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March 22, 2007

VIA ELECTRONIC FILING

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

Re: New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway, Petition for Exemption, Finance Docket No. 34797

Dear Secretary Williams:

We are writing on behalf of the New Jersey Department of Environmental Protection ("NJDEP") and the New Jersey Meadowlands Commission ("NJMC") to briefly respond to the March 15, 2007 letter submitted by New England Transrail ("NET") in this proceeding. NJDEP and NJMC recognize that the National Solid Waste Management Association has filed a motion to strike the recent filings by NYS&W, NET and NJDEP/NJMC, and agree that the court's decision in *NYS&W v. Jackson* is not relevant to this proceeding. Nonetheless, to the extent the Board determines to accept the filings of NYS&W and NET, NJDEP and NJMC respectfully request that the Board consider NJDEP's/NJMC's supplemental responses to the issues raised by NYS&W and NET.

As a preliminary matter, NET's bald assertion that "political pressure" is being put on the Board to "stop this project" is completely without foundation. The proposed legislation to which NET apparently refers is obviously not intended to subject the Board to any sort of political pressure or to influence its decision in this case. In fact, this very legislation was first introduced on July 29, 2005, months before NET even filed its Petition for Exemption in this matter. The recently re-introduced legislation is clearly directed to preventing misuse of the railroad preemption provision by those seeking to avoid legitimate and necessary federal and state health, safety and environmental regulations relating to the handling of solid waste.

Moreover, NET's veiled suggestion of a conspiracy to "stop this project" is absurd. There is nothing in the record to suggest that anyone wants to "stop" the NET project. NJDEP's and NJMC's interest in this proceeding is to (1) encourage the Board to look more closely at exemption

applications for operating authority, such as the one submitted by NET in this case, and (2) to make clear that the solid waste processing activities at such facilities are not integral to rail transportation. Only Board action on both issues will prevent the abuse of the Board's processes and the railroad preemption provision by those seeking railroad operating authority for the purpose of evading health, safety and environmental regulations. Perhaps more to the point, NET gives no indication how denial of railroad status to NET would preclude the outbound movement of solid waste by rail from the proposed facility, or prevent NET from accommodating the needs of its purported customers.

NET's reliance on the *Coastal Distribution* case is inappropriate for several reasons. First, the court's decision was by summary order not intended to have precedential effect. Indeed, the *Coastal Distribution* decision, attached hereto as Exhibit A, makes clear that the court's ruling was intended to have no precedential effect. Second, the *Coastal Distribution* decision was premised on the District Court's conclusion, attached hereto as Exhibit B, that the facility at issue there was <u>not</u> a solid waste facility, but rather a transload facility that did not implicate the "'well-recognized compelling state interest' in regulating its solid waste disposal facilities." Finally, the case dealt with the preemption of local zoning regulations, not the environmental and public health regulations relevant here. In fact, the District Court in *Coastal* reaffirmed the STB's long-standing position that "'direct environmental regulation enacted for the public health and safety' would withstand preemption."

NET's assertion that the Board can impose environmental conditions on rail solid waste facilities to adequately ameliorate the purported total preemption of state health, safety and environmental regulations is misguided, to say the least. While the Board may be able to impose environmental conditions in connection with its grant of operating authority to a new railroad or its approval of the construction of a new rail line, it appears that the Board's authority to impose such conditions for facilities constructed by existing railroads is constrained by § 10906. *See, e.g., New York City Economic Development Corp. – Petition for Declaratory Order*, STB Finance Docket No. 34429 (STB served July 15, 2004). Accordingly, a solid waste operator seeking to avoid state environmental regulations could obtain railroad operating status based on claims that it intends to handle non-waste commodities, and then add solid waste processing facilities only after it has become a rail carrier. In such a scenario, the new carrier would likely claim that its operations are completely immune from state regulation under the railroad preemption provision, and likewise immune from Board regulation pursuant to § 10906. Moreover, even in circumstances where the Board may have the authority to impose health, safety and environmental conditions on a railroad's operations, the Board simply does not have the resources to inspect hundreds, or even thousands, of such facilities to ensure compliance on a day-to-day basis.

Finally, NET's assertion that its solid waste handling facility will utilize "best management practices" and use "state of the art" equipment should be viewed with some skepticism.

Unfortunately, NJDEP and NJMC have learned that pledges of "voluntary" or "substantial" compliance with state regulations – made by companies claiming to be completely immune from those very regulations - are insufficient safeguards to protect public health and the environment. For example, in its recent submission to the Board in this proceeding, NYS&W claims it has voluntarily "substantially" complied with New Jersey's 2D Regulations. But the NYS&W facilities in New Jersey still clearly fail to meet the minimum health, safety and environmental requirements applicable to solid waste facilities in the State of New Jersey. The NYS&W facilities still have not implemented adequate measures to control storm water runoff, waste water, leachate and dust emissions. Indeed, the enclosures at the NYS&W facilities do not even meet internationally recognized construction standards for such buildings. As the Third Circuit Court of Appeals noted in *Hi Tech*, "New Jersey has suffered the scourge of unregulated solid waste facilities for decades." Asserted "good intentions" and promises of "substantial" "voluntary" compliance by solid waste operators are no reason to return to a system of self-policing solid waste facilities that history has shown to be doomed to failure.

Respectfully submitted,

Edward D. Greenberg
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Counsel for New Jersey Department
of Environmental Protection and the
New Jersey Meadowlands Commission

cc: All Counsel of Record

CERTIFICATE OF SERVICE

I do hereby certify that I have delivered a true and correct copy of the foregoing document to the following addressees at the addresses stated by depositing same in the United States mail, first class postage prepaid, this 22nd day of March 2007:

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EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 0.23 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 6th day of February, two thousand seven.

PRESENT: HON. DENNIS JACOBS,
Chief Judge,
HON. GUIDO CALABRESI,
Circuit Judge,
HON. JOSEPH F. BIANCO,*
District Judge.

- -X

COASTAL DISTRIBUTION, LLC, THE NEW YORK AND ATLANTIC RAILWAY COMPANY,
Plaintiffs-Appellees,

-v.- 06-0981-CV
06-0989-CV

THE TOWN OF BABYLON, a Municipal Corporation, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, PETER CASSERLY, as Commissioner of Planning and Development of the Town of Babylon, and PINELAWN CEMETERY,

---

* The Honorable Joseph F. Bianco of the United States District Court for the Eastern District of New York, sitting by designation.

Defendants-Appellants.

- -X

APPEARING FOR DEFENDANTS-APPELLANTS: JAMES P. CLARK, Bond, Schoeneck & King, PLLC, Garden City, NY, for Defendant-Appellant the Town of Babylon.

FRAN M. JACOBS, Duane Morris LLP, New York, NY, for Defendant-Appellant Pinelawn Cemetery.

APPEARING FOR PLAINTIFFS-APPELLEES: RONALD A. LANE, Fletcher & Sippel LLC, Chicago, IL, for Plaintiff-Appellee the New York and Atlantic Railway Company.

JOHN F. McHUGH, New York, NY, for Plaintiff-Appellee Coastal Distribution, LLC.

Appeal from the United States District Court for the Eastern District of New York (Seybert, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order of the district court be **AFFIRMED AS MODIFIED HEREIN.**

Defendants-appellants the Town of Babylon (the "Town") and Pinelawn Cemetery ("Pinelawn") appeal from the January 31, 2006 order of the United States District Court for the Eastern District of New York (Seybert, J.) granting a preliminary injunction to plaintiffs-appellees Coastal Distribution, LLC ("Coastal") and the New York and Atlantic Railway Company ("NYA"), enjoining the Town from enforcing a stop work order that prohibited Coastal from continuing construction on a shed it operated on property owned by Pinelawn but leased to the Long Island Railroad ("LIRR") and NYA. See Coastal Distrib., LLC v. Town of Babylon, 05-CV-2032, 2006 WL 270252 (E.D.N.Y. Jan. 31, 2006).

We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for

review. In a nutshell, Coastal operates a transloading facility at NYA's Farmingdale Yard in Babylon, New York. Coastal loads bulk cargo from trucks onto railcars, and NYA transports the railcars from Coastal to their destinations. A variety of bulk cargo is transloaded at the facility; but the Town and Pinelawn allege that most if not all is construction and demolition debris ("C&D debris").

At the outset of this dispute, Coastal was building a large shed that the Town alleges is intended to facilitate the sorting and preparation of C&D debris. When it was very near completion, the town issued a stop work order on the construction. Coastal appealed to the Town Zoning Board of Appeals (the "ZBA"), arguing that because the Coastal facility was integral to NYA's railroad services, the enforcement of local zoning regulations was preempted by the exclusive jurisdiction of the federal Surface Transportation Board (the "STB"). See 49 U.S.C. § 10501(a)-(b). The ZBA ruled that Coastal's activities were not transportation by rail subject to the STB's jurisdiction.

Coastal and NYA brought this action in federal court to enjoin the enforcement of the stop work order and the court granted a preliminary injunction.

The grant of a preliminary injunction is reviewed for abuse of discretion. Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 167-70 (2d Cir. 2001). A district court abuses its discretion where it makes an error of law or a clear error of fact. Forest City Daly Hous., Inc. v. Town of N. Hempstead, 175 F.3d 144, 149 (2d Cir. 1999).

A party seeking a preliminary injunction must show "(1) that it will be irreparably harmed in the absence of an injunction, and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits of the case to make them a fair ground for litigation, and a balance of hardships tipping decidedly in its favor." Id. But where the party seeks to enjoin "government action taken in the public interest pursuant to a . . . regulatory scheme, the less demanding 'fair ground for litigation' standard is inapplicable, and therefore a 'likelihood of success' must be shown." Id.

The district court did not abuse its discretion by granting the preliminary injunction, but it is necessary to modify the injunction to clarify that the parties are

permitted to immediately seek review before the STB, which is the tribunal best equipped to decide the issues of federal transportation policy implicated here.

As to the likelihood of irreparable harm, the district court's findings were not clearly erroneous. "[I]rreparable harm may be found where damages are difficult to establish and measure," Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 404 (2d Cir. 2004), such as where (as here) a party will otherwise lose customer relationships that account for an indeterminate amount of business over years, see id.; Ticor Title Ins. Co. v. Cohen, 173 F.3d 63, 69 (2d Cir. 1999). It was not clearly erroneous for the district court to find that Coastal's relationships with its customers could be permanently harmed by Coastal's inability to assure customers that its business will be ongoing.

It was also not clear error to find a likelihood of success on the merits. Coastal and NYA claim that the Interstate Commerce Commission Termination Act (the "Termination Act") preempts the Town's attempts to regulate Coastal's activity in NYA's rail yard, because the STB is vested with exclusive jurisdiction over "transportation by rail carrier," which includes the construction of rail facilities. See 49 U.S.C. § 10501(a)-(b); Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 642-43 (2d Cir. 2005). In Green Mountain, we held that notwithstanding the Termination Act's preemption provisions, state and local authorities retain police powers to enforce regulations that "protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions." 404 F.3d at 643. By the same token, however, state and local authorities cannot subject the construction of railroad facilities to pre-permitting processes where there are no clear construction standards and where the permit depends on the discretion of a local agency. Id. Green Mountain, much like this case, involved the construction of transloading facilities on railroad property, which we decided were within the STB's exclusive jurisdiction because they were "integral to the railroad's operation." Id. at 644; see also City of Chicago v. Atchinson, Topeka & Santa Fe R.R. Co., 357 U.S. 77, 87-89 (1958) (pre-ICCTA case holding that bus service between train terminals operated by a third party on a rail carrier's behalf was an "integral part" of interstate rail transportation).

As the Town argues, Green Mountain does not entirely resolve this case because it is Coastal, and not NYA, that conducts the day-to-day operations at the transloading facility. One STB decision reflects the agency's view that where C&D debris transloading is conducted by a third party on rail carrier property, rather than by the rail carrier itself, the transloading operations are only "by rail carrier" (and within STB's jurisdiction) under Section 10501(a) if the rail carrier holds out its own services through the third party as an agent or exerts control over the third party's operations. See Hi Tech Trans, LLC--Petition for Declaratory Order--Newark, NJ, STB Finance Docket No. 34192, 2003 WL 21952136, at *3-5 (S.T.B. Aug. 14, 2003); see also Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295, 308 (3d Cir. 2004) (holding that there was no preemption because no agency relationship existed and the transloading agreement "essentially eliminates [the railroad's] involvement in, and responsibility for, the operation of Hi Tech's facility.").

The Town urges that the Hi Tech cases should control the result here. However, the district court found that NYA exerted sufficient control over Coastal's operations to put them within the STB's exclusive jurisdiction. This was not clear error. While no NYA employees participated in Coastal's operations, the parties' agreement (1) gave NYA supervisory control over Coastal's transloading operations and the right to inspect or audit them; (2) required that NYA's logo was to appear on all of Coastal's marketing materials for the facility and that NYA was to pre-approve all such materials; and (3) said that, although the duties under all transportation documentation would be between NYA and the end customer, Coastal could execute the documents as agent for NYA. See Coastal, 2006 WL 270252, at *7. Magistrate Boyle, whose report the district court adopted, explicitly found an agency relationship between Coastal and NYA based on the terms of their agreement. (The agreement in Hi Tech disclaimed any agency relationship, see id.; Hi Tech, 2003 WL 21952136, at *2; Hi Tech, 382 F.3d at 308.) The Town contends that the agreement does not reflect the reality of how the business is conducted, citing the preceding lease agreement, which granted Coastal a great deal more independence. But the agreement and testimony concerning it suffice to support a finding of likelihood of success at the preliminary injunction stage.

Equitable factors weigh in favor of Coastal and NYA's position. Absent the injunction, the Town will be free to shut down Coastal's operations; according to NYA, this would effectively foreclose bulk cargo transloading operations at the only suitable site on Long Island. NYA has pointed out that it has volume obligations under its franchise agreement with LIRR that would be hard to meet if it could not benefit from transloading operations at issue. Green Mountain recognizes the interest of state and local authorities in enforcing health and safety regulations; but it is unclear here whether such a regulation has been violated.

The district court properly held that abstention under Younger v. Harris, 401 U.S. 37 (1971), was inappropriate. Younger and its progeny dictate that federal courts should decline to exercise jurisdiction where "(1) there is an ongoing state proceeding; (2) an important state interest is implicated in that proceeding; and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review" of federal claims. Diamond D Constr. Corp. v. McGowan, 282 F.3d 191, 198 (2d Cir. 2002). Younger abstention applies to ongoing state court proceedings, and to state administrative proceedings as well. See Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc., 477 U.S. 619, 627 (1986). The Town, citing Diamond D, urges that a state proceeding is ongoing whenever a party to a completed municipal administrative proceeding could have brought--but failed to bring--a state mandamus action to challenge the outcome. Diamond D does not support the Town's position, because in that case state administrative proceedings were still ongoing when the plaintiff brought a Section 1983 action and sought to preliminarily enjoin the state proceedings. 282 F.3d at 196. The parties conceded the general applicability of Younger, id. at 199, and we held that the "extraordinary circumstances" exception to Younger was inapplicable in part because the plaintiff had an adequate state remedy in the form of a mandamus proceeding in state court through which the plaintiff could have raised federal constitutional claims, id. at 201-02. There are no ongoing state proceedings here: the ZBA issued its final decision before the federal action was brought. Diamond D gives no support to the proposition that the availability of an Article 78 action after the completion of state administrative proceedings renders them ongoing perpetually.

The appellants also argue that the ZBA's factual determinations were entitled to issue-preclusive effect.

The "full faith and credit" provisions of 28 U.S.C. § 1738 apply only to state courts and not state administrative agencies. But under federal common law principles of issue-preclusion, the determination of a state administrative agency acting in a judicial capacity is generally entitled to the same issue-preclusive effect in federal court that it would be afforded in state court, provided the parties have had an adequate opportunity to litigate the issue. See Univ. of Tenn. v. Elliott, 478 U.S. 788, 799 (1986). New York courts apply issue-preclusive effect to the quasi-judicial findings of state administrative agencies, as well as municipal zoning boards, see Town of Wallkill v. Lachmann, 813 N.Y.S.2d 157, 158 (N.Y. App. Div. 2d Dep't 2006), but ordinarily do so only in actions brought beyond the period of limitation for an Article 78 challenge to the agency's decision. See, e.g., Allied Chem. v. Niagara Mohawk Power Corp., 528 N.E.2d 153, 157 (N.Y. 1988) (affirming application of issue preclusion but noting that the lower court properly declined to convert proceeding into an Article 78 proceeding because four month review period had elapsed before the action was initiated). Here, if the appellees had brought suit in an Article 78 state court proceeding--which would have been timely as of the date of the federal complaint--rather than an action in federal court, the state court would not have given the ZBA findings issue-preclusive effect: it would have reviewed them using a deferential standard of review after hearing any additional evidence it deemed necessary. See Doyle v. Amster, 594 N.E.2d 911, 913 (N.Y. 1992) ("[C]ourts may not interfere with [municipal zoning] decisions enjoying a rational basis, supported by substantial evidence in the record."); N.Y. Town Law § 267-c(4) ("If . . . it shall appear to the court [reviewing a zoning board determination] that testimony is necessary . . . , it may take evidence . . . , which shall constitute a part of the proceedings upon which the determination of the court shall be made."). Elliott does not hold that state law supplies the standard of review when a municipal administrative decision is timely challenged on federal preemption grounds in the federal forum. The very basis for federal jurisdiction here was the appellees' assertion that the Town and its ZBA were preempted by federal law from taking any action to regulate Coastal's activities; and that issue was never reviewed by any court, state or federal. For these reasons, the district court did not err by refusing to grant the ZBA's unreviewed findings preclusive effect.

Nevertheless, we conclude that the preliminary injunction must be modified. At oral argument, counsel for the Town represented that the Town and Pinelawn had refrained from petitioning the STB to define its jurisdiction (or lack thereof) over Coastal's operations because the preliminary injunction prohibited the Town from doing so. We doubt that the district court intended that inhibition. In any event, we modify the preliminary injunction to allow the parties to petition the STB for a declaratory judgment on the scope of its jurisdiction. "As the agency authorized by Congress to administer the Termination Act, the [STB] is uniquely qualified to determine whether state law should be preempted by the Termination Act." Green Mountain, 404 F.3d at 642 (citation and internal quotation marks omitted). Given the existing guidance from this Court and the STB, the district court did not abuse its discretion by issuing a preliminary injunction, but it is wholly appropriate that the parties should seek further guidance from the STB notwithstanding the pendency of litigation in federal court.

We have considered the Town's and Pinelawn's remaining arguments and find them to be without merit. For the reasons set forth above, the preliminary injunction is hereby modified to allow either party to file a petition to the STB for a declaratory judgment as to whether the operations at issue in this case are within the STB's jurisdiction, and--as modified--the preliminary injunction is affirmed.

FOR THE COURT:
THOMAS ASREEN, ACTING CLERK
By:

_____

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

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

Plaintiffs,

-against-

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, PETER CASSERLY, in his capacity as Commissioner of Planning and Development of the Town of Babylon, and PINELAWN CEMETERY,

Defendants.

----------X

REPORT AND RECOMMENDATION

CV 05-2032 (JS) (ETB)

TO THE HONORABLE JOANNA SEYBERT, UNITED STATES DISTRICT JUDGE:

Plaintiffs bring this action pursuant to the Interstate Commerce Commission Termination Act ("ICCTA"), 28 U.S.C. § 1331 and § 1337, ordering the defendants to show cause why the Town of Babylon should not be enjoined from enforcing a stop work order served on plaintiff Coastal Distribution, LLC on March 29, 2004, stating that Coastal Distribution, LLC was working without a permit. The Town of Babylon also contends that Coastal Distribution is illegally operating a commercial facility in a residential zone.[1]

On May 2, 2005, the action was referred to the undersigned to conduct a preliminary injunction hearing and issue a report and recommendation. An evidentiary hearing was held on May 19, 2005.

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[1]This issue was not raised by the Town in any pre- or post-evidentiary papers submitted on this application. While it was mentioned by counsel for the Town of Babylon at the evidentiary hearing (Tr. at 11), the Town has submitted no evidence on this issue.

I. BACKGROUND

Plaintiffs in this action, the New York and Atlantic Railway ("NYA"), and its contractor, Coastal Distribution, LLC ("Coastal") operate a transloading facility in Farmingdale, New York, at which cargo is transferred from rail to truck or vice versa. The transloading facility is located in the Town of Babylon ("Town"), on land leased by defendant Pinelawn Cemetery ("Pinelawn") to the New York State Metropolitan Transportation Authority ("MTA").

This action arises from the Town's issuance of a stop work order to plaintiff Coastal, declaring that Coastal was "working without a permit" by constructing a storage shed at the Farmingdale facility. Coastal had approached Town officials prior to commencement of any work on the storage shed, and was advised in writing by Town officials that the Town had no jurisdiction over the project because the facility was under the exclusive control of the Long Island Railroad ("LIRR"). Plaintiffs brought this action seeking to enjoin the Town from enforcing the stop work order as against Coastal on the ground that the Interstate Commerce Commission Termination Act ("ICCTA"), 28 U.S.C. § 1331 and § 1337, gives exclusive jurisdiction over rail operations to the Surface Transportation Board ("STB"), a Congressionally-created Board which plaintiffs argue preempts state and municipal authority to regulate railroad operations.

II. FINDINGS OF FACT

A. Relationship between New York and Atlantic Railway and the Long Island Railroad

Plaintiff New York and Atlantic Railway ("NYA") is a common carrier by railroad duly authorized to operate as a rail common carrier by the United States Surface Transportation Board ("STB"). (Tr. at 10, 27.) In November 1996, NYA (then known as "Southern Empire State Railroad Company") entered into a transfer agreement with the Long Island Railroad ("LIRR"), a

subsidiary of the New York State Metropolitan Transportation Authority ("MTA"). (See NYA Ex. 2.) Under the agreement, NYA was granted the exclusive right to handle rail freight on the lines of the LIRR. (Tr. at 25; Affidavit of Fred L. Krebs ("Krebs Aff."), President of NYA, ¶ 4.) Fred Krebs, the president of NYA, testified that the agreement stemmed in part from the governor's initiative in the mid-nineties to privatize the freight industry, thereby moving freight traffic off of the highways and onto the rails. (Tr. at 28.) The agreement between NYA and the LIRR is a twenty year franchise with an automatic ten-year renewal, provided that NYA meets certain volume requirements and comports with safety standards. (Tr. at 25.) Pursuant to the agreement, the subject rail facility located in Farmingdale, New York (the "Farmingdale facility") in the Town of Babylon (the "Town") was made available for NYA's use. (Krebs Aff. ¶ 3.) The Farmingdale facility is located on two parcels of land owned by Pinelawn Cemetery ("Pinelawn"), and leased to the MTA for use by the LIRR. (Coastal Ex. 3C.)

B. Relationship between Pinelawn Cemetery and the Long Island Railroad

The two parcels of land on which the Farmingdale facility sits were leased by Pinelawn to the MTA for 99 year terms. (Coastal Ex. 3C.) In a letter dated October 17, 2003 to an attorney at the law firm of Jenkins & Gilchrist Parker Chapin LLP, Roco Krsulic ("Krsulic"), Director of Real Estate at the MTA, stated that on behalf of the LIRR, the MTA is "hereby exercising it's [sic] option to renew the above-referenced lease dated November 1, 1905 for an additional 99 years, thereby extending it through October 31, 2103." (Id.) In the same letter, Krsulic stated that the MTA is "also hereby agreeing to reinstate and extend the lease dated August 30, 1904 for 99 more years, through July 31, 2102." (Id.) The letter includes the signature of the President of Pinelawn, next to the word "Concurrence." (Id.) Beneath his signature is a handwritten note stating "This concurrence refers to Aug 30 1904 lease." (Id.)

A dispute subsequently has arisen between Pinelawn and NYA as to the lease renewal of the parcel of land covered under the 1905 lease. (Tr. at 13-14.) This dispute is presently the subject of ongoing litigation in the Suffolk County Supreme Court, which reportedly has refused to issue Pinelawn a preliminary injunction against Coastal. (See Coastal Distribution LLC's Post Hearing Memorandum ("Coastal Post-Hearing Mem.") at 23 n.3.) The validity of the renewal of the lease(s) is not at issue in this action however. It is undisputed that the shed was constructed by Coastal in reliance on the validity of the lease renewal to the MTA and LIRR.

C. Relationship between New York and Atlantic Railway and Coastal Distribution

In 2002, NYA entered into an agreement (the "Lease Agreement" or "Lease") with co-plaintiff Coastal by which NYA leased the Farmingdale facility to Coastal for $2,000 per month (Tr. at 48; NYA Ex. 7.) The Lease Agreement was formed for the purposes of developing the Farmingdale facility into a successful rail-truck transloading facility where freight would be transferred from truck to rail and vice versa. (Tr. at 48.) The Lease required that Coastal meet certain volume requirements over the course of the leasehold period. (Tr. at 48; Krebs Aff. at ¶ 3; NYA Ex. 7.) Specifically, the Lease specified that NYA would have the right to terminate the contract if Coastal failed to handle 1200 carloads of freight in the first contract year, 1800 carloads in the second contract year, 2400 carloads in the third contract year, and 3200 carloads for each year thereafter. (NYA Ex. 7 ¶ C.3.)

In the fall of 2003, NYA and Coastal learned that the LIRR leased the land where the Farmingdale facility was situated from Pinelawn. (Tr. at 152.) In August of 2004, NYA and Coastal entered into another agreement, the Transload Facility Operations Agreement (the "Operations Agreement" or "Agreement"), which encompassed and superceded the 2002 Lease Agreement. The Operations Agreement did not significantly alter the nature of the operations at the

Farmingdale facility. (Tr. at 98; see also NYA Ex. 8.) The Operations Agreement provides that Coastal is responsible for the loading of freight at the Farmingdale facility, and NYA is responsible for the transportation of the freight. (Tr. at 33, 61; NYA Ex. 8.) Under the Agreement, Coastal is responsible for the marketing and customer service at the Farmingdale facility, setting the loading fees, and supplying the equipment. (Tr. at 67, 99; NYA Ex. 8.) Coastal pays NYA a usage fee of twenty dollars per car, and Coastal is required to meet the same minimum volume requirements set forth in the Lease Agreement. (Tr. at 122; NYA Ex. 8.) NYA is responsible for transporting the freight on rail cars after the cars have been loaded. (Tr. at 61; NYA Ex. 8.) NYA is also responsible for setting the rules governing how the loading and off loading are performed, and for assuring that the loaded cars comport with LIRR and federal safety standards. (Tr. at 62.) To this end, NYA employees check the condition of the cars and the loads each night, and periodically inspect the track, the yard, and the switch. (Id.)

D. Plaintiffs' Testimony Concerning the Operations at the Farmingdale Facility

The plaintiffs called two witnesses to testify to the daily operations at the Farmingdale facility. Fred Krebs, president of NYA, and Joseph Rutigliano, a Coastal principal, testified that the Farmingdale facility conducts two types of operations. Krebs and Rutigliano testified that the in-coming aspect of Coastal's operations involves handling "homogeneous loads" of freight, such as lumber, sheetrock, and steel, which individual businesses transport via rail using the services of Coastal and NYA. (Id. at 56, 165-66.) This use of the facility, whereby members of the public can utilize the railroad for transportation of freight, dates back to the 1900's, when the railroad provided "team tracks" for members of the public to unload cargo from teams of horses onto the rails for transport. (Id. at 31.)

The other aspect of Coastal's business– out-going freight– involves handling construction

and demolition debris ("C&D"). C&D is comprised of pieces of concrete that have been removed from construction sites, and may also include construction debris such as insulation, wood, metal, or glass. (Id. at 52, 56, 69.) The C&D arrives by truck from transfer stations where the material has been processed and sorted, and Coastal and NYA facilitate the outbound shipment of the material to an Ohio landfill. (Id. at 56, 165.) When the C&D arrives at the site, it has already been processed through a transfer station. (Id. at 166.) After the C&D is delivered, Coastal workers conduct a visual inspection of the materials and remove any remaining "contaminate" items that are prohibited from going to the landfill, such as metal, tires, and mattresses. (Id. at 103-104, 114.) Coastal employees then load the C&D onto the rail cars. (Id. at 115.) After the cars are loaded, NYA employees check to ensure the cars are loaded correctly, and then NYA transports the freight cars to the Ohio landfill. (Id. at 116.) Coastal collects the extracted metal for sale to a local scrap dealer, and returns any contaminates, such as tires or mattresses, to the customers who brought them. (Id. at 105-106.)

Rutigliano testified that prior to Coastal's involvement with the Farmingdale facility, "[t]he property was derelict, littered with abandoned vehicles [and] illegal dumps." (Tr. at 155.) Fred Krebs, president of NYA, testified that NYA and Coastal wanted to improve the Farmingdale facility to make it "safe and presentable and good for the entire neighborhood." (Id. at 52-53.) Coastal cleaned up the facility and in late 2003, Coastal began erecting a storage structure (the "shed") on the property. (Id. at 52-53, 155-56.) The shed that Coastal built is an open-sided structure which rises over a section of the tracks and provides a shelter beneath which cargo can be loaded and unloaded. (Id. at 56.) The shed also contains a misting system used to control dust created by the C&D. (Id.) Rutigliano testified that the purpose of the building is to house freight that needs to be protected from the weather, and to help keep dust levels to a minimum. (Id. at

156.)

Pursuant to the Transfer Agreement between NYA and the LIRR, Coastal obtained the approval of the LIRR before constructing the shed. (Tr. at 54; Declaration of Joseph Rutigliano, ("Rutigliano Decl.") ¶ 5.) Coastal also consulted with the Town of Babylon Department of Planning and Development on several occasions in 2003 to discuss Coastal's plans for the Farmingdale facility, including the construction of the shed. (Tr. at 148-52.) Rutigliano testified that Town officials repeatedly advised him that the Town had no jurisdiction over LIRR property, and the Town repeatedly refused to review the proposal for the shed. (Id.) In response to the attempts by Coastal's architect to formally file the plans with the Town, Peter Casserly, Commissioner of the Town of Babylon Planning & Development, signed a letter dated August 8, 2003 in which the Town of Babylon stated that it had no jurisdiction over the property. (Id. See also Rutigliano Decl. Ex. D, Correspondence from Peter M. Casserly to Oliver Wilhelm, dated August 8, 2003 ("As per our conversation, I am confirming that the Town of Babylon has no jurisdiction over the Long Island Railroad Property.").) Additionally, prior to beginning construction on the shed, Coastal sought and received confirmation from Pinelawn that Pinelawn intended to reinstate LIRR's lease on the two parcels for a new 99 year term. (Tr. at 152; Rutigliano Decl. ¶ 8.) Rutigliano testified that in October 2004, he was provided a letter by Steven Locke, an officer of Pinelawn, signed by the president of Pinelawn, specifically reinstating LIRR's lease of the parcels. (Tr. at 154; See also Rutigliano Decl. Ex. E, Correspondence from Roco Krsulic, MTA Director of Real Estate, to Jonathan S. Gaynin, dated October 17, 2003, stating that LIRR is exercising its option to renew the leases between the LIRR and Pinelawn. The letter is counter-signed by the president of Pinelawn Cemetery.) The court credits Rutligliano's testimony.

In late October 2003, Coastal began construction on the shed. (Rutigliano Decl. ¶ 7.) The shed was virtually completed in January 2004. (Id. ¶ 8.) On January 15, 2004 Coastal received a letter from attorneys for Pinelawn stating that Pinelawn deemed the lease for the northern parcel of the Farmingdale site to have terminated, and directing Coastal to remove their facilities, including the shed, from that parcel. (Id.) On March 29, 2004, the Town of Babylon issued a stop work order. (Id. ¶ 9.) The stop work order stated that Coastal was working without a permit, but did not identify any code or ordinance which Coastal was deemed to have violated. (Id. See also Order to Show Cause Ex. A.) On March 29, 2004, Rutigliano met with Acting Commissioner Timothy Bessemer ("Bessemer"), who had issued the stop work order. (Rutigliano Decl. ¶ 7.) According to Rutigliano, Bessemer stated that he had been instructed to issue the stop work order based on Pinelawn's claim that the LIRR's lease had expired and that Pinelawn owned the land. (Id. ¶ 9.) Rutigliano testified that Bessemer additionally stated that the order was issued just to "get Coastal's attention," and that it applied only to the construction of the shed, and not to Coastal's operation or occupancy of the site. (Tr. at 190-91; Rutigliano Decl. ¶ 7.) This testimony, which was not disputed by the Town at the evidentiary hearing conducted herein, is credited by the Court.

On March 31, 2004, the Town wrote a letter to Coastal indicating that the stop work order had been issued because Coastal had failed to obtain a building permit before constructing the shed. (Id.) The stop work order does not include a reference to any code or ordinance Coastal was deemed to have violated, and to date, Coastal has never been apprised of the code or ordinance under which the stop work order was issued. The Town attorney also asserted at the hearing that the Farmingdale facility is in a residential zone, but the railroad facility has been in continuous operation, notwithstanding the zoning, since 1904. The Town has submitted no

evidence or written argument addressing this issue.

With the approval of the LIRR and NYA, Coastal appealed the stop work order to the Zoning Board of Appeals ("ZBA") of the Town of Babylon. (Id. ¶ 12.) The ZBA is comprised of members appointed by the town supervisor, Steve Bellone ("Bellone"). (Id.) In an inter-office memo dated September 9, 2004, the date of the first public hearing, Bellone requested that the ZBA deny Coastal's appeal of the stop work order. (Id. See also Rutigliano Decl. Ex. F.) After two public hearings on the matter, on April 22, 2005, the BZA denied Coastal's appeal. (Rutigliano Decl. ¶ 12. See also BZA Findings.) Thereafter, on April 26, 2005, Coastal and NYA filed the complaint in the instant action. The Town consented not to enforce the stop work order during the pendency of this motion for a preliminary injunction. (Tr. at 15.)

E. Defendants' Testimony Concerning the Operations at the Farmingdale Facility

Defendants claim that Coastal is operating a transfer facility, as opposed to a transload facility, at which Coastal sorts, processes, and transports municipal solid waste ("MSW") deposited at the site. (Tr. at 201, 205, 211; Post-Hearing Mem. Of Law in Opp'n to Mot. for Prelim. Injunction Submitted by Town of Babylon ("Town Post-Hearing Mem."), at 20.) The defendants' proof is woefully inadequate.

The defendants called two witnesses to testify to Coastal's activity at the Farmingdale facility. The first defense witness, Michael J. Posillico ("Posillico"), is the owner and operator of a construction, environmental, and development business located across the street from Coastal in an adjacent industrial zoned area. (Tr. at 222.) One aspect of Posillico's business involves recycling contaminated soil. (Tr. at 233.) Posillico has a variety of New York State Department of Environmental Conservation ("DEC") permits for handling hazardous materials, and he testified that he has experience running a waste facility and transporting waste. (Tr. at 224.) Posillico

testified that obtaining a permit to operate a transfer facility is very difficult, and that the transfer permit is the "holy grail of permits to obtain in New York State." (Tr. at 228.) Posillico acknowledged that he does not hold such a permit. (Id.)

Posillico opined that based on his previous experience with transfer and transload facilities, Coastal is operating a transfer, as opposed to a transload, facility. (Id. at 223, 226.) He bases his opinion on his observations of Coastal employees, from his business across the street, dumping materials on the ground, separating them, and then loading the materials onto the rail cars. (Id. at 222-223.) Posillico testified that his concern is that Coastal is operating a transfer facility "with no regulation or permits for safety, concern of human health." (Id. at 223.)

I place little weight in Mr. Posillico's testimony. Posillico has never visited the Coastal site. (Id. at 230.) He was unable to specify types of material he observed being dumped and separated at the facility, nor was he aware of hazards present at Coastal. (Id. 232.) Further, Posillico testified that he has no knowledge of the kind of paperwork that accompanies the loads delivered to Coastal, nor does he know where the trucks come from that deliver materials to Coastal. (Id. at 229-30.) Even if his testimony was credited, it fails to establish that Coastal is operating a transfer, as opposed to a transload, facility at the Farmingdale site. As discussed further, infra Part III.B.1.b(i), the New York State Department of Environmental Conservation ("NYDEC"), which has jurisdiction over municipal solid waste and the operation of a transfer facility in the State of New York, has inspected the Farmingdale facility and issued a written certification that Coastal is engaged in transloading operations on behalf of NYA, and that the NYDEC is preempted from exercising jurisdiction over the facility. (See Rutigliano Decl. Ex. I.)

The defendants' second witness, John Ahearn ("Ahearn") is a private investigator who conducted undercover videotape surveillance of Coastal on May 13 and May 17, 2005. (Id. at

244-245.) Ahearn observed Coastal from various locations, including the rooftop of Posillico's building, for approximately eight hours over the course of the two days. (Id. at 260-261; 266-67.) Ahearn narrated three portions of the surveillance tape, totaling approximately five minutes, which the defendants considered to be the relevant portions. (Id. at 247, 249.) Ahearn testified that on May 13, 2005 at 10:36 a.m. he observed a load being dumped inside the shed at the Farmingdale facility, and workers examining and removing black plastic bags from the load. (Id. at 249-251; Pinelawn Ex. A.) On May 17, 2005, Ahearn testified that at 11:58 a.m., he observed a small machine placing aluminum scrap into a container labeled "Mid-Island Salvage." (Tr. at 252-53; Pinelawn Ex. B.) In the background, he observed a large machine picking debris from one large pile and loading it into the rail cars. (Tr. at 252-253.) Finally, Ahearn testified that on the same day, at 11:58 a.m. and 12:05p.m., he observed a machine and a worker throwing small amounts of aluminum into a pile. (Id. at 252-253, 263.) Ahearn testified that, apart from the incidents he narrated, the rest of the time conducting surveillance he observed routine operations of trucks dumping material on the ground in the shed and Coastal employees loading the material into the railroad cars. (Id. at 264.)

The witnesses' testimony is consistent with Coastal's operation of a transloading facility. As discussed supra, Part II.D, the plaintiffs' witnesses testified that when trucks arrive at Coastal, they discharge their cargo onto the asphalt floor inside the shed, Coastal employees inspect the load and remove materials prohibited by the Ohio landfill, and then Coastal employees load the C&D into the rail car. (Id. at 104-06, 167-169.) The Court credits the testimony of the plaintiffs' witnesses. The undercover surveillance videotapes taken by defendants of the Farmingdale facility fail to establish that municipal solid waste is being processed there, or that the facility is a transfer facility.

Notably, neither of defendants' witnesses has ever set foot onto the Coastal site. Further, neither witness testified to observing any MSW being handled at the site. Posillico testified that in his opinion, Coastal is a transfer facility because the material that is delivered to Coastal is dumped on the ground and inspected before being loaded into the rail cars, however, Krebs testified that this type of inspection is necessary to ensure that only permissible material is transported to the landfill in Ohio. (Id. at 103-04.) Furthermore, the surveillance video taken by defendants' witness supports the testimony of plaintiffs' witnesses, in that it shows workers visually inspecting the piles of dumped material and periodically removing non-C&D material from the debris. The video certainly does not evidence the extensive sorting and processing that would need to take place on a continuous basis if Coastal was in fact operating a transfer, as opposed to a transload, facility.

Based on the testimony of all of the witnesses, I find that the Farmingdale facility is a transload facility which is not engaged in transporting municipal solid waste.

III. DISCUSSION AND CONCLUSIONS OF LAW

A. Federal Jurisdiction

The defendants in this action argue that this complaint should be dismissed under the Younger abstention doctrine for lack of federal jurisdiction. (Town Mem. Of Law in Opp'n to Mot. For Prelim. Injunction ("Town Pre-Hearing Mem in Opp'n") at 4-7.) The plaintiffs contend that Younger abstention does not apply and this matter is ripe for consideration by the federal court because the Town Zoning Board of Appeals has rendered its final decision and no action is pending in the state court. (Pls.' Mem. of Law in Support of a Preliminary Injunction ("Pls.' Mem. in Supp.") at 8; NYA Post-Hearing Mem. at 23-25.)

Abstention is a judicially created doctrine by which the court "is primarily concerned, in

an equitable setting, with considerations of comity and federalism, both as they relate to the State's interest in pursuing an ongoing state proceeding, and as they involve the ability of the state courts to consider federal constitutional claims in that context." City Partners, Ltd. v. Jamaica Sav. Bank, 454 F. Supp. 1269, 1271 (E.D.N.Y. 1978) (citing Ohio Bureau of Employment Servs. v. Hodory, 431 U.S. 471, 477, 97 S. Ct. 1898, 1902-03, 52 L. Ed. 2d 513 (1977)). Under the Younger abstention doctrine, derived from the Supreme Court's holding in Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746 (1971), federal courts are generally required "to abstain from taking jurisdiction over federal constitutional claims that involve or call into question ongoing state proceedings." Diamond D Constr. Corp. v. McGowan, 282 F.3d 191, 198 (2d. Cir. 2002) (citing Younger, 401 U.S. 37, 43-44, 91 S.Ct. 746, 27 L. Ed.2d 669). The Younger abstention doctrine applies to state administrative proceedings, such as the ZBA proceedings which preceded this federal action. See Ohio Civil Rights Comm'n v. Dayton Christian Schs, 477 U.S. 619, 106 S. Ct. 2718 (1986). Younger abstention is appropriate if: "(1) there is an ongoing state proceeding; (2) an important state interest is implicated in that proceeding; and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of the federal constitutional claims." Diamond D, 282 F.3d at 198. Still, "[d]espite the strong policy in favor of abstention, a federal court may nevertheless intervene in a state proceeding upon a showing of 'bad faith, harassment or any other unusual circumstance that would call for equitable relief.'" Id. (citing Younger, 401 U.S. at 54, 91 S. Ct. 746).

Here, Younger abstention is not required because there is no ongoing state proceeding. The ZBA rendered its final decision, denying Coastal's appeal, on April 22, 2005. Following the ZBA's final decision, neither party commenced an action in state court. Accordingly, this Court is entitled to exercise federal jurisdiction over this matter. See Hawaii Housing Auth. v. Midkiff,

467 U.S. 229, 239 (1984) ("Younger is not a bar to federal court action when state judicial proceedings have not themselves commenced.").

B. Legal Standard for a Preliminary Injunction

The purpose of a preliminary injunction is to prevent legal harm and preserve the status quo until final determination of the action. WarnerVision Entm't v. Empire of Carolina, Inc., 101 F.3d 259, 261- 62 (2d Cir. 1996). Generally, in order to prevail on a motion for preliminary injunctive relief, the movant must show "(a) irreparable harm and (b) either (1) likelihood of success on the merits, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Forest City Daly Housing, Inc. v. Town of North Hempstead, 175 F.3d 144, 149 (2d Cir. 1999); Jackson Dairy Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir.1979). However, "where a preliminary injunction is sought against government action taken in the public interests pursuant to a statutory or regulatory scheme, the less-demanding 'fair ground for litigation' standard is inapplicable, and therefore a 'likelihood of success' must be shown." Forest City Daly Housing, 175 F.3d at 149 (citing International Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 70 (2d Cir. 1996). See also No-Spray Coalition, Inc. v. City of New York, 252 F.3d 148, 150 (2d Cir. 2001). Additionally, if the injunction "'will alter rather than maintain the status quo,' the movant must show 'clear' or 'substantial' likelihood of success." No-Spray Coalition, 252 F.3d at 150 (citing Rodriguez v. DeBuono, 175 F.3d 227, 233 (2d Cir. 1999)). The movant must carry the burden of persuasion by a clear showing, and the harm must be imminent or certain, not merely speculative. Tom Doherty Assoc., Inc. v. Saban Entm't, Inc., 60 F.3d 27, 37 (1995). Further, it has long been held that "[w]here there is an adequate remedy at law, such as an award of money damages, injunctions are unavailable except in extraordinary circumstances." Id. (citing Morales v. Trans

World Airlines, Inc., 504 U.S. 374, 381, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992); Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees & Rest. Employees Int'l Union, 239 F.3d 172, 177 (2d Cir. 2001)).

1. Likelihood of Success on the Merits

The legal issue in this case is whether the Town's building code permit requirements and zoning laws are preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), and if so, whether Coastal and its operations fall within the purview of the ICCTA. In order to demonstrate a likelihood of success on the merits, the plaintiffs must demonstrate that upon review, the Court will likely find: (1) that the Town's building permit requirements and zoning laws are preempted by the ICCTA; (2) that Coastal's transloading operations fall within the category of rail "transportation" for purposes of the ICCTA; and (3) that Coastal, by virtue of its relationship with NYA, is considered a rail carrier under the ICCTA.

a. Preemption

Where Congress has enacted an express preemption provision, the scope of the preemption is determined by the language of the preemption provision and the surrounding statutory framework. Medtronic, Inc. v. Lohr, 518 U.S. 470, 486 (1996). The statute at issue here, the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10101, et seq., was enacted by Congress in 1995. 49 U.S.C. § 10101. The statute states that the remedies provided by the ICCTA "with respect to rail transportation are exclusive and preempt the remedies provided under Federal or State law." Id. Further, the legislative history indicates that the principal purpose of the ICCTA was to eliminate the remaining areas where states retained regulatory authority over railroad facilities and operations. See H.R. 104-311, 104th Cong., 1st Sess. 82-83 (1995) reprinted in 1995 U.S.C.C.A.N. 793, 807-08. ("This provision replaces the railroad portion of

former Section 10501. Conforming changes are made to reflect the direct and complete pre-emption of State economic regulation of railroads.... The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system. Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive.")

In general, courts have consistently held that the ICCTA preempts state and local regulations. See, e.g., R.R. Ventures, Inc. v. Surface Transp. Board, 299 F.3d 523, 562-63 (6th Cir. 2002); Friberg v. Kansas City S. Ry. Co., 267 F.3d 439 (5th Cir. 2001); City of Auburn v. United States, 154 F.3d 1025, 1030 (9th Cir. 1998), cert denied 527 U.S. 1022 (1999); Dakota, Minnesota, & E. R.R. Corp. v. South Dakota, 236 F. Supp. 2d 989, 1005 (D. South Dakota 2002), aff'd in part & rev'd in part on other grounds, 362 F.3d 512 (8th Cir. 2004). But see Florida E. Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324, 1330-1332 (11th Cir. 2001) (holding that the ICCTA did not preempt a municipal zoning regulation).

In Green Mountain R.R. Corp. v. Vermont, a case involving facts similar to those herein, the Second Circuit recently stated: "[T]he plain language of Section 10501 reflects clear congressional intent to preempt state and local regulation of integral rail facilities. 'It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations.'" 404 F.3d 638, 645 (2d Cir. 2005) (quoting CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581 (N.D. Ga.1996)).

Additionally, the Surface Transportation Board ("STB"), the Board that Congress vested with exclusive jurisdiction over transportation by rail carriers, has stated that although state and local regulations which protect public health and safety are not preempted by the ICCTA, "[l]ocal

land use restrictions, like zoning requirements, can be used to frustrate transportation-related activities and interfere with interstate commerce. To the extent that they are used in this way (e.g., that restrictions are placed on where a railroad facility can be located), courts have found that the local regulations are preempted by the ICCTA." Borough of Riverdale, STB Finance Docket No. 33466, 1999 WL 715272, at *6 (S.T.B. September 10, 1999).

Of particular relevance to this case is the STB's finding that

> local entities such as the Borough can not require that railroads seek building permits prior to constructing or using railroad facilities because of the inherent delay and interference with interstate commerce that such requirements would cause. . . Specifically, under the law enacted by Congress, as interpreted by the courts, it appears to us that state and local entities can enforce in a non-discriminatory matter electrical and building codes, or fire and plumbing regulations, so long as they do not do so by requiring the obtaining of permits as a prerequisite to the construction or improvement of railroad facilities.

Id.

Here, the Town seeks to enjoin Coastal from conducting business at the Farmingdale transloading facility due to Coastal's alleged violation of Town zoning[2] and building codes. I find that the plaintiffs will likely succeed in establishing on the facts here that the Town's authority to enforce its building codes, as applied to facilities on the property leased by NYA through the LIRR, is preempted by the ICCTA.

b. The Definition of Transportation Under the ICCTA

Prior to ICCTA, the Interstate Commerce Commission ("ICC") had

[2]There is no evidence in this case that any portion of the Farmingdale facility is in a residential zone. It is discussed here only because it was raised orally by counsel for the Town. The issue was not briefed or otherwise raised by the Town in any of its written submissions. Accordingly, the argument is without merit, based on the lack of any proof.

exclusive and plenary jurisdiction over interstate railroad transportation. To replace the authority of the ICC, the ICCTA created the Surface Transportation Board ("STB"), which was granted exclusive jurisdiction over

> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.

49 U.S.C. § 10501(b).

As the jurisdiction of the STB is limited to "transportation by rail carrier," 49 U.S.C. § 10501(a), the scope of the STB's jurisdiction relies on the statutory definitions related to rail carrier transportation.

In the ICCTA, Congress defined "transportation" to include:

> (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, <u>regardless of ownership or an agreement concerning use</u>; and
>
> (B) services related to that movement, including receipt, delivery, elevation, <u>transfer in transit</u>, refrigeration, icing, ventilation, <u>storage</u>, <u>handling</u>, <u>and interchange of</u> passengers and <u>property</u>.

49 U.S.C. § 10102(9) (emphasis added).

The statute defines a "rail carrier" as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5).

Finally, the definition of a "railroad" includes

> (A) a bridge, car float, lighter, ferry, and intermodal equipment used

> by or in connection with a railroad;
>
> (B) the road used by a rail carrier and owned by it or operated under an agreement; and
>
> (C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation.

49 U.S.C. § 10102 (emphasis added).

In this case, the defendants argue that Coastal's operation at the Farmingdale facility does not fall within the scope of "transportation by rail carrier," and consequently, that Coastal's activities do not fall within the exclusive federal jurisdiction of the STB. (Pinelawn Mem. in Opp'n at 10.)[3]

The defendants rely heavily on the Third Circuit Court of Appeals ruling in Hi Tech Trans, LLC v. State of New Jersey, 382 F.3d 295 (3d Cir. 2004). In that case, Hi Tech entered into a license agreement with a railroad company whereby Hi Tech would operate a C&D transloading facility at a rail yard. Hi Tech, 382 F.3d at 298-299. As in the instant case, the contracting company was responsible for loading the C&D into the rail cars, and the railroad company was responsible for transporting the cars to an out-of-state disposal facility. Id. at 299. Unlike the instant case, however, the agreement between the rail carrier and Hi Tech disclaimed the creation of an employment or an agency relationship between the parties, and specifically provided that neither party could represent that such a relationship existed. Id. at 308; Hi Tech Trans. LLC, Petition for Declaratory Order, STB Finance Docket No. 34192, 2003 WL 21952136, at *2 (S.T.B. Aug. 14, 2003). Additionally, unlike the present case, in Hi Tech the New Jersey

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[3]Although Pinelawn Cemetery was permitted to intervene as a party defendant in this action on consent of all parties, at the evidentiary hearing and in post-hearing submissions it has made no contentions unique to its position as landowner of the property at issue, but instead simply argues those issues that are applicable to the defendant Town of Babylon.

Department of Environmental Protection ("NJDEP") investigated the site and concluded that Hi Tech was operating it as a transfer, as opposed to a transload, station, and was illegally handling solid waste. Id. at 300. The NJDEP had issued an Administrative Order stating that Hi Tech was operating in violation of state laws, and ordered Hi Tech to cease solid waste operations within twenty days. Id. Those are the predicate facts giving rise to that action. Hi Tech then filed a complaint seeking a declaration that the state laws requiring solid waste transfer stations to obtain certain permits were preempted by the ICCTA. Id. at 301.

The court ultimately held that the Hi Tech operation did not involve "transportation by rail carrier," but rather, transportation "to rail carrier." Id. at 308 (emphasis in original). The court noted that, "[T]he mere fact that the [railroad] ultimately uses rail cars to transport the C&D debris Hi Tech loads does not morph Hi Tech's activities into 'transportation by rail carrier.'" Id. at 309. The court rejected Hi Tech's preemption claim. Id. at 310.

(I) Hi Tech is Distinguishable and Not Applicable

The facts of Hi Tech are distinguishable from the facts in the instant case because here: (1) the relationship between the railroad and the transloading company is of a different nature than that in Hi Tech; (2) the New York State Department of Environmental Conservation has investigated the Farmingdale facility and concluded that Coastal is operating a transloading facility and falls within the definition of transportation under the ICCTA; (3) the defendants have failed to establish that Coastal is operating a transfer facility or handling municipal solid waste; and (4) plaintiffs have adequately established that the Farmingdale facility is being used and operated as a transloading facility related to the transportation of freight by rail carrier.

The relationship between NYA and Coastal differs from the relationship between the

railroad and the contractor in Hi Tech because in Hi Tech, the railroad had no responsibility for Hi Tech's operations, and the railroad and Hi Tech explicitly disclaimed any agency or employment relationship. Hi Tech Trans. LLC v. New Jersey, 382 F.3d 295, 308 (3d Cir. 2004). More pointedly, the agreement between Canadian Pacific Railway ("CPR") and Hi Tech specifically provided that "neither party may represent that such a relationship exists." Hi Tech Trans. LLC, Petition for Declaratory Order, STB Finance Docket No. 34192, 2003 WL 21952136, at *2 (S.T.B. Aug. 14, 2003). Based on the language of the contract, the court found that the agreement between Hi Tech and CPR "essentially eliminates CPR's involvement in, and responsibility for, the operation of Hi Tech's facility." Hi Tech, 382 F.3d 295 at 308.

Here, the plaintiffs agree that by entering into the Operations Agreement, "NY&A retain[ed] Coastal as its agent to operate the Farmingdale facility as part of NY&A's common carrier services. . . ." (Pls.' Mem. In Supp. at 2.) Still, the defendants argue that Coastal is not an agent of NYA because the Farmingdale facility is wholly under the control of Coastal. The defendants point to the testimony of the plaintiffs' witnesses, which established that Coastal uses its own employees and equipment, decides how to run the facility, sets the rates, and handles all customer interaction. (Town Post-Hearing Mem. at 18.)

The Court of Appeals has defined agency as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." In re Shulman Transp. Enters., Inc., 744 F.2d 293, 295 (2d. Cir. 1984) (citing Restatement (Second) of Agency § 1(1) (1958)) (additional citation omitted). The factual elements required to establish the existence of an agency relationship are: "the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in

control of the undertaking." Cabrera v. Jakabovitz, 24 F.3d 372, 386 (2d Cir. 1994) (citing Restatement (Second) of Agency § 1 cmt. b (1958)). It is essential to an agency relationship that the principal exercise control over the agent. In re Shulman, 744 F.2d 293 at 295. Additionally, "A person's statement that he was an agent of another may not establish that relationship as an incontrovertible fact, but it can help establish that that individual himself believed that he was acting on another's behalf and under another's control." Cabrera, 24 F.3d 372 at 387 (citing Slotkin v. Citizens Casualty Co. of N.Y., 614 F.2d 301, 316 (2d Cir. 1979); Restatement (Second) of Agency § 285 cmt. a (1958)).

Here, while Coastal conducts many of the operations at the Farmingdale facility, I conclude that it is not autonomous and does so "for and on behalf of [NYA]," within the terms of the Operations Agreement. (NYA Post-Hearing Mem. at 13; NYA Ex. 8 ¶ 1.01.) The Operations Agreement specifies that "RAILROAD shall control the Facility's operations," and shall have the right to review and audit Coastal's records and inspect Coastal's facility. (NYA Post-Hearing Mem. at 14; NYA Ex. 8 ¶ 1.02 (capitals in original).) Moreover, the contract specifies that Coastal's services shall include only those "commodities, movements and equipment. . . approved by RAILROAD," and that Coastal is required to immediately cease and desist from any operation which is found to be "in violation of any contractual or other obligation of RAILROAD upon notice from Railroad." (NYA Post-Hearing Mem. at 14; NYA Ex. 8 ¶ 1.04 (capitals in original).) The Operations Agreement further specifies that Coastal must obtain NYA's advance written approval of all written marketing materials used by Coastal, and that any such marketing material and signage must prominently indicate NYA's name and/or logo. (NYA Post-Hearing Mem. at 14; NYA Ex. 8 ¶ 1.04.) Further, while Coastal sets and collects the loading fees, Coastal is required to pass a portion of the fee on to NYA in the form of a usage fee for each car loaded. (NYA Post-

Hearing Mem. at 15; NYA Ex. 8 ¶ 3.02.) Finally, under the Operations Agreement, Coastal is required to develop increasing levels of traffic at the Farmingdale facility or face termination of the contract. (NYA Post-Hearing Mem. at 15; NYA Ex. 8 ¶ 5.01.) Notably, the Hi Tech court's review of the agreement between the Canadian Pacific Railroad and Hi Tech did not reveal any provisions analogous to those stated herein.

Furthermore, Krebs, the president of NYA, testified that he visits the Coastal facility regularly, a "minimum of two times a week." (Tr. at 57.) He testified that there are NYA personnel regularly check the condition the tracks and the switch. (Id. at 62.) Moreover, regular inspections are conducted by NYA personnel to ensure that the freight cars are properly loaded and balanced. Whereas the railroad in Hi Tech "disclaim[ed] any liability for Hi Tech's operations," and in fact, did not join Hi Tech in any of the litigation arising from the state's attempt to regulate Hi Tech's facility, here NYA and Coastal have joined as party plaintiffs in this action and both testified to the interests each company has in insuring the success of the Farmingdale facility. (Tr. at 46-47; 183-84.)

Based on the foregoing, I find that the language of the contract and the conduct of the plaintiffs establishes an agency relationship between NYA and Coastal. While Coastal has autonomy in many aspects of its operation at the Farmingdale facility, Coastal is obliged to operate and does operate within the confines of the delegation of responsibility in the Agreement wherein NYA retains ultimate control over Coastal. Coastal's entire operation is subject to NYA's authority to: (1) inspect Coastal's books and operations, (2) order Coastal to cease and desist any unapproved operations at the Farmingdale site, (3) set minimum volume requirements for Coastal, and (4) approve the commodities and equipment handled by Coastal.

A further important distinguishing factor is that in Hi Tech, the New Jersey Department of

Environmental Protection ("NJDEP") determined that Hi Tech was operating a transfer station and that the site was a "solid waste facility," and issued the cease and desist order since Hi Tech was operating the facility without required permits, registration, or design approvals, in violation of several state laws. Hi Tech, LLC v. New Jersey, 382 F.3d 295, 300 (3d Cir. 2004). Furthermore, the Surface Transportation Board found that Hi Tech had "'muddied the waters' by seeking and receiving multiple informal staff opinions under various hypothetical factual situations favorable to Hi Tech and then using them or parts of them to its advantage." Hi Tech Trans, LLC, Petition for Declaratory Order, STB Finance Docket No. 34192, 2003 WL 21952136, at *3 (S.T.B. Aug. 14, 2003).

In sharp contrast, here, Coastal has made every effort to operate in accordance with state and local law. See discussion supra, Part II.D. Most significantly, in summer 2004, an inspector from the New York State Department of Environmental Conservation ("NYDEC") toured the Coastal facility, presumably to determine compliance to New York State laws as well as applicable NYDEC regulations. (Tr. 165.) In a subsequent writing the DEC concluded that the operation of the Farmingdale facility constituted a transloading operating subject to the exclusive jurisdiction of the ICCTA. The DEC letter, dated February 15, 2005, from Anthony J. Cava at the NYDEC, states:

> It is the New York State Department of Environmental Conservation's (the Department) understanding that Coastal has been contracted by the New York and Atlantic Railway (NY&A Railway) to operate transloading operations that NY&A Railway offers to its customers. Pursuant to the contract between the parties, NY&A Railway has control of the facility and the operations. The Department's Regional Staff have raised the question as to whether or not Part 360 regulations are preempted by the STB. Based on a review of this specific case, it has been determined that the Department is preempted from requiring a Part 360 transfer stating permit, since: (1) the transloading operations are considered

> transportation pursuant to 49 U.S.C. 10102(9)(A), (B); and (2) the transportation activities are performed by a rail carrier pursuant to 49 U.S.C. 10102(5). The STB has found that transloading activities fall within the definition of transportation. In this case, while the transportation activities are not directly performed by NY&A Railway, Coastal is acting on behalf of NY&A Railway, and the Coastal's activities are part of the railroad service that is being offered to NY&A Railway's customers. The Department continues to retain police powers to control odor, noise and vermin complaints.

Rutigliano Decl. Ex. I.

It is clear from the language of this letter that the state is unequivocal in its finding that Coastal is operating a transloading facility on behalf of NYA, and that the state is preempted from exercising jurisdiction over the facility, apart from controlling odor, noise and vermin complaints. The position of the NYDEC here stands in stark contrast to New Jersey's position in the Hi Tech litigation.

Finally, the facts of Hi Tech diverge even more significantly from the facts here when one considers the scarcity of evidence defendants have to offer in support of their allegations that Coastal is operating a transfer facility and handling municipal solid waste ("MSW"). In Hi Tech, the state determined that Hi Tech was illegally operating a transfer station and handling solid waste based on a site visit by New Jersey Department of Environmental Protection investigators. Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295, 299-300 (3d Cir. 2004). Neither Hi Tech nor the court disputed the state's findings Id. at 298.

In this case, both the state and Coastal characterize the Farmingdale facility as a transload, as opposed to a transfer, station. Defendants attempt to refute this characterization by relying on testimony from Posillico, the owner of a competing waste recycling company across the street, who stated that he had never been on Coastal's site, and had never observed any solid waste at the

site. (Tr. at 223.) The innocuous nature of Coastal's operation was further confirmed by the private investigator, Ahearn, who spent two days observing Coastal and whose observations are discussed more fully supra, Section II.E.

Lastly, if this facility was being operated as a transload facility involving municipal solid waste, as the Town claims, it would fall within the exclusive jurisdiction of the NYDEC. The Town of Babylon has no authority to enforce the applicable provisions of state law. See N.Y. Environmental Conservation Law § 27-0707, § 71-0201 (McKinney 1997). Thus, unlike the plaintiff in Hi Tech, the Town here has no standing to enforce the provisions that it alleges the plaintiffs have violated.

For all of the foregoing reasons, Hi-Tech is clearly distinguishable and inapplicable to the facts presented here.

(ii) The Second Circuit Held in Green Mountain that Operations at a Transloading Facility were Considered "Transportation" for the Purposes of the ICCTA

In Green Mountain R.R. Corp. v. State of Vermont, 404 F.3d 638 (2d Cir. 2005), the Green Mountain Railroad proposed to build a transloading facility on its property in Vermont. Id. at 639. Vermont argued that the construction of the facility was subject to Act 250, a Vermont environmental land use statute that mandates preconstruction permits for land development. Id. The state had granted the railroad and its lessee a building permit for a portion of the facility, but refused to grant the railroad a permit for the construction of a storage shed on the site. Id. at 640-41. When the railroad constructed the shed without the permit, the State of Vermont issued a notice of violation, and the railroad ultimately filed suit seeking a declaration that the ICCTA preempts the state land use statute. Id. The court ruled in favor of the railroad, holding that "Act 250's pre-construction permit requirement is preempted for two

reasons: (I) it 'unduly intefere[s] with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations'; and (ii) it can be time-consuming, allowing a local body to delay construction of railroad facilities almost indefinitely." Id. at 643 (quoting Town of Ayer, STB Finance Docket No. 33971, 2001 WL 458685, at *5 and citing Green Mountain R.R. Corp.v. State of Vermont, 404 F.3d 438, 2003 U.S. Dist. LEXIS 23774 at *13). The court went on to note that "[The Railroad] 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.'" Id. at 644. The Second Circuit's conclusion in Green Mountain comports with the decisions of several other courts, which have held that the activities which take place at transload facilities are "transportation" within the purview ICCTA. See, e.g., Canadian Nat'l Ry. Co. v. City of Rockwood, 2005 WL 1349077, at *4 (E.D. Mich. June 1, 2005); Grafton & Upton R.R. Co. v. Town of Milford, 337 F. Supp. 2d 233, 239 (D. Mass. 2004); Norfolk S. Ry. Co. v. City of Austell, 1997 WL 113647, *6 (N.D. Ga. 1997).

Based on the foregoing, I find that the Farmingdale facility is a transload facility and that the plaintiffs are likely to succeed on the argument that the Farmingdale facility falls within the definition of "transportation" under the ICCTA.

c. The Definition of "Rail Carrier" for Purposes of the ICCTA

While the Green Mountain court squarely addressed the scope of the ICCTA's definition of "transportation," it was not required to interpret the ICCTA's definition of "rail carrier," since in Green Mountain, the railroad itself conducted the transloading operations. Green Mountain R.R. Corp. v. State of Vermont, 404 F.3d 638, 640 (2d Cir. 2005).

Here, the defendants contend that even if the Court finds that the Farmingdale transloading facility is included in the scope of "transportation" under the ICCTA, the ICCTA is still inapplicable to Coastal because Coastal is not a rail carrier. The defendants argue that Coastal not a rail carrier and not even an agent of NYA, the rail carrier here. Instead, defendants maintain that Coastal is "nothing more than a customer of NY&A." (Town Post-Hearing Mem. at 18.) The defendants makes this argument based on the testimony of the plaintiffs' witnesses which established that NYA has limited involvement in the operation of the Farmingdale facility. The facts do not support the defendants' claims.

The ICCTA defines a "rail carrier" as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). Crucial to the interpretation of this definition is Congress' definition of "transportation" under the ICCTA, which specifies that "transportation" includes services and equipment "of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use." 49 U.S.C. § 10102(9) (emphasis added).

I conclude that when the ICCTA granted the Surface Transportation Board exclusive jurisdiction over transportation by rail carriers, it intended that the term "rail carrier" include any entity or person providing "service and equipment" related to the movement of freight by rail, pursuant to contract with a rail carrier. This reading comports with other courts' interpretations of "rail carrier" under the ICCTA.

For example, even prior to the enactment of ICCTA, in City of Chicago v. Atchison, Topeka & Santa Fe Ry. Co., 357 U.S. 77, 78 S. Ct. 1063, 2 L. Ed. 2d 1174 (1958), the Supreme Court interpreted the definition of "rail carrier" under the Interstate Commerce Act to include a private bus corporation that contracted with the railroad as its agent to provide passenger transfer

services between railway stations. 357 U.S. at 88-89. The Court stated:

> We believe the [Interstate Commerce Act] authorizes the railroads to engage in this transfer operation themselves or to select such agents as they see fit for that purpose without leave from local authorities.. . . National rather [than] local control of interstate railroad transportation has long been the policy of Congress. It is not at all extraordinary that Congress should extend freedom from local restraints to the movement of interstate traffic between railroad terminals. Serious impediments to the efficient and uninterrupted flow of this traffic might well result if the City could deny the railroads the right to transfer passengers by their own vehicles or by those of their selected agents.

357 U.S. 77 at 87-88. While the statute under review in City of Chicago was the Interstate Commerce Act ("ICA"), which preceded the ICCTA, the ICCTA was intended to broaden– not narrow– the pre-emptive scope of the ICA. Thus, the Court's holding in City of Chicago still provides an accurate reading of Congressional intent when it comes to the federal preemption of state regulation of railroads. See e.g., H.R. Conf. Rep. No. 104-2539, at 14993 (December 18, 1995) ("This provision replaces the railroad provision of former Section 10501. Conforming changes are made to reflect the direct and complete pre-emption of State economic regulation of railroads. . . The former disclaimer regarding residual state police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system.").

Other courts around the country that have confronted facts similar to those presented here have concluded that the ICCTA applies to third-party contractors engaged in activities closely tied to the movement of passengers or freight by rail. See, e.g., Canadian Nat'l Ry. Co. v. City of Rockwood, 2005 WL 1349077, at *6 (E.D. Mich. June 1, 2005) (holding that the ICCTA applied to the activities of a third-party contractor which provided transloading services to the railroad because the contractor was working "under the auspices of a rail carrier"); Grafton & Upton R.R

Co. v. Town of Milford, 337 F. Supp. 2d 233 (D. Mass. 2004) ("Although the Milford Yard will clearly have a trucking component, an examination of the analogous scenarios discussed in the cited case law demonstrates that such a non-rail component is still subject to the preemptive effect of the ICCTA.").

The defendants rely on the Eleventh Circuit Court of Appeals decision in Florida E. Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001), for the argument that the activities of railroad contractors doing transloading are not within the scope of the ICCTA. However, the Florida E. Coast court reached its holding after finding that, based on the statute's full definition of "transportation," the clause broadening the scope of the definition to include things "regardless of ownership or an agreement concerning use" applies only to equipment related to the movement of passengers or property by rail and not to services related to such movement.[4] Id. at 1332-33. However, the terms "warehouse," "yard," and "facility," as related to the movement of property by rail, would all seem descriptive of the Farmingdale facility that is at issue here. The terms are all included in that portion of the definition to which, according to the Eleventh Circuit opinion, preemption applies.

In addition, the Eleventh Circuit's interpretation is not consistent with the interpretation of

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[4]The full definition of "transportation" under the ICCTA is:

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(9).

the Second Circuit in Green Mountain, discussed supra. In Green Mountain, the Second Circuit noted that under ICCTA, "'[t]ransportation' is expansively defined. . . Certainly, the plain language [of the statute] grants the Transportation Board wide authority over the transloading and storage facilities undertaken by Green Mountain." Green Mountain Railroad Corp. v. Vermont, 404 F.3d 638, 642 (2d Cir. 2005).

Based on the foregoing, the Court finds that the plaintiffs are likely to succeed in establishing that Coastal falls within the scope of the "rail carrier" provision of the ICCTA, and therefore will likely prevail in this action.

d. Considerations of Equitable Estoppel

In its post-hearing memorandum, NYA argues that the Town should be estopped from enforcing the stop work order because Coastal invested millions of dollars in site improvements at the Farmingdale facility in reliance on the Town's repeated assertions that it did not have jurisdiction over the LIRR property. (NYA Post-Hearing Mem. at 21.) There is no dispute as to the facts. The defendants argue that the Town cannot be estopped from enforcing its zoning code against the plaintiffs based on the general policy against relying on the doctrine of estoppel to prevent a municipal agency from discharging its statutory duties. (Pinelawn Post-Hearing Mem. at 23.)

The New York Court of Appeals has stated that, "[G]enerally, estoppel may not be invoked against a municipal agency to prevent it from discharging its statutory duties." Parkview Assocs v. City of New York, 71 N.Y.2d 274, 282 (1988) (citations omitted). Nevertheless, in certain situations, a local government may be estopped from taking inconsistent positions where a citizen has relied to his detriment on the government's earlier position. For example, in In re Faymore Development Co., Inc. v. Bd. of Standards & Appeals, City of New York, 45 N.Y.2d 560 (1978),

the New York Court of Appeals addressed a situation in which the city revoked a developer's building permit one and a half years after granting it, when the community planning board and community groups objected to the proposed development. 45 N.Y.2d at 563. Between the time the permit was granted and later revoked, the developer in Faymore spent in excess of $1,380,000 developing the site. Id. at 564. The Court of Appeals reinstated the building permit, noting, "At the outset the building department revoked the permit on technical grounds. The defect, if there was one, had been evident on the face of the plans for over a year and a half and was only acted upon when community opposition to the project was heard." Id. at 566. The court held that a municipality may "be estopped from claiming the benefit of its own inaction, whether intentional or merely negligent." Id. See also In re 15555 Boston Road Corp. v. Finance Administrator, City of New York, 61 A.D.2d 187, 192 (N.Y. App. Div. 2d Dept 1978) ("A municipality may be estopped by its misleading nonfeasance if there would otherwise be a manifest injustice.")

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

The Town unequivocally expressed no regulatory interest in the operations of the Farmingdale facility. The plaintiffs went ahead and made substantial improvements to the site. The plaintiffs have relied on the oral and written disclaimer of jurisdiction by Town officials to their extreme detriment. Therefore, I find that the Town should be equitably estopped from

asserting any jurisdiction (assuming arguendo that such jurisdiction exists) over the Farmingdale facility at this time.

2. Coastal and NYA Have Suffered Irreparable Harm, and Will Continue to Suffer Irreparable Harm, without the Preliminary Injunction

In order to prevail on their motion for a preliminary injunction, plaintiffs must not only demonstrate a likelihood of success on the merits, but must also demonstrate irreparable harm. Jackson Dairy Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979). Here, Coastal asserts that it has suffered irreparable harm because as a start-up business, Coastal's ability to invest in needed equipment and to market its services to potential clients has been curtailed by the stop work order. (Coastal Post-Hearing Mem. at 15; Tr. at 183-184.) NYA argues that it has demonstrated irreparable harm because NYA has committed the use of its Farmingdale facility to Coastal for the purpose of conducting transloading operations, and the stop work order is frustrating that purpose. (NYA Post-Hearing Mem. at 25.) Further, both Coastal and NYA argue that they have suffered irreparable harm in the form of loss of customers, goodwill, and reputation.[5] (Coastal Post-Hearing Mem. at 17; NYA Post-Hearing Mem. at 25-26.)

Defendants contend that plaintiffs' motion for preliminary injunction should be denied

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[5]Plaintiffs argue in the alternative that they have suffered irreparable harm as a matter of law because the Town has denied them the constitutional right to participate in interstate commerce. (Pls.' Mem. in Supp. at 23.) Based on the Court's findings with respect to the plaintiffs' primary arguments, the Court finds it unnecessary to examine the merits of this alternative argument. Moreover, the cases cited by the plaintiffs appear to be distinguishable from the situation here. See, e.g., Molloy v. Metropolitan Transportation Authority, 94 F.3d 808, 810 (2d Cir. 1996) (discussing merits of plaintiffs' claim that a Metropolitan Transit Authority plan to reduce staff violates the American with Disabilities Act); Gerling Global Reinsurance Corp. of America v. Quackenbush, 2000 WL 777978, at *1 (E.D.Cal. Jun 09, 2000) (discussing merits of plaintiffs' claim that portions of California's Holocaust Victim Insurance Relief Act and accompanying regulations are unconstitutional).

because plaintiffs have not demonstrated irreparable harm, since plaintiffs' injuries are largely tied to their claims of lost revenue. (Town Mem. in Opp'n at 13; Pinelawn Mem. in Opp'n at 8-9.) Defendant Pinelawn further notes that Coastal's claims of lost revenue are merely speculative, as Coastal has never stopped operations at its facility. (Pinelawn Post-Hearing Mem. at 11. See also Tr. at 72, 127.)

It has been long held that expenditures of money, time, and energy, in the absence of an injunction, are not enough to demonstrate irreparable harm. Jayaraj v. Scappini, 66 F.3d 36, (2d Cir. 1995) (citing Sampson v. Murray, 415 U.S. 61, 90, 94 S.Ct. 937, 953, 39 L. Ed.2d 166 (1974)). Under certain circumstances, loss of goodwill and damage to reputation may constitute irreparable injury. John B. Hull, Inc. v. Waterbury Petroleum Products, Inc., 588 F.2d 24, 29 (2d Cir. 1978) (citing Interphoto Corp. v. Minolta Corp., 417 F.2d 621 (2d Cir. 1969)). Further, "[a]n anticipated loss of market share growth may suffice as an irreparable harm." Freedom Holdings Inc. v. Spitzer, 408 F.3d 112, 114-15 (2d. Cir. 2005) (citing Register.com Inc. v. Verio, Inc., 356 F.3d 393, 404 (2d Cir.2004) (additional citations omitted)). Additionally, the court may consider the effect a denial or grant of preliminary injunctive relief will have on the public interest, though this consideration does not obviate the need to demonstrate irreparable injury. Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944); United States v. City of New Haven, 447 F.2d 972 (2d Cir. 1971). Overall, "in exercising its equity power, the court must weigh the equities, balancing conveniences and injuries." Crossbow, Inc. v. Dan-Dee Imports, Inc., 266 F. Supp. 335, 341 (S.D.N.Y. 1967) (granting a preliminary injunction to a manufacturer alleging trademark infringement, where plaintiffs demonstrated the likelihood that defendant's continued deceptive practices would cause irreparable injury in terms of loss of customers, goodwill, and reputation).

To a limited extent, business losses which Coastal and NYA would undoubtedly incur under the enforcement of the stop work order could be calculated and compensated by money damages. However, the plaintiffs' testimony established that Coastal and NYA will both suffer additional irreparable harm in the form of loss of goodwill from existing customers, loss of future contracts, and the loss of market opportunities, if a preliminary injunction is not granted. Rutigliano testified that Coastal has refrained from entering a contract with a scrap metal company which would be a very large customer. (Tr. at 183-84.) It has also delayed signing contracts with other new customers, due to the uncertainty caused by the stop work order and the present application. In addition, Coastal has refrained from making investments that would enhance services for existing customers, and has refrained from entering long-term contracts with existing customers. (Id. at 178, 184.)

The court credits the testimony of the plaintiffs' witnesses and finds that Coastal and NYA have suffered, and will continue to suffer, the loss of customers, goodwill, and reputation if a preliminary injunction is not granted. Critical to this Court's determination is the fact that Coastal is a start-up company attempting, with NYA, to establish a market in the developing industry of moving freight on and off Long Island on the LIRR lines. Transloading is almost 100 percent of NYA's growth, and just as NYA's contract with Coastal requires Coastal to meet certain volume requirements, the LIRR's contract with NYA requires NYA to grow the freight business. (Id. at 25, 30, 48, 49.) The irreparable harm here is unique to this fledgling industry. Once a client contracts with Coastal, that client has in essence agreed to abandon its relationship with the trucking industry in exchange for reliance on transportation by rail. (Id. at 183-84.) The unrebutted testimony is that it is difficult to re-establish a "dedicated" trucking contract once those trucking ties are severed. (Id.) Here, any potential client must contend with the uncertainty of the

outcome of this litigation and Coastal's future. (Id.) Coastal has adequately established that potential clients have been especially reluctant to give up their rights to the security of a "dedicated haul" by truckers, particularly in light of the difficulty of establishing good trucking arrangements, due to the issuance of the stop work order. (Id.) These damages cannot be adequately determined for purposes of liquidated damages.

Consequently, based on the loss of goodwill, future contracts and market opportunities, I conclude that both Coastal and NYA, by virtue of their co-dependency, will suffer irreparable injury unless the preliminary injunction sought here is issued. At least one other court recently faced with similar facts has come to this same conclusion. See Canadian Nat'l Ry. Co. v. City of Rockwood, 2005 WL 1349077, at *9 (E.D. Mich. June 1, 2005) (holding that, upon review of facts very similar to the instant case, "[t]he loss of future contracts and the loss of the opportunity to enter a market, here the market for transportation of [construction and demolition debris], are inherently speculative, making these damages too difficult to calculate. Hence, these loses (sic) are also irreparable.").

Lastly I note that the public will benefit from the continued use of the Farmingdale facility as a transload operation throughout the pendency of this action. The cargo that is transported off Long Island by rail by NYA through Coastal's transload operation is cargo that would otherwise be transported by truck on congested roadways throughout Long Island and the City of New York. The decrease in heavy truck traffic loaded with construction debris undoubtedly furthers the public health and safety of the millions of drivers who daily utilize the roadways within the Eastern District of New York.

IV. CONCLUSION

Based on the foregoing, I find that the plaintiffs have suffered, and will continue to suffer,

irreparable harm if a preliminary injunction is not granted. The plaintiffs will likely succeed on the merits of their claims that: (1) the Town's zoning laws are preempted by the ICCTA; (2) transloading operations fall within the category of rail "transportation" for purposes of the ICCTA; (3) Coastal, by virtue of its relationship with NYA, is considered a rail carrier under the ICCTA; and (4) the Town of Babylon is estopped from asserting jurisdiction based on Coastal's detrimental reliance on the Town's assertion that it held no jurisdiction over the property. The undersigned recommends that the plaintiffs be granted a preliminary injunction to enjoin the Town from enforcing the stop work order and any applicable zoning regulations against Coastal.

OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Any objections to this Report and Recommendation must be filed with the Clerk of the Court with a copy to the undersigned within ten (10) days of the date of this report. Failure to file objections within ten (10) days will preclude further appellate review of the District Court's order. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), and 72(b); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993), cert. denied, 513 U.S. 822 (1994); Frank v. Johnson, 968 F.2d 298 (2d Cir. 1992), cert. denied, 506 U.S. 1038 (1992); Small v. Sec'y of Health and Human Servs., 892 F.2d 15, 16 (2d Cir. 1989) (per curiam).

Plaintiffs' counsel is directed to notify all parties of this report upon receipt.

SO ORDERED.

Dated: Central Islip, New York
July 15, 2005

/s/ E. Thomas Boyle
E. THOMAS BOYLE
United States Magistrate Judge