litter, weeds and debris from the Premises, promptly removing snow and ice from the Premises and, if any, the adjacent sidewalks (using sand or calcium chloride or another salt substitute only), and the repair of any damage resulting from the Permittee's use of the Premises.

(c) Removal - Upon the request of the Permitter, Permit Administrator and/or Apple, Permittee shall promptly remove (or reimburse the Permitter, Permit Administrator and/or Apple for the cost of such a removal) any equipment, supplies, debris, Hazardous Materials (as defined in Article 8 - "Indemnification"), other material or other items that are on, in at or upon the Premises in violation of this Occupancy Permit.

The Permittee has the entire responsibility, at the Permittee's sole cost and expense, for testing, analyzing, inspecting and/or any other steps necessary for establishing that all the material that is brought to, on or in the Premise and/or stored at the Premises is non-hazardous material. The term "non-hazardous material" means material (including, without limitation, excavated material, fill and any other matter) that is not a "Hazardous Materials" as defined in Article 8 entitled Indemnification of this Occupancy Permit.

11. No Charge Reduction or Set-Off: Permittee shall not be entitled to any charge reduction or set-off whatsoever for repairs or alterations or reductions to the Premises or for any other reason.

12. Premises "As Is":

(a) Permittee has inspected the condition of the Premises and accepts the Premises "as is" and will not at any time make any claim that the Premises or structures thereon are not in suitable repair or condition for the uses and purposes of this Occupancy Permit, nor will Permittee at any time make any claim for reduction of charge, or payments for damages or reimbursement, for damage arising from or consequent upon any repairs that Permitter, Permit Administrator, Apple, or Permittee may do or cause to be done, or in consequence of the occupation of the Premises by Permitter or its agents or contractors.

(b) Neither Permitter nor Permit Administrator has made or makes any representation or warranty as to the condition of the Premises or its suitability for any particular use or as to any other matter affecting this Occupancy Permit.

(c) The provision contained in this Article that Permittee accepts the Premises "as is" relates to the condition of the Premises as they were when Permittee first entered into possession thereof, or on the Commencement Date, whichever is earlier.

(d) The Permittee, at its own cost and expense, shall be responsible for preparing the Premises (and thereafter maintaining the Premises in all manner and conditions required) for the storage of the equipment and new supplies, including, without limitation, Permittee's responsibility for: (1) taking all necessary steps to comply with all applicable laws, rules, Requirements (as defined in Article 8-"Indemnification") and regulations of any Federal, State and Municipal government, agency and officials for the Permittee's use of the Premises, (2) complying with all the terms, conditions, obligations and requirements of the Reconstruction of the Washington Street Contract pertaining to the location and storage of equipment and new supplies; (3) clearing and grading of the Premises as necessary, and (4) providing equipment and supplies as appropriate and necessary for the Permittee's use of the Premises. Permittee acknowledges and expressly states that neither the Permitter nor the Permit Administrator have made no representations to or agreements with the Permittee that the Permitter or the Permit Administrator shall do any work, repairs, modifications or changes to the Premises for the Permittee or for any other party.

(e) In addition to and without limiting any of the other requirements, obligations, terms or conditions elsewhere in this Permit, the Permittee agrees, at its own cost and expense, to perform such work, installations and other steps, as directed by the Permitter and/or the Permit Administrator, to: (i) protect the Premises; (ii) to prevent harm or imminent danger to the safety, health or welfare of persons or entities at, on, in or near the Premises or the community, and (iii) prevent the presence of or any Release (as defined in Article 8 entitled Indemnification) of any Hazardous Materials (as defined in Article 8 entitled Indemnification) at, on, in, about, upon, and/or adjacent to



Premises, the 65th Street Rail Yard and BAT. The responsibilities and obligations of the Permittee pursuant to this subsection shall be applicable at all times before commencing the use of the Premises as well as during Permittee's use of the Premises (even if this subsection requires Permittee to temporarily discontinue its use of the Premises and accommodate the requirements and obligations of this subsection).

13. Legality of Use:

- (a) Permitter makes no representation as to the legality of use of the Premises for the Permittee's intended purposes. In the event any use or proposed use is declared illegal by a court of competent jurisdiction, Permittee covenants and agrees that neither Permitter, Permit Administrator, nor Apple, their respective agents, officers, and employees, shall be liable for any damages arising out of or related to such illegal use and that Permittee shall defend, indemnify and hold harmless Permitter, Permit Administrator, Apple, their respective agents, officers, and employees, against any liability or expense therefor in accordance with Article 8 ("Indemnification") hereof.
- (b) Permittee, at its sole cost and expense, shall obtain any and all necessary Federal, State and Municipal permits, licenses and certifications and provide Permitter and the Permit Administrator with a copy of such prior to the commencement of any use of the Premises that requires such permit, license or certification including without limitation to those pertaining to the use of the Premises (as set forth in Article 2- "Use") and pertaining to the all storage of equipment, supplies, and other material, and any other work performed and activities conducted in, on, at or upon the Premises.

14. Changes, Additions:

- (a) Permittee shall not make any improvements or alterations to the Premises except with the prior written consent of Permitter. Permittee shall not affix any advertisement, notice or sign in, to, or on the Premises, other than those required by law, without first obtaining the specific written consent and authorization of Permitter.
- (b) All additions and improvements, made at any time during the Period, shall, at no cost or expense to Permitter or Permit Administrator, become property of Permitter.
- (c) No later than the Expiration Date, Permittee shall restore the Premises to its original or proper condition, to be reasonably determined by Permit Administrator, at Permittee's sole cost and expense, to the satisfaction of Permitter. In the event Permittee fails or neglects to do so, Permitter and Permit Administrator shall have the right to remove any structures and improvements and effect the restoration of the Premises, or any part thereof, at the sole cost and expense of Permittee, which may,

in the sole discretion of Permitter or Permit Administrator, be deducted from the security deposit described in Article 5.

15. [Intentionally Omitted]
16. [Intentionally Omitted]
17. Access: Permittee shall at all times permit inspection of the Premises by Permitter's agents, employees, consultants and representatives (including Permit Administrator, Apple and their agents, employees, consultants and representatives) and shall permit inspection thereof by or on behalf of prospective future occupants. If Permitter determines that an unsafe condition exists at the Premises, Permitter shall have the right to take back all or any portion of the Premises affected by such unsafe condition upon twenty-four (24) hours' notice on the same terms as set forth in Article 39 ("Permitter's Right to Reduce Space") of this Occupancy Permit.
18. Liens Against Premises; Discharge of Liens:
 - (a) Permittee shall not create, cause to be created or allow to exist (i) any lien, encumbrance or charge upon the Premises or any part thereof, (ii) any lien, encumbrance or charge upon any assets of, or funds appropriated to, Permitter, Permit Administrator or Apple, or (iii) any other matter or thing whereby the estate, rights or interest of Permitter in and to the Premises or any part thereof might be impaired. If any mechanic's, laborer's, vendor's, materialman's or similar statutory lien is filed against the Premises or any part thereof, or if any public improvement lien is created, or caused or suffered to be created by the Permittee, then Permittee shall within thirty (30) days after receipt of notice of the filing of such mechanic's, laborer's, vendor's, materialman's or similar statutory lien or public improvement lien, cause it to be vacated or discharged of record by payment, deposit, bond, order of court of competent jurisdiction or otherwise.
 - (b) Should Permittee elect to dispute the validity of any such lien or charge placed, filed or recorded against the Premises, in lieu of canceling or discharging the same, Permittee (i) shall furnish to Permitter or Permit Administrator a bond or bonds in connection therewith in such form and amount as shall be approved by Permitter and (ii) shall bring an appropriate proceeding to discharge such lien and shall prosecute such proceeding with diligence and continuity; except that if, despite Permittee's efforts to seek discharge of the lien, Permitter or Permit Administrator believes such lien is about to be foreclosed and so notifies Permittee, Permittee shall immediately cause such lien to be discharged as of record or Permitter or Permit Administrator may use the bond or other security furnished by Permittee in order to discharge the lien.

The provisions of this Article 18 ("Liens Against Premises; Discharge of Liens") shall

survive the Expiration Date or other termination of this Occupancy Permit.

19. No Assignment: Permittee shall not assign, grant use of, or license the whole or any part of the Premises, nor allow the same to be occupied by any person or entity other than Permittee, whether by merger, consolidation, purchase of assets, transfer of stock in Permittee, transfer of joint venture or partnership interests in Permittee, operation of law or otherwise without the prior written consent of Permitter in each instance. Additionally, Permittee shall not mortgage or pledge this Occupancy Permit or any part thereof, or in any way charge or encumber the rights granted herein, or any part thereof without the prior written consent of Permitter.

20. Waiver of Trial by Jury, Counterclaim; Venue:
 - (a) Permitter and Permittee waive their right to trial by jury, and Permittee waives its right to counterclaim against Permitter, Permit Administrator and Apple in any action for ejectment or non-payment of charges or in any summary proceeding.

 - (b) The Permittee hereby irrevocably agrees that any action against the Permitter, Permit Administrator, or Apple will be brought in the Supreme Court of New York State in New York County and further hereby irrevocably consents to the jurisdiction of the Supreme Court of New York State in New York County in connection with any action brought by Permitter or Permit Administrator or any action in which Permitter, the City or Permit Administrator is or becomes a party to enforce any of its rights and remedies under this Permit. The foregoing consent, however, shall not affect or limit in any manner or to any extent the right of Permitter or Permit Administrator to enforce such rights and remedies in any other jurisdiction.

21. Condemnation: In the event the Premises are subject to a condemnation proceeding started during the Period of this Occupancy Permit, the Occupancy Permit shall be deemed as having terminated thirty (30) days before the start of such proceeding. In such event, Permittee shall not be entitled to any part of any award therein in connection with such proceedings, nor to any set-off, reduction or refund of any Base Monthly Charges or Additional Charges.

22. License Required: This Occupancy Permit does not grant authority for any operation or use which may require any authorization, permit, certification, license or approval. If required, Permittee must obtain any such authorization, permit, certification, license or approval, at its sole cost and expense, and send copies of the authorization, permit or approval, by certified mail to the addresses and to the officials noted on the first page hereof. Such compliance includes, but is not limited to, any required review, permit or approval by Permitter, acting in its governmental capacity, and/or any other applicable governmental entity.

23. Compliance with Authorities: Permittee shall, at its sole cost and expense, comply with and observe the provisions of this Occupancy Permit and any and all Requirements, laws, rules, regulations, requirements, codes, ordinances, resolutions, administrative codes and orders of Permitter and of any and all administrations, departments, bureaus and boards of federal, state and local authorities (including, without limitation, the New York City Zoning Board, Department of Sanitation, Department of Environmental Protection and the New York State Department of Environmental Conservation) applicable to this Occupancy Permit, the Premises and/or the use, occupancy and maintenance thereof and/or storage of equipment and new supplies, or other material or items.
24. Non Discrimination: Permittee shall not discriminate with respect to its use of the Premises against any person because of race, creed, color, national origin, sex, sexual orientation, age or disability.
25. Conflict of Interest: Permittee warrants and represents that no officer, agent, employee or representative of the City, Permitter, Permit Administrator or Apple has received any payment or other consideration for the granting of this Occupancy Permit and that no officer, agent, employee or representative of Permitter, Permit Administrator or Apple has any interest, directly or indirectly in Permittee, this Occupancy Permit, or the proceeds thereof. Permittee acknowledges that Permitter is relying on the warranty and representation contained in this Article 25 and that Permitter would not enter into this Occupancy Permit absent the same. It is specifically agreed that, in the event the facts hereby warranted and represented prove, in the opinion of Permitter, to be incorrect, Permitter shall have the right to terminate this Occupancy Permit upon twenty-four (24) hours' notice to Permittee and to rescind this transaction in all respects.
26. No Waiver of Permit Terms: Permitter's, Permit Administrator's, or Apple's acceptance of partial payment of Base Monthly Charges or any Additional Charge or failure to enforce any provision of this Occupancy Permit shall not be considered a waiver of any of Permitter's rights under this Occupancy Permit or at law or in equity.
27. Investigation:
- 27.1 The parties to this Occupancy Permit agree to cooperate fully with any investigation, audit, or inquiry conducted by a State of New York ("State") or City governmental agency or authority that is empowered directly or by designation to compel the attendance of witnesses and to examine witnesses under oath, or conducted by the Inspector General of the Department of Small Business Services, with respect to investigations pertaining to this Occupancy Permit and/or activities conducted on the Premises.
- 27.2 (a) If any person has been advised that his or her statement, and any information from such statement, will not be used against him or her in any subsequent criminal proceeding and still refuses to testify before a grand jury or other

governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to examine witnesses under oath concerning the award of or performance under any transaction, agreement, lease, permit, contract or license entered into with the City, the State or any political subdivision or public authority thereof, or the Port Authority of New York and New Jersey, or any local development organization within the City, or any public benefit corporation organized under the laws of the State, then Permittee may be subject to a hearing or penalties as set forth in Sections 27.3 and 27.4 herein or;

- (b) If any person refuses to testify for a reason other than the assertion of his or her privilege against self incrimination in an investigation, audit or inquiry conducted by a City or State governmental agency or authority empowered directly or by designation to compel the attendance of witnesses and to take testimony under oath, or by the Inspector General of the governmental agency that is a party in interest in, and is seeking testimony concerning the award of, or the performance under, any transaction, agreement, lease, permit, contract or license entered into with the City, the State, or any political subdivision thereof or any local development corporation within the City, then Permittee may be subject to a hearing or penalties as set forth in Sections 27.3 and 27.4 herein.

27.3 (a) The Commissioner of DSBS ("Commissioner") or the agency head whose agency is a party in interest to the transaction, submitted bid, submitted proposal, contract, lease, permit or license may convene a hearing, upon not less than five (5) days' written notice to the parties involved to determine if any penalties should attach for the failure of a person to testify.

- (b) If any non-governmental party to the hearing requests an adjournment, the Commissioner or the agency head who convened the hearing may, upon granting the adjournment, suspend any contract, lease, permit or license pending the final determination pursuant to paragraph 27.5 below without the City incurring any penalty or damages for delay or otherwise.

27.4 The penalties that may attach after the final determination by Permittor may include, but shall not exceed:

- (a) The disqualification for a period not to exceed five (5) years from the date of any adverse determination for any person or any entity of which such person was a member, shareholder, officer, director, employee or agent at the time the testimony was sought, from submitting bids for, or transacting business with, or entering into or obtaining any contract, lease, permit or license with or from the City; and/or

- (b) The cancellation or termination of any and all existing City contracts, leases, permits or licenses that the refusal to testify concerns and that have not been assigned as permitted under this Occupancy Permit, nor the proceeds of which pledged to an unaffiliated and unrelated institutional lender for fair value prior to the issuance of the notice scheduling the hearing, without the City incurring any penalty or damages on account of such cancellation or termination; monies lawfully due for goods delivered, work done, rentals, or fees accrued prior to the cancellation or termination shall be paid by the City.

27.5 The Commissioner or agency head shall consider or address in reaching his or her other determination and in assessing an appropriate penalty the factors in paragraphs (a) and (b) below. He or she may also consider, if relevant and appropriate, the criteria established in paragraphs (c) and (d) below, in addition to any other information which may be relevant and appropriate.

- (a) The party's good faith endeavors or lack thereof to cooperate fully and faithfully with any governmental investigation or audit including, but not limited to the discipline, discharge, or disassociation of any person failing to testify, the production of accurate and complete books and records, and the forthcoming testimony of all other members, agents, assignees or fiduciaries whose testimony is sought.
- (b) The relationship of the person who refused to testify to any entity that is a party to the hearing, including, but not limited to, whether the person whose testimony is sought has an ownership interest in the entity and/or the degree of authority and responsibility the person has within the entity.
- (c) The nexus of the testimony sought to the subject entity and its contracts, leases, permits or licenses with the City.
- (d) The effect a penalty may have on an unaffiliated and unrelated party or entity that has a significant interest in an entity subject to penalties under 27.4 above, provided that the party or entity has given actual notice to the Commissioner or agency head upon the acquisition of the interest, or at the hearing called for in 27.3 (a) above gives notice and proves that such interest was previously acquired. Under either circumstance the party or entity must present evidence at the hearing demonstrating the adverse impact such a penalty would have on such person or entity.

27.6 (a) The term "license" or "permit" as used herein shall be defined as a license, permit, franchise or concession not granted as a matter of right.

- (b) The term "person" as used herein shall be defined as any natural person doing business alone or associated with another person or entity as a partner,

director, officer, principal or employee.

- (c) The term "entity" as used herein shall be defined as any firm, partnership, corporation, association or person that receives monies, benefits, licenses, leases or permits from or through the City or otherwise transacts business with the City.
- (d) The term "member" as used herein shall be defined as any person associated with any other person or entity as a partner, director, officer, principal or employee.

27.7 In addition to and notwithstanding any other provision of this Occupancy Permit, the Commissioner or the agency head may, at his or her discretion, terminate this permit upon twenty four (24) hours' written notice in the event Permittee fails to promptly report in writing to the Commissioner of Investigation of the City of New York any solicitation of money, goods, requests for future employment or other benefit or thing of value, by or on behalf of any employee of the City, Permit Administrator, Apple or other person, firm, corporation or entity for any purpose which may be related to the procurement or obtaining of this Occupancy Permit by Permittee, or affecting the performance of this Occupancy Permit.

28. Review and Approval: The granting of this Occupancy Permit is subject to the applicable government review and approval process including, but not limited to, approval of Permittee based upon the information provided in either the required Business Disclosure Statement or the required Business Entity Questionnaire and the Principal Questionnaire, whichever is applicable. The aforementioned documents shall be completed by Permittee and submitted to Permitter prior to or upon execution of this Occupancy Permit. If after Permittee's execution of this Occupancy Permit, approval is not granted by the applicable authority, this Permit shall be considered null and void upon twenty-four (24) hours' notice to Permittee and Permittee must vacate the Premises within twenty-four (24) hours' of such notice to Permittee.

29. Default: In the event that Permittee fails to pay all or any of the Base Monthly Charge or Additional Charges, if any, when due or fails to comply with any other provision of this Occupancy Permit, the same shall constitute a default hereunder and Permitter, upon twenty-four (24) hours' notice to Permittee, may terminate this Occupancy Permit and remove Permittee by any legal means available to Permitter. Permittee hereby waives any right to counterclaim or setoff against Permitter, Permit Administrator or Apple in any action or proceedings brought by Permitter, Permit Administrator or Apple. In the event that Permittee abandons the Premises or permits the same to become vacant during the Period of this Occupancy Permit, this Occupancy Permit shall terminate upon the date of such abandonment or vacatur as fully and completely as if that were the date originally set in this Occupancy Permit for the expiration of the Period. Nothing herein contained shall be construed to prevent Permitter from maintaining an action for damages against Permittee by

reason of such abandonment or vacatur.

30. Termination; Expiration:

- (a) In addition to Permitter's right to terminate this Permit under Articles 21 ("Condemnation"), 25 ("Conflict of Interest"), 27 ("Investigation") and 29 ("Default") and notwithstanding any other provision of this Occupancy Permit, Permitter may terminate this Occupancy Permit at will for any reason or no reason at any time by giving Permittee not less than thirty (30) days' notice.
- (b) Upon the Expiration Date, Permittee shall vacate the Premises and return possession thereof to Permitter in the same condition and grade as existed at the Commencement Date of the Permit. The responsibilities of the Permittee, upon the Expiration Date, include, without limitation, the removal of the Permittee's Concrete Platform (or, at the request of the Permitter and/or Permit Administrator, instead of removing the Permittee's Concrete Platform, the Permittee shall put the Permittee's Concrete Platform in good condition and order, which shall include but not be limited to repairing cavitations, cracks and any areas that have deteriorated since the initial installation by Permittee, if any. In the event that Permittee fails to do so, Permittee shall be liable for any and all damages to Permitter or Permit Administrator resulting therefrom, including, without limitation, reasonable attorney's fees, and any other monies paid or incurred by Permitter or Permit Administrator, for service of process, marshal's fees, and all other costs incurred in summary proceedings and the like.
- (c) In the event that Permittee tenders any partial payments of the Base Monthly Charges or Additional Charges to Permitter for a period subsequent to the Expiration Date, the same shall conclusively be deemed to be for use and occupancy of the Premises and shall under no circumstances be construed to create or revive any right on the part of Permittee to occupancy of the Premises.
- (d) In the event that any property (including, without limitation, Permittee's Concrete Platform, equipment, supplies, vehicles, trade fixtures, or other material or items) is in, on, at or upon the Premises at the end of the Period, Permitter or Permit Administrator or Apple may, in their sole discretion, dispose of same and charge Permittee for the cost of such disposal, or keep the property as abandoned property.
- (e) Permittee acknowledges and agrees that it shall not be entitled to, and shall not bring any action or make any counterclaim for, any monetary damages or equitable relief in the event Permitter terminates this Occupancy Permit in accordance with the provisions hereof or elsewhere in this Occupancy Permit.

31. Permitter's Consent: Whenever Permitter's consent is required under this Permit, such consent shall be prior consent, shall be in writing and shall be subject to such conditions as Permitter or Permit Administrator may, each in its sole and absolute discretion, require.

32. Notices: All demands, notices, consents, approvals or orders to be made or given by Permittor to Permittee, and any acts relating hereto that may or shall be performed by Permittor, may be made, given or performed by Permit Administrator or Apple with the same effect as if made given or performed by Permittor, except for the designation of a new Permit Administrator, which may be done only by Permittor. Such demands, notices, consents, approvals or orders shall be served either by personal service upon Permittee or by posting same in a conspicuous place upon the Premises or by ordinary first class mail addressed to

Permittee at:

J.L.J. IV Enterprises, Inc.
213-19 99th Avenue
Queens Village, New York 11429
Attention: James Juliano, President

Any notice from Permittee to Permittor shall be made in duplicate, one to the Permittor and one to the Permit Administrator, shall be in writing, and sent by certified mail, with return receipt requested, or personally delivered to the addresses and to the officials noted on the first page hereof. Notices given pursuant to this Article shall be deemed effective on the day after personal delivery or three days after mailing.

Any notice from Permittee to Permit Administrator and/or to Apple shall be made in duplicate, one to the Permit Administrator and one to Apple, shall be in writing, and sent by certified mail, with return receipt requested, or personally delivered to the addresses and to the officials noted on the first page hereof. Notices given pursuant to this Article shall be deemed effective on the day after personal delivery or three days after mailing.

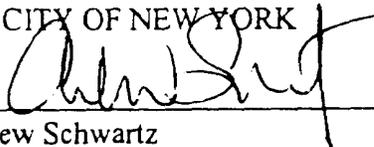
33. Noise Control:

- (a) Permittee shall comply with 24.201 et.seq. of the Administrative Code of the City of New York (the "Noise Control Code"). Permittee shall not permit or cause to be permitted, operated, conducted, constructed or manufactured on the Premises devices and activities which would cause a violation of the Noise Control Code.
- (b) Any such devices and activities shall incorporate advances in the art of noise control developed for the kind and level of noise emitted or produced by such devices or activities in accordance with the regulations issued by the Department of Environmental Protection of the City of New York, or its successor.

34. No Oral Modification: This Occupancy Permit may not be altered, modified or amended in any manner whatsoever except by a written instrument signed by Permittor, Permit Administrator and Permittee.

35. Captions: The captions are inserted for reference purposes only and in no way define, limit or describe the scope or intent of this Occupancy Permit, or affect this Occupancy Permit in any way.
36. Survival: Any and all obligations and/or liabilities of Permittee under this Occupancy Permit which accrue prior to the Expiration Date or which survive by the express terms of this Occupancy Permit shall survive the expiration or termination of this Occupancy Permit.
37. Security: Permittee is solely responsible for the security of the Premises and their operation including, without limitation, Permittee's provision of security to protect and safeguard Permittee and the employees, guests, invitees, customers, contractors, subcontractors, representatives or agents of Permittee and their respective property, equipment, supplies and materials and must coordinate these responsibilities with the other permittees and tenants, if any, located at BAT and the 65th Street Rail Yard to ensure the overall security of the Premises.
38. Warranty: The undersigned signatory for Permittee, by signing this Occupancy Permit, personally warrants that he or she has the power and authority to enter into this Occupancy Permit agreement on behalf of Permittee and to bind Permittee to the terms and conditions of this Occupancy Permit.
39. Permitter's Right to Reduce Space: Notwithstanding any other provisions of this Occupancy Permit, including, without limitation, Section 1(e) ("Premises"), Permitter reserves the right to take back all or any portion of the Premises during the term of the Occupancy Permit for any purpose including, but not limited to, construction, storage, alternate uses or occupants, ingress and egress. If Permitter exercises such right, a pro-rata reduction in the Base Monthly Charge will be given to Permittee on a per square foot basis for the period of time during which Permitter has exercised such right. The duration of such reduction and amount of square footage taken shall be determined in the sole judgment of Permitter. In the event such action by Permitter shall significantly affect Permittee's operation of the Premises for the intended uses, upon reasonable determination by Permitter of such effect, Permittee may terminate the Occupancy Permit upon no less than twenty-four (24) hours' notice.
40. Assessments: Permittee shall be solely responsible for the payment of all fees, charges and taxes related to the Premises and to Permittee's operation in connection therewith, except for real property taxes and tax assessments.
41. Entire Agreement. This Occupancy Permit contains the entire and integrated agreement between Permitter and Permittee with respect to the subject matter and supersedes all prior negotiations, representations and agreements with respect to the subject matter, whether written or oral. This Occupancy Permit may be signed in counterparts, each of which, when taken together, shall constitute one and the same agreement.

PERMITTOR:
THE CITY OF NEW YORK

By: 
Andrew Schwartz
First Deputy Commissioner
Department of Small Business Services
Date: _____

PERMITTEE:
J.L.J. IV ENTERPRISES, INC.

By: 
Name: JAMES JULIANO
Title: PRES
Date: 8-19-05

Approved as to Form
Certified as to Legal Authority:

NEW YORK CITY CORPORATION COUNSEL

By: 
Acting Corporation Counsel
Date: _____

EXHIBIT A

Premises:

A portion of that certain property situated west of Second Avenue between 64th Street and Wakeman Place, within the area known as the 65th Street Rail Yard ("65th Street Rail Yard"), in the County of Kings, City of New York, described as follows:

Consisting of approximately 10,000 square feet of upland, unimproved lot, that is approximately 40 feet wide and 250 feet long, and which is approximately 60 feet from the New York Upper Bay; and

Forming a part of block 5804, Lot 1, in Community Board #7, on the tax map for the Borough of Brooklyn, all as shown on the Diagram following this Exhibit A cover page.

LAIIDII A

Kamco Supply Corp.

23rd Street Marine Terminal Block 644 p/o Lot 1

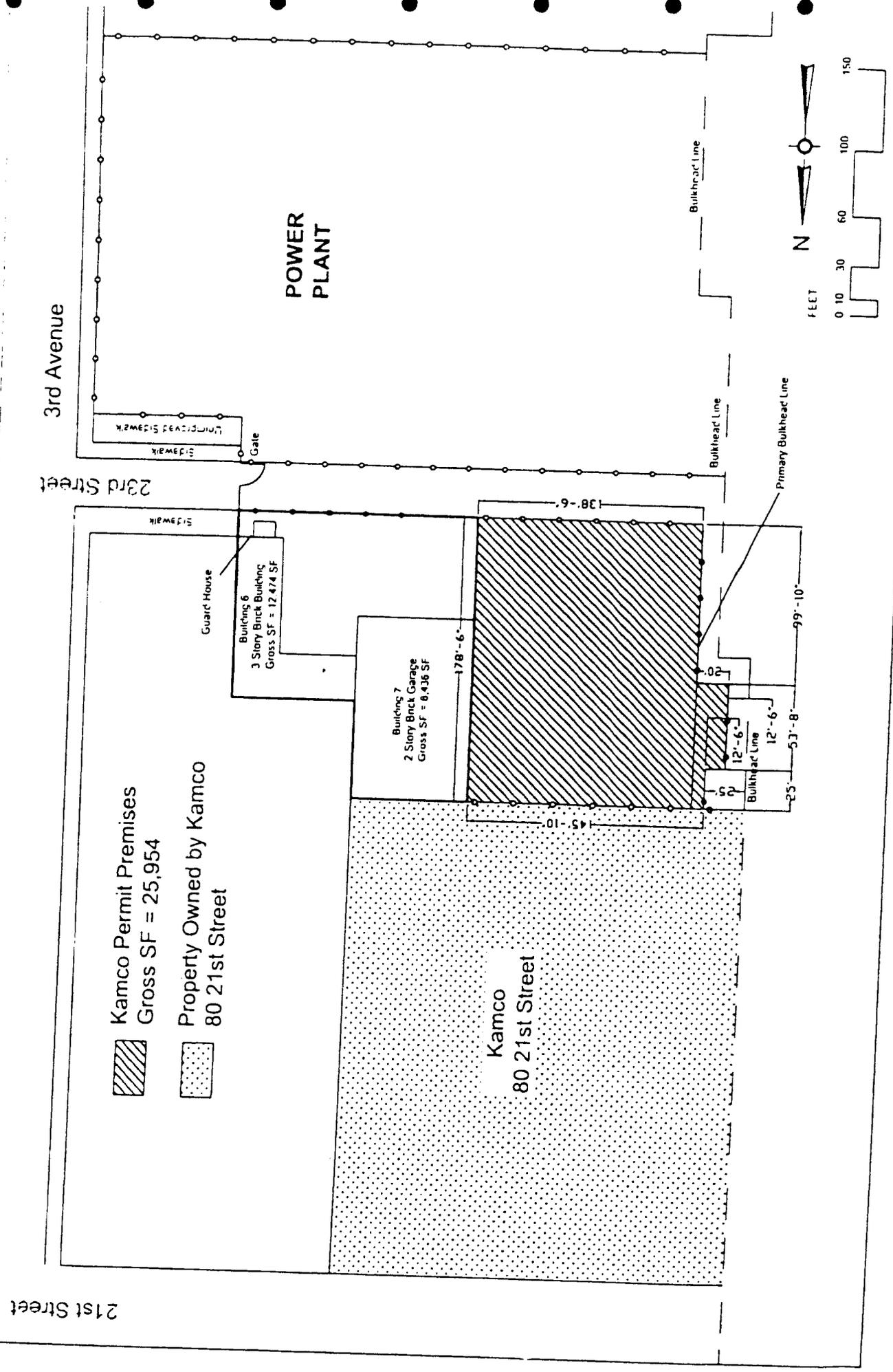
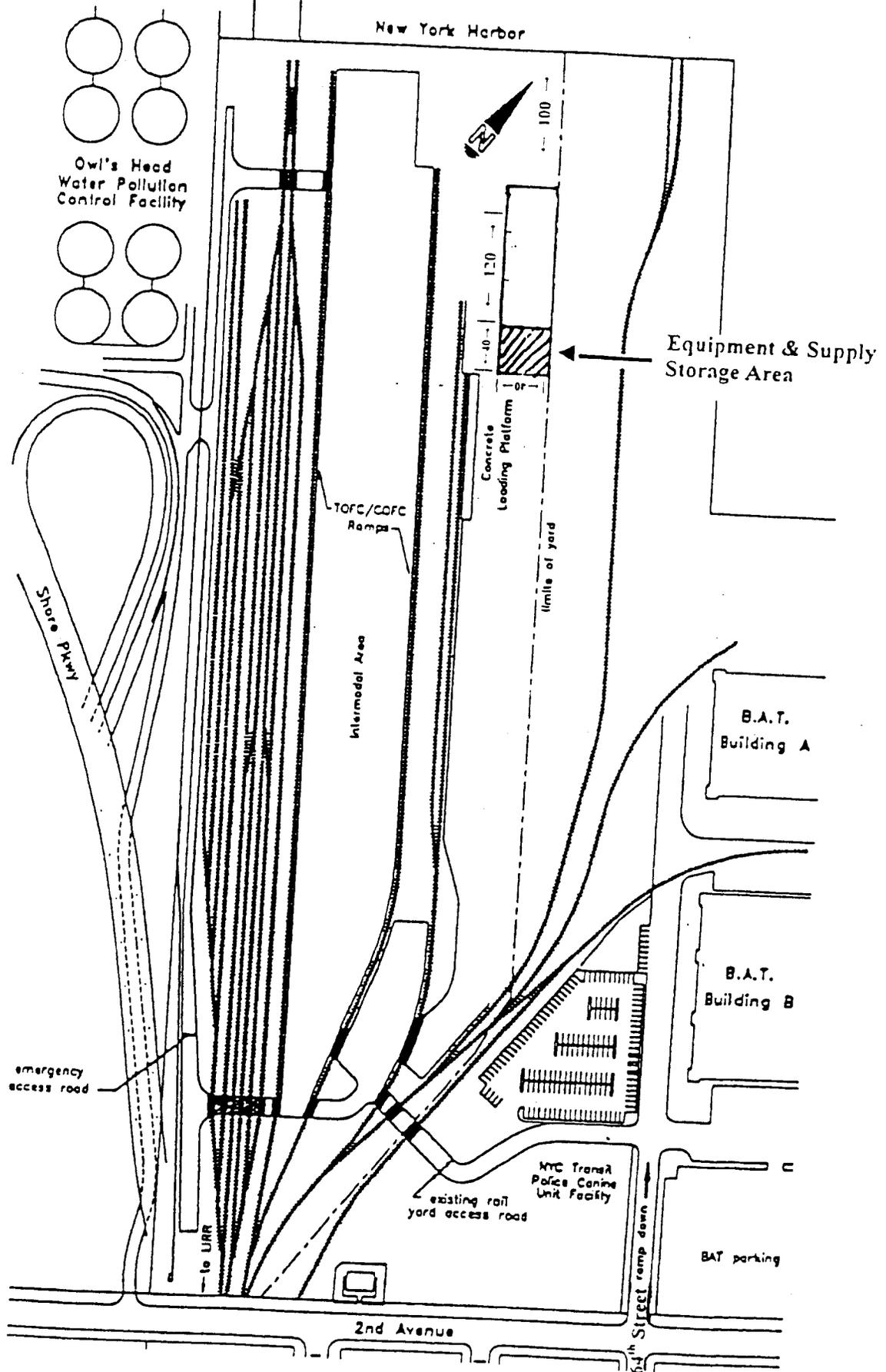


EXHIBIT A

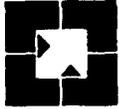
Site Plan

65th St. Rail Yard

New Transferbridges
(Not included in Premises)







**New York City
Economic Development
Corporation**

July 5, 2005

Mr. Frank Mavica
All Type Auto Repairs
140 58th Street
Brooklyn, NY 11220

Re: All Type Auto Repairs
140 58th Street, Brooklyn, NY
Land located within the south western
Portion of the Brooklyn Army Terminal

7/13/05 - 4:00 PM
Frank is OK w/ The Permit

Dear Mr. Mavica:

Pursuant to our conversation, below is our proposed terms for the Permit renewal for the above referenced premises:

Space:	47,000 square feet	
Term:	1-year renewal plus 2 options to renew of 1 year each option	
Base Rent:	<i>Jose B</i> 7/1/05 – 6/31/06	\$110,450.00yr/\$9,204.17mo (\$2.35 psf)
Options to Renew:		
1 st Option	7/1/06 – 6/31/07	\$116,090.00yr/\$9,674.17mo(\$2.47 psf)
2 nd Option	7/1/07 - 6/31/08	\$121,730.00yr/\$10,144.17mo (\$2.59psf)
PILOT:	Included in base rent.	
Security Deposit:	\$10,000.00	

Right to Terminate: Permitter has the right to terminate this Permit upon 30 days notice to Permittee.

Please note that this Permit is subject to approval by the City of New York, Franchise and Commission Review Committee. Should you have any questions regarding this matter, please call me directly at (212) 312-3850.

Sincerely,

[Signature]
Maria C. Goncalves
Assistant Vice President
Property Management and Leasing

PERMIT

THIS PERMIT, made as of the 15th day of January, 2001, between NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, hereinafter called Permittor, a local development corporation pursuant to Section 1411 of the Not-for-Profit Corporation Law of the State of New York, having an office at 110 William Street, 4th Floor, New York, New York 10038, and ALL TYPE AUTO REPAIRS, INC., having an address at 218 48th Street, Brooklyn, NY 11220, hereinafter called Permittee.

WITNESSETH:

WHEREAS, The City of New York (the "City") is the owner of the premises (hereinafter defined); and

WHEREAS, the City, acting by the Deputy Mayor for Finance and Economic Development and by the Commissioner of Ports and Terminals (which office has been succeeded by the Commissioner of the Department of Business Services) (in either case, the "Commissioner"), pursuant to a lease, dated as of February 1, 1986, as amended and renewed from time to time (the "Lease"), has leased the premises to Permittor; and

WHEREAS, Permittor desires to grant Permittee certain rights and to impose on Permittee certain duties with respect to the premises and, on the terms herein contained, Permittee desires to accept the same;

NOW, THEREFORE, for the consideration of the mutual covenants set forth below, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

Term For and in consideration of the charges, covenants, terms and conditions hereinafter to be paid, performed, kept and observed, Permittor does hereby issue this Permit to Permittee to use and occupy the hereinafter described property, for the period commencing on January 1, 2001 (the "Commencement Date"), and continuing until December 31, 2001 (the "Initial Term"), subject to termination and revocation as hereinafter provided (any such termination date, the "Expiration Date").

Premises All that certain property, at the Military Ocean Terminal a/k/a Brooklyn Army Terminal (hereinafter sometimes referred to as the "Terminal"), situated in Kings County, City of New York, described as follows:

Land located within the south western portion of the Terminal, adjacent to the 65th Street Rail Yard, measuring approximately 47,000 square feet as shown on Exhibit A attached hereto, hereinafter called the "premises", together with the right to enter thereupon for the purposes of this Permit

on the following TERMS AND CONDITIONS, which Permittee hereby covenants, promises and agrees to and with Permitter to keep and perform:

Use

(1)(a) Permittee shall enter upon and use the premises solely for the storage of impounded vehicles by the New York City Marshall's Department and related ^{ACTIVITIES} ~~administrative~~ use and for no other use or purpose except with the prior written approval of Permitter in each instance. Without limiting the foregoing, Permittee shall not permit anyone on the premises other than Permittee's employees and support personnel.

(b) In the event of a breach or threatened breach by Permittee of the provisions of this Article, Permitter shall have the right of injunction and/or may re-enter the premises as provided herein. Permitter may also maintain an action for damages arising out of such breach.

(c) Permittee's use of the premises is subject to building restrictions, zoning regulations, covenants, restrictions of record and easements affecting the premises. The premises may not be used for any unlawful, illegal or hazardous business, use or purpose or in such manner as may make void or voidable any insurance with respect to the premises.

Charge for
Period

(2)(a) The amount of \$8,812.50 shall be payable each month ("Base Monthly Charge"), in advance, regardless of receipt by Permittee of a charge invoice.

In the event that Permittee takes possession on any day other than the first day of a month, Permittee shall pay on the Commencement Date, a pro rata partial base monthly charge for that month in addition to the base monthly charge for the following month.

(b) Charge Payment: Permittee shall pay the Base Monthly Charge in full with no amount deducted from it, in advance, commencing on the Commencement Date, at Permitter's address above. All additional charges ("Charges") shall be billed to Permittee and shall be paid in full by Permittee promptly upon receipt of notice of such Charges.

(c) Late Payment: In the event that Permittee fails to pay any Base Monthly Charge and/or any Charges in full by the tenth (10th) day that such Base Monthly Charge and/or Charge is due, Permitter, at its sole discretion, may accelerate the entire charge for the remainder of the Period or may impose a late payment Charge for that monthly period equal to two percent (2%) of any charges due, but not less than a minimum charge of ten dollars (\$10.00). Such late payment Charge shall be compounded monthly and shall be collectible as an additional charge. Failure to demand a late payment charge shall not waive Permitter's right to collect it at a later date. In the event Permittee fails to pay any Base Monthly

Charges and/or other Charges, any subsequent payments shall first be applied for Base Monthly Charges and/or Charges past due.

- (d) All Charges payable to Permittor shall be made by check payable to Apple Industrial Development Corp ("Permit Administrator").

Security
Deposit

- (3) At the time of execution of this Permit, Permittee is posting a security deposit in the amount of \$10,000.00, by certified check payable to New York City Economic Development Corporation. Permittor may use any part of the security deposit to satisfy any default of the Permittee and any expenses arising from such default. If Permittor uses or applies any part or all of the security deposit to satisfy any such default, Permittee shall immediately post an additional security deposit in the manner provided in the first sentence of this Article 3, in an amount that is sufficient to replenish the full amount of the original security deposit. Solely for the purposes of this Article 3, "default" shall mean the breach of any covenant of Permittee contained in this Permit which, after five (5) days notice from Permittor to Permittee remains uncured; provided, however, that where notice to the Permittee shall adversely affect Permittor, no such notice will be required. If Permittee shall comply with the terms of this Permit, the security deposit shall be returned to the Permittee within thirty (30) days after the Expiration Date, without interest.

Option to
Extend

- (4)(a) Subject to the provisions of this Article, Permittee shall have two consecutive options to extend the Term from the date upon which it would otherwise expire, each for a period of one year (such periods, individually and collectively, being herein referred to as the "Extension Period"), which option may only be exercised in the manner hereinafter set forth.
- (b) Provided that this Permit shall then be in full force and effect and there shall not then exist any uncured default hereunder, Permittee may exercise the aforesaid option to extend the Term for the Extension Period, subject as aforesaid, by giving written notice to Permittor of its election so to extend not earlier than six (6) months nor later than two (2) months prior to the expiration of the initial Term, with time of the essence.
- (c) If Permittee shall duly exercise the aforesaid option to extend, the Term shall automatically be extended for the Extension Period without the necessity for execution of an extension or renewal lease. The Extension Period shall be upon all of the same terms, covenants and conditions as shall be in effect hereunder immediately prior to the commencement of the Extension Period, except that Permittee shall have no further right to

extend or renew the Term following the expiration of either Extension Period.

Notices (5) All notices or orders to be given by Permittor to Permittee shall be served either in person to Permittee, with delivery or service acknowledged in writing by the party receiving the same, or by posting same in a conspicuous place upon the premises, or by ordinary first-class mail addressed to Permittee at:

All Type Auto Repairs, Inc.
218 48th Street
Brooklyn, NY 11220
Attn: Frank Mavica

Any notice by Permittee to Permittor shall be served in person to Permittor, with delivery or service acknowledged in writing by the party receiving the same, or by certified or registered mail addressed as follows:

New York City Economic Development Corporation
110 William Street, 4th Floor
New York, New York 10038
Attn: Senior Vice President, Property Management

Notices and orders may be served or given to such other addresses and persons as either of the above, by written notice sent in accordance herewith to the other, shall designate.

Utilities,
Maintenance
and Services

(6)(a) Permittor will provide at points in or near the demised premises the facilities necessary to enable Permittee to obtain for the demised premises electric power.

(b) Notwithstanding the foregoing, however, Permittee agrees to pay Permittor, as an additional Charge hereunder, for electric energy supplied to the demised premises as measured by a submeter installed at Permittee's sole cost and expense. Permittee's use of electric energy in the demised premises shall be measured by said submeter from and after the date of delivery of possession of the demised premises to Permittee, at rates which shall not be higher than those that would be charged to Permittee if such electric service was supplied directly to Permittee by a third-party utility company providing electric service to the Building, including an amount equal to the New York State and New York City Sales taxes payable on the sale of electricity to Tenant. Permittee shall keep said submeter and related equipment in good working order and

repair at Permittee's own cost and expense, in default of which Permitter may cause such submeter and equipment to be replaced or repaired and collect the cost thereof from Permittee as an additional Charge. Payment for electric charges shall be due and payable within ten (10) days following the rendition to Tenant of bills therefor, and on default in making such payment Owner may pay such charges and collect the same from Tenant, together with late charges thereon. Tenant's electricity bills shall be itemized so as to show separately electric charges, late charges, if any, and any other items.

- (e) Permittee shall, at Permittee's expense, keep the demised premises clean and in order, to the satisfaction of Permitter. Permittee shall independently contract for the prompt and orderly removal of its rubbish and refuse from the Terminal. The removal of such refuse and rubbish shall be subject to such rules and regulations as, in the judgment of Permitter, are necessary for the proper operations of Terminal. Permitter reserves the right to negotiate on behalf of Permittee for carting and refuse removal services, or, at Permitter's election, to approve Permittee's choice of persons to provide carting and refuse removal services. Furthermore, Permitter reserves the right, upon notice to Permittee, to arrange for the removal of Permittee's refuse and rubbish, in which case Permittee shall pay to Permitter the cost of removal of any Permittee's refuse and rubbish from the Terminal. Bills for the same shall be rendered by Permitter to Permittee at such time as Permitter may elect and shall be due and payable hereunder. Permitter reserves the right to designate areas in which containers shall be placed for removal of all refuse and rubbish of Permittee.

- Insurance (7)(a) Permittee shall provide commercial general liability insurance, including, without limitation, insurance against assumed or contractual liability under this Permit, and containing no exclusion for sprinkler or water damage, legal liability or any other hazard customarily covered by this insurance, with a combined single limit per occurrence of one million dollars (\$1,000,000) for bodily injury, death and for property damage and two million dollars in the aggregate (\$2,000,000), naming Permitter and the City as "Insured Permitter" and naming Permit Administrator as additional insured. The liability policy must specifically state that it is being issued "in accordance with the Permit commencing January 1, 2001, between The New York City Economic Development Corporation, as Permitter, and All Type Auto Repairs Inc., as Permittee," with respect to contractual liability coverage in accordance with New York State Policy Forms.
- (b) Permittee shall provide Automobile Liability Insurance for bodily injury, death and property damage with a combined single limit of one million

dollars (\$1,000,000) per occurrence. Such insurance must be comprehensive and cover all vehicles in connection with this Permit on the premises.

- (c) Permittee shall provide Worker's Compensation and Employer's Liability Insurance with Worker's Compensation as may be legally required and Employer's Liability Insurance with a limit of \$500,000 per occurrence.
- (d) Permittee shall also, for the benefit of Permitter, keep the Premises and structures insured against loss or damage by fire, collision, action of the elements and such other hazards, casualties and contingencies, and all other risks now or hereafter embraced by extended coverage and "all risk" endorsements, in an amount equal to the estimated full replacement value of the Premises, in such amounts that Permittee will not be considered a co-insurer, and without deduction for depreciation, including the cost of the removal of the debris, and no property insurance shall provide for any deductible or self-insured retention in excess of one thousand dollars (\$1,000) per occurrence. Policies for such insurance shall insure Permitter solely and unconditionally, with loss adjusted with, and payable solely and unconditionally to, Permitter, without restriction or regard as to whether or not Permittee carried additional or other insurance.
- (e) Permittee shall provide Garagekeepers Legal Liability Insurance with a combined single limit per occurrence of two million dollars (\$2,000,000) and four million dollars in the aggregate (\$4,000,000), naming the City and Permitter as additional insureds.
- (f) All policies of insurance required by this Article shall contain the terms and conditions of policies and endorsements available for such risks and a written waiver of the right of subrogation with respect to all of the named insureds and additional insureds, including Permitter and Permit Administrator. Should other or additional types of insurance or clauses thereafter become available, Permittee agrees to furnish such new policies on demand of the Permitter. Permittee further agrees to execute and deliver any additional instruments and to do or cause to be done all acts and things that may be requested by Permitter properly and fully to insure Permitter and Permit Administrator against all damage and loss as herein provided for and to effectuate and carry out the intents and purposes of this Permit.
- (g) Policies providing for applicable insurance shall be issued only by insurance companies that are licensed or authorized to do business in the State of New York and that have a rating in the latest edition of "Bests Key Rating Guide" of "A.VII" or better, or another comparable rating reasonably acceptable to Permitter. Certificates of Insurance evidencing

the issuance of all insurance required by this Article, and guaranteeing at least thirty (30) days prior notice to Permitter and Permit Administrator of cancellation or non-renewal, shall be delivered to Permitter and Permit Administrator prior to execution of this Permit, or, in the case of new or renewal policies replacing any polices expiring during the Period, no later than thirty (30) days before the expiration dates of such policies. At Permitter's or Permit Administrator's request, Permittee shall submit the entire original policy.

- (h) Permittee shall not violate or permit to be violated any of the conditions, provisions or requirements of any insurance policy required by this Article 7, and Permittee shall perform, satisfy and comply with or cause to be performed, satisfied or complied with all conditions, provisions and requirements of all such insurance policies.
- (i) Each policy of insurance required to be carried pursuant to the provisions of this Article 7, except worker's compensation/employer's liability, shall contain a provision that no act or omission of Permittee shall affect or limit the obligation of the insurance company to pay the amount of any loss sustained by Permitter, or Permit Administrator.
- (j) All policies shall be primarily protection and neither Permitter nor Permit Administrator will be called upon to contribute to a loss that would otherwise be paid by Permittee's insurer.
- (k) All certificates of insurance shall name Permitter and the City as additional insureds, except for "all risk" property insurance for the Premises, which shall name Permitter and the City as sole insureds.
- (l) Permittee shall be, continue and remain liable for any destruction, loss or damage from any cause arising from action taken or from inaction under this Permit or from breach of the covenant of the several articles of this Permit by Permittee. In the event of any such loss or damage for which Permittee becomes liable as aforesaid, Permittee shall, at its sole cost and expense, promptly repair or replace the property so lost or damaged in accordance with plans and specifications approved by Permitter.

Indemnity (8) Permittee shall forever defend, indemnify and save harmless Permitter and the City, and their respective members, directors, officials officers, agents, representatives and employees from and against any and all liabilities, claims, demands, penalties, fines, settlements, damages, costs, expenses, including attorney's and other professional fees and expenses, and judgments (a) arising from injury to any person or persons, including death, or any damage to property of any nature, occasioned wholly or in part by any act(s) or omission(s) of Permittee or of the employees, guests, contractors, subcontractors, representatives or agents of Permittee,

occurring on or in proximity to the Premises, or (b) relating to or arising from any and all liens and encumbrances which may be filed or recorded against the Premises or any public improvement lien filed against any funds of Permitter as a result of actions taken by or on behalf of Permittee, its contractors, subcontractors, agents, representatives, employees, guests or invitees. Further, Permittee agrees to defend, indemnify and hold harmless Permitter and Fee Owner and their representatives, members, directors, officials, officers, agents, representatives and employees from and against any and all claims, demands, penalties, fines, liabilities, settlements, damages, costs, expenses, including attorney's and other professional fees and expenses, and judgments of whatever kind or nature, known or unknown, contingent or otherwise, arising out of, or in any way related to the presence, storage, transportation, disposal, release or threatened release of any Hazardous Materials (as hereinafter defined) over, under, in, on, from or affecting the Premises or any persons, real property, personal property, or natural substances thereon or affected thereby during the Period of this Permit. For purposes of this paragraph "Hazardous Materials" means (a) any "hazardous waste" as defined under the Resource Conservation and Recovery Act, 42 U.S.C. Section 9601 et seq.; or (b) "hazardous materials" as defined under the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801 et seq., or (c) "hazardous waste" as defined under the New York Environmental Conservation Law Section 27-0901 et seq., or (d) "hazardous substance" as defined under the Clean Water Act, 33 U.S. C. Section 1321 et seq. or (e) "petroleum" as defined within the New York Navigation Law, Article XII, and the regulations adopted and publications promulgated pursuant to all such Acts and Laws. The provisions of this Article 8 shall survive the Expiration Date.

Requirements
of Law

(9)

Permittee shall comply with and observe and shall be subject to any existing or future certificate of completion and/or occupancy for the premises or all or any part of the Building as then in force, and to any and all other applicable laws, rules, regulations, orders, ordinances, codes, executive orders and requirements of governmental entities and Permitter. Without limiting the foregoing, Permittee agrees to obtain any and all waivers necessary from the New York Fire Department, New York Buildings Department and any and all other agencies having jurisdiction over the Building in order to render Permittee's use and occupancy of the premises in compliance with the foregoing, including, without limitation, the installation of sprinkler and other fire safety improvements and operations not provided by Permitter as of the date hereof.

Acceptance of
Payments;
Waiver

- (10) The acceptance of payment by Permitter for any of period or periods after a default of any of the terms, covenants, or conditions herein contained to be performed, kept, and observed by Permittee, shall not be deemed a waiver of any right on the part of Permitter to cancel this Permit for failure by Permittee so to perform, keep, or observe any of the terms, covenants or conditions of this Permit. No waiver of default by Permitter of any of the terms, covenants or conditions hereof to be performed, kept and observed by Permittee shall be construed to be or act as a waiver of any subsequent default of any of the terms, covenants and conditions herein contained to be performed, kept and observed by Permittee.

Structures
&

- Improvements (11)(a) Permittee, at its sole cost and expense, shall install and maintain in good condition and repair a fence around the perimeter of the demised premises. Except for the foregoing, Permittee shall not erect nor maintain nor permit to be erected or maintained upon the premises installations, additions, alterations, changes, improvements, structures, signs, or encumbrances of any kind other than those now on the premises or specifically authorized by this Permit, without Permitter's prior written consent, which consent shall be predicated upon Permitter's review and approval of plans and specifications, signed and sealed by a licensed architect or engineer, prior to the commencement of such work. Permittee, at Permitter's option, shall promptly remove any and all structures, installations, additions, changes, improvements, signs or encumbrances that have been placed by it upon the premises without such consent of Permitter. In case of Permittee's failure to remove the same, Permitter may remove such installations, additions, alterations, changes, improvements, structures, signs or encumbrances, and Permittee shall pay the cost of such removal and of the storage of the material, or Permitter may, if Permitter so elects, deal with it as though it were abandoned property.
- (b) All alterations, installations, additions, improvements, structures, signs and encumbrances in and to the premises, shall be the property of the Permitter without cost to the Permitter and shall remain upon the premises. Permittee, in connection with any installations, additions, alterations, improvements, structures, signs or encumbrances, shall without cost to Permitter comply with all applicable codes and regulations of the federal, state and City governments and obtain all permits, approvals and certificates required by law. Permittee shall carry and will cause Permittee's contractors and subcontractors to carry such workers' compensation, general liability, personal and property damage insurance as Permitter deems necessary, and shall cause Permitter and Apple Industrial Development Corp., as Permit administrator, to be named as

additional insured on all general liability, personal and property damage insurance.

- (c) If any mechanic's, public improvement, laborer's or materialman's lien is filed against the premises or upon any funds of the City, Permitter or Permittee for payment of same for work claimed to have been done for, or materials furnished to Permittee, whether or not done pursuant to this Article, then the Permittee shall cause the same to be discharged of record promptly and in no event more than 10 days after the filing thereof.

Condemnation(12) In the event that the premises or any part thereof are condemned by any lawful authority, including the City, Permittee waives any and all claims to any award therefor or other damage or alleged damage by reason of such condemnation.

Unconditional
Right

of Revocation (13) Permittee expressly agrees that Permitter shall have the unconditional right to revoke this Permit and terminate the term hereof upon thirty (30) days' notice to Permittee, any provision of this Permit to the contrary notwithstanding. In the event of such revocation and termination, Permittee shall remain liable for the due and full performance of all the terms, covenants and conditions of this Permit on the part of Permittee to be performed up to the time of such revocation and termination.

Any and all obligations and/or liabilities of Permittee under this Permit shall survive the expiration of the Term of this Permit or other revocation, cancellation or termination hereof.

Repairs, Painting,
and

Rebuilding (14) Except as otherwise provided herein, Permittee at its own cost and expense, at all times during the Term of this Permit, shall put, keep, and maintain the premises, and every part thereof, and the structures thereon or to be erected thereon, in good and sufficient repair and condition. The Permitter shall be the sole judge of the amount of repair, maintenance and painting necessary under the terms of this Permit.

Fees and
Expenses

(15) If Permittee shall default in the performance of any covenant on Permittee's part to be performed by virtue of any provision in any Article in this Permit contained, the Permitter may immediately, or any time thereafter, without notice, perform the same for the account of Permittee in the name of, or as agent of, Permittee, or otherwise. If Permitter at any time elects to pay any sum of money, or do any act which will require the payment of any sum of money, by reason of Permittee's failure to comply

with any provision hereof, or, if Permittor is compelled to incur any expenses, in instituting, prosecuting, or defending any action or proceeding instituted by reason of default of Permittee hereunder, the sum or sums so paid by Permittor with all interest, costs, and damages, shall be due from Permittee to Permittor on the first day of the month following the incurring of such respective expenses.

Waiver of
Liability

(16) Permittor shall not be liable for any damage, loss, injury or liability that may be sustained by Permittee or any other person whatsoever, or to their goods and chattels from any cause whatsoever, arising from or out of this Permit or the use or occupancy of the premises or any construction on the premises, including but not limited to damage by the elements, fire, leakage, obstruction, or other defect of water pipes, gas pipes, oil pipes, electric apparatus, other leakage in or about the premises or in and from any other part of the structure or structures of which the premises are part, or the condition of the premises or any part thereof; and Permittee hereby expressly releases and discharges Permittor and its officers, directors, agents and employees from any and all demands, claims, actions and causes of action arising from any of the aforesaid.

Industrial
Facility

(17) Permittee understands and acknowledges that Permittor markets and operates the Terminal, including without limitation space adjacent to the premises, as a first class industrial facility. Permittee covenants to conduct its operations in a manner consistent with same, and shall follow all reasonable direction from Permittor given for the purpose of maintaining the operating standards and decorum of such a facility.

Surrender

(18) Permittee shall peaceably and quietly leave, surrender, and yield up unto the possession of Permittor, without any fraud or delay, the premises together with all structures, additions, alterations, changes, or replacements made thereon, except such thereof made by Permittee, that Permittor shall require to be removed by Permittee at the end of the Term of this Permit or other sooner termination thereof, and the premises, structures, and improvements thereon shall then be well and sufficiently repaired, painted and in good order and condition.

In the event the premises at the end of the Term of this Permit or other sooner termination thereof are in a state of disrepair resulting from the failure of Permittee to repair, paint, and maintain the premises during said Term, then and in that event, or either of such events, Permittee shall be required to sufficiently repair, paint and place the premises in good order and condition as though all of such work had properly been done during such Term.

- No Right of Redemption (19) Permittee hereby expressly waives any and all rights of redemption granted by or under any present or future laws, whether in the event of Permittee being evicted or dispossessed for any cause, or in the event of Permittor obtaining possession of the premises, by reason of the violation by Permittee of any of the covenants and conditions of this Permit, or otherwise.
- Access (20) Permittee, at all times during the Term of this Permit, shall permit inspection of the premises by Permittor's and the City's agents or representatives and shall permit inspection thereof by or on behalf of prospective future occupants. Permittee shall, at Permittor's or the City's direction, allow an adjoining owner desiring to excavate on his property, or Permittor or the City or a permittee of any premises adjoining the premises, desiring to do any work with regard to the Terminal or to excavate a nearby street, to enter the premises and shore up an intervening wall during such excavation or work.
- Right of Entry (21) In the event that this Permit shall be terminated as provided in this Permit or by summary proceedings, notice of revocation, or otherwise, or in the event that the premises, or any part thereof, shall be abandoned by Permittee, or shall become vacant during the Term hereof, Permittor or its agents, servants, or representatives, may, immediately or any time thereafter, reenter and resume possession of the premises or such part thereof, and remove all persons and property therefrom, either by summary dispossess proceedings or by a suitable action or proceeding at law or in equity or by force or otherwise, without being liable for any damage therefor. No such reentry shall be deemed an acceptance of a surrender of this Permit.
- Assignment or Mortgage (22) Permittee shall not at any time assign, sublet, mortgage, or pledge this Permit or any part thereof, or in any way charge or encumber the rights or property granted herein, or any part thereof, or issue or grant any permit or license to use the premises or any part thereof, without the prior written consent of Permittor.
- Advertising (23)(a) No advertisement, notice, or sign shall be placed or affixed to any of the structures, appurtenances, or any other part of the outside or inside of the premises except such as shall have received the prior written approval of Permittor.
- (b) Permittor may require Permittee to place and affix at Permittee's sole cost and expense to any of the structures, appurtenances, or any other part of the outside or inside of the premises, appropriate sign or signs designating

the premises as City owned and under the jurisdiction of the Permitter, and Permittee shall at its own cost and expense maintain such sign or signs.

(c) Permittee shall not be listed on the Building Directory.

Binding
on Heirs

(24) Each and everyone of the terms, covenants and provisions of this Permit shall inure to the benefit of and be binding upon the parties hereto and, except as herein otherwise provided, upon their respective legal representatives, successors and assigns.

Waiver of
Trial by Jury

(25) Permittee hereby expressly waives all rights to trial by jury in any proceeding hereafter instituted by Permitter against Permittee or on any counterclaim interposed by Permittee with respect to the premises and in any action hereafter brought to recover rent or Charges becoming due hereunder or in any proceeding, counterclaim or action or any cause of action directly or indirectly involving the terms, covenants or conditions of this Permit or the premises on any matters whatsoever arising out of or in any way connected to this Permit, including, but not limited to, the result of Permitter's, and Permittee's use or occupancy of the premises.

Waiver of
Notice

(26) Permittee hereby expressly waives and renounces all rights to any notice to surrender possession, or of any intention of Permitter to enter, reenter or resume possession under any statute, law or decision now or hereafter in force, or of instituting legal proceedings to that end.

Survival
Rights

(27) The provisions of this Permit relating to waiver of a jury trial and the right of reentry shall survive the expiration date of this Permit.

Telephones,
Vending
Machines

(28) No pay telephone, merchandise vending machines or concessions shall be installed on the premises without prior written permission of the Permitter. If, after obtaining such written permission from the Permitter, Permittee places or installs any pay telephone, merchandise vending machines or concessions thereon, Permittee shall pay to Permitter fifty percent (50%) of all gross revenues derived by it from these operations, whether such pay telephone, merchandise vending machines or concessions are presently installed or in operation, or are hereafter installed or operated.

Such fifty percent (50%) of all sums so collected shall be the property of Permitter and shall be remitted by Permittee as additional Charges to Permitter on each of the days fixed for the payment of Charges under this Permit. Permitter may require Permittee to keep records in such form as it

designates relating to collection of any of the aforesaid moneys; and the books and records of Permittee with respect to such collections shall be open to inspection by Permitter and the Comptroller of the City and their designees at all reasonable times for the purpose of determining any amounts due to Permitter.

Default (29) If any default be made in the payment of the charges hereunder or any part thereof, or if any default be made in the performance of any of the covenants and agreements herein contained, or if the premises shall become vacant, Permitter may, in addition to the right to reenter without notice, and in addition to the right to regain possession by means of summary proceedings or any other method permitted by law, upon resuming possession, let or otherwise permit the use of the premises without terminating this Permit, or in any manner affecting the obligation of Permittee to pay, as damages, the amount herein covenanted to be paid as charges, in which event, however, there shall be credited to the account of Permittee (to the extent Permittee is liable to Permitter for any amounts due hereunder) the amount received from such new occupancy after deducting the expenses of such proceedings as may have been necessary in order to regain possession under this provision, as well as the costs of arranging such new occupancy; and the execution of a new lease or permit for the same property, regardless of the Term and/or provisions thereof, shall not terminate Permittee's liability or obligations hereunder which shall, in all events, remain in full force and effect for the full term of this Permit. Once Permittee has vacated the premises, Permittee may not reenter.

Damages
Collectible
as Periodic
Charges

(30) In the case of the reentry or taking of possession by Permitter in the manner, or by means as provided or referred to in Article 21 of this Permit, then the amount of damages or deficiency shall become due and payable on the first day of each month, as soon as the amount of such damage or deficiency shall have been ascertained in the manner herein provided, and separate actions may be maintained monthly to recover the damage or deficiency then due, without waiting until the end of the Term. No notice or demand shall be necessary in order to maintain such action.

Capital
Improvements (31)

Permitter shall have the right, if it so chooses, to install capital improvements and do other construction work in the premises. Permitter shall notify Permittee not less than three days prior to the date any such work is to be done in the premises. Permitter shall attempt to minimize any loss of use, delay or inconvenience to Permittee caused by such work

provided that the cost of the work is not increased thereby and the schedule of the work is not disrupted thereby. Permittee shall not be entitled to any reduction or diminution in charges by reason of loss of use, delay or inconvenience due to installation of any capital improvement or any other construction work.

Legality
of Use

- (32) Permitter makes no representation as to the legality of the use of the premises for any purpose. In the event any use or proposed use is declared illegal by a court of competent jurisdiction, Permittee covenants and agrees that Permitter, and their respective directors, agents, officers and employees shall not be liable for any damages arising out of or related to such illegal use or proposed use.

Marginal
Notes

- (33) The marginal notes are inserted for reference only and in no way define, limit, or describe the scope or intent of this Permit, or affect this Permit in any way.

Noise
Control

- (34) Permittee shall comply with 1403.3-2.25 of the Administrative Code of The City of New York. Permittee shall not permit or cause to be permitted on the premises devices and activities which are subject to the provisions of the New York City Noise Control Code to be operated, conducted, constructed or manufactured in a manner which causes a violation of the Noise Control Code.

Any such devices and activities shall incorporate advances in the art of noise control developed for the kind and level of noise emitted or produced by such devices and activities, in accordance with regulations issued by the Commissioner of the Department of Environmental Protection of The City of New York, or its successor.

No Oral

Modification

- (35) This Permit represents the entire agreement between the parties and may not be altered, modified or amended in any manner whatsoever except by a written instrument signed by Permitter and Permittee.

Non

- Discrimination (36) Permittee covenants and agrees not to discriminate upon the basis of race, sex, age, color, religion, creed, marital status, sexual orientation, disability, or national origin in the use or occupancy of the premises or in improvements erected thereon or to be erected thereon, or in part thereof, or in its employment practices conducted thereon, and will state in all solicitations or advertisements for employees placed by or in behalf of the

Permittee with regard to the premises that all equally qualified applicants will be afforded equal employment opportunities without discrimination.

- Condition of Premises (37) No representations have been made to Permittee as to the condition of the premises, and Permittee accepts the premises "as is" and will not at any time make any claim that the premises are not, or on the Commencement Date were not, in suitable repair or condition for the uses and purposes of this Permit, nor will Permittee at any time make any claim for or by way of reduction of charge, or otherwise, for damage arising from or consequent upon any repairs that Permittor may do or cause to be done pursuant to the provisions of this Permit or in consequence of the occupation of the premises by Permittor, or their agents or contractors.
- Not a Lease (38) It is expressly understood that this Permit is not a lease and shall not be deemed to constitute a lease, but that during the Term of this Permit, Permittee shall have the rights and obligations set forth herein with regard to the premises.
- Subpermits (39) Permittee may not subpermit, assign or transfer the premises or any of Permittee's rights and obligations under this Permit; provided that Permittee may contract for improvements and construction approved pursuant to this Permit.
- Parking (40) Parking by Permittee and its employees, contractors and invitees is only permitted within the demised premises. Automobiles parked outside the designated area may be towed by Permittor at the Permittee's and/or the automobile owner's expense.
- Security (41) Permittee is solely responsible for the security for the demised premises and the contents thereof. Permittor and the City have no obligation to provide security and are not responsible for any theft from or damage to the premises due to lack of or faulty security whether or not Permittor or the City provides any security. Any security for the premises and the structure in which, and the land on which, the premises are located provided by Permittor or the City may be changed at any time. Permittee will cooperate and comply with all security arrangements established by the Permittor or the City, if any, and will cause its employees and invitees to so cooperate and comply.
- Snow Removal (42) Permittor and the City will not be responsible for removing snow from any parking area for the premises or from any road or other way necessary for access to the premises. Permittee and other permitted users of the

Terminal may make arrangement for and pay for such snow removal with Permitter's approval.

Ingress and
Egress to and
from Piers (43) Permittee shall not hinder ingress and egress to and from any pier in the Terminal.

Lease (44) This Permit is subject and subordinate to the Lease. If the Lease is terminated, Permitter shall so inform Permittee, and this Permit shall terminate at the time the Lease terminates unless the City notifies Permittee at such time that it is assuming Permitter's rights and obligations hereunder; provided that the City may require Permittee to attorn to the City or enter into a direct permit with the City on terms substantially the same as those in this Permit.

Removal of
Personal
Property (45) Prior to the expiration, or earlier termination, of this Permit, Permittee shall remove any and all materials, equipment and other personal property placed by it at the premises. In case of Permittee's failure to remove the same, the same shall be deemed abandoned and Permitter may, at Permitter's election, retain, store, remove or dispose of such materials, equipment and other personal property, at Permittee's expense. Permittee shall hold Permitter, Permitter's directors, and Permitter's officers, agents and employees harmless from any claim, liability or damage resulting from any such removal, storage, and/or disposal.

Heating System
Maintenance (46) INTENTIONALLY OMITTED

Access by Tenant
on Floor
Above (47) INTENTIONALLY OMITTED

Rules and
Regulations (48) INTENTIONALLY OMITTED

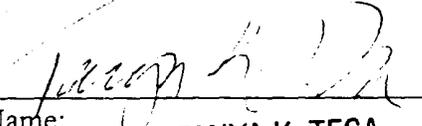
Separability (49) If any of the terms or provisions of this Permit or the application thereof shall be held invalid or otherwise unenforceable, the remaining terms and provisions of this Permit and the application of such terms or provision to persons or circumstances other than those to which the same were held invalid or unenforceable shall not be affected thereby and shall remain in full force and effect, and each term and provision of this Permit shall be valid and enforceable to the fullest extent permitted by law.

Headings

(50) The marginal headings are inserted only as a matter of convenience and in no way define, limit, or describe the scope of this Permit or the intent of any provision thereof.

IN WITNESS WHEREOF, the parties hereunder have caused this Permit to be executed the day and year first above written.

NEW YORK CITY ECONOMIC
DEVELOPMENT CORPORATION

By: 
Name: TANYA K. TESA
Title: EXECUTIVE VICE PRESIDENT

ALL TYPE AUTO REPAIRS, INC.

By: 
Name:
Title:

Index No. 05-7561

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK	
TRI-STATE BRICK AND STONE OF NEW YORK, INC. D/B/A TRI-STATE BRICK & BUILDING MATERIALS and TRI-STATE TRANSPORTATION, INC.	Plaintiffs
-against-	
NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, APPLE INDUSTRIAL DEVELOPMENT CORP., AND THE CITY OF NEW YORK,	Defendants.
DECLARATION OF JOAN MCDONALD	
<i>MICHAEL A. CARDOZO</i> <i>Corporation Counsel of the City of New York</i> <i>Attorney for the City</i> <i>100 Church Street</i> <i>New York, N.Y. 10007</i>	
<i>Of Counsel: Mindy R. Koenig</i> <i>Tel: (212) 788-8719</i> <i>NYCLIS No.</i>	
<i>Due and timely service is hereby admitted.</i>	
<i>New York, N.Y., 200.....</i>	
<i>..... Esq.</i>	
<i>Attorney for.....</i>	



CROSS HARBOR

FREIGHT MOVEMENT PROJECT

DRAFT ENVIRONMENTAL IMPACT STATEMENT



United States Department of Transportation
Federal Highway Administration
Federal Railroad Administration



New York City
Economic Development
Corporation

The Alternatives

Subsequent to the Draft EIS, the project team conducted a series of public meetings and workshops to gather input from the public and stakeholders. The project team also conducted a series of public meetings and workshops to gather input from the public and stakeholders. The project team also conducted a series of public meetings and workshops to gather input from the public and stakeholders. The project team also conducted a series of public meetings and workshops to gather input from the public and stakeholders.

1. NO ACTION

- Includes the maintenance of current infrastructure and future projects for which funding is committed (or likely to be) by public agencies or through private investment.

2. TRANSPORTATION SYSTEMS MANAGEMENT (TSM)

- Improve coordination between passenger and freight operations on existing rail lines
- Rehabilitate existing single track along the Bay Ridge Branch and perform minor rail yard improvements
- Improve overhead clearance to 17'-6" along the Bay Ridge and Montauk Branches
- Improve signal systems
- Rehabilitate existing Greenville Yard float bridges

3. EXPANDED FLOAT OPERATIONS

- Improve operations through expanded and scheduled float service hours of operation
- Improve overhead clearance to 17'-6" along the Bay Ridge and Montauk Branches
- Rehabilitate existing single track along the Bay Ridge Branch and perform minor rail yard improvements
- Expand existing bulk / merchandise rail yard in West Maspeth, Queens
- Construct two additional float bridges at Greenville Yard, Jersey City and two additional float bridges at 65th Street yard, Brooklyn

4. RAIL-FREIGHT TUNNEL

- Alignments considered:
 - Staten Island to Brooklyn
 - Jersey City to Brooklyn
- Improve overhead clearance to 22'-6" along the Bay Ridge and Montauk Branches
- Develop a new intermodal rail yard by expanding the existing yard and facilities in West Maspeth, Queens



CROSS HARBOR
FREIGHT MOVEMENT PROJECT

- Construction of the project would result in the creation of new jobs in the region.
 - Construction of the project would result in the creation of new jobs in the region.
 - Construction of the project would result in the creation of new jobs in the region.
- REGIONAL TRANSPORTATION BENEFITS FOR 2025 VS. NO ACTION**
 The following table provides economic and transportation benefits to the region for each alternative. The table also provides the greatest benefits. The table below provides some of the key annual benefits for each alternative.

Category	Expanded Float	NJ Double Tunnel	SI Double Tunnel	NJ Single Tunnel	SI Single Tunnel
Forecast Freight Diversion – 2025	459,000 annual tons	14.9M annual tons	12.9M annual tons	9.5M annual tons	8.8M annual tons
Forecast Change in Total Regional Truck VMT – 2025 vs. No Action	-8M annual miles	-62M annual miles	-54M annual miles	-41M annual miles	-38M annual miles
Employment (new jobs)	107	29,900	26,100	16,900	15,530
Personal Income (in millions)	\$8	\$1,600	\$1,400	\$892	\$820
Savings to Automobile Users (in millions)	\$1.3	\$32.5	\$32.3	\$10.4	\$10.3
Societal Benefits (in millions)	\$0.4	\$12.3	\$12.2	\$4.7	\$4.0
Total Dollar Value (in millions)	\$9.7	\$1,639.2	\$1,444.2	\$914.7	\$836.3
B/C Ratio	0.29	2.2	1.9	1.9	1.8

CATEGORY DEFINITIONS

- **Employment:** New jobs created in the region.
- **Personal Income:** The wages earned by workers hired for the new jobs created by each alternative and the improvement in the efficiency of business related travel.
- **Savings to Automobile Users:** The amount of money individuals using the region's transportation network would save in terms of travel time.
- **Societal Benefits:** Public funding savings realized from reduced roadway infrastructure maintenance costs, reduced accident rates and reduced vehicle related air emissions.
- **Total Dollar Value:** The combined savings the region would experience from the increase in the Personal Income, savings to Automobile Users and Societal Benefits categories.
- **B/C Ratio (Benefit to Cost):** In determining the most cost efficient alternative that best meets the project's needs, the B/C ratio for each alternative was determined by weighing the expected benefits (increase in personal income, regional air quality, safety and transportation efficiency) against the annualized cost (construction and long-term operating in the project design year of 2025). A ratio of one or more signifies that the expected benefits of an alternative outweigh its cost.
- **VMT:** Vehicle Miles Travelled