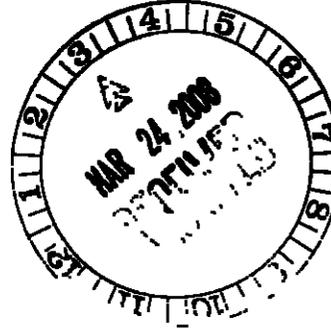


FRAN M JACOBS  
DIRECT DIAL 212 692 1060  
PERSONAL FAX 212 202 6413  
1-800-361-1000 fmyacobs@duanemorris.com

www.duanemorris.com

Duane Morris®



FIRM and ATTORNEY OFFICES

NEW YORK  
LONDON  
SINGAPORE  
LOS ANGELES  
CHICAGO  
HOUSTON  
HANOI  
PHILADELPHIA  
SAN DIEGO  
SAN FRANCISCO  
HAI PHONG  
BOSTON  
WASHINGTON DC  
LAS VEGAS  
ATLANTA  
MIAMI  
PITTSBURGH  
NEWARK  
WILMINGTON  
PRINCETON  
TALLAHASSEE  
MINNEAPOLIS

ENTERED  
Office of Proceedings

MAR 24 2008

March 20, 2008

Part of  
Public Record

VIA FEDEX

Mr. Vernon A. Williams, Secretary  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20024

Re: Response of Town of Babylon and Pinelawn Cemetery – Petitions for  
Reconsideration of Coastal Distribution LLC and New York and Atlantic Railway  
Company of Decision dated January 31, 2008  
Finance Docket No. 35057

Dear Secretary Williams:

Enclosed are the original and ten copies of the joint response of petitioners Town of Babylon and Pinelawn Cemetery to the petitions of Coastal Distribution LLC and New York and Atlantic Railway Company for reconsideration of the Board's decision, dated January 31, 2008, granting the Petition for a Declaratory Order.

Respectfully,

Fran M Jacobs

Enclosures

cc: Ronald Lane, Esq. (by FedEx and w/encl )  
John F. McHugh, Esq. (by FedEx and w/encl.)  
Howard M. Miller, Esq. (by FedEx and w/encl )  
Mark A. Cuthbertson, Esq. (by FedEx and w/encl.)

BEFORE THE  
SURFACE TRANSPORTATION BOARD

STB Finance Docket No 35057



22/882

RESPONSE OF THE TOWN OF BABYLON  
AND PINELAWN CEMETERY TO THE  
PETITIONS OF COASTAL DISTRIBUTION LLC  
AND NEW YORK AND ATLANTIC RAILWAY  
COMPANY FOR RECONSIDERATION AND OTHER RELIEF

ENTERED  
Office of Proceedings  
MAR 24 2008  
Part of  
Public Record

Howard M. Miller  
Bond Schoeneck & King, PLLC  
1399 Franklin Avenue  
Garden City, NY 11530  
516-267-6300  
Attorneys for the Town of Babylon

Fran M. Jacobs  
Jonathan S. Gaynin  
Duane Morris LLP  
1540 Broadway  
New York, NY 10036-4086  
212-692-1000

-and-

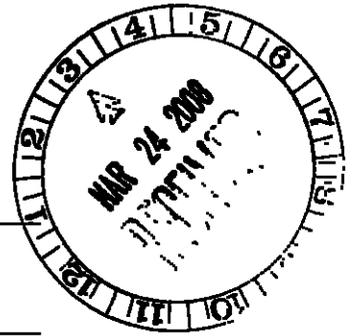
Mark A. Cuthbertson  
434 New York Avenue  
Huntington, NY 11743  
(631) 351-3501

March 20, 2008

Attorneys for Pinelawn Cemetery

BEFORE THE  
SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 35057



RESPONSE OF THE TOWN OF BABYLON  
AND PINELAWN CEMETERY TO THE  
PETITIONS OF COASTAL DISTRIBUTION LLC  
AND NEW YORK AND ATLANTIC RAILWAY  
COMPANY FOR RECONSIDERATION AND OTHER RELIEF

ENTERED  
Office of Proceedings  
MAR 24 2008  
Part of  
Public Record

Preliminary Statement

This response is submitted on behalf of The Town of Babylon (the “Town”) and Pinelawn Cemetery (“Pinelawn”) to address the arguments made in the petitions of Coastal Distribution LLC (“Coastal”) and New York and Atlantic Railway Company (“NYAR”) (a) to reopen this docket and dismiss the petition (the “Petition”) filed by the Town and Pinelawn for a declaratory order determining that the Board does not have jurisdiction over Coastal’s activities and (b) reconsideration of the Board’s January 31, 2008 decision granting the Petition (the “Decision”).<sup>1</sup>

No basis for dismissing the Petition exists. The premise underlying the application is that the Board did not rule on the Petition for the reasons recited in the Decision – that Coastal’s activities were not integral to rail transportation and instead granted the Petition for made-up reasons because the Board was afraid that a contrary ruling would jeopardize its funding. There is no factual or legal support for this dubious premise. Had the Board believed that Coastal was acting under the auspices of NYAR, it could have denied the Petition without losing its funding;

---

<sup>1</sup> Prior to filing their petitions for reconsideration, Coastal and NYAR each filed petitions in the United States Court of Appeals for the District of Columbia Circuit for judicial review of the Board’s Decision.

it would simply have had to obtain a written assurance from the Governor that Coastal would comply with state and local health, safety, and environmental laws – which is exactly what the Board has done in other cases.

Coastal and NYAR have also failed to present any grounds for reconsidering the Decision. To be entitled to reconsideration, Coastal and NYAR would have had to show that (a) new evidence exists or a change in circumstances occurred which materially affected the Board's Decision or (b) the Decision involved material error. They did not make such a showing here. On the contrary, Coastal and NYAR have largely repeated the same arguments they previously made. The purpose of reargument is not to give the losing party a chance to restate or embellish arguments that the Board has already heard and rejected. Aside from theorizing that the reasons the STB gave for its Decision were pretextual, Coastal and NYAR have nothing new to say. Accordingly, their petitions should be denied, and the Board should adhere to its Decision.

#### ARGUMENT

A. The Petition Should Not Be Reopened Because Coastal and NYAR Are Wrong About the Effect of the Consolidated Appropriations Act, 2008

Coastal and NYAR each ask the Board to reopen this docket and dismiss the Petition on the theory that the Consolidated Appropriation Act, 2008 (the "Act"), Pub. L. No. 110-161, 121 Stat. 1844 (2007), somehow prevented the Board from deciding the Petition on its merits and left the Board with no choice but to rule against them. According to Coastal and NYAR, the reasons the Board gave in the Decision for granting the petition were pretextual, the real – but secret – reason for finding that Coastal was neither a rail carrier nor acting under the auspices of a rail carrier was that the Board did not want to risk its funding. This theory is as irresponsible as it is baseless.

The Board was not faced with a choice between losing its funding or ruling against Coastal. Rather, following the enactment of the Act,<sup>2</sup> the Board stated that it “will continue to accept and process petitions, notices, and other filings in conformance with its regulations” and “will ensure compliance with the Act by providing notice . . . that no pertinent Board decision issued during the period covered by the Act will authorize any [solid waste disposal] activities prior to receipt of the written assurances referenced in the Act from the governor (or governor’s designee) of the state where such activities are proposed” Consolidated Appropriations Act, 2008 – Solid Waste Rail Transfer Facilities, STB Ex Parte No. 675 (Jan 15, 2008) (emphasis added).

In keeping with this articulated policy, where a rail carrier proposes to engage in solid waste disposal activities, the Board has indicated that it will authorize such activities provided that it receives appropriate written assurances. For example, in JP Rail, Inc.- Lease and Operation Exemption, STB Finance Docket No 35090, 2008 STB LEXIS 25 (Jan. 17, 2008), the Board wrote:

The transloading of this C&D appears to be exactly the type of activity that is the focus of the Act, because this C&D evidently would be transported solely for the purpose of disposal in a C&D landfill. See 40 CFR 257.2. JP Rail has not submitted any written assurance of agreement to comply with state and local public health, safety, and environmental regulations from the Governor of Pennsylvania, or the Governor’s designee. Indeed, the only state authority from Pennsylvania that has participated in this proceeding, PaDEP, opposes the project. Neither has JP Rail shown that its proposed activities would consist of transferring C&D in “original shipping containers.” Under these circumstances, we will not authorize JP Rail’s operations as they

---

<sup>2</sup> Coastal edits out of its quotation from the Act any reference to written assurances from the Governor. (See Coastal Petition at p 2 )

are described in its notice, and JP Rail's notice of exemption will be rejected.

(Emphasis added.)

The decision in JP Rail demonstrates that the assumptions NYAR and Coastal make in their petitions are wrong. Contrary to their belief that the Board is "constrained" by the Act to rule against any rail carrier who seeks to engage in solid waste disposal activities, JP Rail shows that the Board is willing to authorize solid waste disposal activities by a rail carrier – as long as it receives appropriate written assurance of the rail carrier's agreement to comply with state and local regulations.

JP Rail also makes clear that, where a proposed activity involves solid waste activities which are subject to the Act, the Board is not afraid to say so explicitly in its decision. In JP Rail, the Board did not make up a reason for denying the rail carrier's petition – as Coastal and NYAR improbably suggest the Board did in this case, instead, the Board stated in JP Rail that it was denying the petition because the requisite assurances had not been provided.

There is no reason to believe that the Board would not have done the same thing in this case that it did in JP Rail if it had found that Coastal was acting as NYAR's agent or under NYAR's auspices. But the Board concluded, based on a careful review and analysis of the record, that Coastal was neither a rail carrier nor acting on behalf of a rail carrier. Since Coastal and NYAR have not pointed to anything which suggests that the reasons given for the Board's decision were pretextual, their motions to dismiss the Petition are completely baseless and should be denied.

**B. Since No New Evidence or Change in Circumstances Has Been Shown, and the Decision Involves No Material Error, the Petitions Should be Denied**

Under 49 C.F.R. § 1115.3(b), reconsideration may not be granted unless “[t]he prior action will be materially affected because of new evidence or changed circumstances” or “[t]he prior action involves material error.” Where a petition for reconsideration is based on arguments “which merely restate or expand arguments before the Board issued [the original] Decision,” it should be denied Canadian National Railway Company and Grant Trunk Corporation – Control – EJ & E West Co., STB Finance Doc. No. 35087 at 3, 2008 STB LEXIS 38, at \*4 (Jan. 25, 2008). Coastal and NYAR have not sustained their burden of showing that grounds for reconsideration exist here

**1. The Governor’s Veto Message Does Not Constitute New Evidence**

The sole “new evidence” that Coastal and NYAR identify in their requests for reconsideration is a veto message by the former Governor of New York. There are two reasons why the veto message does not constitute new evidence which warrants reconsideration of the Decision. First, the primary basis for the veto was the Governor’s belief that Coastal’s operation was subject to federal preemption. The Board’s Decision establishes that this belief was mistaken. Second, nothing in the veto message has the slightest bearing on the question that the Board was asked to decide in the Petition - whether Coastal was acting as or on behalf of a rail carrier and was subject to the Board’s exclusive jurisdiction. As we explain more fully below, the veto message is therefore irrelevant.

**(a) The Veto Message Was Based on the Governor’s Erroneous Belief That Coastal’s Operation Was Entitled to Federal Preemption.** Neither Coastal nor NYAR quotes the

principal reason the Governor gave for refusing to approve legislation relating to Coastal's facility In his veto message, the Governor stated:

Although I certainly recognize the desire of local governments to regulate rail facilities operating within their boundaries, as a general rule such local laws and ordinances are preempted by the federal Interstate Commerce Commission Termination Act ("ICCTA"). Indeed, the Babylon rail facility at issue here has been the subject of several years of federal litigation, and the courts have enjoined the local efforts to regulate the facility, holding that they are preempted by the ICCTA. In addition, the bill would place the MTA in the untenable position of pursuing its tenants for violations of state or local laws that are otherwise inapplicable pursuant to federal preemption.

(See Ex. A to Coastal's Petition, dated February 18, 2006; emphasis added.)

The Governor also stated in his veto message that he understood "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 . . . ." (Emphasis added.)

When the Governor made these statements, the Board had not yet rendered its Decision. The veto message was thus based on the Governor's belief that Coastal's activities were subject to federal preemption. As it turned out, the Governor's belief was wrong. The Board subsequently held in the Decision that it "does not have jurisdiction over Coastal's activities, and the Federal preemption in section 10501(b) does not apply." (Decision p. 6.) The Governor's erroneous belief about the applicability of federal preemption does not constitute new evidence and is not a ground for reconsideration.

(b) Nothing that the Governor Said in the Veto Message About Truck Traffic is Relevant The Governor's belief that Coastal's operation reduced truck traffic is neither new evidence nor relevant. NYAR and Coastal previously argued that Coastal was removing trucks

from the road. Indeed, in seeking reconsideration, Coastal pointed out that it had asked the Board to deny the Petition on the ground that “[c]losing this facility would put not less than 3,200 carloads of heavy bulk freight and general merchandise on the highway.” (See Coastal Petition p. 4.) Attributing a similar statement to the Governor of New York does not transform the statement into “new evidence.”

Even if argument Coastal and NYAR make about truck traffic had been new, it would not be relevant to any issue before the Board. The Interstate Commerce Commission Termination Act (“ICCTA”) did not empower the Board to exempt a business from state and local regulation whenever doing so would help reduce truck traffic. Rather, as the Board stated in Suffolk & Southern Rail Road – Lease and Operation Exemption – Sills Road Realty, LLC, STB Finance Docket No. 35036 at 6, STB LEXIS 752, at \* 14 (Dec. 20, 2007), where it denied an application for reconsideration of a cease and desist order barring the operation of an unauthorized transloading facility, “the need for additional transloading and intermodal freight facilities on Long Island does not mean that the Cease and Desist Order should not have been issued. . . .”

Since Coastal is not itself a rail carrier or under the control of a rail carrier, it is not subject to the Board’s jurisdiction and is not entitled to federal preemption – whether or not its operation helps remove trucks from the road.

2. The Board Did Not Err By Failing to Conduct Environmental Analysis Before Rendering the Decision

Coastal also makes a legally baseless argument that the Board violated its own regulations by rendering the decision without conducting environmental analysis. But, as Coastal itself concedes, 49 C.F.R. § 1105.5(b) expressly states: “A finding that a service or transaction is not within the STB’s jurisdiction does not require an environmental analysis under the National Environmental Policy Act . . . .”

While this regulation, without more, establishes that, having concluded that it lacked jurisdiction, the Board was not required to conduct environmental analysis here, it is far from the only flaw in Coastal's argument. The rule that Coastal claims required environmental review – 49 C.F.R. § 1105.7(c)(4)(iv)(A) and (C) – is inapplicable on its face. Section 1105.7(a) requires that environmental reports be submitted by applicants for actions identified in 49 C.F.R. § 1105.6(a) or (b), which involve construction. Thus, had Section 1105.6(a) or (b) been applicable, it would have been Coastal who was obligated to provide an environmental report, and it never did so.

By contrast, 49 C.F.R. § 1105.6(c) lists actions which do not require environmental documentation. Among the actions which do not require environmental documentation are declaratory orders. See 49 C.F.R. § 1105.6(c)(iii). Since the Town and Pinelawn filed a Petition for a declaratory order, environmental analysis was not required under 49 C.F.R. § 1105.7.

3. **The Remaining Arguments Made By Coastal and NYAR Merely Repeat Arguments that the Board Considered and Properly Rejected in the Decision**

Coastal and NYAR both devote most of their latest submission to re-stating the same arguments they made in response to the Petition. Thus, they each assert that (a) Coastal is acting on behalf of NYAR; (b) the Board erred in concluding that Coastal is not really NYAR's agent; and (c) the Decision represents a departure from existing law. They have not shown any error – much less a material error – in the Board's Decision on these issues.

(a) **The Board Correctly Found that Coastal Is Offering Its Own Services to Customers Directly.** The Board gave the following explanation for its conclusion that Coastal was not conducting its operations on behalf of NYAR. (Decision at p. 5):

Based on all of the information provided by the parties, we find that the facts of this case fail to establish that Coastal's

activities are being offered by NYAR or through Coastal as NYAR's agent or contract operator. While the Operations Agreement includes a statement providing that NYAR "shall control all aspects of the Facility's transloading operations," the agreement, when considered in its entirety, shows that NYAR has essentially no involvement in the operations at the facility. Under the parties' agreement, NYAR's responsibility and liability for the cars ends when they are uncoupled at the Farmingdale Yard and resumes when they are coupled to NYAR's locomotive. Coastal exercises almost total control over the activities of the facility. For example, Coastal has the exclusive right to conduct transloading operations on the property. Coastal built the facility and pursuant to the Operations Agreement, is responsible for all track repairs and for all necessary repairs, maintenance, and upkeep of the facility. Coastal also performs the marketing activities for the operations at the facility and provides and maintains all rail cars. Coastal is entitled to charge a loading fee for its transloading services, a fee which is in addition to the rail freight transportation charge payable to the railroad and over which NYAR has no control. And for use of the facility, Coastal pays NYAR a usage fee of \$20 per loaded rail car (inbound or outbound).

Moreover, Coastal, not NYAR, conducts all customer negotiations and bills and collects the loading fee from customers separately from the transportation charges, which are collected by the connecting Class I carrier (CSX Transportation, Inc.). In fact, Coastal may enter into separate disposal agreements in its own name with customers for disposition of commodities after transportation, from which NYAR disclaims any liability. Finally, the parties' agreement provides that Coastal must maintain liability insurance executed in favor of NYAR and that Coastal agrees to indemnify NYAR for all claims and liability arising out of Coastal's use of the premises.

Neither Coastal nor NYAR has shown that the Board's analysis is wrong, nor could they. Thus, they do not deny that (i) NYAR has no responsibility for rail cars and their contents at Coastal's facility once the cars are uncoupled from its locomotive (Operations Agreement ¶ 1.05<sup>3</sup>); (ii) Coastal has the exclusive right to conduct transloading operations at the facility, and NYAR cannot do anything which would interfere with Coastal's operations (*Id.* at ¶ 1.12); (iii)

---

<sup>3</sup> A copy of the Operations Agreement was annexed as Exhibit D to the Petition

Coastal built the facility at its own expense and, under the terms of the lease which was in effect when the facility was built, Coastal could remove such improvements at the end of the term. (Ex. C to Petition at ¶¶ C(2), (8)); (iv) Coastal is responsible for all repairs, maintenance, and upkeep of the facility; (v) Coastal charges a loading fee which it sets unilaterally and in which NYAR does not share; (vi) Coastal alone conducts customer negotiations; (vii) Coastal bills and collects its loading fee separately from transportation charges, which are collected by the connecting Class I carrier; (viii) Coastal can make its own disposal agreements with customers; and (ix) NYAR has no liability for claims arising out of Coastal's use of the premises.

These facts amply support the Board's conclusion that "NYAR's involvement essentially is limited to transferring cars to and from the facility." The Board therefore did not commit material error in rendering the Decision.

(b) The Board Correctly Found that Coastal Is Not NYAR's Agent. NYAR contends that the Board committed a material error of law in finding that NYAR exerts insufficient control over Coastal for Coastal to be NYAR's agent. As support for this argument, NYAR asserts that, under basic agency law, an agent can be required to indemnify its principal for harm caused by the agent's breach of its duties to its principal. NYAR suggests, based on this law, that the Board erred in attaching significance to the fact that "NYAR has assumed no liability or responsibility for Coastal's transloading activities." (Decision p. 6.) NYAR is mistaken

The Operations Agreement provides that NYAR's "responsibility and liability for the cars and their contents bound to or from the Facility ends when the cars are uncoupled from the RAILROAD'S locomotive at the Facility, and the RAILROAD'S responsibility and liability is resumed when the cars are coupled to RAILROAD'S locomotive." (Operations Agreement

¶ 1 05.) Since NYAR had no responsibility for rail cars and their contents when the cars are not connected to its locomotive, Coastal cannot be acting on behalf of NYAR at such times; if NYAR itself has no responsibility for anything that happens at the facility except when railcars are connected to its locomotive, NYAR has no primary responsibility which Coastal can perform as NYAR's agent. Accordingly, when Coastal agreed to indemnify NYAR "from and against any and all claims and liability caused by, arising out of or resulting in any manner from the condition, existence, use or occupancy of the Premises by COASTAL" (Operations Agreement ¶ 6 01), it was not – as NYAR contends – an agent "indemnifying" its principal for harm to third parties caused by a breach of its duties. Coastal was, rather, acknowledging its primary liability for actions taken on its own behalf.

(c) The Decision Does Not Represent a Change in the Law. Little need be said in response to the arguments Coastal and NYAR make that the Decision changes existing law or will have far-reaching and unintended ramifications. The Decision is consistent with existing law which the Board cited – and which Coastal and NYAR did not, and cannot, distinguish. See Town of Milford, MA- Petition for Declaratory Order, STB Finance Docket No. 34444, 2004 STB LEXIS 507 (Aug. 12, 2004); Hi Tech Trans, LLC - Petition for Declaratory Order - Newark, NJ, STB Finance Docket No. 34192, 2003 STB LEXIS 475 (Aug. 14, 2003); see also Kansas City Transportation Co., LLC, STB Finance Docket No. 34830, 2007 STB LEXIS 254 (May 21, 2007), Tri-State Brick and Stone of New York, Inc., STB Finance Docket No. 34824, 2006 STB LEXIS 463 (Aug. 9, 2006). These decisions all hold that a non-rail carrier operating a transload facility for its own benefit is not subject to Board's exclusive jurisdiction. Thus, the Decision does nothing more than apply the facts to established law

With respect to NYAR's contention that Coastal operates in "full compliance with all State and local laws except zoning" and that this dispute is nothing more than "a simple zoning case" (NYAR Petition pp 16-17), even if it were true – and it is not – it would not be a basis for reconsideration. The issue before the Board was whether Coastal's operation qualified for federal preemption under the Interstate Commerce Commission Termination Act ("ICCTA") Only if it did would it be excused from complying with state and local laws, including zoning laws. Since the Board found that federal preemption under ICCTA did not apply to Coastal's operation, Coastal is not exempt from complying with any laws.

Moreover, this dispute involves serious health and safety issues. The Town and Pinelawn pointed out in their Petition that Coastal is tipping waste onto the floor of its unenclosed structure and sorting it there. As a result, it is releasing potentially hazardous dust into the atmosphere and contaminated water into the soil. They also pointed out that trucks come to Coastal's facility directly from construction sites and were depositing roofing materials and other unprocessed construction debris onto the floor of Coastal's unenclosed facility where it was disturbed and released into the atmosphere as dust and run-off. Indeed, in 2005, the Town's Zoning Board of Appeals expressed concern about the roofing material that was being brought to the facility (See Ex. F to Petition at p. 9.) Although roofing material is known to contain asbestos, Coastal subjects such material to the same treatment as non-hazardous debris, and has not complied with any of the federal, state, or local laws designed to protect the public from exposure to potentially hazardous materials.

In the four years since Coastal began operating the facility – free from regulation by the Board or any state or local agency -- the situation has not improved. The Town and Pinelawn have observed no decrease in the amount of dust generated by Coastal's facility. On the

contrary, because Coastal's volume commitments to NYAR increase over time (See Ex D to Petition at ¶ 5.01(c)), the Town and Pinelawn have every reason to believe the conditions will continue to worsen. In the meantime, Coastal has not voluntarily adopted the safeguards reflected in the federal, state, and local laws by which it would be bound – and by which other waste disposal facilities are bound – if it were not operating on property leased to a rail carrier.

7

CONCLUSION

It is respectfully submitted that, because no new evidence has been offered and because the Decision does not involve material error, the Board should decline to reopen this docket in order to dismiss the Petition, and should deny the applications of Coastal and NYAR for reconsideration.

Dated: New York, New York  
March 20, 2008

Respectfully Submitted,

BOND SCHOENECK & KING, PLLC

By: Howard M. Miller by EAJ w/permission  
Howard M. Miller

1399 Franklin Avenue  
Garden City, NY 11530  
516-267-6300  
Attorneys for the Town of Babylon

DUANE MORRIS LLP

By Iran M. Jacobs  
Iran M. Jacobs  
Jonathan S. Gaynin

1540 Broadway  
New York, NY 10036-4086  
212-692-1000

-and-

LAW OFFICES OF MARK A CUTHBERTSON

By: Mark A. Cuthbertson by EAJ w/permission  
Mark A. Cuthbertson

434 New York Avenue  
Huntington, NY 11743  
(631) 351-3501

Attorneys for Pinelawn Cemetery

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Response of the Town of Babylon and Pinelawn Cemetery to the Petitions of Coastal Distribution LLC and New York and Atlantic Railway Company for Reconsideration and Other Relief was served on March 20, 2008 by FedEx, on the following parties and their counsel:

FLETCHER & SIPPEL LLC  
29 North Wacker Drive, Suite 920  
Chicago, IL 60606-2875  
Attorneys for New York and Atlantic Railway Company

JOHN F. McHUGH, ESQ.  
6 Water Street  
New York, NY 10005  
Attorney for Coastal Distribution LLC



---

Fran M. Jacobs