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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35057

**NEW YORK & ATLANTIC RAILWAY COMPANY'S
MOTION TO DISMISS AND IN THE ALTERNATIVE
PETITION FOR RECONSIDERATION**

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February 20, 2008

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New York & Atlantic Railway Company ("NYA") moves this Board to reopen this docket and dismiss the Petition because the enactment of the Consolidated Appropriations Act, 2008 prevents this Board from providing due process to NYA and its agent, Coastal Distribution, LLC ("Coastal"). In the alternative, if this Board retains this proceeding, NYA seeks reconsideration pursuant to 49 C.F.R. §1115.3 of the Board's January 31, 2008 Decision ("January Decision") because of new law, new evidence and material error as shown below.

MOTION TO DISMISS

While this Petition was pending before the Board and after all briefs had been submitted, Congress passed the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, ("the Act"), and it was signed into law. Buried in this massive appropriations bill, was a provision denying funding for any Board action "approving" certain activities, including the transloading of construction and demolition debris, without receiving certain written assurances from the Governor Section 193. See *Consolidated Appropriations Act, 2008*, STB Ex Parte No. 675 (served January 16, 2008). Section 193 of the Act would appear to apply to this docket

This proceeding is before the Board on the deferral of the District Court for the Eastern District of New York. That deferral was suggested *sua sponte* by the Second Circuit Court of Appeals in *Coastal Distribution, LLC v Town of Babylon*, 216 Fed.Appx. 97 (2nd Cir 2007). While the Second Circuit noted the expertise of this Board, it did not and could not have anticipated that the Board's hands would be tied in such a fashion that only one outcome was permissible.

It would be unconstitutional for the Board to proceed to adjudicate the rights of the parties in this matter. Congress has not amended the Interstate Commerce Commission Termination Act, 49 U.S.C. §§10101, *et seq.* ("ICCTA") It is ICCTA that grants this Board authority and jurisdiction, and it is ICCTA that defines the scope of the preemption that flows from this Board's exclusive jurisdiction. Nevertheless, Congress has intervened in this Board's statutory authority by using the appropriations power to dictate the outcome of a pending proceeding in which the Board is acting in its quasi-judicial role. An appropriations law that purports to alter the rules of decision concerning a statutory claim without amending the statute itself violates Constitutional separation of powers. *United States v Klein*, 80 U.S. (13 Wall) 128, 146-47 (1871). See *Robertson v Seattle Audubon Society*, 503 U.S. 429 (1992), *Clark v United States*, __ Fed Cl __, 2007 WL 2142652 (Fed Cl 2007); *City of Chicago v Bureau of Alcohol, Tobacco & Firearms*, 423 F.3d 777 (7th Cir. 2005). By use of the appropriation power, Congress has attempted to compel its interpretation of the existing substantive law of the land. Congress has put its thumb heavily on the scales of justice. Still, unless and until it is changed, ICCTA is the law of the land, and this Board has the authority and obligation to interpret and apply that law.

Fortunately, it is unnecessary to resolve the Constitutionality of Section 193 in this proceeding. Rather, the Board can avoid considering Constitutional issues by simply dismissing this action. The Congressional intervention necessarily taints any appearance of fairness in the Board's handling of this case. Without regard to the law or the facts, the Board appears to be constrained to rule against the Respondents. Even if the Board eschews reliance on the terms of this legislation, the appearance of an unstated bias is impossible to remove. What agency would risk its funding over this adjudication? A more apparent denial of fundamental fairness is hard to imagine. We cast no aspersion on the Board, but Congress has placed this Board in an untenable position. If the Board decides this matter, NYA and Coastal will have been denied due process by the intervention of Congress.

The Board has broad discretion in determining whether to issue a declaratory order. See *InterCity Transp Co v United States*, 737 F.2d 104 (D.C Cir 1984). Under the peculiar circumstances of this case, the Board should exercise its discretion to recuse itself from consideration of this issue at this time and allow the Courts to interpret the law. The only appropriate action for this Board is to withdraw the January Decision, dismiss the petition and inform the District Court for the Eastern District of New York that because of the Congressional action, it is not appropriate for this Board to decide the questions presented.

REQUEST FOR RECONSIDERATION

In the event that this Board determines to continue this proceeding notwithstanding the manifest injustice of doing so*, NYA sets forth the reasons why the Board should reconsider its January Decision.

SUMMARY OF ARGUMENT

New material evidence has become available in the form of a formal veto message from the Governor of New York setting forth the State's interest in keeping the Farmingdale Yard facility open.

In addition, the January Decision is premised on three material errors of fact:

- 1) There is substantial evidence in the record that NYA and Coastal hold out the services of the Farmingdale transload facility to the public
- 2) There is substantial evidence in the record that NYA retains responsibility and liability for the operation of the Farmingdale transload facility
- 3) There is substantial evidence in the record that NYA has the right to and does exercise control over Coastal at the Farmingdale transload facility

The January Decision is based on three material errors of law:

- 1) NYA and Coastal were deprived of the opportunity to fulfill the conditions set forth in the Consolidated Appropriations Act, 2008, Section 193.
- 2) Under settled law carried forward through the enactment of ICCTA, railroad functions performed by agents and contractors are subject to federal preemption.

* The basis for ruling for Respondents in this proceeding would be that Section 193 is directed at proceedings that approve specified operational activities. As set forth in detail below, those activities are not the subject of this proceeding and the Board is not called upon to approve them. Rather, this proceeding reviews the application of a local zoning ordinance to railroad construction, and preemption of zoning regulations in connection with railroad construction is consistent with the intent of Section 193.

3.) The Board has exclusive jurisdiction over construction of rail facilities that preempts local zoning laws without regard to the subsequent operator of the facility.

NEW EVIDENCE

On December 5, 2007, after this matter was fully briefed and submitted, the Governor of New York vetoed legislation that would have shut down the Farmingdale transload facility. His veto message contains important new facts concerning the State's support of the operations taking place at this facility. A copy of the Governor's veto message is attached.

Governor Spitzer notes that this bill, like a similar bill vetoed by Governor Pataki last year, was proposed in response to the very dispute now before this Board: "a construction and demolition waste facility operating in the Town of Babylon.. ." Governor Spitzer states that the New York Metropolitan Transit Authority, New York Department of Transportation, New York Department of Environmental Conservation and the New York Department of State all opposed this bill. The Governor also recites that

The New York State Department of Transportation ("DOT") indicates that closure of the rail facility in Babylon would result in an additional 39,500 loaded 20-ton trailer dump trucks – and an equal number of empty returning trucks – traveling on downstate roads and bridges each year, which would have an adverse impact on traffic congestion, bridge wear and air quality. In addition the bill would permit localities to impose divergent requirements on rail operators, which could result in a patchwork of laws that conflict with or undercut statewide oversight by the Department of Environmental Conservation ("DEC").

The situation in Babylon, unlike other situations in New Jersey, is one in which all the relevant State agencies oppose parochial zoning action fueled by "Not In My Backyard!" sentiments. This squares with the fact -- overlooked in the January Decision -- that the

Farmingdale facility is in full compliance with all State and local public health and safety and environmental laws, the only regulation at issue is a local zoning ordinance. No operator of the Farmingdale facility (whether manned by Railroad employees or by contractor employees) can comply with the Babylon zoning law, because no one can move the railroad to a different part of town.

MATERIAL ERRORS OF FACT

1. NYA IS HOLDING OUT TRANSLOADING SERVICE

The January Decision finds as a matter of fact that, “there is no evidence that . NYAR is holding out Coastal’s transloading services as part of the common carrier services that NYAR offers to the public” Slip op 5-6. That finding is erroneous. NYA’s website identifies the Farmingdale Yard as a transload facility, A-456. NYA’s published “tariff” specifically lists Farmingdale as a Group 2 station, A-243,546, and quotes rates to and from Farmingdale A-547 NYA’s logo appears prominently at the Farmingdale facility, A-1072, and its logo is displayed on all marketing materials. A-918

Not only does NYA hold itself out to provide transloading services, it has in fact repeatedly provided such services to the shipping public at Farmingdale Yard The record contains vivid color pictures of transloaded freight consigned to or from public customers -- not just C&D debris -- that actually has been transloaded at Farmingdale These shipments include sheetrock, A-1078-80; oversized steel plate, A-1086-88; telephone poles, A-1092-94; and bricks, A-1096-97 The president of NYA also testified without contradiction that the Farmingdale facility has been used for transloading inbound and outbound plastic pellets, A-231 The record colorfully depicts these

numerous bulk material commodities, transloaded for non-C&D customers, also moving through NYA's Farmingdale transload facility. It was further established at trial that substantial amounts of other bulk materials would move through this facility but for the legal uncertainty generated by the extended litigation about the facility. A-358-59

With respect to C&D, the record reflects that transloading is not limited to any single customer. To the contrary, dozens of different producers, mostly permitted transfer stations, but also various other generators of debris bring their waste product to Farmingdale for rail transportation to distant landfills. A-340-41. NYA holds Farmingdale out to the public for transload service, and the public is receiving that service.

The January Decision also finds as a matter of fact that "there is no evidence that NYAR has ever quoted rates or charged compensation for use of Coastal's [sic] transloading facility" That finding is erroneous. Aside from describing the facility as Coastal's (it is not, see p 19 infra) this statement simply assumes the Board's ultimate conclusion that Coastal is not NYA's agent. The fact is that the Agreement requires all "transportation documents" must be between NYA and the customer, that such documents must be on a form approved by NYA, and that NYA explicitly appointed Coastal to act as agent for NYA in executing such documents.

All bills of lading and similar documents for outbound rail shipments from the Facility (collectively, "Transport Documentation") for the Commodities transloaded at the Facility shall be between RAILROAD and the Customer, but Coastal, as RAILROAD'S agent may execute such Transportation Documentation on behalf of RAILROAD.

Art. 2.01, A-139. All rates for all services provided at Farmingdale are quoted by Coastal as agent for NYA. The sums collected by Coastal are collected as agent for NYA, and

NYA allows Coastal to retain the bulk of that money as payment for its services for NYA. This is no different from the fact that CSX Transportation and Canadian Pacific Railroad, as agents for NYA, collect transportation charges and remit to NYA its portion. Art. 2 02, A-139 NYA is not set up to collect and account for individual loads and movements, so it has designated others as agents for that purpose

The January Decision is based upon material factual error.

2. NO LIABILITY FOR FARMINGDALE YARD

The January Decision finds that, “. NYAR has assumed no liability or responsibility for operations at the Farmingdale Yard ...” Slip op 6 To the extent that is a factual finding, it is erroneous as a matter of fact NYA remains responsible to LIRR for the condition of the property NYA as the originating or terminating carrier has obligations to its shippers, to car owners and other carriers. Further, NYA still has responsibility for the condition and operation the yard in connection with injuries to trespassers, invitees and employees. Review of the Transfer Facility Operating Agreement as a matter of fact that nothing in the Agreement exculpates NYA (nor could it) from NYA's liability to third parties The Agreement merely allocates the ultimate cost for some of those potential liabilities between NYA and Coastal. (See discussion, pp. 13-15, infra).

To the extent that the January Decision finds as a matter of fact that NYA does not retain responsibility or liability for the Farmingdale Facility, it is based on a material error of fact.

3. INSUFFICIENT CONTROL

The January Decision turns on the factual finding that NYA does not exert “sufficient” control over Coastal to make operation of the Farmingdale Yard an NYA operation. In reaching this determination the Board fails to account for the following undisputed facts

a. **Coastal is required to produce railroad traffic.** The January Decision fails to acknowledge that NYA’s purpose in establishing the Coastal arrangement, like the prior arrangements with another operator, is to increase throughput at Farmingdale A-220 Like the prior operators, including CSXT’s bulk handling affiliate, Coastal loses all rights at Farmingdale if it fails to generate sufficient throughput. A-143. NYA in fact has terminated prior operators at Farmingdale, who failed to produce enough throughput A-222-23, and it has “controlled” Coastal by ensuring that Coastal works diligently and effectively for NYA’s benefit. It is important to note that the throughput is not a product generated by Coastal for Coastal’s own use The bulk commodity is both delivered by the railroad to consignees at Farmingdale (sheetrock, poles, steel, plastic pellets, etc) and delivered to the railroad daily by dozens of generators of C&D debris A-340-41. Since Coastal does not generate these commodities, it must aggressively seek out such loads to meet its required throughput. NYA is Coastal’s “800-pound gorilla ”

b. **NYA controls virtually all aspects of Coastal’s operations.** The January Decision does not reflect that all “commodities, movements and equipment” at the facility must be approved by NYA. Article 1.04(a). A-135. In fact, NYA has prohibited handling of municipal solid waste. A-363. NYA has required Coastal to reload cars that were not properly loaded. A-233-34 NYA inspects the tracks and

requires Coastal to maintain them properly Article 1 07, A-137. NYA promulgates all rules concerning customers, Coastal employees and visitors at the Facility and concerning safety at the Facility, Art. 1 04(b). NYA shares with Coastal the authority to promulgate rules concerning the operation of the facility. Installation and removal of equipment is subject to NYA approval. *Id.* Operations at the Facility are subject to the supervisory authority of the nearby NYA Superintendent. Art 1 02 NYA's President personally inspects the facility at least twice a week A-232-33

c. **Operations at the Facility comply with all applicable rules.** The January Decision fails to recognize that Coastal is required by the Transload Facility Operations Agreement "to comply with any and all applicable governmental health, safety and environmental rules or regulations." Art. 1 04(b), A-136. The Decision also fails to recognize that the Facility does in fact comply with all such regulations. A-339-40

The finding in the January Decision that NYA does not control Coastal is premised on a material error of fact

MATERIAL ERRORS OF LAW

New York and Atlantic respectfully suggests that the January Decision contains at least three material legal errors. The first error is procedural, in that NYA has been denied any opportunity to comply with the new procedures contained in Section 193 of the Act to obtain the consent of the Governor of New York. The second two errors are substantive: First, the opinion confuses cases where third party contractors seek to wrap themselves in federal immunity with this situation, in which the railroad itself has taken responsibility and has announced in every reasonable way that the operator is the

railroad's agent, and therefore the railroad is responsible for the agent's conduct. Second, the opinion fails to distinguish the typical "trash" cases involving actual operations of a facility, from this case, in which a zoning regulation would prevent a railroad from constructing a railroad facility: The local regulation involved here is a zoning ordinance that was invoked by building inspectors to "Stop Work" on the construction of a rail facility, and the STB has exclusive jurisdiction of construction of rail facilities not only under §10504(b)(1), but also independently under §10504(b)(2) -- without regard to whether the construction is being performed "by a rail carrier."

1. The Parties Have Been Denied the Opportunity to Submit Certification From the Governor.

As demonstrated by New York Governor Eliot Spitzer's veto message, the Governor and the several involved state agencies support operation of this facility. In fact, the New York DOT assisted in establishing this facility from the outset. A-948 Coastal is contractually required to comply with "all applicable health, safety and environmental rules or regulations," and both NYA and Coastal have consistently represented throughout this litigation that they do comply and will comply with all applicable public health, safety, and environmental standards for the transloading operation at Farmingdale Yard. The New York Department of Environmental Control inspected the Farmingdale facility and found no violations. A-339-40. The only regulation that NYA does not and cannot comply with is Babylon's zoning ordinance. That ordinance is the subject of this proceeding. Accordingly, there is every reason to expect that if asked, Governor Spitzer would provide the kind of written assurance that Congress presumably sought when enacting the Consolidated Appropriations Act. It is unfair and a denial of due process for this Board, while operating under the strictures and

influence of this legislation, to rule against Respondents without even affording them a chance to demonstrate that this operation is within the ambit approved by Congress

New York & Atlantic respectfully requests that before the Board takes action subject to the Consolidated Appropriations Act, it reconsider the January Decision and afford the Respondents a reasonable opportunity to petition the Governor of New York as contemplated by that Act

2. Railroad Operations are Preempted from Local Regulation Even if the Operation is Performed by a Contractor.

a. Under settled law, a rail carrier may contract services.

It is undisputed that if NYA used NYA's own employees to conduct loading operations at Farmingdale Yard, then Babylon could not enforce its zoning code, and the transload operation could be located where it is despite Babylon's wishes. Counsel for Babylon represented to the District Court

Mr. Clark: " The exemption only goes to rail carriers. It's clear, no dispute about that, New York and Atlantic is a rail [carrier] They went to the Board, got licensed As a result they are entitled to the exemption that goes with that As [counsel for Coastal] said, if a railroad builds a building, we can't require them to get a building permit. In most cases we would agree with that " A-185.

Thus it is no overstatement to say that Babylon's position, and the effect of the January Decision, is that by virtue of contracting the loading activities at Farmingdale to Coastal, Babylon gains the ability to zone the transload operation right out of its town (Farmingdale Yard is located within an area where the Town zoning ordinance prohibits transfer stations. See discussion at p. 16, infra)

The January Decision ignores decades of settled law by seriously limiting a rail carrier's ability to contract operations At least since 1911 when addressed by the

Supreme Court, the courts and the ICC have recognized that a railroad could hire a third party to provide part of its transportation service.

As the carrier is required to furnish this part of the transportation upon request ... there is nothing to prevent his hiring the instrumentality instead of owning it.

Interstate Commerce Comm v Duffenbach, 222 U.S. 42, 44 (1911)(transloading to grain elevator). The Court specifically held that a contractor providing services to a railroad cannot escape common carrier obligations

It is not important that [facility operator], as an incident to the service it renders to shippers and to the line-haul carriers, it acts as agent to the latter. The character of the service, in its relation to the public, determines whether the calling is a public one, and a common carrier does not cease to be such merely because in rendering service to the public it acts as the agent of another.

Union Stock Yard & Transit Co of Chicago v United States, 308 U.S. 213, 220 (1939) (emphasis added). The Supreme Court explicitly extended the reach of federal preemption to railroad contractors in *City of Chicago v The Atchison, T & S F Ry Co*, 357 U.S. 77, 88 (1958)(roadway transfer between railroads):

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.

The Supreme Court did not find it necessary to examine the contracts between the railroad and its contractor to determine whether the contractor's operations were preempted from local regulation. Contractor operations were likewise found to be preempted in *Lone Star Steel Co v McGee*, 380 F.2d 640 (5th Cir. 1967), *cert denied*, 389 U.S. 977, *Kieronski v Wyandotte Terminal RR Co*, 806 F.2d 107 (6th Cir. 1986). In none of these cases did the courts find any need to examine the terms of the contracts

between the railroad and its contractor or to examine the degree of control exercised by the railroad to find preemption of railroad activities.

The January Decision, by construing a “rail carrier” to exclude a railroad contractor and a railroad agent, cedes a significant portion of this Board’s jurisdiction as well as sharply and significantly restricting the scope of federal preemption from the settled law before ICCTA. However, when Congress enacted the ICCTA, it intended to expand, not contract the scope of preemption.

Congress broadened the express Federal preemption, making the Board’s jurisdiction “exclusive” for all rail transportation and rail facilities that are part of the national rail network--including even the ancillary track.

New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway--Construction, Acquisition and Operation Exemption—In Wilmington and Woburn, MA, STB Finance Docket No. 34797 (served July 10, 2007) The January Decision is flatly contrary to Congress’ intent in enacting ICCTA. Further, the January Decision imposes new and uncertain requirements for a railroad to contract some of its operations. The Decision suggests that local laws may apply to rail operations performed by a contractor if the railroad requires indemnity or insurance from its contractors, or if the contractor has the exclusive right to perform the contracted service, or if the contractor builds a facility or is responsible for its maintenance, or if a contractor is retained to perform marketing services. The January Decision reflects a radical and unwarranted departure from settled law, and should be reconsidered.

b. NYA is “Holding Out” Transloading Services to the Public.

The January Decision reaches the startling conclusion that NYA is not holding out transload services to the public. In reaching that decision, the Board erroneously ignored

the facts that NYA lists Farmingdale as a transload facility on its website, A-456, and that it quotes rates to and from Farmingdale A-547 Most significantly, it ignores the fact that this terminal is not exclusively used for C&D debris, but that in fact numerous shippers, unrelated to Coastal, have used the facility for transloading and transporting bulk materials by rail The colored pictures of some of those other commodities are in the record. A-1078-97. There can be no doubt that NYA and Coastal are holding out the transload service and facility at Farmingdale to the shipping public for transportation of C&D debris It is undisputed that dozens of independent companies, including licensed transfer facilities, bring their debris to Farmingdale for rail transportation. Use of the facility is not limited to any particular generator of debris All generators are treated the same The loading fee is determined in the same way for all

This Board recently stated that, "The fundamental test of common carriage is whether there is a public profession or holding out to serve the public." *New England Transrail, supra* The record establishes beyond serious doubt that NYA intends to offer and has offered the services of this terminal to the shipping public The record also establishes that the shipping public has in fact accepted NYA's offer and transloaded bulk commodities at Farmingdale Yard.

The January Decision is based on a material error of law and should be reconsidered

c. The January Decision Misapplies Agency Law.

The January Decision concludes that NYA does not exert sufficient control over Coastal for Coastal to be NYA's agent. Slip op., p. 5. Although NYA firmly disputes that conclusion, the degree of NYA's control is immaterial to Coastal's agency status

Whether an agent has wide discretion or is tightly constrained by contract or otherwise does not affect his legal status as an agent. Likewise, it does not matter how much an agent is paid or to what extent the agent must indemnify the principal for the agent's actions. What is key is that the agent has the legal authority to bind his principal in obligations to third parties

At Farmingdale Yard, Coastal has the legal authority to bind NYA in obligation to third parties: If Coastal accepts and loads material, NYA cannot reject it. If Coastal damages any lading, NYA is liable to the owner for loss or damage. NYA remains liable to third parties -- be they shippers, car owners, connecting carriers, invitees, trespassers, neighbors or any one else -- on exactly the same basis as if its own employees operated the front-end loaders and scale at Farmingdale. The indemnity and insurance arrangements between NYA and Coastal only affect the economics between them. The parties could with exactly the same legal effect, make NYA responsible for any and all liability arising at Farmingdale, require NYA obtain insurance to cover that exposure and reduce the cash compensation retained by Coastal. Instead the two parties agreed to allocate the cost of any losses according to whether or not the cars were coupled to the locomotive when the liability arises. This is no different from standard joint facility agreements that allocate responsibility on the basis of which railroad's train was operating when the liability arose

Nothing in the Transfer Facility Operation Agreement diminishes NYA's responsibilities as a railroad common carrier to third parties. The Restatement, Third of Agency explains,

A principal required by contract or otherwise by law to protect another cannot avoid liability by delegating performance of the duty, whether or not the delegate is an agent.

American Law Institute, *Restatement of the Law, Agency, Third* (2005), § 7.06, vol. 2, p 195. In other words, the mere fact that Coastal may be NYA's agent or contractor does not allow NYA to avoid liability for NYA's obligations. See, *New Jersey Steamboat Co v Brockett*, 121 U.S. 637, 645 (1887); *New Orleans & N E RR. Co. v Jopes*, 142 U.S. 18, 26 (1891).

Moreover the fact that Coastal, as agent, indemnifies NYA, as principal, against losses arising while the cars are in Coastal's custody is fully consistent with basic agency law.

Subject to any agreement with the principal, an agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents in similar circumstances. Special skills or knowledge possessed by an agent are circumstances to be taken into account in determining whether the agent acted with due care and diligence

Id., § 8.08. Comment b. to that section emphasizes that even in the absence of a contractual provision, Coastal, as agent, is obligated as a matter of tort law to indemnify NYA, as principal, from any harm caused by Coastal's breach of its duties toward its principal.

In particular, an agent is subject to liability to the principal for all harm, whether past, present, or prospective, caused the principal by the agent's breach of the duties stated in this section. ... The agent's liability includes an obligation to indemnify the principal when a wrongful act by the agent subjects the principal to vicarious liability to a third person

Id., p. 344 (emphasis added) See, *Oxford Shipping Co v New Hampshire Trading Corp.*, 697 F.2d 1, 6 (1st Cir 1982)(agent liable to principal for principal's damages stemming from seizure of vessel caused by agent's breach of duties to principal).

Coastal's contractual indemnification of NYA is essentially the same indemnification that would be applied as a matter of law in the absence of any contract. Indemnification and insurance provisions are common in most all modern agreements for a contractor to provide services on the premises of a property owner (or lessee)

The allocation of ultimate costs between Coastal and NYA is immaterial to whether Coastal is acting as an agent for NYA. NYA has appointed Coastal as its agent and therefore, Coastal stands in NYA's shoes and its actions bind NYA to the obligations incurred by Coastal as if NYA itself took those actions.

The January Decision is based on a material error of law.

d. The January Decision Would Have Broad and Unintended Ramifications for the Railroad Industry

The consequences of the January Decision stretch far beyond the facts of this case. As this Board undoubtedly knows, it is commonplace in the rail industry for railroads to contract the operation of intermodal yards and automobile unloading yards to independent operators. This practice has arisen for a variety of business reasons. It is for the same reasons that NYA contracts the operation of the Farmingdale transload facility. However, if Coastal cannot operate a transload facility for NYA without complying with local zoning laws, then the scores of intermodal and auto unloading yards can also be shut down by local authorities who do not want such operations in their jurisdiction. Furthermore, if the terms of the operator's contract determine whether railroad intermodal and auto unloading yards are subject to local regulation, then this Board will be required to examine many, many routine operating agreements. There are undoubtedly many other situations as well, where subjecting a railroad contractor to local law would jeopardize rail operations. Rather than require such sweeping changes in the context of a

request for declaratory order, the Board should conduct a formal rulemaking on this subject if it feels the established law should be reversed.

3. Preemption Of Local Zoning Laws Does Not Depend On The Operator Of A Rail Facility

The January Decision misapplies operational standards to a zoning/construction case. The Board's focus on the operations of a facility and on the relationship between the railroad and facility operator have been applied in the past to efforts to preempt local regulation of transload operations. However, there is no issue in this case about the operation of the Facility at Farmingdale. Respondents have never even asked for preemption of any operating regulation. The January Decision overlooks the fact that the Facility operates in full compliance with all State and local laws except zoning, and there has never been any complaint about the transloading operations occurring at that site. *This case is not like the New Jersey cases where operators claimed preemption from State and local laws for their operations -- operations that generated public outcry.* The only issue in dispute here is whether a transloading facility can be located in this part of Babylon.

The Babylon zoning ordinance at issue is attached hereto. It provides

Transfer stations ... shall only be permitted in the area of the Town
... south of Patton Avenue, West Babylon .

Article XXII, Transfer Stations, §213-279A. The railroad is north of Patton Avenue, it always has been north of Patton Avenue, and it cannot be moved south of Patton Avenue. Consequently, it is impossible for any rail transload facility at the Farmingdale Yard to comply with Babylon's zoning ordinance -- regardless of who the operator of the facility might be

a. The Placement of Rail Facilities Is Preempted From Local Zoning Ordinances.

The STB and the courts have consistently held that federal law preempts application of local zoning laws and related pre-construction permitting requirements that would prevent construction of rail facilities. *E g , Green Mountain RR Corp v State of Vermont*, 404 F 3d 638 (2nd Cir 5), *cert denied*, 546 U.S. 977 (2005), *City of Auburn v United States*, 154 F.3d 1025 (9th Cir. 1998), *Joint Petition for Declaratory Order— Boston & Maine Corp and Town of Ayer, MA*, STB Finance Docket No. 33971(served May 1, 2001), *aff'd*, *Boston & Maine Corp v Town of Ayer*, 191 F.Supp 2d 257 (D Mass 2002).

b. Babylon Is Attempting To Enforce A Zoning Requirement On The Construction Of A Rail Facility, Not The Operation of a Facility.

The Stop Work order involved here was issued by Babylon's building inspector. A-579 The Stop Work order was upheld by Babylon's Zoning Board of Appeals, an entity whose only jurisdiction is to review zoning decisions. NY McKinney's Town Law § 267-b. This is a simple zoning case

Farmingdale Yard is the only location on Long Island where NYA can transload bulk materials A-208-09 Notwithstanding the fanciful "residential" zoning classification, the area surrounding the yard is industrial in every direction except for the adjacent cemetery Photos of the area are included in the record before this Board. A-957-76, 1075, 1077. Long Island Railroad used the site as a waste transfer station A-121-28. Truck traffic is already heavy on New Highway, just outside the facility. Nonetheless the city fathers of Babylon sought to prevent the construction of a three-sided building used to spray dust and confine bulk materials loaded to and from

railcars. This situation is no different than the cases discussed above in which considerations of interstate commerce by rail preempted parochial local concerns

c. The Board Has Exclusive Jurisdiction Over Construction Of A Railroad Facility, Without Regard To Who Operates The Facility.

The cases cited above uniformly hold that local zoning and building permit requirements with respect to location and construction of railroad facilities are preempted under 49 U.S.C. § 10501(b)(1). In addition, if there were any doubt about the Board's exclusive jurisdiction over the location, placement and construction of this facility, those doubts must be set aside based on 49 U.S.C. §10501(b)(2).

The jurisdiction of the Board over --

- (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,

is exclusive Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

There is no requirement in subsection (b)(2) that a preempted facility must be constructed "by rail carriers." Whatever merit there might be, and we firmly believe there is none, in limiting the Board's jurisdiction under subsection (b)(1) only to the operations of a rail carrier, and exempting those of a rail carrier's agent or contractor, there is no basis whatsoever to read such a requirement into the Board's construction authority under subsection (b)(2). That section simply does not contain the words "by a rail carrier "

The January Decision accurately notes that Coastal paid for the construction of the shed in the Farmingdale Yard, but it fails to acknowledge that the structure is owned by the railroads for use in rail transportation. The Transfer Agreement provides,

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

Art 3.1.3, A-471-472. Accordingly, it is misleading to suggest simply because Coastal constructed the shed, that this facility is in any manner other than a railroad facility. It is now owned by Long Island Railroad and used by NYA or its contractor for the term of the freight franchise.

We respectfully point out that the January Decision would lead to what Judge Seybert in this case described as an absurd result.

[I]f the Court was to accept Defendants' argument, preemption of state regulations would occur only when the railroads are the sole owners and operators of a transload facility. Inconsistency would result. Railroad-owned and operated transload facilities would be regulated under ICCTA. But transload facilities operated by third parties contracting with a railroad would be subject to Town regulations even though all those transload facilities provided the same exact services. To avoid this absurd result, all transload facilities related to the movement of passengers and property by rail—whether controlled by a railroad or not—are transportation.

Coastal Distribution LLC v Town of Babylon, 2006 WL 270252 (E D N Y) *6 From the inception of this litigation, Babylon has recognized, as it must under settled law, that if NYA operated this facility, the operation would be preempted from Babylon's zoning ordinance A-185. Since the "operation" consists of weighing in- and out-bound trucks and using front-end loaders to load the trucks' contents into railcars, there is no dispute that if NYA employees operate the scale and front-end loader, then Babylon's zoning

ordinance is inapplicable. *Ibid* It would be truly absurd if placement and construction of a railroad facility depends on whose payroll carries the employees who will operate the facility after it has been built

NYA respectfully suggests that the January Decision is based on a material error of law and should be reconsidered

CONCLUSION

NYA moves this Board to reopen this docket, withdraw the January Decision and dismiss the petition because the enactment of the Consolidated Appropriations Act, 2008 prevents this Board from providing due process to NYA and its agent, Coastal Distribution, LLC. In the alternative, if this Board retains this proceeding, NYA seeks reconsideration pursuant to 49 C.F.R. §1115.3 of the Board's January 31, 2008 Decision and an order either providing Respondents an opportunity to petition the Governor of New York, or declaring that the location and construction of the Farmingdale Facility is not subject to Babylon's zoning ordinance

Dated: February 20, 2008

Respectfully submitted,

By /s/Ronald A. Lane

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February, 2008, I have caused to be electronically filed with the Surface Transportation Board the foregoing **MOTION TO DISMISS AND IN THE ALTERNATIVE PETITION FOR RECONSIDERATION** and have served a true and correct copy thereof upon the following parties:

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

/s/Ronald A. Lane

ments on rail operators, which could result in a patchwork of laws that conflict with or undercut statewide oversight by the Department of Environmental Conservation ("DEC").

The MTA, DOT, DEC and the Department of State all recommend that this bill be vetoed for the reasons noted above. I understand the desire of the proponents of this bill to provide greater local control over rail facilities, but because such restrictions generally are preempted by federal law, this legislation will not achieve its desired goals and could have other adverse consequences, and so I am compelled to veto this bill

The bill is disapproved

(signed) ELIOT SPITZER

ARTICLE XXII, EN(1) Transfer Stations [Added 3-12-1996 by L.L. No. 4-1996]

§ 213-277. Definitions.

As used in this article, the following terms shall have the meanings indicated

TRANSFER STATION -- A solid waste management facility, including a recyclables handling and recovery facility, or a construction and demolition debris processing facility as such terms are defined in Chapter 133 of this Code, where solid waste is received for the purpose of subsequent transfer to another solid waste management facility for further processing, treating, transfer or disposal.

§ 213-278. Location of transfer station to be restricted.

Notwithstanding anything contained in this Code to the contrary, transfer stations shall only be permitted in any industrial district within the geographical area described in § 213-279A, and only if a special exception permit is granted by the Zoning Board of Appeals to the operator of the transfer station pursuant to the standards set forth in this article

§ 213-279. Standards for granting special exception permits for transfer station.

- A. Transfer stations or expansion of existing permitted transfer stations shall only be permitted in the area of the Town north of Edison Avenue, west of Otis Street, east of Plate Avenue (existing and as abandoned) and south of Patton Avenue, West Babylon [Amended 7-9-1996 by L.L No 15-1996]
- B The applicant shall provide proof to the Board that the landowner has consented to the operation of a transfer station.
- C The applicant, prior to applying for a special exception permit under this article, will have applied for all required federal, state and county permits. The applicant shall have been issued all permits required by the federal, state and county governments for the processing of solid waste at the site prior to the issuance of a permit pursuant to this article
- D The applicant shall have obtained site plan approval by the Planning Board
- E. The requirements of Articles XIV, XV, XVI or XVII of this chapter shall be complied with, as applicable with exception of side and rear yard buffers where the minimum shall be 10 feet Notwithstanding the foregoing, the Board shall have the authority to grant such area