BEFORE THE
SURFACE TRANSPORTATION BOARD

JAN 28 2011
RECEIVED

TOWN OF BABYLON AND PINELAWN CEMETERY –
PETITION FOR DECLARATORY ORDER

Finance Docket No. ~~35057~~ 35468

228694

PETITION OF PINELAWN CEMETERY TO REOPEN

FILED
FEB - 3 2011
SURFACE TRANSPORTATION BOARD

ENTERED
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FEB 03 2011
Part of
Public Record

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Preliminary Statement

At the direction of the New York Supreme Court, Appellate Division, Second Department ("Second Department"),[1] this petition is filed on behalf of Pinelawn Cemetery ("Pinelawn") in support of its request that the Surface Transportation Board (the "Board") reopen this docket and issue an order pursuant to its authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721(b)(4) for the purpose of terminating a controversy and removing uncertainty concerning the scope of its jurisdiction under the Interstate Commerce Commission Termination Act ("ICCTA"). Pinelawn seeks a declaration that the "Farmingdale Yard" (described below) is not now, nor has ever been, a "line of railroad" over which the STB has exclusive jurisdiction. Rather, the Farmingdale Yard is a "team," "spur" or "wye" track, excepted from the Board's jurisdiction by 49 U.S.C. § 10906.

The Board has already held on *three* separate occasions that the current operator on the property, Coastal Distribution, LLC ("Coastal"), is not a rail carrier nor is it engaging in rail activity at the Farmingdale Yard, which it constructed in or about 2003. Further, Coastal has never received authority to operate from the Board and, as such, the track in question is either excepted track or Coastal's operations are in violation of law. While Pinelawn has chosen to follow the direction of the Second Department, it believes and will argue that an abandonment

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[1] The Second Department's decision is appended hereto at Exhibit A.

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proceeding under 49 U.S.C. § 10903 is not necessary. However, if this Board disagrees with Pinelawn's position, it is respectfully requested that the Board set a schedule including time for discovery, opening by Pinelawn, reply by NYAR and Coastal, and rebuttal by Pinelawn.

BACKGROUND

Pinelawn is a not-for-profit corporation organized under the laws of the State of New York having a principal place of business at Pinelawn Road & Wellwood Avenue in Farmingdale, New York. Pinelawn owns approximately 900 acres of property in the Town of Babylon. At issue in these proceedings are two of its contingous parcels of land located at 1633 New Highway, Farmingdale, New York (hereinafter collectively the "Property"). At the turn of the last century, each parcel was separately leased from Pinelawn to the Long Island Railroad ("LIRR") for ninety-nine-year terms at different times approximately one year apart (1904 and 1905). The parties have been involved in protracted litigation in state court ("State Court Action")[2] over whether the lease over one portion of the property (the "August New Highway Lease") was validly renewed. The State Court Action has been affected by various related state and federal proceedings regarding the interpretation of this Board's jurisdiction. Due to the complicated procedural and factual background, a timeline/chronology of the relevant factual dates and court proceedings has been appended hereto at Exhibit B. The relevant history is also set forth in detail below.

Pinelawn leased the Property to the entity now known as the Metropolitan Transportation Authority ("MTA") – the parent of LIRR (collectively, the "LIRR-MTA") – in the early 1900s.

[2] In the pending State Court Action, Pinelawn maintains that the LIRR-MTA did not validly renew one of two leases, which govern the property. See Pinelawn Cemetery v. Coastal Distribution, LLC, et al, Suffolk County Supreme Court Index No. 04-8599; Second Department App. Div. Nos. 2008-2472 and 2009-2839. The issue of whether the lease has been validly renewed has not been decided by the State Court, which is awaiting the Board's determination on this petition before resolving the state law issues.

Shortly after leasing the two parcels from Pinelawn, the LIRR-MTA constructed the "Farmingdale Wye Track" on the Property, consisting of two rail tracks each approximately one-quarter mile long, which together comprise a "Y" or "wye" track. A map of the Farmingdale Wye Track is appended hereto at Exhibit C. There is also a "rail siding" track that runs parallel to the main line of the Long Island Rail Road to the north of the main line and to the south of the Farmingdale Yard. Initially, the Farmingdale Wye Track was used by Pinelawn as a turnaround for funeral processions. The LIRR-MTA operated on the Farmingdale Wye Track for a part of the 20th century, but no longer does so. The tracks were rarely used, if at all, beginning in the 1960s.

In 1997, New York & Atlantic Railway ("NYAR"), a rail carrier licensed to operate a line of railroad by this Board, took over the freight operation of the LIRR-MTA pursuant to a transfer agreement dated November 18, 1996 ("Transfer Agreement"),[3] which was approved by the Board. The Transfer Agreement is appended hereto at Exhibit D. The Transfer Agreement covered over 250 miles of "Subject Line." Under the Transfer Agreement, NYAR acquired, *inter alia*, the right to operate on the Farmingdale Wye Track. The Transfer Agreement between LIRR-MTA and NYAR labels the Farmingdale Wye Track as a "yard" that consists of "PW Long Siding, Wye and Team Yard." See Exhibit D at Ex 1. The Freight Agreement also lists several "sidings not in use" in Farmingdale including 6 such sidings labeled "Wellwood." Exhibit D at Ex 3, page 2 of 3. In addition, the agreement states that NYAR is obligated to obtain permission from the STB for any abandonment of freight services to the extent legally required. Exhibit D at 50, ¶ 6.1.

[3] Originally the parties to the Transfer Agreement were the LIRR and the Southern Empire State Railroad Company ("Southern"), which changed its name to NYAR.

When NYAR applied for an operation exemption, it supplied a rough map of the "Subject Line" and stated that it sought the exemption for the following:

> Bay Ridge Branch (mp 4.0 to mp 16.0)
> Central Extension (mp 19.1 to mp 21.2)
> Bushwick Branch (mp 4.0 to mp 6.0)
> (collectively, the "Freight Line")
>
> Main Line (mp 9.3 to mp. 94.3)
> Montauk Branch (mp 0.0 to mp 115.8)
> Port Jefferson Branch (mp 24.9 to mp 58.0)
> Central Branch (mp 28.7 to mp 35.9)
> Central Extension (mp 18.7 to mp 19.1)
> Hempstead Branch (mp 13.3 to mp 18.7)
> West Hempstead Branch (mp 15.5 to mp 20.1)
> Montauk Cut Off (mp 0.1 to mp 1.3)
> (collectively the "Joint Use Line" and, together with the Freight Line, the "Subject Line")

See Exhibit E. NYAR described the "Subject Line" as the main portions of track over which it offered common carrier freight services, but did not explicitly include the Farmingdale Wye Track, which was built by the LIRR-MTA as excepted track. The Board exempted NYAR's freight operations on the "Subject Line." New York & Atlantic Railway Company –Operation Exemption – The Long Island Rail Road Company, STB Finance Docket No. 33300 (served Nov. 17, 1997).

On or about March 22, 2002, NYAR entered into a lease agreement with Coastal Distribution, LLC ("Coastal") for the Property, which lease was subsequently revised on or about July 2002 and again in 2008. As set forth below, this Board has held on several occasions that Coastal is not a licensed railroad, nor does it operate a line of railroad on the Property. See Town of Babylon and Pinelawn Cemetery – Petition for Declaratory Order, STB Finance Docket No.

35037 (decisions served February 1, 2008, September 26, 2008 and October 15, 2009).[4] Rather, by its own admission Coastal operates what it terms as a "transloading facility" on the Farmingdale Wye Track at the Property where it processes Construction and Demolition ("C&D") materials and loads those materials onto rail cars. See Coastal's Memorandum of Law in Support of Motion for Summary Judgment at 2, Suffolk Supreme Court Index No. 2004-8599 (March 30, 2007). It is telling that when NYAR leased the property to non-rail-carrier Coastal, it did not seek an abandonment of its freight services as required by the Transfer Agreement. Exhibit D at 50, ¶ 6.1. This is because there were no common carrier freight services occurring on the property which required abandonment.

The genesis of the current dispute and extensive litigation began on or about October 2003, when Coastal began construction[5] of the so-called "Farmingdale Yard" on the Property. Attorneys for Pinelawn sent a letter to the Town of Babylon ("Town") on December 18, 2003 advising the Town that Pinelawn (and not the MTA or Coastal) was the owner of the Property and requesting the Town issue a cease and desist order against Coastal because it had commenced operations and the erection of a structure without the proper permits from the Town. On or about March 29, 2004, the Town issued a Stop Work Order to Coastal for "working

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[4] All three decisions were appealed to the U.S. Court of Appeals for the District of Columbia ("DC Circuit"). The DC Circuit transferred the appeals to the U.S. Court of Appeals for the Second Circuit ("Second Circuit"), which heard argument in September 2010 but has not yet issued a decision.

[5] The Board has repeatedly held that Coastal, and not NYAR, built the Farmingdale Yard. See, e.g., FD 35057 (decision served Oct. 15, 2009, at 5 and decision served Feb 1. 2008 at 5). In addition, Coastal admits that prior to its arrangement with NYAR and its construction of the Farmingdale Yard, less than *four cars per year* were transloaded on the excepted track. See Coastal's Petition to Reconsider the Board's Jan. 31, 2008 Decision, STB Finance Docket No. 35057 (Document No. 221649).

without a permit" and in or about April 2004, Coastal and NYAR appealed the issuance of the Stop Work Order to the Town of Babylon Zoning Board of Appeals ("ZBA").

On April 6, 2004, Pinelawn commenced the State Court Action regarding the lease in Suffolk Supreme Court against Coastal, LIRR, MTA and NYAR, seeking, *inter alia*, a declaration from the Suffolk Supreme Court that the August New Highway Lease was terminated since it was neither renewed by the LIRR-MTA according to its terms nor otherwise extended or reinstated by Pinelawn. In addition, Pinelawn sought a preliminary injunction, which was later denied, preventing Coastal from further construction on the Property.

On or about August 6, 2004, approximately one month before the scheduled hearing in front of the ZBA on the Stop Work Order, NYAR and Coastal terminated their lease agreement and entered into a "Transload Facility Operations Agreement." Notwithstanding this purported change – and as this Board has held – there was no change in the way Coastal operated its facility after entering into the Operations Agreement. See generally Town of Babylon and Pinelawn Cemetery – Petition for Declaratory Order, STB Finance Docket No. 35037 (served February 1, 2008).

Coastal operates what it has described as a "transloading facility" on the Property which it has characterized as follows:

> [the facility] is one at which **cargo is transferred** between modes of transportation, in this case **between highway vehicles and railway vehicles. Transload is the modern term for a "team track"** the name referred to the teams of horses that pulled "drays" (wagons) to the side of rail cars so that freight could be transferred and then delivered to locations beyond the physical limits of the railroad's track. Modern transload facilities include machinery needed to move commodities efficiently between modes.

See Coastal's Memorandum of Law in Support of Motion for Summary Judgment at 2, Suffolk Supreme Court Index No. 2004-8599 (March 30, 2007).

On April 22, 2005, the ZBA issued its decision on NYAR and Coastal's appeal, which affirmed the Stop Work Order and upheld the Town's ability to enforce its zoning laws. Not content with this decision, Coastal and NYAR commenced an action in federal court to enjoin any local code enforcement against the operations at the Farmingdale Yard on the basis of federal preemption under the ICCTA. Shortly after the commencement of that action, a two-day preliminary injunction hearing was held in front of United States Magistrate Judge E. Thomas Boyle, on May 19-20, 2005, in which an extensive record was established. During the course of that hearing, Joseph Rutigliano, a principal in Coastal, claimed that he had invested several million dollars in the Coastal Facility and that the "normal activities" at the site consisted of the following:

- trucks loaded with C&D debris enter the site and are weighed;
- the trucks then discharge their load of C&D debris on the floor of the building at the facility;
- the emptied trucks are weighed and then exit the facility;
- the C&D debris is sorted and loaded onto rail cars by mechanical loading machines; and
- the rail cars leave the facility bound for Ohio.

See Excerpts from Hearing Transcripts, Exhibit F, at 165-69.

Ultimately, Magistrate Boyle issued a Report and Recommendation ("R&R") which recommended that the preliminary injunction be granted and found, *inter alia*: (1) that the Town's zoning laws are preempted by the ICCTA; (2) that transloading operations fall within the category of rail "transportation" for purposes of the ICCTA; (3) that Coastal, by virtue of its relationship with NYAR, is considered a rail carrier under the ICCTA; and (4) that 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. United States District Judge Joanna Seybert adopted the R&R in a decision dated January 31, 2006. See Coastal

Distribution, LLC v. Town of Babylon, No. 05-CV-2032 (E.D.N.Y. Jan. 31, 2006). The Town of Babylon and Pinelawn immediately appealed this decision to the United States Court of Appeals for the Second Circuit ("Second Circuit").[6]

On February 6, 2007, the Second Circuit took the extraordinary step of modifying the U.S. District Court's preliminary injunction to allow the parties to petition this Board ("STB") "for a declaratory judgment on the scope of its jurisdiction" and noted that "'[a]s the agency authorized by Congress to administer the Interstate Commerce Commission Termination Act, the [STB] is uniquely qualified to determine whether state law should be preempted by the Termination Act.'" See Coastal Distribution, LLC v. Town of Babylon, 216 Fed. Appx. 97 100-03, (2d Cir. 2007).

Meanwhile, in the State Court Action, Coastal and NYAR respectively filed motions for summary judgment and/or to dismiss the proceedings in the Suffolk County Supreme Court ("Suffolk Supreme Court") in March and May of 2007. Once again, the principal argument by Coastal and NYAR was that the Suffolk Supreme Court lacked jurisdiction over Pinelawn's claims relating to the Farmingdale Yard because the Farmingdale Yard was in the exclusive jurisdiction of the STB based on the federal preemption set forth in the ICCTA. Specifically, Coastal and NYAR argued that Coastal – although not a rail carrier itself – was acting on behalf of a "rail carrier" for purposes of 49 U.S.C. § 10901, that the facility was necessary for "transportation by rail," and that, therefore, the Suffolk Supreme Court did not have jurisdiction over the claims relating to the August New Highway Lease covering a portion of the Farmingdale Yard. In addition, Coastal and NYAR argued that because the Farmingdale Yard

[6] Judge Seybert has since stayed the Federal Action pending resolution of the appeals of the three STB decisions. Coastal Distribution, LLC v. Town of Babylon, No. 05-CV-2032 (E.D.N.Y. Nov. 10, 2010).

was subject to the exclusive jurisdiction of the STB, the termination of the August New Highway Lease would constitute an impermissible abandonment of a line of rail under 49 U.S.C. § 10903. Id.

Pinelawn responded to the motions for summary judgment and/or to dismiss the State Court Action arguing, *inter alia,* that: (1) material issues of fact existed regarding whether Coastal was operating as a "rail carrier" or the facility was a "rail yard" and therefore summary judgment was inappropriate; (2) the operations at the Farmingdale Yard and Coastal itself were not subject to the exclusive jurisdiction of the STB, including the abandonment provisions; and (3) even if the STB had jurisdiction over any rail activity occurring at the Farmingdale Yard – which it did not – that jurisdiction did not preempt the Supreme Court's jurisdiction over the state law claims regarding a lease between two private parties.

Shortly thereafter, in keeping with the direction of the Second Circuit's February 2007 decision, Pinelawn and the Town sought guidance from this Board on the jurisdictional issues relating to federal railroad law, which was the first time any of the parties had sought a decision from this Board on whether the Farmingdale Yard was within its jurisdiction (as neither NYAR nor Coastal have ever sought permission to construct and/or operate the Farmingdale Yard). Specifically, on July 2, 2007, the Town and Pinelawn filed a Petition with the STB for a Declaratory Order to determine whether Coastal was a rail carrier or was operating on behalf of a rail carrier, and whether the activity at the Premises constituted a line of railroad. See Town of Babylon and Pinelawn Cemetery, STB Finance Docket No. 35057 (Document No. 219688). In opposition, Coastal and NYAR filed with the Board *the entire record* before the federal court on this matter.

On January 8, 2008 – subsequent to the filing of the first STB Petition, but prior to a decision from the Board – the Suffolk Supreme Court issued its decision in the State Court Action on the summary judgment motions, holding that it lacked jurisdiction due to federal preemption and dismissing Pinelawn's claims. Among its conclusory findings, the Suffolk Supreme Court stated that (1) "Jurisdiction" the court puts with the state transportation board [*sic*] – Surface Transportation Board, Federal agency" and (2) "Coastal can easily be described as an agent of [NYAR], putting them well within the jurisdiction of the [STB]." See Pinelawn Cemetery v. Coastal Distribution, LLC, et al, Suffolk Sup. Ct Index No. 04-8599 (Jan. 8, 2008). In addition, the Suffolk Supreme Court held, somewhat incongruously, that it both lacked jurisdiction to hear the case, and that the only body competent to decide whether it lacked jurisdiction was the STB. Id. Pinelawn appealed this decision to the Second Department.

Three weeks later, in a controlling decision directly contradicting the Suffolk Supreme Court's findings in the State Court Action, this Board determined that Coastal was not a rail carrier or operating on behalf of a rail carrier. In its decision served on February 1, 2008, the Board found that:

> [b]ased 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.... Rather, based on the evidence before us here, Coastal is offering its own services to customers directly, and NYAR's involvement essentially is limited to transporting cars to and from the facility. Because Coastal is the only party that operates the transloading facility and is responsible for it, and because NYAR has assumed no liability or responsibility for Coastal's transloading activities, NYAR's level of involvement with Coastal's transloading operations at the Farmingdale Yard is **insufficient to make Coastal's activities an integral part of NYAR's provision of transportation by 'rail carrier.'**

Town of Babylon and Pinelawn Cemetery, STB Finance Docket No. 35057 (served Feb. 1, 2008) at 5.[7] In other words, the Board held that Coastal was not operating as a rail carrier for purposes of federal preemption and the facts of the case did not establish that Coastal was operating on behalf of or as the agent of NYAR. The Board further held that no "rail transportation" was occurring at the Farmingdale Yard and that nothing in the record suggested that Coastal's activities were an "integral part of NYAR's provision of transportation by 'rail carrier.'" Id. at 5-6. Therefore, the Board concluded that "[it] does not have jurisdiction over Coastal's activities, and the Federal preemption in section 10501(b) does not apply." Id. at 6. Just a few weeks later, both Coastal and NYAR filed petitions for reconsideration of the Board's February 1, 2008 decision. See Town of Babylon and Pinelawn Cemetery, STB Finance Docket No. 35037 (Documents No. 221649 and 221654).

Based on the Board's February 1, 2008 decision and while the petitions for reconsideration were pending, Pinelawn filed a motion to renew in the State Court Action requesting leave to renew and requesting that the Suffolk Supreme Court revisit its prior decision based on the Board's intervening February 1, 2008 decision:

> There has been a change in law that materially effects this Court's decision dated January 8, 2008, to wit, **the United States Surface Transportation Board ("STB"), in a decision dated January 31, 2008 determined that Defendant Coastal is not an agent of Defendant NYAR and therefore the STB does not have jurisdiction over Coastal's activities and federal preemption in 49 U.S.C. §10501(b) does not apply.** This finding and conclusion directly contradicts the determination relied upon by this Court in its January 8, 2008 decision that stated that "...Coastal can easily be described as an agent of New York and Atlantic Railway, putting them well within the production of the Surface Transportation Board."

[7] An appeal of this decision is pending, *see supra*, note 4.

See Pinelawn Motion for Leave to Renew, Suffolk Sup. Ct. Index No. 04-8599 (March 14, 2008). NYAR opposed Plaintiff's Motion and argued that (1) regardless of whether Coastal is a "rail carrier," there is no dispute that [NYAR] and [LIRR] are rail carriers; and (2) the order of the STB is interlocutory, the Board is currently reconsidering its Order, and it would simply be premature for this court to take any action based on such an order. Similarly, Coastal opposed the motion to renew and argued that (1) the proceedings before the STB were not relevant because they involved a petition for declaratory judgment and not a petition for abandonment; and (2) the January 31, 2008 decision of the STB had no "legal effect" because it was the subject of a pending appeal to the DC Circuit.

In September 2008, prior to the Suffolk Supreme Court issuing a decision on the motion to renew, the STB denied the petitions for reconsideration and affirmed its prior decision that Coastal was not a rail carrier and was not operating on or behalf a rail carrier. See generally Town of Babylon and Pinelawn Cemetery, STB Finance Docket No. 35057 (served September 26, 2008). The Board reasoned that:

> [W]hile section 10501(b)(2) enumerates various transportation activities over which the Board's jurisdiction is exclusive, section 10501(a)(1) clearly specifies that **the Board's jurisdiction is over "transportation by rail carrier." Thus, to come within the Board's jurisdiction and thereby be entitled to preemption under section 10501(b), an activity must constitute "transportation" and must be performed by, or under the auspices of, a "rail carrier."** See 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 (STB served July 10, 2007) (citation omitted). For an activity to be subject to the agency's jurisdiction, and therefore entitled to preemption, both jurisdictional prongs of the statutory test must be met, not just one as suggested by NYAR. The Board reasonably applied the record evidence in this case to its existing precedent to conclude that **Coastal is not a rail carrier and would not become a rail carrier by virtue of the construction activities for which it seeks to be protected from state and local regulation. Simply put, where, as here, a non-rail**

> **carrier is operating a transload facility for its own benefit, it is not subject to the Board's jurisdiction.**
>
> Petitioners charge that the Board was wrong in its determination that Coastal is not acting as NYAR's agent. But the Board carefully considered the agency issue in the February 2008 Decision, and petitioners' arguments on reconsideration merely rehash their earlier arguments and provide no basis for us to hold differently here.
>
> For all of the above reasons, petitioners fail to demonstrate grounds for us either to dismiss the declaratory order petition or to reconsider our prior decision. Consequently, the relief sought by petitioners will be denied.

Town of Babylon and Pinelawn Cemetery, STB Finance Docket No. 35057 (served September 26, 2008) at 5-6 (emphasis added).[8] Days later, Pinelawn provided the Suffolk Supreme Court with a copy of the STB decision by letter dated September 30, 2008.

In October 2008, Congress passed the Clean Railroads Act ("CRA"). As such, the Town and Pinelawn filed a renewed petition with the Board on December 18, 2008 to reopen the docket and issue a declaratory order confirming that the February 1, 2008 and September 26, 2008 Decisions remain valid and that, under the CRA, the Farmingdale Yard is a non-rail facility and thus is subject to local regulation. Town of Babylon and Pinelawn Cemetery, STB Finance Docket No. 35037 (Document No. 224216).

On February 18, 2009 – prior to the Board issuing a decision on the December 2008 Petition – the Suffolk Supreme Court granted Pinelawn's motion to renew in the State Court Action, and acknowledged that in its decision served February 1, 2008 the STB had determined that Coastal was not operating on or behalf of a rail carrier or engaging in rail transportation decision but that this decision materially affected the Court's January 8, 2008 determination. See Pinelawn Cemetery v. Coastal Distribution, LLC, et al, Suffolk Sup. Ct. Index No. 04-8599 (Feb.

[8] An appeal of this decision is pending, *see supra*, note 4.

18, 2009). Notwithstanding the fact that the Suffolk Supreme Court recognized that the basis of its January 8, 2008 decision was essentially overturned by the STB's decision, the Suffolk Supreme Court went on to grant summary judgment and dismiss the State Court Action for a second time. Id. at 5. Pinelawn also appealed the Suffolk Supreme Court's February 18, 2009 Decision to the Second Department, arguing that the Suffolk Supreme Court incorrectly granted summary judgment.

On October 15, 2009, the Board decided the December 2008 Petition and held: "the Farmingdale Yard facility is not (and never was) part of 'transportation by rail carrier' within the Board's jurisdiction." Town of Babylon and Pinelawn Cemetery, STB Finance Docket No. 35057 (served October 15, 2009) at 7.[9]

On June 8, 2010, the Second Department decided the two appeals of the State Court Action, reversing the grant of summary judgment, holding that the case should have been stayed pending a "determination by the STB on the issue of abandonment," and remanding to the Suffolk Supreme Court. Pinelawn Cemetery v. Coastal Distribution, LLC et al, 74 A.D.3d 938, 906 N.Y.S.2d 565, 568 (App. Div. 2d Dep't 2010). On remand, at a conference on July 8, 2010, the Suffolk Supreme Court directed Pinelawn to file a petition for adverse abandonment with the Board within six months. On January 6, 2011, the parties stipulated that Pinelawn seek the Board's guidance on or before January 25, 2011.

ARGUMENT

While Pinelawn seeks the Board's assistance in re-opening this docket to declare the rights of the respective parties, it is respectfully submitted that the Second Department erred in its analysis and no petition for adverse abandonment is necessary. The Farmingdale Yard is not

[9] An appeal of this decision is pending, *see supra*, note 4.

now nor has ever been part of a main line of railroad under the Board's jurisdiction. As such, Pinelawn respectfully requests that the Board reopen this docket and enter an order declaring (1) the Farmingdale Yard is excepted track pursuant to 49 U.S.C. § 10906; and (2) no petition for abandonment – adverse or otherwise – under section 49 U.S.C. § 10903 is necessary. Alternatively, if the Board declines to grant such an order, it is respectfully requested that a briefing schedule be set for Pinelawn to file a petition for adverse abandonment or discontinuance at the Farmingdale Yard.

POINT I
THE STB HAS THE EXCLUSIVE AUTHORITY TO DETERMINE QUESTIONS OF ITS JURISDICTION AND TO ISSUE DECLARATORY ORDERS REGARDING THE SAME

The Board has authority to determine its own jurisdiction. Burlington N. Inc. v. Chicago & N.W. Transp. Co., 649 F.2d 556, 558 (8th Cir. 1981). In fact, even where the Board has previously held that it lacks jurisdiction over a property or subject matter, it has continuing authority to issue decisions addressing the extent of its jurisdiction. See, e.g., N&W Ry. – Lease of Line in Cook and Will Count. IL, 9 I.C.C.2d 1155 (1993)(affirming an earlier order declaring that the ICC lacked jurisdiction over the lease in question) vacated, United Transp. Union – Illinois Legislative Bd. v. I.C.C., 52 F. 3d 1074 (D.C. Cir. 1995)(remanding with instructions for the ICC to explain its determination of jurisdiction). Specifically, the Board may reopen a docket and issue a declaratory in order to remove uncertainty regarding the scope of its jurisdiction. See 5 U.S.C. § 554(e) and 49 U.S.C. § 721. The Board has broad discretion in determining whether to issue such a declaratory order. See InterCity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Authority – Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). Where, as here, the Second Department has determined that it cannot resolve an issue of state law without clarification by the Board of its jurisdiction over this

Property, the Board should exercise its discretion and issue a declaratory order directing the parties and the state court.

POINT II
ABANDONMENT IS NOT NECESSARY WHERE THE TRACK IS EXCEPTED

In an effort to standardize and streamline the regulation of the interstate rail industry, Congress granted this Board exclusive jurisdiction over "transportation by rail carriers." The statutory scheme for this jurisdiction is set forth in the ICCTA. A rail carrier is defined as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5).

As a part of its authority under ICCTA, the STB regulates the abandonment of railroad lines. Specifically, a "rail carrier" may not abandon a "railroad line" unless a certificate is obtained from the STB indicating that the present or future public convenience and necessity permit such abandonment. 49 U.S.C. § 10903. An exception to this provision exists for the abandonment "of spur, industrial, team, switching, or side tracks" ("Excepted Track"). 49 U.S.C. § 10906. The ICCTA explicitly states that the STB does not have jurisdiction over the abandonment of Excepted Track:

> Notwithstanding section 10901 and subchapter II of chapter 113 of this title, and without the approval of the Board, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. **The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.**

49 U.S.C. § 10906 (emphasis added).

Where, as here, the track in question is not a line of railroad, but rather Excepted Track, the ICCTA abandonment provisions are wholly inapplicable and the Second Department's

direction in the State Court Action that the parties must seek a certificate of abandonment is in error.

POINT III
THE TRACK IN QUESTION IS NOT NOW AND HAS NEVER BEEN A LINE OF RAILROAD

In excepting small segments of track such as "spur, industrial, team, switching or side track," Congress sought to distinguish the regulation of "main lines" that would have implications for interstate commerce from the "mass of tracks that are incidental to the operation of the line." Detroit & M. Ry. V. Boyne City, G. & A.R.R., 286 F.540, 546 (E.D. Mich. 1923).

The underlying purpose for the distinction between a "railroad line" and Excepted Track has been explained as follows:

> ... the obvious purpose prompting the [Interstate Commerce Act] but also of the general nature of the tracks mentioned, that Congress intended *to subject to the requirements of [section 1(18)]* so-called main or branch lines of railroad, that is, *lines designed and used for continuous transportation service by through, full trains between different points of shipment or travel, and to exclude* from the operation of the statute *all that mass of "tracks"* (as distinguished from "lines") naturally and necessarily *designed and used for* **loading, unloading, *switching* and other *purposes connected with, and incidental to*, but not actually and directly used for, *such transportation service.***

Detroit & M. Ry. v. Boyne City, G. & A.R.R., 286 F. 540, 546 (E.D. Mich. 1923)(italics in original)(bold emphasis added). The agency and the courts look primarily at the use of a track and its physical characteristics in making the determination of whether it should be categorized as a line of railroad, or as Excepted Track. Battaglia Distributing Co. v. Burlington Northern Railroad Co., STB Finance Docket No. 32058 (served June 27, 1997) at 3.

Whether a track is Excepted Track as opposed to an "extension" or "railroad line" is a mixed question of law and fact. United States v. Idaho, 298 U.S. 104, 105 (1936); Hughes v.

Consol-Pennsylvania Coal Company, 945 F.2d 594 (3d Cir. 1991); New Orleans Terminal Company v. Spencer, 366 F.2d 160 (5th Cir. 1969).[10] This mixed question of law and fact "turns on the intended use of track segment, not on the label or cost of the segment." Columbiana County Port Authority v. Boodman Township Park District, 154 F.Supp. 1165 (N.D.O.H. 2001). Thus, the use of the tracks, and not just the fact that they are tracks, determines whether the track constitutes a "railroad line."

Here, based on the factual record, the admissions by Coastal and NYAR, and the prior decisions by this Board, it is evident that there is no line of railroad at the Farmingdale Yard, which is and has always been Excepted Track.

A. The Track As Constructed Was Not Part of the Main Line of Railroad

The track was built in the early 1900s as a spur track, consisting of two rail tracks each approximately one-quarter mile long, which together comprise a "Y" or "wye" track. It is less than one mile long, was stub-ended, was not built for the purposes of reaching another railroad's territory, and did not have regularly scheduled service. These physical characteristics make clear that it was not intended to be, nor was it, a part of the "main line" of railroad on which the LIRR-MTA provided passenger or freight service to Long Island. See, e.g., The New York City Economic Development Corporation – Petition For Declaratory Order, STB Finance Docket No. 34429 (served July 15, 2004) at 4 (listing, *inter alia*, the above criteria and finding that the physical characteristics of a planned track were consistent with the conclusion that it would be a spur or switching track).

[10] See, e.g., Texas & P. Ry. v. Gulf, Colo. & S.F. Ry., supra, 270 U.S. 266, 274-79 (1926) (track segment identified as "industrial" track held to require Commission approval pursuant to section 1(18)); Georgia S. & Fla. Ry. V. Duval Connecting R.R., 324 F.2d 801, 802 (5th Cir. 1963)(*per curiam*)(track segment identified as "yard" track held not to require Commission approval pursuant to section 1(18)).

Further, the use of track at its inception was two-fold. Pinelawn used the track as a turnaround for funeral processions arriving to the cemetery by rail. In addition, upon information and belief, the LIRR-MTA used the track for purposes incidental to the movement of trains on its main line, including switching, maintenance, loading, and unloading. See, e.g., MVC Transportation, LLC – Acquisition Exemption – PL&E Properties, Inc., STB Finance Docket No. 34462 (served Oct. 20, 2004) at 3; see also 49 U.S.C. § 10906. There has never been a rail station located in the Yard and no through trains have ever operated over the trackage. See, e.g., Louisiana & Arkansas Railway Company v. Missouri Pacific Railway Company, 288 F. Supp. 320, 323 (E.D. Lous. 1968)(finding that the track was excepted spur track where it was used for loading, unloading, storage, and switching of cars, incidental to the receipt and delivery of shipments to and from carriers).

In fact, from 1960 to 2003, there was little to no activity at all on the Farmingdale Wye Track. Locke Affidavit, Exhibit G, at ¶ 23. For all of these reasons, it is clear that at its inception and throughout the 1900s, the track was properly classified and treated as Excepted Track.

B. When NYAR Assumed the LIRR-MTA's Freight Services, the Operations on the Track Remained the Same and Did Not Become Transportation By Rail Carrier

When NYAR took over the freight operations of the LIRR-MTA pursuant to a transfer agreement dated November 18, 1996 ("Transfer Agreement"), it did not extend those freight services over the existing Farmingdale Wye Track; it did not add to or alter the physical characteristics of the track; and it did not build a station or offer passenger or freight services over the track. In its filings with the Board regarding the Transfer Agreement, NYAR explicitly noted that "the transaction was designed merely to effect a change in the entity conducting freight operations. Through the transaction, NYAR would take over the freight service formerly

provided by LIRR, with no significant operational changes contemplated." New York & Atlantic Railway Company – Operation Exemption – The Long Island Rail Road Company, STB Finance Docket No. 33300 (served Nov. 17, 1997)(decision approving the Freight Transfer Agreement)(citing NYAR Reply at 4). Indeed, as stated above, the Transfer Agreement, approved by the Board, labels the Farmingdale Wye Track as a "yard" that consists of "PW Long Siding, Wye and Team Yard." See Exhibit D at Ex. 1.

When NYAR applied for an operation exemption, it supplied a rough map of the "Subject Line" and stated that it sought such exemption for the following main lines of railroad:

> Bay Ridge Branch (mp 4.0 to mp 16.0)
> Central Extension (mp 19.1 to mp 21.2)
> Bushwick Branch (mp 4.0 to mp 6.0)
> (collectively, the "Freight Line")
>
> Main Line (mp 9.3 to mp. 94.3)
> Montauk Branch (mp 0.0 to mp 115.8)
> Port Jefferson Branch (mp 24.9 to mp 58.0)
> Central Branch (mp 28.7 to mp 35.9)
> Central Extension (mp 18.7 to mp 19.1)
> Hempstead Branch (mp 13.3 to mp 18.7)
> West Hempstead Branch (mp 15.5 to mp 20.1)
> Montauk Cut Off (mp 0.1 to mp 1.3)
> (collectively the "Joint Use Line" and, together with the Freight Line, the "Subject Line")

See Exhibit E. NYAR described the "Subject Line" as the main portions of track over which it offered common carrier freight services, but did not explicitly include the Farmingdale Wye Track, which was built by the LIRR-MTA and explicitly described as a ""yard" that consists of "PW Long Siding, Wye and Team Yard," in the agreement between the LIRR-MTA and NYAR. The Board granted NYAR an operation exemption for the "Subject Line," and NYAR continued to use the Farmingdale Wye Track for purposes incidental to the movement of trains on its main lines. In short, nothing about this transaction created a line of railroad.

C. Coastal Has Admitted that the Farmingdale Wye Track is a Team or "Y" Track

In or about 2003, Coastal built a structure on the property that is best described as a waste transfer station. It is not a railway station and there is no doubt that the property is not currently being used for rail transportation. In fact, Coastal itself admitted that the facility is a "team track," when it explained that its operation at the Rail Yard is a "transload facility," which:

> ...is one at which cargo is transferred between modes of transportation, in this case between highway vehicles and railway vehicles. **Transload is the modern term for a "team track"** the name referring to the teams of horses which pulled "drays" (wagons) to the side of rail cars so that freight could be transferred and then delivered to locations beyond the physical limits of the railroad's track. Modern transload facilities include machinery needed to move commodities efficiently between modes.

See Coastal's Memorandum of Law in Support of Motion for Summary Judgment at 2, Suffolk Supreme Court Index No. 2004-8599 (March 30, 2007).

Thus, by Coastal's own admission, its operation fits within the definition of the excepted track in 49 U.S.C. § 10906 and is therefore exempt from STB abandonment jurisdiction. This self-admitted "team track" label is further evidenced by the Transfer Agreement's characterization of the facility as "yard" that consists of "PW Long Siding, Wye and Team Yard."

D. Even without Coastal's Admission, it is clear that the Farmingdale Wye Track is Excepted Track Under Applicable Precedent

Even if the Board were to ignore Coastal's characterization of its own facility, existing case law clearly establishes that the facility in question is Excepted Track. In Nicholson v. Interstate Commerce Commission, 711 F.2d 364 (D.C. Cir. 1983), the owner of property that was going to be acquired by condemnation sought to oppose such action by filing a petition with the ICC alleging that to build a proposed "classification yard" on his property required approval by the ICC because the yard would be an additional "rail road line." Id. at 366. The

classification yard was to consist of numerous tracks, which would be used to switch cars in the making up and breaking up of freight cars, to arrange cars or trains in delivery order and to sort cars in trains by types of cars or contents preparatory to train movement. Id. The proposed yard was to be approximately 3.5 miles long and .5 miles wide, cover 550 acres and consisted of over 100 miles of track and cost an estimated at $75 million (in the year 1983). Id.

Ultimately, the D.C. Circuit Court in Nicholson affirmed an ICC decision, which explained that while the term "railroad line" is not defined in the act, a separate section excludes from the requirements of 49 U.S.C. §10901, all "spur, industrial, team, switching and side track." Thus, reasoned the Court, based on case law and common sense the proposed classification yard cannot qualify as a "railroad line." Nicholson v. Missouri Pacific Railroad Company, 366 I.C.C. 69 (I.C.C. 1982). Specifically, the ICC noted that:

> there are a large number of classification yards in this country, and many have been built since 1920 [when ICC first obtained jurisdiction over rail lines]. **Yet we have no instance in which the ICC has found that the construction of a classification yard-or of any other yard-to require ICC approval under Section 10901 or its predecessor, section 1(18) of the Interstate Commerce Act.**

Nicholoson, 366 I.C.C. at 72-73 (emphasis added).

While Nicholson involved construction of a "classification yard," the analysis for purposes of reviewing whether the Farmingdale Yard must be "abandoned" is the same. The Board must decide whether the rail facility constitutes an actual "railroad line" or extension thereof or whether it is merely an adjunct to a railroad line such as a yard, team, switching, industrial or side track. Here the facility is far smaller than the classification yard in Nicholson. The Fifth Circuit has opined in similar circumstances that loading of cars incidental to the receipt of shipments is not under STB jurisdiction, explaining that:

> if there are traffic movements which are part of the actual transportation haul from shipper to consignee, then the trackage over which the movement takes place is a "line of railroad, or extension thereof...." If, however, the trackage is used in the loading, reloading, storage and switching of cars *incidental* to the receipt of shipments by the carrier or their delivery to the consignee, then such trackage is "spur, industrial, team, switching or side tracks" and as such, no under commission jurisdiction.

New Orleans Terminal Company and Southern Pacific Company v. Charles W. Spencer et al., 366 F.2d 160 (5th Cir. 1966).

Here, the Farmingdale Yard is used for the storage of rail cars, the dumping of construction and demolition debris and the subsequent loading of same onto rail cars. Given that the Farmingdale Yard is used for loading C&D debris, it is clear that its use is incidental to, but not actually and directly, used for the provision of transportation services. As such, it is not a line of railroad and no certificate of abandonment is necessary.

E. This Board Has Examined The Activities At The Yard On Three Separate Occasions, and Determined that the Track is "Not Now" and "Never Was" a Line of Railroad.

Having reviewed the facts of this case and the operations at the Farmindale Yard on three separate occasions, the Board need look no further than its own decisions for an analysis of whether the Farmingdale Yard constitutes a "line of railroad" that must be abandoned.

First, on February 1, 2008, the Board found the following facts in support of its conclusion that no transportation by rail carrier was occurring on the property, and thus, it did not have jurisdiction:

- Coastal built the facility;
- Coastal's activities are not being offered by NYAR or through Coastal as NYAR's agent or contract operator;
- the Operations 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 has the exclusive right to conduct transloading operations on the property;

- Pursuant to the Operations Agreement, Coastal is responsible for all track repairs and for all necessary repairs, maintenance, and upkeep of the facility;

- Coastal 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;

- Coastal pays NYAR a usage fee of $20 per loaded rail car (inbound or outbound);

- 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.);

- 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;

- 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.

Town of Babylon and Pinelawn Cemetery, STB Finance Docket No. 35057 (served Feb. 1, 2008) at 5. In light of these facts, the Board concluded:

> In sum, the record here, including in particular the parties' rights and obligations under their own agreement, does not establish that Coastal is acting as an agent or under the auspices of NYAR. This case differs from P&C Dock because there is no evidence that NYAR has ever quoted rates or charged compensation for use of Coastal's transloading facility or that NYAR is holding out Coastal's transloading services as part of the common carrier services that NYAR offers to the public.[12] Rather, based on the evidence before us here, Coastal is offering its own services to customers directly, and NYAR's involvement essentially is limited to

> transporting cars to and from the facility. Because Coastal is the only party that operates the transloading facility and is responsible for it, and because NYAR has assumed no liability or responsibility for Coastal's transloading activities, NYAR's level of involvement with Coastal's transloading operations at the Farmingdale Yard is insufficient to make Coastal's activities an integral part of NYAR's provision of transportation by "rail carrier." Thus, the Board does not have jurisdiction over Coastal's activities, and the Federal preemption in section 10501(b) does not apply.

Town of Babylon and Pinelawn Cemetery, STB Finance Docket No. 35057 (served Feb. 1, 2008) at 5-6.

Second, on September 26, 2008, when faced with petitions for reconsideration, the Board "carefully reconsidered" its February 2008 decision and reached the same conclusion, despite vigorous opposition from NYAR and Coastal. Specifically, the Board reiterated its clearly defined statutory jurisdiction and found:

> [W]hile section 10501(b)(2) enumerates various transportation activities over which the Board's jurisdiction is exclusive, section 10501(a)(1) clearly specifies that the Board's jurisdiction is over "transportation by rail carrier." Thus, to come within the Board's jurisdiction and thereby be entitled to preemption under section 10501(b), an activity must constitute "transportation" and must be performed by, or under the auspices of, a "rail carrier." See 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 (STB served July 10, 2007) (citation omitted). For an activity to be subject to the agency's jurisdiction, and therefore entitled to preemption, both jurisdictional prongs of the statutory test must be met, not jus one as suggested by NYAR. The Board reasonably applied the record evidence I this case to its existing precedent to conclude that Coastal is not a rail carrier and would not become a rail carrier by virtue of the construction activities for which it seeks to be protected from state and local regulation. Simply put, where, as here, a non-rail carrier is operating a transload facility for its own benefit, it is not subject to the Board's jurisdiction.

Town of Babylon and Pinelawn Cemetery, STB Finance Docket No. 35057 (served Sept. 26, 2008) at 5-6. In so holding, the Board made clear that it lacked jurisdiction both because Coastal was not a rail carrier and because the operations on the property – transloading" – were not "transportation" under its jurisdictional statute. Thus, to the extent that NYAR or LIRR-MTA

operated a transload facility on the Property prior to Coastal's sublease, it was also not transportation by rail carrier under the STB's jurisdiction. Thus, no abandonment was necessary when non-rail carrier Coastal took over the operations.

Finally, in October 2009, in light of an Amended Agreement between Coastal and NYAR and the passage of the Clean Railroads Act, the Board once again analyzed whether rail activity was occurring on the property. Not only did it affirm its prior findings, but it went so far as to hold that, "Here, the Farmingdale Yard facility is not (and never was) part of 'transportation by rail carrier' within the Board's jurisdiction." Town of Babylon and Pinelawn Cemetery, STB Finance Docket No. 35057 (served Oct. 16, 2009) at 5-6. In its analysis the Board discussed its prior decisions as follows:

> In the February 2008 Decision, we observed that Coastal exercised control over fees, operations, and maintenance at Farmingdale Yard, and was solely responsible and liable for its own actions. Based on that evidence, we concluded that Coastal is not the agent of NYAR. Further, we found that Coastal is offering its own services to customers directly, and NYAR's involvement is essentially limited to transporting cars to and from the yard. Because Coastal is the only party that operates the yard and is responsible for it, and because NYAR had not assumed liability for Coastal's activities, we concluded that Coastal's activities are not an integral part of NYAR's provision of transportation by a "rail carrier." Although the Respondents apparently drafted the Amended Agreement to respond to our prior decisions, we do not find the changes sufficient to make Coastal NYAR's agent. Nor are Coastal's activities under the Amended Agreement an integral part of NYAR's operation as a rail carrier.

Id. at 4. In determining that the amended agreement had not changed the Board's two prior decisions, the Board relied on, *inter alia*, the following facts:

- the Amended Agreement authorizes NYAR to adjust the transloading fee but only "at Coastal's request or with Coastal's consent."
- the fee must be sufficient to pay all operating expenses, a reasonable return on Coastal's investment, and a reasonable profit margin.
- NYAR continues to have only limited influence over transloading fees;

- The Amended Agreement does not effectively change the setting of transloading fees by Coastal from the earlier agreement, for purposes of establishing an agency relationship or integration of operations as a railroad carrier.

- The Amended Agreement does not give NYAR control over the operation of Farmingdale Yard.

- Coastal remains "solely responsible for all necessary repairs, maintenance and upkeep of the facility."

- NYAR is under no obligation to pay or repay Coastal for improvements that Coastal makes to the yard.

- Coastal alone continues to provide transloading services.

- Coastal alone loads and unloads commodities.

- Coastal alone bills customers for its loading services.

- The requirement in the Amended Agreement that Coastal state that it acts as NYAR's agent does not divest it of any of the powers vested in it by the agreement and vests no powers at all in NYAR.

- The general statement in the agreement that NYAR "shall control all aspects of the Facility's transload operations. . . ." does not deprive Coastal of any of the specific powers vested in it by the agreement and grants no specific authority to NYAR.

- Coastal's transload services are separate from, and distinguishable from, NYAR's freight rail service offerings.

- Coastal built the Farmingdale Yard, not NYAR;

- Coastal has the exclusive right to conduct the transloading operations under a long-term lease;

- Coastal collects its transload fees from its customers directly;

- Coastal pays fees to NYAR in the nature of rent; and

- Coastal can only be removed during the term of the agreement for cause.

Id. After a thorough analysis for the third time, The Board concluded:

> [A]fter reviewing the Amended Agreement, it is apparent that Coastal still operates Farmingdale Yard with a high degree of autonomy, independent

> of NYAR. The level of involvement of NYAR remains insufficient to establish it either as the operator of the facility or as the principal of Coastal. Nor are Coastal's activities integral to NYAR's provision of transportation as a "rail carrier." Because Coastal is not a rail carrier, the agent of a carrier, or an integral part of NYAR's rail operation, we lack jurisdiction to regulate Farmingdale Yard, federal preemption does not apply, and the facility remains subject to state an local regulation. See Hi Tech, LLC v. New Jersey, 382 F.3d 295, 308 (3d Cir. 2004).

Town of Babylon and Pinelawn Cemetery, STB Finance Docket No. 35057 (served Oct. 16, 2009) at 5-6. No petition for abandonment is necessary where, as here, the track has never been part of a line of railroad. Cf. Allegheny Valley Railroad Company – Petition for Declaratory Order, STB Finance Docket No. 35239 (served June 15, 2010) at 5-6.

In all of the filings with the Board, not once did Coastal or NYAR raise the issue of abandonment with the Board. Instead, Coastal and NYAR only raised the issue in the State Court Action and the appeal therefrom. Coastal and NYAR argued to state courts for *three years* that the STB was the only entity with jurisdiction because there had been no petition for abandonment, but never raised the argument in this proceeding, pending before the STB. This speaks volumes about the lack of merit in the assertion that an abandonment is necessary where, as here, no rail activity is occurring.

Finally, given that Coastal never applied for or received authority from the Board to operate, if the track is not Excepted Track as argued herein, Coastal's operations are in violation of law.

CONCLUSION

Because it is absolutely clear that there is not now – and there never was – any "rail activity" to abandon, the Board should reopen this docket and issue a declaratory order stating that:

(1) no rail activity is or was occurring on the Property;

(2) the STB does not have jurisdiction over the Farmingdale Yard, which is Excepted Track;

(3) no petition for abandonment is necessary;

(4) the State Court should resolve the state law claims.

In the alternative, if the Board is not inclined to reopen the docket and grant such an order, Pinelawn respectfully requests that it set a schedule for an abandonment proceeding as follows:

- 60 days for discovery;
- 30 days from the close of discovery for Pinelawn to file an opening brief;
- 30 days thereafter for reply by NYAR and Coastal;
- 30 days thereafter for rebuttal by Pinelawn.

Dated: Huntington, NY
January 25, 2011

Respectfully Submitted,

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EXHIBIT A

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D27693
O/prt

_____AD3d_____

Argued - April 30, 2010

MARK C. DILLON, J.P.
RUTH C. BALKIN
L. PRISCILLA HALL
PLUMMER E. LOTT, JJ.

2009-02839

DECISION & ORDER

Pinelawn Cemetery, appellant, v Coastal Distribution, LLC, et al., respondents.

(Index No. 8599/04)

Mark A. Cuthbertson, Huntington, N.Y. (Jessica P. Driscoll of counsel), for appellant.

John F. McHugh, New York, N.Y., for respondent Coastal Distribution, LLC.

Jay Safar, Central Islip, N.Y., for respondents Metropolitan Transportation Authority and Long Island Rail Road Company.

In an action, inter alia, for a judgment declaring that a certain lease dated August 30, 1904, was terminated, the plaintiff appeals, as limited by its brief, from so much of an order of the Supreme Court, Suffolk County (Costello, J.), dated February 19, 2009, as, upon renewal, adhered to the original determination in an order dated January 8, 2008, granting the separate motions of the defendants Coastal Distribution, LLC, and New York & Atlantic Railway for summary judgment dismissing the complaint insofar as asserted against each of them and, in effect, directing the dismissal of the complaint against all of the defendants on the ground that its claims were preempted by that provision of the Interstate Commerce Commission Termination Act which grants exclusive jurisdiction to the United States Surface Transportation Board to regulate the abandonment of railroads.

ORDERED that the order is reversed insofar as appealed from, on the law, with one bill of costs payable by the respondents appearing separately and filing separate briefs, upon renewal, the order dated January 8, 2008, is vacated, the motions of the defendants Coastal Distribution, LLC,

and New York & Atlantic Railway for summary judgment dismissing the complaint insofar as asserted against them are denied, and the matter is remitted to the Supreme Court, Suffolk County, for the imposition of a stay of any further proceedings in this action pending resolution by the United States Surface Transportation Board of the issue of whether the subject railroad has been abandoned.

In 1904 and 1905, the plaintiff, Pinelawn Cemetery (hereinafter Pinelawn), leased two parcels of real property to the defendant Long Island Rail Road (hereinafter the LIRR) for a term of 99 years, with an option to renew each lease for a second term of 99 years, provided that the LIRR exercised that option in writing at least three months prior to the termination of each lease. The LIRR constructed two railroad tracks on the two parcels, which are collectively referred to as the Farmingdale Yard. Although it is undisputed that the LIRR properly renewed the 1905 lease, the primary issue in this case is whether the LIRR properly renewed the 1904 lease.

In 1996 the LIRR transferred its freight operations, including the facilities at the Farmingdale Yard, to the Southern Empire State Railroad Company, which subsequently changed its name to the defendant New York & Atlantic Railway (hereinafter NYAR). In 2002 NYAR, a licensed rail carrier, subleased the Farmingdale Yard to the defendant Coastal Distribution, LLC (hereinafter Coastal), which uses the site as a transloading facility to weigh, sort, and load construction and demolition debris onto railroad cars that are bound for Ohio.

In March 2004 the Town of Babylon issued a stop work order, which prohibited Coastal from completing the construction of a three-sided shed at the Farmingdale Yard. In August 2004 Coastal and NYAR replaced the sublease with a transload facility operations agreement, whereby NYAR engaged Coastal as its "contractor" to operate the transloading facility. Coastal applied to the Town's Zoning Board of Appeals (hereinafter the ZBA) to annul the stop work order on the ground that it was exempt from the local zoning laws because it was governed by the Interstate Commerce Commission Termination Act (49 USC § 10101, *et seq.*) (hereinafter the ICCTA), which grants exclusive jurisdiction upon the United States Surface Transportation Board (hereinafter the STB) over most railroad matters. In April 2005 the ZBA upheld the stop work order on the ground that Coastal's activities did not constitute transportation by a rail carrier within the meaning of the ICCTA.

In a related federal action, the United States District Court for the Eastern District of New York granted Coastal's and NYAR's request to preliminarily enjoin the Town from enforcing the stop work order. On appeal, the United States Court of Appeals for the Second Circuit modified the injunction to permit the parties to seek a declaratory order from the STB on the scope of its jurisdiction (*see Coastal Distrib., LLC v Town of Babylon,* 2006 US Dist Lexis 8400 [ED NY 2006], *affd in part and mod in part,* 2007 US App Lexis 3042 [2d Cir 2007]). In a decision dated January 31, 2008, the STB determined that it did not have jurisdiction because Coastal's transloading activities at the Farmingdale Yard did not constitute transportation by a rail carrier (*see Town of Babylon and Pinelawn Cemetery,* STB Fin. Dkt. No. 35057 [Jan. 31, 2008], 2008 WL 275697).

In April 2004 Pinelawn commenced the present action in the Supreme Court, Suffolk County, against Coastal, NYAR, the LIRR, and its parent company, the Metropolitan Transportation Authority. The amended complaint asserted seven causes of action seeking, inter alia, a judgment

declaring that the defendants failed to renew the 1904 lease, injunctive relief, and damages for trespass and negligent misrepresentation. In essence, Pinelawn sought to evict the defendants from the parcel that was the subject of the 1904 lease.

In April 2007 Coastal and NYAR had separately moved for summary judgment dismissing the complaint insofar as asserted against each of them on the ground that the Supreme Court's jurisdiction over the subject matter was preempted by the ICCTA. In an order dated January 8, 2008, the Supreme Court granted both motions for summary judgment and directed the dismissal of the complaint against all of the defendants based on the federal court decisions.

After the STB determined that it did not have subject matter jurisdiction, Pinelawn moved pursuant to CPLR 2221(e) for leave to renew its opposition to the previous motions for summary judgment on the ground that the STB decision contradicted the federal court decisions upon which the Supreme Court had relied. In an order dated February 19, 2009, the Supreme Court granted Pinelawn's motion for renewal and, upon renewal, adhered to its original determination granting the motions of Coastal and NYAR for summary judgment and, in effect, directing dismissal of the complaint against all of the defendants on the ground that the STB had exclusive jurisdiction to regulate the abandonment of railroads.

The general jurisdiction provision of the ICCTA states, in relevant part, that the STB has exclusive jurisdiction over "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 USC § 10501[b][2]). Moreover, 49 USC § 10501(b) contains an express preemption clause, which provides that "[e]xcept 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."

The procedure for abandoning or discontinuing rail transportation over any part of a railroad line is set forth in 49 USC § 10903. Among other requirements, the statute provides that "[a] rail carrier providing transportation subject to the jurisdiction of the [STB] under this part who intends to" abandon or discontinue service over a railroad line must apply to the STB for approval (49 USC § 10903[a][1]). If the STB finds that public convenience and necessity require or permit the abandonment or discontinuance, it will generally approve the application (*see* 49 USC § 10903[d], [e]).

Although 49 USC § 10903(a)(1) states that a "rail carrier" must file the application, there is a long line of cases recognizing that non-carriers who have a sufficient interest in the property may apply for a certificate of abandonment. This procedure is known as an adverse abandonment (*see e.g. Thompson v Texas Mexican Ry. Co.*, 328 US 134; *Howard v Surface Transp. Bd.*, 389 F3d 259; *Consolidated Rail Corp. v Interstate Commerce Commn.*, 29 F3d 706; *Modern Handcraft, Inc. - Abandonment in Jackson County, Mo.*, 363 ICC 969).

Normally, a dispute between a landlord and a tenant is resolved according to state law. When these disputes affect interstate commerce, however, the STB's primary jurisdiction over the abandonment or discontinuance of rail service deprive a landlord of the customary recourse to the

courts until the STB removes its primary jurisdiction. The proper way for the STB to remove its primary jurisdiction is through an adverse abandonment proceeding. If the STB grants an adverse abandonment application, the landlord can seek an eviction (*see City of Peoria & the Village of Peoria Heights, Illinois – Adverse Discontinuance – Pioneer Indus. Ry. Co.*, STB Dkt. No. AB-878 [August 9, 2005], 2005 WL 1900922).

Thus, instead of dismissing the complaint in its entirety, the Supreme Court should have stayed all proceedings in the action pending a determination by the STB of the issue of abandonment (*see Thompson v Texas Mexican Ry. Co.*, 328 US 134; *Chicago & North Western Ry. Co. v Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 502 F2d 193; *City of Des Moines, Iowa v Chicago & North Western Ry. Co.*, 264 F2d 454; *City of New York v Tri-State Brick & Stone of N.Y.*, 17 Misc 3d 1117[A], 2007 NY Slip Op 52050[U]).

DILLON, J.P., BALKIN, HALL and LOTT, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court

EXHIBIT B

PETITION OF PINELAWN CEMETERY
FOR DECLARATORY ORDER
STB Finance Docket No. 35057

Chronology

1904 / 1905	Pinelawn enters into lease agreements with Long Island Railroad for two parcels of land located at 1633 New Highway, Farmingdale ("Property").
Early 1900's	LIRR-MTA constructed a "Railway Spur" on the Property, consisting of two rail tracks each approximately one-quarter mile long, which together comprise a "Y" or "wye" track.
1960	Use of Railway Spur for any purpose all but ceases
11/18/96	NYAR and LIRR-MTA enter into a Transfer Agreement under which NYAR assumes LIRR-MTA's freight services over existing Subject Line on Long Island; does not alter use of Railway Spur
12/5/96	**NYAR, a common carrier, files verified notice of exemption with STB for freight services on Long Island per the Transfer Agreement**
11/17/97	**STB approves the Transfer Agreement and NYAR's exemption for freight services on the Subject Line in Finance Docket No. 33300**
3/22/02	NYAR entered into a lease agreement with Coastal Distribution LLC ("Coastal") for the Property, which lease was subsequently revised on or about July 2002 and again in 2008
10/2003	Coastal began construction of the so-called "Farmingdale Yard" on the Property, which included a truck scale, a rail car scale and a large open structure to "protect transloading activities"
12/18/03	**Attorneys for Pinelawn sent a letter to the Town of Babylon ("Town") requesting the Town issue a cease and desist order against Coastal**
3/29/04	**Town issued a Stop Work Order to Coastal for "working without a permit"**
4/2004	**Coastal and NYAR appealed the issuance of the Stop Work Order to the Town of Babylon Zoning Board of Appeals ("ZBA")**

BLUE = STB
RED = Federal Action
GREEN = State Court Action

PETITION OF PINELAWN CEMETERY
FOR DECLARATORY ORDER
STB Finance Docket No. 35057

Chronology

4/6/2004	**Pinelawn commenced an action regarding the lease in Suffolk Supreme Court against Coastal, LIRR, MTA and the NYAR ("State Court Action"); Pinelawn Cemetery v. Coastal et al, Suffolk Supreme Court Index No. 2004-8599.**
8/6/04	**NYAR and Coastal terminated their lease agreement and entered into a "Transload Facility Operations Agreement."**
4/22/05	**ZBA affirmed the Stop Work Order**
4/26/05	**Coastal and the NYAR seek an injunction in federal court against the Town of Babylon and Pinelawn from enforcing the Stop Work Order ("Federal Court Action"); Coastal & NYAR v. Town of Babylon et al, EDNY CV 05-02032(JS)(ETB).**
5/19/05 – 5/20/05	**Two-day preliminary injunction hearing in front of United States Magistrate Judge E. Thomas Boyle, as a result of Coastal and NYAR's action in federal court.**
7/15/05	**Judge Boyle issued a Report & Recommendation ("R&R") which recommended that the preliminary injunction be granted and found, *inter alia*: (1) that the Town's zoning laws are preempted by the ICCTA; (2) that transloading operations fall within the category of rail "transportation" for purposes of the ICCTA; (3) that Coastal, by virtue of its relationship with NYAR, is considered a rail carrier under the ICCTA; and (4) that 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.**
1/31/06	**United States District Judge Joanna Seybert adopted the R&R issued by Magistrate Boyle and enjoined the Town from enforcing its zoning laws**
2/27/06	**Town of Babylon and Pinelawn appealed the decision in the Federal Action to the United States Court of Appeals for the Second Circuit ("Second Circuit")**

BLUE = STB
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PETITION OF PINELAWN CEMETERY
FOR DECLARATORY ORDER
STB Finance Docket No. 35057

Chronology

2/6/07	**Second Circuit modifies U.S. District Court's preliminary injunction to allow the parties to petition this Board ("STB"); Coastal Distribution, LLC v. Town of Babylon, 216 Fed. Appx. 97, at 100, 103 (2d Cir. 2007).**
3/2007 and 5/2007	**Coastal and the NYAR respectively filed motions for summary judgment and/or to dismiss the proceedings before the Suffolk County Supreme Court**
7/2/07	**In accordance with the direction from the Second Circuit, the Town of Babylon and Pinelawn filed a Petition with the STB for a Declaratory Order to determine whether Coastal was a rail carrier or was operating on behalf of a rail carrier, and whether the activity at the Premises constituted a line of railroad; Pinelawn Cemetery; Town of Babylon and Pinelawn Cemetery, STB Finance Docket No. 35057 (Document ID No. 219688).**
1/8/08	**Decision in State Court Action granting summary judgment, holding that the State Court lacked jurisdiction due to federal preemption and dismissing Pinelawn's claims; Pinelawn Cemetery v. Coastal et al, Suffolk Supreme Court Index No. 2004-8599.**
1/31/08	**STB decided the Petition filed by the Town and Pinelawn and determined that Coastal was not a rail carrier or operating on behalf of a rail carrier; Town of Babylon and Pinelawn Cemetery, STB Finance Docket No. 35057 (served Feb. 1, 2008).**
3/7/08	**Pinelawn appealed to the Appellate Division, Second Department, ("Second Department") from the January 8, 2008 decision in the State Court Action; Pinelawn Cemetery v. Coastal Distribution, LLC, et al, App. Div. Case No. 2008-02472.**
3/14/08	**Pinelawn filed a motion for leave to renew in the State Court Action with the lower Court based on a change in the law in light of the STB decision served February 1, 2008 in Finance Docket No. 35057.**

BLUE = STB
RED = Federal Action
GREEN = State Court Action

PETITION OF PINELAWN CEMETERY
FOR DECLARATORY ORDER
STB Finance Docket No. 35057

Chronology

9/24/08	**STB denied petitions for reconsideration by NYAR and Coastal and affirmed its prior decision that Coastal was not a rail carrier and was not operating on or behalf a rail carrier. Town of Babylon and Pinelawn Cemetery, STB Finance Docket No. 35057 (served Sept. 26, 2008).**
10/16/08	**The Clean Railroads Act, which excepted from the Board's jurisdiction waste transfer rail stations, became law.**
12/18/08	**Pinelawn filed a renewed petition with the STB to reopen the docket and issue a declaratory order in light of the Clean Railroads Act and an amended agreement between Coastal and the NYAR; Town of Babylon and Pinelawn Cemetery, STB Finance Docket No. 35057.**
2/28/09	**State Court granted Pinelawn's motion to renew, granted summary judgment and dismissed the action for a second time; Pinelawn Cemetery v. Coastal et al, Suffolk Supreme Court Index No. 2004-8599.**
3/19/09	**Pinelawn again appealed to the Second Department from the lower Court's February 18, 2009 Decision in the State Court Action; Pinelawn Cemetery v. Coastal Distribution, LLC, et al, App. Div. Case No. 2009-02839.**
10/15/09	**STB decided the December 2008 Petition by Pinelawn and the Town of Babylon and specifically held: "the Farmingdale Yard facility is not (and never was) part of 'transportation by rail carrier' within the Board's jurisdiction. Town of Babylon and Pinelawn Cemetery, STB Finance Docket No. 35057 (served Oct. 15, 2009).**
6/8/10	**Second Department decided the two related appeals, reversing the lower Court's grant of summary judgment, holding that the case should have been stayed pending a "determination by the STB on the issue of abandonment," and remanding to the lower Court; Pinelawn Cemetery v. Coastal Distribution, LLC, et al, App. Div. Case Nos. 2008-02472 and 2009-02839.**

BLUE = STB
RED = Federal Action
GREEN = State Court Action

PETITION OF PINELAWN CEMETERY
FOR DECLARATORY ORDER
STB Finance Docket No. 35057

Chronology

7/8/10	**On remand, the State Court directed Pinelawn to file a petition for adverse abandonment with the Board within six months of a conference held on July 8, 2010; Pinelawn Cemetery v. Coastal et al, Suffolk Supreme Court Index No. 2004-8599.**
1/6/10	**The parties to the State Court Action stipulated that Pinelawn would file the Petition on or before January 25, 2010; Pinelawn Cemetery v. Coastal et al, Suffolk Supreme Court Index No. 2004-8599.**

BLUE = STB
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GREEN = State Court Action

EXHIBIT C

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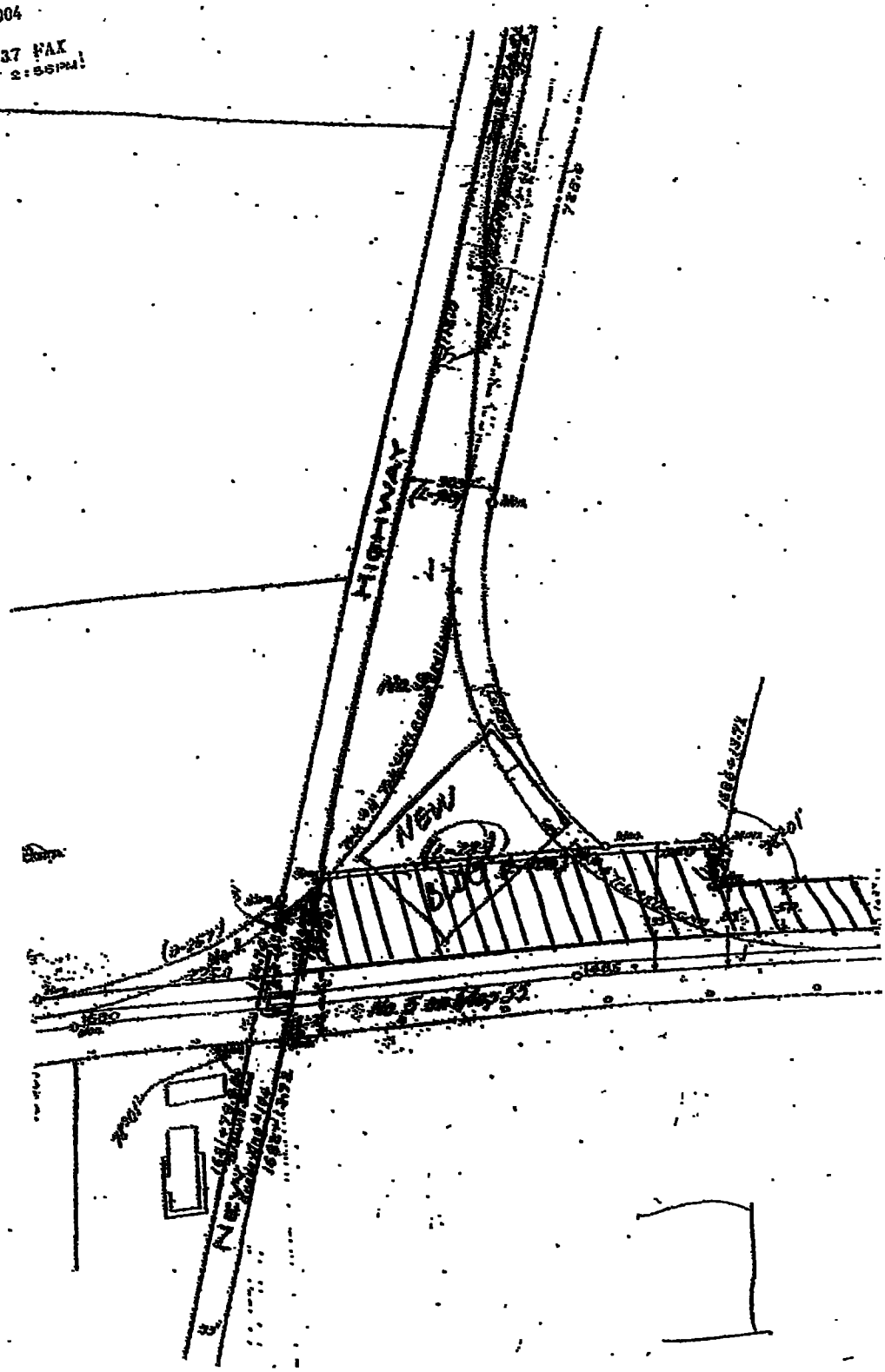

EXHIBIT D

TRANSFER AGREEMENT

BETWEEN

THE LONG ISLAND RAIL ROAD COMPANY

AND

SOUTHERN EMPIRE STATE RAILROAD COMPANY

Dated as of November 18, 1996

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TRANSFER AGREEMENT
BETWEEN
THE LONG ISLAND RAIL ROAD COMPANY
AND
SOUTHERN EMPIRE STATE RAILROAD COMPANY

This Transfer Agreement is made as of this 18th day of November, 1996, by and between **THE LONG ISLAND RAIL ROAD COMPANY**, a New York State public benefit corporation, Jamaica Station, Jamaica, New York 11435, (including its successors, the "LIRR") and **SOUTHERN EMPIRE STATE RAILROAD COMPANY**, a Delaware corporation, (including its successors and permitted assigns, the "Freight Operator").

WITNESSETH:

WHEREAS, the LIRR owns and operates rail freight facilities serving a diversified customer base in the Long Island region;

WHEREAS, the LIRR issued a Request for Proposals ("RFP") for privatization of its freight services;

WHEREAS, Anacostia & Pacific Company, Inc., in contemplation of establishing a Freight Operator, submitted a proposal,

WHEREAS, the Freight Operator submitted a proposal in response to the RFP and a final proposal in response to the LIRR's Request for Best and Final Offers (collectively the "Proposals"); and

WHEREAS, this transaction is intended and should be construed as the LIRR entirely ceasing its operations

relating to the transportation of freight (other than as a customer) and granting the right to the Freight Operator to own, conduct and operate such freight operations on an exclusive basis on and with certain property retained by the LIRR; and,

WHEREAS, the parties wish to establish the terms and conditions upon which the freight services shall be owned and operated by the Freight Operator.

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

ARTICLE 1: AGREEMENT AND DEFINITIONS

1.1 <u>The Agreement</u>

1.1.1 The agreement between the parties consists of this Transfer Agreement, which includes Exhibits 1 through 16 hereto, and documents specifically incorporated herein by reference (collectively, this "Agreement"). The Request for Proposals, the Request for Best and Final Offers and the Proposals are expressly superseded by this Agreement and shall be of no force or effect.

1.1.2 Each of the parties represents and warrants that it will perform in accordance with the terms and conditions of this Agreement.

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1.1.3 This Agreement contains the entire understanding between the Freight Operator and the LIRR with respect to the Freight Operations. The parties are not bound by any written or oral statement or representation which is not expressly part of this Agreement. Any waivers, modifications or changes to this Agreement shall not be binding on either party unless set forth in a writing duly executed by both the Freight Operator and the LIRR.

1.1.4 (a) This Agreement is binding upon the Freight Operator upon its execution, but shall be null and void ab initio if (i) the LIRR fails to satisfy the requirements of clause (b)(i) within sixty (60) days of the Freight Operator's execution of this Agreement or such greater period as the Freight Operator, in its sole discretion, shall determine or (ii) the Freight Operator fails to satisfy the requirements of clause (b)(ii) within sixty (60) days of the LIRR's execution of this Agreement or such greater period as the LIRR, in its sole discretion, shall determine.

(b) The later of the dates on which the following requirements are satisfied shall be deemed the "Effective Date":

(i) The LIRR obtains the approval of the Board of Directors of the MTA and thereafter executes this Agreement; or

(ii) The Freight Operator secures approval or exemption for the transactions contemplated by this Agreement from the STB consistent with Article 12.1 hereof.

This Agreement shall be null and void in the event any labor protective provisions are imposed by the STB unless the parties otherwise agree or a party agrees to pay the cost associated with such labor. protective provisions.

1.1.5 The Freight Operator shall commence the Freight Operations on or before April 1, 1997, provided that such date shall be extended in the event of the occurrence of an Event of Force Majeure or the existence of an injunction or order prohibiting or delaying such commencement, by the number of days of the duration of such Event of Force Majeure, injunction or order or such other period as may be mutually agreed upon by the parties, and shall continue the Freight Operations throughout the term of this Agreement (including the Extension Period, if applicable) except as otherwise provided herein. Such date on which the Freight Operator commences operations hereunder shall be referred to herein as the "Commencement Date."

1.1.6 The obligations of the Freight Operator hereunder are subject to the condition that on the date the Freight Operator is to commence operations pursuant to Section 1.1.5 there has been no material adverse change in the Freight Premises since September 16,

1996. For purposes of this Article 1.1.6 the expiration of any contract by its terms, including, without limitation, any cancellation by a party other than the LIRR, shall not, nor shall the effects thereof, constitute or be considered as a contributing factor to a material adverse change, provided that the failure to commence, or the termination prior to the Commencement Date, of the contract for movement of excavated rock in the volume of 13,600 carloads at $517 per carload shall be deemed a material adverse change for purposes of this Article. In the event of a material adverse change, this Agreement shall be deemed terminated and the Concession Fee shall be promptly refunded.

1.2 <u>Definitions</u>

1.2.1 Unless otherwise noted, the following definitions shall apply throughout this Agreement:

1.2.2 "AAR" means the Association of American Railroads.

1.2.3 "AAR Office Manual" means the Office Manual of the AAR Interchange Rules, adopted by the AAR, Operations and Maintenance Department, Technical Services Division, as amended from time to time.

1.2.4 "Abatement Period" means, (a) for any Annual Fee Period two separate periods of at least ten consecutive days; provided that for purposes of this clause (a) if the second of such periods straddles two Annual Fee Periods such period shall nevertheless

be deemed an Abatement Period, (b) a single period of 20 consecutive days or (c) for any Annual Fee Period an aggregate of at least 45 full calendar days whether or not consecutive. It is understood that (i) only days on which the Freight Operator is unable to provide service which it otherwise would have provided shall be counted for purposes of clause (c) and (ii) none of the periods referred to in clause (a), (b) or (c) shall be included in more than one Abatement Period.

1.2.5 "Accident/Incident" means an event or situation related to the Freight Operations that (1) results in personal injury, property damage or a derailment on the Operating Premises, or (2) is required to be reported to the FRA pursuant to the rules and regulations of the FRA.

1.2.6 "Annual Fee" means the fee described in Article 4.1.1(c) hereof.

1.2.7 "Annual Fee Period" means the one year period commencing on the Commencement Date and ending on the day before the anniversary of the Commencement Date and each subsequent one-year period through the termination of this Agreement.

1.2.8 "Business Plan" means the Business Plan for the five-year period commencing on the Commencement Date submitted by Freight Operator in connection with this Agreement and a copy of which has been executed by the parties.

1.2.9 "Capital Expenditures" means expenditures (excluding expenditures for maintenance), in excess of $25,000 for improvements or additions to the Freight Premises or Freight Rolling Stock (it being understood that multiple improvements or additions to a single facility may be aggregated and additions of multiple "units" of a single type of Rolling Stock may be aggregated for purposes of the foregoing) that will extend or have a useful life, respectively, greater than one year, including, without limitation, amounts paid out for new buildings, rail facilities or structures, Freight Rolling Stock, or for permanent improvements or additions made to increase the value of the Freight Premises or Freight Rolling Stock. Capital Expenditures shall include the cost of assets acquired under capital leases.

1.2.10 "Capital Improvements" means any improvements made to the Freight Premises, with Capital Expenditures, including, without limitation, improvements or additions made with Capital Expenditures to Freight Rolling Stock, capital leases undertaken by the Freight Operator and improvements or additions made to the Freight Premises by customers of the Freight Operator.

1.2.11 "Car Miles" means the distance traveled (using LIRR timetable miles) by a "unit" of Freight Rolling Stock, whether loaded or empty, over the Joint Use Premises or the Passenger Premises.

1.2.12 "Class I Upgrade" means the improvements necessary to upgrade the Freight Premises, or any part thereof, to meet Class I track standards promulgated by the FRA.

1.2.13 "Clearance Point" means the location established by the LIRR near the switch where two tracks converge at which Freight Rolling Stock will foul the Joint Use Premises or the Passenger Premises. The Clearance Point will be 14.5 feet from the center line of the nearest track on the Joint Use Premises or the Passenger Premises, unless a different distance is or has been established by the LIRR in its sole discretion.

1.2.14 "Commencement Date" means the date defined in Article 1.1.5 hereof.

1.2.15 "Company Traffic" means freight shipments where the LIRR is the consignee or consignor.

1.2.16 "Concession Fee" means the fee described in Article 4.1.1(d) hereof.

1.2.17 "Condemnation" means the taking of all or any part of the Operating Premises for any public or quasi-public use under the right of eminent domain.

1.2.18 "DOT" means the United States Department of Transportation or any successor agency performing the same or similar functions.

1.2.19 "Effective Date" is defined in Article 1.1.4(b) hereof.

1.2.20 "Employee" means an officer, director, agent, employee, or contractor of either of the parties while engaged in any activity related to the Agreement.

1.2.21 "Equitable Abatement" shall mean an amount which is equal to the lesser of (a) the Freight Operator's damages related to the underlying condition(s) in respect of which such amounts is being determined and (b) the amount obtained by dividing the Annual Fee by 365 and multiplying such number by the number of days during which such underlying condition(s) persisted. Notwithstanding any provisions herein, in no event shall the sum of all Equitable Abatements with respect to all Abatement Periods occurring in any particular Annual Fee Period exceed the Annual Fee for such Annual Fee Period. In the event any Abatement Period described in clause (a) or (b) of the definition of the term "Abatement Period" falls within more than one Annual Fee Period, the Equitable Abatement in respect thereof shall be allocated pro rata between such Annual Fee Periods on the basis of the number of days of such Abatement Period falling in such Annual Fee Periods for purposes of the foregoing.

1.2.22 "Event of Force Majeure" means any of the following acts, events or circumstances: (a) storms, (b) lightning, (c) floods, (d) fires, (e) epidemics, (f)

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earthquakes, (g) quarantine, (f) blockade, (g) strikes, walkouts, lockouts or labor disputes, (h) actions by any governmental agency (other than the LIRR, the MTA or any other governmental agency controlled by the MTA) that have the effect of delaying or materially impeding the Freight Operations, (i) war, (j) insurrection or civil strife, (k) sabotage, (l) explosion, (m) other acts, events or circumstances, whether of the kind herein enumerated or otherwise, and whether caused or occasioned by or happening on account of the act or omission of one of the parties hereto or some person or entity not a party hereto, but only to the extent that such acts, events or circumstances are beyond the reasonable control of the affected party.

1.2.23 "Extension Period" is defined in Article 2.2.1 hereof.

1.2.24 "FRA" means the Federal Railroad Administration and any successor agency performing the same or similar functions.

1.2.25 "Final Termination Date" is defined in Article 14.2 hereof.

1.2.26 "Freight Operations" means all operations related to the movement of freight by rail (other than Company Traffic) on the Operating Premises, including, without limitation, the storage, warehousing, transloading of freight moved by rail and the storage of equipment used for transporting freight by rail.

1.2.27 "Freight Premises" means the real property, including the right-of-way, tracks, appurtenances, buildings, facilities, other physical plants, and improvements thereto used by the Freight Operator pursuant to this Agreement. Freight Premises shall include only the properties identified in Exhibit 1 hereto and all Sidetracks.

1.2.28 "Freight Rolling Stock" means Rolling Stock under the control of or operated by the Freight Operator.

1.2.29 "Freight Switch" means a rail switch and other track components connecting Joint Use Premises with Freight Premises that is used to switch Freight Rolling Stock from and to Joint Use Premises and Freight Premises.

1.2.30 "Hazardous Material" means (i) "hazardous substance" as defined under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601 et seq., and any regulations promulgated thereunder, each as it may be in effect from time to time, (ii) "hazardous materials" as defined under the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801 et seq., and any regulations promulgated thereunder, each as it may be in effect from time to time, (iii) "hazardous waste" as defined under New York Environmental Conservation Law Section 27-0901 et seq., and any regulations promulgated thereunder, each as it may be in effect from time to time, (iv) "hazardous substance" as defined under the Clean Water Act, 33 U.S.C. Section 1321 et seq., and any regulations promulgated thereunder, each as it may be

in effect from time to time, (v) "Petroleum" as defined in N.Y. Environmental Conservation Law § 15.0514, and any regulations promulgated thereunder, each as it may be in effect from time to time, (vi) asbestos and (vii) polychlorinated biphenyls.

1.2.31 "Initial Expiration Date" is defined in Article 2.1 hereof.

1.2.32 "Interchange Rules" means the Interchange Rules included in the AAR Office Manual (or any successor manual).

1.2.33 "Joint Use Premises" means real property, including right-of-way, tracks, appurtenances, buildings, facilities, any other physical plants and improvements thereto used for both Passenger Operations and Freight Operations. Joint Use Premises shall include only the properties identified in Exhibit 2 hereto.

1.2.34 "Light Engines" means one or more locomotive units not coupled to cars or passenger coaches.

1.2.35 "LIRR Operating Rules" means all rules, requirements and procedures governing operations or activities on or about the Joint Use Premises and Passenger Premises, including the dispatching, movement and placement of Rolling Stock and the use and operation of infrastructure components and systems as outlined or incorporated by reference in the LIRR's "Rules of

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the Operating Departments," as such may be modified from time to time and/or amended by periodic General Orders, Special Instructions or General Notices.

1.2.36 "LIRR Safety Rules" means the rules, requirements and procedures established by the LIRR governing the safety of its operations, employees and customers on or about the Joint Use Premises and the Passenger Premises, as such may be modified from time to time, including, without limitation, any Roadworker Safety Rules that may be adopted.

1.2.37 "Loss or Damage" means all claims, liabilities, costs and expenses of every kind or nature, including amounts paid under any State or Federal compensation law, and costs and attorneys fees incurred in the investigation, defense, or settlement of any actual or threatened legal proceeding related to personal injury or property loss or damage (including environmental loss or damage) arising under or related to this Agreement. Property loss or damage includes loss or damage to real property and improvements thereon, and personal property of either party or third persons. Personal injury includes injury to or illness or death of persons including employees of either party, invitees, licensees, and trespassers.

1.2.38 "MTA" means the New York State Metropolitan Transportation Authority and its affiliates and subsidiaries or any successor agency.

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1.2.39 "Operating Premises" means the "Freight Premises" and the "Joint Use Premises."

1.2.40 "Operating Windows" means the blocks of time between passenger trains (loaded or empty) and on-going construction work (both maintenance and capital) during which freight trains can operate on the Joint Use Premises. It is understood that Operating Windows may be modified by the LIRR due to operating exigencies and changes to the LIRR's schedules.

1.2.41 "Passenger Operations" means all operations related to the transportation of persons by rail.

1.2.42 "Passenger Premises" means all property, including rights-of-way, tracks, appurtenances, buildings, facilities, other physical plants, and improvements thereto used for Passenger Operations that are not included in the Freight Premises or Joint Use Premises.

1.2.43 "Private Freight Siding" means a rail facility, including track and appurtenances thereto, owned by a freight customer. All such rail facilities are identified on Exhibit 3 hereto.

1.2.44 "Renewal Fee" means the fee described in Article 2.2.2.

1.2.45 "Renewal Notice" means the notice to extend the Agreement as more fully described in Article 2.2.1(e).

1.2.46 "Rolling Stock" means a railroad car, locomotive, caboose, intermodel car, inspection car, passenger coach, cab car, bogie, wrecking equipment, work equipment and any other form of equipment with wheels operated on railroad track. Each of the foregoing will constitute a "unit" of Rolling Stock (it being understood that, with respect to any multiplatform car, each platform shall be considered a "unit").

1.2.47 "Sidetrack" means all track on the Freight Premises side of a Clearance Point of a Freight Switch that is used for switching freight cars and equipment to and from freight customer facilities or Team Track.

1.2.48 "STB" means the United States Surface Transportation Board or any successor agency performing the same or similar functions.

1.2.49 "Switch Maintenance Fee" is defined in Article 4.1.1(b) hereof.

1.2.50 "Team Track" means a rail facility, included in the Freight Premises, that is available for use by multiple rail customers for loading and unloading merchandise from Freight Rolling Stock. The Team Tracks are identified on Exhibit 1 hereof.

1.2.51 "Trackage Fee" is defined in Article 4.1.1(a) hereof.

1.3 All adjustments for inflation contained in this Agreement shall be based on the Indices of Railroad Material Prices and Wage Rates for Eastern Class I

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Railroads (material prices, wage rates and supplements combined, excluding fuel) or, in the event such indices are discontinued, the Indices of Railroad Material Prices and Wage Rates for all Class I Railroads (material prices, wage rates and supplements combined, excluding fuel). If both such indices are discontinued then all adjustments for inflation contained in this Agreement shall be based on the Composite Implicit Price Deflator published by the Bureau of Economic Analysis, U.S. Department of Commerce or any successor agency.

ARTICLE 2: TERM AND RENEWAL

2.1 <u>Term</u>

Unless otherwise terminated as provided for in this Agreement, this Agreement shall remain in effect from and after the Effective Date through the twentieth anniversary of the Commencement Date (the "Initial Expiration Date").

2.2 <u>Renewal</u>

2.2.1 In the event the Freight Operator meets the following conditions, this Agreement may be renewed at the Freight Operator's option for a term of 10 years (the "Extension Period"), to commence on the Initial Expiration Date:

(a) The Freight Operator is not in material breach of any term(s) of this Agreement.

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(b) The Freight Operator's safety record based on the average annual FRA-reportable accidents per 200,000 man hours or, if unavailable, other comparable measure, for the three (3) year period preceding the date of the Renewal Notice is equal to or better than the national industry average for Class C freight railroads for the same period or in the event that a national industry average for Class C freight railroads is not ascertainable such other comparable index as may be available. For purposes of this clause, accidents caused primarily by the LIRR shall be excluded from the Freight Operator's safety record; provided that such accident has been previously determined to be caused primarily by the LIRR.

(c) The annual average of freight carload volume (measured in terms of loaded "units" of Rolling Stock consisting of railroad cars and intermodel cars) transported in the Freight Operations for the three (3) year period preceding the date of the Renewal Notice shall be at least 24,474 carloads, or the percentage increase of the carload volume for the twelve calendar months preceding the Commencement Date to the carload volume for the twelve calendar months preceding the Renewal Date shall be more than 125% of the percentage increase achieved by the Eastern Class I Railroads for the corresponding periods; provided that if no such statistic is available

then the percentage increase achieved by all Class I Railroads nationwide shall be used.

(d) In respect of Capital Improvements for the period from the Commencement Date to the date of the Renewal Notice, the Freight Operator has invested or has caused to be invested in the aggregate at least $14,468,920.

(e) The Freight Operator gives notice in writing to the LIRR of its intent to renew the Agreement (the "Renewal Notice") no sooner than 13 years, but prior to 18 years, after the Commencement Date.

2.2.2 The terms and conditions of this Agreement shall remain in full force and effect during the Extension Period except for the following:

(a) The Freight Operator shall pay to the LIRR a Renewal Fee of $3,040,550 at the commencement of the Extension Period, and ten equal annual installments of $1,268,865 each on each anniversary of the commencement of the Extension Period.

(b) Capital Expenditures during the Extension Period shall be at least 50% above the amount proposed in the Business Plan, indexed for inflation to the end of the twenty (20) year term of the Agreement using the methodology and indices described in Article 4.2.

2.2.3 Notwithstanding any provisions herein, nothing shall prevent the parties from negotiating any renewals for a term no greater than ten (10) years.

ARTICLE 3: GRANT OF RIGHTS TO USE

3.1 Right to Operate and Use

3.1.1 The Freight Operator shall have the exclusive right to use the Freight Premises and the Joint Use Premises to conduct Freight Operations in accordance with the provisions of this Agreement.

3.1.2 The Freight Operator shall have the exclusive right to manage, direct and control the Freight Premises; provided, that the Freight Operator shall not enter into any contracts, leases or other agreements which extend past the Initial Expiration Date or, if the Agreement is extended, such other applicable termination date, without the LIRR's prior written consent.

3.1.3 The Freight Operator may, at its sole risk and expense, construct or relocate freight-related facilities and infrastructures (such as transloading facilities, shops, team tracks, yards, sidings, etc.) within the Freight Premises, subject to prior review and approval by the LIRR of the Freight Operator's plans, which approval will not unreasonably be withheld; provided that such approval shall be deemed to be granted if the LIRR has not objected to such construction within 45 days of notice thereof. All

facilities constructed by the Freight Operator hereunder, improvements made thereon or improvements made to existing premises by the Freight Operator shall be made in compliance with applicable building codes and other regulations, and shall be owned by the LIRR as part of the Freight Premises.

3.2 <u>Assignment of Contracts</u>

3.2.1 The LIRR hereby assigns and the Freight Operator (a) hereby accepts all existing tariffs, customer contracts, leases, real estate agreements, side track agreements and other agreements applicable to the LIRR's existing Freight Operations and (b) shall have the right, from time to time, to take any lawful action to modify such contracts and agreements. Notwithstanding the foregoing, if any customer contracts, leases or real estate agreements (i) are not set forth on Exhibits 12 and 13 hereto or were not disclosed or made available to the Freight Operator during the Freight Operator's due diligence, (ii) are required to be assumed or otherwise performed by the Freight Operator and (iii) as a result, have a material adverse effect on the Business Plan, then the Freight Operator shall receive an Equitable Abatement in connection with such contracts and agreements.

3.2.2 In the event that the excavation spoils from the water supply shaft that is being created in the area known as Maspeth Yard and is the subject of an easement granted by The Long Island Rail Road Company

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to the City of New York Department of General Services commencing on September 1, 1992 pursuant to a Purchase Option Agreement dated August 26, 1992, are not moved from the area by rail as required by Section 5 of the Terms and Conditions of that Agreement, except due to force majeure, the LIRR shall, at the request of the Freight Operator, promptly use good faith efforts to negotiate the "significantly higher compensation" referred to in said Section 5 and shall promptly pay to the Freight Operator from the additional compensation, if any, received the lesser of (i) the full amount of such additional compensation, if any, or (ii) 50% of the difference between $5.4 million and the revenues collected by the Freight Operator for movement of such material.

3.3 <u>Limitations on Grant</u>

3.3.1 The Freight Operator's right to conduct Freight Operations over the Joint Use Premises is subject to the LIRR's management, direction, dispatching, operation and control as set forth in this Agreement.

3.3.2 The grant of rights in Article 3.1 specifically excludes all of the following:

Limitations on Grant

(a) Any right to control, direct or interfere with the LIRR's Passenger Operations on the Operating Premises or the Passenger Premises.

(b) Any subsurface or air rights in or associated with the Freight Premises or elsewhere in or associated with the Operating Premises, which subsurface and air rights shall remain with the LIRR.

(c) All utility occupancies currently located on the Freight Premises, including, but not limited to, the Buckeye Pipeline and all easements and reservations of record. To the extent any such utility has provided the LIRR with any indemnification, the LIRR shall use reasonable efforts to enforce such indemnification in favor of the Freight Operator, if and when applicable.

(d) Any rights to property encumbered by encroachments, tenants, licensees, squatters or other occupancies currently on the Freight Premises. There shall be no obligation on the part of the LIRR to take any action to remove the same except that the LIRR shall continue to pursue litigation pending on the Effective Date and the LIRR shall take actions to remove any encroachment that arose after September 16, 1996 and is existing on the Commencement Date that prevents the movement of Rolling Stock on lines being actively used immediately before the Commencement Date in connection with Freight Operations on the Freight Premises; provided that, encroachment in this sentence shall mean a permanent structure and provided, further that the Freight Operator shall inform the LIRR of

any such encroachments within 30 days after the Commencement Date; provided, however, that the Freight Operator (at its own expense) may on the LIRR's behalf take lawful action to remove any such occupancy which was not granted or approved by the LIRR or its predecessors in title. At the Freight Operator's request the LIRR, to the extent applicable, shall, at the expense of the Freight Operator, cooperate with the Freight Operator in connection therewith.

(e) Any right to use or permit others to use the Freight Premises for purposes not directly related to Freight Operations. Without limiting the generality of the foregoing, the Freight Operator shall not use or permit the use of the Operating Premises for:

(i) Tenancies not directly related to the Freight Operations;

(ii) Utility right-of-way or crossings, including electrical and telephone wires, fiber optic cables and pipelines of any kind (unless such utility is installed for the benefit of the Freight Operator or a permitted subtenant, with the prior permission of the LIRR); and

(iii) Advertising or billboards of any kind and signage not directly related to the Freight Operations.

Notwithstanding the foregoing, with respect to clause (i), the Freight Operator shall be permitted, with the prior ~~consent of the~~ LIRR, to use or permit the use of the Freight Premises for the purposes stated; provided that any contracts entered into with third parties in connection therewith are on terms no less favorable than could be obtained with an unaffiliated third party and that any revenues received therefrom shall be shared equally by the parties hereto.

The parties acknowledge and agree that in the case of clause (iii) above, (x) TDI has the exclusive right to install and maintain billboards on the Freight Premises, (y) no new billboards shall be installed on the Freight Premises without the prior written consent of the Freight Operator and (z) the Freight Operator shall permit TDI to have access to the Freight Premises, upon reasonable notice to the Freight Operator and at reasonable times, for the purpose of maintaining or removing any billboard. To the extent TDI has provided the LIRR with any indemnification, the LIRR shall use reasonable efforts to enforce such indemnification in favor of the Freight Operator, if and when applicable.

(f) The Freight Operator may not lease, license or otherwise assign any portion of the Operating Premises to any person for any purpose except by written consent of the LIRR which may be granted in the sole discretion of the LIRR; provided, however, that the Freight Operator may, without the prior written consent of the LIRR, lease or license portions of the Freight Premises to

shippers or others directly involved in the furtherance of Freight Operations on the Freight Premises (other than any such lease or license that has the effect, individually or taken together with all other leases or licenses, of causing all or a substantial portion of the Freight Operations to be conducted directly by any person or entity other than the Freight Operator), which shall be subordinate and subject to the terms and conditions of this Agreement. The LIRR shall receive prior written notice of any and all such agreements. Such leases and licenses, if any, shall provide for insurance and indemnification of the LIRR and its affiliates (including any government or governmental agency) to the same extent as provided under this Agreement. Such leases and licenses, if any, shall not relieve the Freight Operator of any obligations or duties imposed on it by this Agreement.

(g) Any use of the name The Long Island Rail Road Company or LIRR or any name derived therefrom or confusingly similar thereto, without the prior written consent of the LIRR; provided that the Freight Operator may use any other name with the words "the", "railroad" or "company". The Freight Operator agrees not to hold itself out as (a) having a common identity with the LIRR or any of its affiliates (including any government or governmental agency) or (b) acting as the LIRR's agent.

(h) Any title or estate in the ownership of the Freight Premises, any other part of the Operating Premises or the Passenger Premises.

(i) The right to conduct Passenger Operations.

3.3.3 The LIRR retains the right to use or to allow third parties to use the Freight Premises to construct, inspect, repair and maintain bridges, culverts and other structures (including structures in connection with the utilization by the LIRR of its subsurface or air rights hereunder) or construct utilities with reasonable prior written notice to the Freight Operator, provided however that any such use shall not materially interfere with the Freight Operations. The Freight Operator, upon receipt of prior written notice from the LIRR, will cooperate, without any cost to the Freight Operator, in allowing the LIRR to effectuate or permit any work described in this Article 3.3.3. Any indemnification or release by any third party to the LIRR with respect to the above shall, by its terms, also inure to the benefit of the Freight Operator.

3.3.4 Upon reasonable prior notice to the Freight Operator, the LIRR shall have the right to permit construction of a highway in conjunction with the Freight Premises on the Bay Ridge Branch from the 65th Street Yard (First Avenue) in Brooklyn to the connection with Conrail at Fresh Pond for mitigating the highway traffic congestion through Brooklyn and Queens during and after completion of the Gowanas Expressway

reconstruction and rehabilitation project. In such event, the Freight Operator will be entitled to receive from the LIRR damages as described in the next sentence. Damages means 50% of the revenues received during the twelve months preceding delivery of the aforementioned notice from customers that can no longer be served by rail due to such project multiplied by twice the number of years and fractional portions thereof of such period of interference. In addition, the LIRR shall, without duplication, indemnify the Freight Operator for any Loss or Damage in connection therewith. If the Freight Operator resumes Freight Operations after completion of this construction project, the Freight Operator shall be subject to certain scheduling limitations as to joint use to be agreed upon in writing. The LIRR shall use reasonable efforts to have the project work performed in a manner to minimize disruptions to the Freight Operations.

3.3.5 The following provisions apply to a portion of the Freight Premises known as Yard A and described more fully in Exhibit 5 hereto:

(a) The LIRR reserves the right to take exclusive possession of part or all of Yard A in the event it is needed to be used as part of the Passenger Operations, for expansion of Passenger Operations, or for any regional transportation plan. Subject to the last paragraph of this Article 3.3.5, the LIRR shall only exercise this right upon not less than six months prior

written notice to the Freight Operator and, in any event, only after December 31, 2001.

(b) The parties agree to negotiate, in good faith, mutually acceptable arrangements with the goal of avoiding additional cost or loss of operations by the Freight Operator in connection with any taking described in clause (a) above, including without limitation, the construction at the sole cost of the LIRR of freight facilities, which shall then become part of the Freight Premises, to handle the average daily volume of traffic handled in the Yard A facilities taken possession of by the LIRR under Article 3.3.5(a) hereof in the twelve (12) months preceding the time when the LIRR takes possession under said Article 3.3.5(a), all of which is subject to availability of an alternative site and capital funds.

(c) Should the Parties be unable to reach a mutually acceptable agreement as described in 3.3.5(b) hereof, the LIRR will reduce the Annual Fee for the balance of the term by an amount equal to the increased operational cost and lost profits associated with any taking described in clause (a) above, but in no event shall such amount exceed 25% of the Annual Fee. In the year in which the LIRR so takes possession, the Annual Fee will be prorated on a daily basis and reduced for the balance of the year, following the date of such possession in accordance with

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the preceding sentence. In addition, to the extent the Freight Operator has made any Capital Improvements to Yard A, the Freight Operator shall receive from the LIRR the unamortized cost of such improvements; provided that such amortization shall be based on a useful life of seven years.

The foregoing provisions of this Article 3.3.5 shall not apply to the property identified in Exhibit 14, which property the LIRR shall be allowed to take any time after the Commencement Date without any compensation to the Freight Operator.

3.3.6 After giving notice of proposed construction under any provision of this Section 3.3, LIRR representatives shall meet with Freight Operator representatives to review the details of the construction project, including but not limited to work plans and schedules. If the construction project, in Freight Operator's sole opinion, requires flagmen or other personnel for safety or operational considerations, Freight Operator will assign personnel to the project at LIRR's sole expense.

3.3.7 The LIRR may, in respect of the Freight Premises, have its own systematic and periodic program of environmental auditing or a documented, systematic practice regarding its due diligence in preventing, detecting or correcting violations as defined in the Environmental Protection Agency Policy regarding

incentives for self-policing dated December 18, 1995 (or any successor thereto, as announced and in effect from time to time); and the Freight Operator shall provide access to its facilities, records and documents, and make available upon reasonable request such staff as may be necessary for the LIRR to conduct such a program or practice; provided, however, that the LIRR shall provide the Freight Operator with a copy of the written procedures or guidelines under which it conducts the program or practice, and shall conduct a review not more frequently than semi-annually at any facility. Upon preparation of a written report as a result of the audit or practice, the LIRR shall provide the Freight Operator with a copy of the report, and the Freight Operator, within 30 days thereafter shall provide any response or other comment on the recommendations or other materials presented in the report. The Freight Operator understands and agrees that the LIRR may operate such a program or practice for the LIRR's benefit, and the Freight Operator shall not be entitled to rely upon the results thereof for any purpose, except with the express written consent of the LIRR.

3.3.8 The LIRR retains the right of access to and exclusive use of the basement communications room in the LIC Freight Building at 21st Street and Jackson Avenue. The LIRR retains the right of access to such basement communications room on an ongoing basis for its own and NYNEX personnel, and for LIRR highway vehicles to enter and park in the parking lot outside the

building. Notwithstanding the foregoing, (i) LIRR shall be solely responsible for the maintenance and security of the basement communications room in the LIC Freight Building, and (ii) LIRR shall indemnify and hold harmless the Freight Operator for all Loss and Damage arising out of or in connection with the use of the basement communications room (except to the extent caused by the gross negligence, recklessness or willful or wanton misconduct of the Freight Operator).

3.3.9 The LIRR retains the right of access to and exclusive use of the property identified in Exhibit 15 that is located underneath the 21st Street Bridge and extends westward into the culvert between the concrete walls, Tracks 1 through 8 (identified in Exhibit 14 of the Transfer Agreement) in Yard A and the ground storage area in Maspeth Yard (Exhibit 16) from April 1997 through December 1998. The LIRR retains the right of access to these facilities for its own personnel and such contractor(s) as may be designated by the LIRR and where necessary, using LIRR crews and equipment. The Freight Operator will also make available to LIRR the western portion of the salt track in Arch Street Yard and Track 5 in Maspeth (identified in Exhibit 15, which is not part of the Freight Premises), on an as-needed basis as determined by LIRR for loading and unloading cars of Company Traffic consistent with the need of the Freight Operator. Movement of LIRR crews and equipment within Yard A, the Arch Street Yard and Maspeth Yard will be coordinated by the Freight Operator. Notwithstanding the foreoing, (i) LIRR

shall be solely responsible for the maintenance and security of the property described in Exhibit 15, and (ii) LIRR shall indemnify and hold harmless the Freight Operator for all Loss and Damage arising out of or in connection with the use of the property described in Exhibit 15 (except to the extent caused by the gross negligence, recklessness, or willful or wanton misconduct of the Freight Operator).

3.4 <u>Additions to Freight Premises</u>

3.4.1 In the event that the LIRR, in its sole discretion, determines that any portion of the Joint Use Premises which is necessary for the Freight Operations is no longer necessary in connection with its Passenger Operations or other public use, and therefore determines to abandon such portion, the Freight Operator shall have the option to accept such portion as an addition to the Freight Premises, and such portion shall be treated as Freight Premises thereafter and in any event shall no longer be treated as Joint Use Premises.

3.5 Reversion of Freight Premises to the LIRR Under Certain Circumstances

3.5.1 The Freight Operator may, by written notice to the LIRR, designate a portion or portions of the Freight Premises as being unnecessary in connection with the Freight Operations. At the option of the LIRR, such portions of the Freight Premises may revert to the LIRR's control and become a part of the Passenger Premises upon 30 days prior written notice to the Freight Operator; provided however, that (i) if any such portion that reverts to the LIRR includes any part of the right-of-way or an appurtenance associated with any tracks in the Freight Premises, such portion that reverts to the LIRR shall also include such tracks and (ii) in no event shall there revert to the LIRR any tracks or facilities that are only accessible through the Freight Premises. If the LIRR does not elect to have any such portion revert to its control (i) such portion shall remain as part of the Freight Premises and (ii) with respect to any such portion which is only accessible through the Freight Premises, the Freight Operator, with the consent of the LIRR (which consent shall not be unreasonably withheld), may remove and sell the rail and associated track materials thereon in accordance with Article 3.6.5(iii).

3.5.2 At any time during the notice period described in Article 3.5.1 hereof, the Freight Operator may reclaim such portion or portions of the Freight Premises by withdrawing the designation described in

Article 3.5.1 hereof.

3.5.3 In the event of a reversion hereunder, there shall be no reduction in the Annual Fee.

3.6 <u>Condition of Freight Premises</u>

3.6.1 The Freight Operator acknowledges that it has conducted due diligence to its satisfaction prior to signing this Agreement.

3.6.2 The LIRR has conducted an environmental audit dated July 12, 1996, which was made available for the Freight Operator's review.

3.6.3 The Freight Operator acknowledges and agrees that the Freight Premises are being transferred hereunder on an "as is/where is" basis and the Freight Operator shall, subject to the provisions of Article 8.4 hereof, be responsible for the condition of the Freight Premises as of the Commencement Date.

3.6.4 The Freight Operator is prohibited from selling, salvaging, demolishing or removing any part of the Freight Premises, including but not limited to the track, ties, ballast and track supports, without the prior written consent of the LIRR.

3.6.5 Notwithstanding any provision herein to the contrary: (i) the Freight Operator may, upon prior written notification to the LIRR, salvage and sell all surplus track materials stored on the right-of-way

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within the Freight Premises, provided, that the net proceeds from any sale shall be shared equally by the Freight Operator and the LIRR; (ii) the Freight Operator may replace any part of the Freight Premises with parts of equal or greater quality and the proceeds from the sale of such replaced parts shall accrue to the Freight Operator; and (iii) net profits, if any, from the sale of any materials with the consent of the LIRR pursuant to Article 3.5.1 hereof shall be shared equally by the Freight Operator and the LIRR.

3.7 Freight Switches

3.7.1 Exhibit 6 hereto sets forth a list of Active Freight Switches, all of which have been classified as either Category A, Category B or Category C Freight Switches. Except as set forth below, the classification of a Freight Switch shall not change prior to the termination of this Agreement, including any Extension Period.

3.7.2 All Category C Freight Switches existing on the Effective Date shall automatically become Category B Freight Switches eighteen (18) months after the Commencement Date, for all purposes under this Agreement, including for purposes of Article 4.1.1(b) hereof.

3.7.3 Any Freight Switch that, after the Commencement Date, is (i) installed, including by way of replacement (other than when replacing a Category A Switch, which

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replacement switch shall also be a Category A Switch) or (ii) newly activated, shall, after such installation or activation, be classified as a Category B Freight Switch, for all purposes under this Agreement, including for purposes of Article 4.1.1(b) hereof.

3.7.4 During the first eighteen (18) months after the Commencement Date, the Freight Operator may activate any Freight Switch identified in Exhibit 7 hereto, by providing thirty (30) days written notice to the LIRR. The LIRR shall, within a reasonable period of time, activate any such Freight Switch requested to be added, provided that, for each Freight Switch activated, the Freight Operator will be charged the cost to activate such Freight Switch.

3.7.5 After eighteen (18) months from the Commencement Date, the Freight Operator shall give at least thirty (30) days prior written notice to deactivate a Freight Switch. The monthly Switch Maintenance Fee shall be reduced accordingly following the lapse of such thirty (30) day period. The LIRR, at its sole option, may remove at any time after eighteen (18) months after the Commencement Date those Freight Switches identified in Exhibits 6 or 7 which are deactivated or are not activated by the Freight Operator during this period.

3.7.6 To install a new Freight Switch at any time, or to activate a Freight Switch in place after eighteen (18) months from the Commencement Date, the Freight

Operator shall make such request in writing to the LIRR, and follow the procedures outlined in Exhibit 8 hereto.

3.7.7 (a) The LIRR shall replace or rehabilitate, at its cost, any Category A Freight Switch that is in need of replacement or rehabilitation upon request of the Freight Operator or if the LIRR elects to replace or rehabilitate such Freight Switch.

(b) The LIRR shall replace or rehabilitate, at the Freight Operator's cost, any Category B or Category C Freight Switch that is, or is estimated to be within one (1) year of the date of notice set forth in this Article 3.7.7, in need of replacement or rehabilitation, provided that (i) the LIRR has furnished to the Freight Operator written notice that includes the cost of and schedule for such replacement or rehabilitation at least 120 days prior to the proposed date of initiating such replacement or rehabilitation (provided, that the LIRR shall not be obligated to furnish such notice in emergencies which affect the safety of Passenger Operations on the Joint Use Premises) and (ii) within 60 days after receipt of such notice, the Freight Operator has not notified the LIRR in writing that such Freight Switch should be deactivated rather than replaced or rehabilitated. Upon receipt of any such notice requesting deactivation, the LIRR may, but shall not be obligated to, deactivate the relevant Freight Switch immediately. Nothing set forth in this clause (b) shall preclude the LIRR from replacing or

rehabilitating a Category B or Category C Freight Switch, at its own election, at the LIRR's expense.

(c) The LIRR's obligation to repair Category C Freight Switches during the first 18 months shall be limited to repairs costing in the aggregate for any single switch no more than $15,000. In the event the aggregate cost is projected to exceed $15,000, the LIRR shall furnish notice to the Freight Operator of the required repairs and the associated cost. Within 30 days of such notice, the Freight Operator shall by written notice to the LIRR elect to (i) pay for that portion of the costs related to such repair which exceed $15,000 or (ii) deactivate the switch.

3.7.8 In connection with customers for which Category B or Category C Freight Switches are used, the Freight Operator shall continue to serve such customers for at least 18 months from the Commencement Date unless (i) a customer refuses to accept the same price and terms existing on the day prior to the Commencement Date or (ii) the Freight Operator elects to have the Freight Switch deactivated under Article 3.7.7 hereof.

ARTICLE 4: COMPENSATION

4.1 <u>Compensation</u>

4.1.1 The Freight Operator shall pay to the LIRR during the term of this Agreement, the following sums:

(a) A Trackage Fee of $0.25 per Car Mile.

(b) (i) A Switch Maintenance Fee for each Category A Freight Switch equal to $785 per month for each month or portion thereof;

(ii) A Switch Maintenance Fee for each Category B Freight Switch equal to $495 per month for each month or portion thereof during which such Freight Switch is activated; and

(iii) A Switch Maintenance Fee, per month, for each Category C Freight Switch equal to 10% of the monthly revenues net of allowances of the Freight Operator attributable to the freight carload volume passing over such Freight Switch during such month for each month or portion thereof during which such Freight Switch is activated, but in no event shall the Switch Maintenance Fee for a Category C Freight Switch exceed $495 per month.

(c) An Annual Fee for the term of this Agreement as set forth below on the Commencement Date and on each anniversary of the Commentement Date:

Commencement Date	$200,000
1st through 4th Anniversaries	$200,000 on each anniversary
5th and 6th Anniversaries	$400,000 on each anniversary
7th, 8th and 9th Anniversaires	$600,000 on each anniversary

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10th through 19th Anniversaries $800,000 on each anniversary

(d) A Concession Fee in the amount of $1,100,000, $250,000 of which shall be paid on the Effective Date and $850,000 of which shall be paid on the Commencement Date.

4.1.2 The fees in Article 4.1.1 (a) and (b) shall be calculated for each month and paid not later than the 30th day of the following month.

4.1.3 The LIRR shall not share in the rail line-haul revenues derived by the Freight Operator in connection with the Freight Operations.

4.1.4 If any payment under this Agreement is due on a LIRR holiday, Saturday or Sunday, the fees in Articles 4.1.1 (a), (b) and (c) shall be paid on the first business day following the holiday, Saturday or Sunday.

4.2 <u>Adjustment of Fees</u>

The fees described in Articles 4.1.1(a) and (b) shall be subject to an adjustment (up or down) effective each January 1, commencing with January 1, 1998, based on the relationship of the AAR (or successor organization) Indices of Railroad Material Prices and Wage Rates for Railroads of Class I, Eastern District (material prices, wage rates and supplement combined, excluding fuel) published in the preceding July 1 to such indices published on July 1, 1996. In the event

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that these indices are discontinued, the adjustment will be based on the Composite Implicit Price Deflator published by Bureau of Economic Analysis, U.S. Department of Commerce, or any successor organization.

4.3 Late Payment Penalty

If the Freight Operator fails to pay the LIRR on the due dates specified in Article 4.1 hereof, it will pay the LIRR interest on the payments due, from the due date to the date of payment, at a monthly rate of 1%, compounded monthly. For invoices rendered by the LIRR or the Freight Operator for services rendered to the other party, other than those included in Article 4.1 hereof, a 1% late charge will be included for each month or part thereof if no payment is received within 30 days of the receipt of invoice. Notwithstanding the foregoing, all late charges payable by the LIRR hereunder will be in compliance with the Prompt Payment Act.

4.4 Billing

4.4.1 No invoices for the fees in Articles 4.1.1 will be issued by the LIRR. The Freight Operator will submit all payments in respect thereof to the LIRR together with the supporting documentation outlined in Article 4.5.1 hereof.

4.4.2 For services provided by the Freight Operator to the LIRR, the Freight Operator will invoice as follows:

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(a) For repairs performed on LIRR equipment, the Freight Operator will bill the LIRR at car repair billing rates included in the latest edition of the AAR Office Manual.

(b) For car hire and freight loss and damage on freight shipments settled with foreign line railroads on account of LIRR Company Traffic moving in foreign line cars, the Freight Operator will bill the LIRR the actual car hire or freight loss and damage, as the case may be, paid or payable to foreign lines on account of the LIRR, increased by 5% to cover administrative costs incurred by the Freight Operator;

(c) For services performed by the Freight Operator for the LIRR not included in Articles 4.4.2(a) and (b) hereof, the services will be billed at the Freight Operator's direct labor and material prices, increased for applicable overheads as set forth in the Freight Operator's then current schedule of rates;

(d) For all services performed by the LIRR for the Freight Operator, the services will be billed at the LIRR's direct labor rates and materials prices, increased for applicable overheads as set forth in the then current LIRR schedule of rates.

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4.5 Payment Documentation

4.5.1 The following documentation is required:

(a) The monthly payment for the Trackage Fee hereof shall be supported by detailed written documentation showing the basis for the fee. At a minimum, the documentation shall include the month of payment, the owner and the number of the Freight Rolling Stock, origin and destination on the Joint Use Premises, miles traveled on the Joint Use Premises and total fees accrued for each unit of Freight Rolling Stock. The total Car Miles and fees shall be aggregated for the month.

(b) The Switch Maintenance Fee described in Article 4.1.1(b) hereof shall be supported by a written statement from the Freight Operator showing the category (A, B or C) and location of the specific switches for which the fee is being paid, and the payment month.

(c) For all other invoices tendered by each party to the other party, the invoice shall be accompanied by detailed written documentation to support the charges therein.

4.5.2 Each party shall make available to representatives of the other party, during normal business hours, all relevant work and materials, books, records, correspondence, disks, instructions, working papers,

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plans, drawings, specifications, receipts, vouchers and memoranda of every description (collectively, the "Information") pertaining to payments under this Agreement and supporting any charges billed to the other party. The parties, at their own expense, shall preserve such of their own documents for a period of one year or such longer period required under state or federal laws and regulations. Each party agrees that all Information provided or made available to it by the other shall not be disclosed to any person other than such party's officers, directors, attorneys or other agents as necessary in connection with performing its obligations under this Agreement or as it may be legally compelled. In the event that any party is legally compelled to disclose any Information such party shall give the other party sufficient notice to allow such party to seek an injunction or other remedy. Each party shall be liable for any disclosures made by their officers, directors, attorneys or other agents to the extent such disclosures violate this Article 4.5.2.

4.6 <u>Payment Address</u>

4.6.1 All invoices by the Freight Operator to the LIRR shall be directed to:

Manager-Accounts Receivable
Mail Code: 1443
Long Island Rail Road
146-01 Archer Avenue
Jamaica, NY 11435

or at such other location as the LIRR may from time to time designate by written notice.

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4.6.2 All payments by the Freight Operator to the LIRR shall be directed to:

Treasurer
Mail Code: 1431
Long Island Rail Road
146-01 Archer Avenue
Jamaica, NY 11435

or at such other location as the LIRR may from time to time designate by written notice.

4.6.3 All payments between the parties will be paid in lawful money of the United States.

4.6.4 All invoices and payments by the LIRR to the Freight Operator shall be directed to:

Southern Empire State Railroad Company
c/o Anacostia & Pacific Company, Inc.
405 Lexington Avenue, 50th Fl.
New York, NY 10174

or at such other location as the Freight Operator may from time to time designate by written notice.

4.6.5 The parties shall not delay payment of any bill because of errors or disputed items, but shall make payment subject to subsequent adjustment. The parties need not honor any exception to an invoice if it is delivered after the expiration of eighteen (18) months from the last day of the calendar month during which such invoice is rendered. Neither party shall render an invoice later than eighteen (18) months (i) after the last day of the calendar month in which the expense covered thereby is incurred, or (ii) in the case of claims disputed as to amount or

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liability, after the amount is settled, or the liability is established, whichever occurs first. This provision shall not limit the retroactive adjustment of billing made pursuant to an exception taken to original accounting by or under authority of the United States Department of Transportation, MTA Auditor General and other regulatory agencies or retroactive adjustment of wage rates and settlement of wage claims subject to any applicable statute of limitations.

4.6.6 The parties shall keep, and cause each subcontractor/supplier to keep, records and books of account, showing the actual cost to it of all items of labor, materials, equipment, supplies, services and other expenditures of whatever nature incurred in connection with this Agreement.

ARTICLE 5: MAINTENANCE

5.1 Maintenance of Freight Premises

5.1.1 Unless waived in writing by the LIRR, the Freight Operator, at its sole cost and expense, shall maintain the Freight Premises in a state of reasonable repair for their intended use. All tracks in the Freight Premises will be maintained to at least FRA Class I standards, except those tracks identified in Exhibit 9 hereto, as (i) Inactive, which shall be maintained in a condition equal to or better than that prevailing on the Commencement Date, and (ii) O.O.S. (Out of Service) which shall be

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maintained in a condition that does not create a hazard.

5.1.2 The Freight Operator will be responsible for all arrangements with third parties concerning existing and future Team Tracks and Private Freight Sidings, including their use and maintenance.

5.1.3 The Freight Operator will be responsible for the inspection of all Private Freight Sidings in use or planned to be used and will use reasonable best efforts to ensure that such facilities are maintained in a safe and operable condition. Before any inactive Private Freight Siding is activated, the Freight Operator will inspect the siding and ensure that it is in a condition to permit safe operations.

5.2 <u>Maintenance of Bridges</u>

5.2.1 Notwithstanding anything in Article 5.1 to the contrary, the LIRR or other agencies currently responsible for the maintenance and repair of the framework and abutments of any bridge structures (other than any culverts or viaducts) carrying any highways over or under the railroad or carrying railroad over or under another railroad or carrying railroad over water, in each case in the Freight Premises, shall continue to be so responsible unless any Loss or Damage is caused by the Freight Operator (except by the Freight Operator's normal use) in which case the Freight Operator shall be responsible for repairing same but shall not be responsible for

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maintaining same after such repairs. The LIRR's responsibility hereunder is subject to the availability and allocation of funding for major bridge repair/reconstruction work. Nothing herein shall be construed as imposing on the LIRR a greater responsibility than that required by law or any limitation on the LIRR's discretion in determining the order of priority of capital projects as between those affecting any Operating Premises and Passenger Premises.

5.2.2 If the condition of any bridge in the Freight Premises results in unsafe or impassable conditions that prevent use of a part of the Freight Premises for any period equal to an Abatement Period, then the Freight Operator shall be entitled to an Equitable Abatement of the Annual Fee; provided, however that this clause shall not apply to any condition which is caused use by the Freight Operator (except by the Freight Operator's normal use).

5.2.3 Upon reasonable prior notice to the Freight Operator the LIRR and its contractors shall have the right to enter the Freight Premises for the purpose of inspections, maintenance and repair in connection with its obligations under this Article.

5.2.4 The Freight Operator's obligation to maintain the Freight Premises shall continue until such time as a reversion of such property to the LIRR or a termination of this Agreement occurs.

5.3 Maintenance of Joint Use Premises

5.3.1 Except as otherwise specifically provided in the Agreement, the LIRR at its own expense shall maintain and repair the Joint Use Premises in a manner that allows it to conduct Passenger Operations and that allows the Freight Operator to conduct Freight Operations in the manner conducted on the Effective Date. Any maintenance and repairs by the LIRR, requested by the Freight Operator, that allow the Freight Operator to conduct Freight Operations other than in the manner conducted on the Effective Date shall only be performed under Article 5.3.2 hereof.

5.3.2 In the event the LIRR, in its sole discretion, agrees to make changes to the Joint Use Premises at the request of the Freight Operator, the Freight Operator will (a) pay for the cost of these changes in accordance with Article 4.4 and (b) will bear all of the incremental costs necessary to maintain the same in a state of good repair as reasonably required by the LIRR.

5.3.3 The LIRR may make or cause to be made any improvements to the Joint Use Premises that the LIRR deems necessary or desirable to the Joint Use Premises except that the LIRR shall maintain clearances in existence on the Effective Date.

5.3.4 Notwithstanding the foregoing, the LIRR may impose temporary clearance, speed or operating restrictions as may be necessary in connection with construction,

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rehabilitation or repair projects or other operating emergencies.

5.3.5 The LIRR does not guarantee the condition of the Joint Use Premises or that the Freight Operations will not be interrupted. If, as a result of LIRR action under Article 5.3.1, 5.3.3 or 5.3.4 hereof, the whole or any part or parts of the Joint Use Premises becomes unusable for Freight Operations for a period equal to an Abatement Period, the Freight Operator shall be entitled to an Equitable Abatement of the Annual Fee (other than as a result of the occurrence of an Event of Force Majeure).

ARTICLE 6: MANAGEMENT, DIRECTION, DISPATCHING, OPERATION AND CONTROL

6.1 Abandonment of Operations

To the extent legally required, the Freight Operator must obtain permission of the STB for any abandonment of any service or operations prior to such abandonment, or obtain an exemption from abandonment in respect thereof and shall furnish the LIRR with prior written notice of any request therefor, as well as notice of receipt of any such permission. In the event the Freight Operator fails or ceases to provide freight services, the responsibility for any abandonment proceeding before the STB in respect thereof shall be borne by the Freight Operator. The LIRR reserves the right, at its option, to participate in any such proceeding, provided that the

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LIRR shall not oppose the Freight Operator in such proceeding. The abandonment of any service or operations shall not affect whether any property is or is not included as part of the Freight Premises.

6.2 Switching and Dispatching

6.2.1 In connection with the grant of rights delineated in Article 3 hereof, the Freight Operator shall perform all switching movements over the Freight Premises.

6.2.2 The LIRR shall perform all dispatching and direct all train and switching movements over the Joint Use Premises under the direction of the Chief Transportation Officer of the LIRR. The LIRR shall dispatch trains of the LIRR and the Freight Operator consistent with the priority of passenger trains, and availability of Operating Windows and with the Freight Operator's ability to provide reasonably consistent services to its freight customers.

6.3 Priority of Passenger Operations Over the Joint Use Premises

6.3.1 The Passenger Operations shall have priority over all Freight Operations conducted over the Joint Use Premises.

6.3.2 Each party shall make good faith efforts to cooperate with the other to establish schedules and to conduct operations in a manner that, consistent with the priority for Passenger Operations and the Freight

Operator's ability to provide reasonably consistent freight services to its customers, minimizes interference or conflict with operations of each other on the Joint Use Premises.

6.3.3 Notwithstanding the foregoing, the Freight Operator shall only conduct operations over the Joint Use Premises during the Operating Windows available for freight trains.

6.4 <u>Cost of Operations</u>

6.4.1 Each party shall be responsible for furnishing, at its own expense, all labor, fuel, materials and equipment necessary for the operation of its own Rolling Stock over the Joint Use Premises.

6.4.2 In the event a party furnishes labor, fuel, materials or equipment to the other party, the recipient shall reimburse the party furnishing same for its costs thereof. Billing and payment shall be in accordance with Article 4.4 hereof.

6.5 <u>Communications</u>

6.5.1 Freight Operator, at its expense, shall install and maintain upon the Freight Rolling Stock such equipment, radios, or devices as may now or in the future be necessary or appropriate, in the reasonable judgment of the LIRR, for operation of Rolling Stock upon the Joint Use Premises. In exercising its reasonable judgment under this Article 6.5.1, the

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LIRR shall apply the same standards to the Freight Operations that are applied to the Passenger Operations.

6.5.2 The Freight Operator must provide and maintain radio equipment in connection with the Freight Operations over the Joint Use Premises and shall use the same frequencies that are used by the LIRR in the Passenger Operations.

6.5.3 The Freight Operator must provide, maintain and use radio equipment compatible with, and capable of, communicating with the LIRR's dispatchers, movement bureau, towers and crews. The LIRR shall notify the Freight Operator prior to the adoption of new communication or signalling systems to be employed on the Joint Use Premises.

6.5.4 In the event the LIRR elects to use a radio frequency unavailable on the Freight Operator radios, then the Freight Operator shall be responsible for supplying new communication equipment or making modifications or additions to the Freight Operator's existing communication equipment necessary for the Freight Operator engineers to communicate with the LIRR's dispatcher, movement bureau, towers and crews; provided, however, that prior to making such election, the LIRR shall provide the Freight Operator with notice such that the Freight Operator shall have a reasonable period of time in which to procure such new equipment or make such modifications or additions.

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6.5.5 The Freight Operator shall ensure that all of its locomotives used on the Joint Use Premises are compatible with the LIRR's signal and communications systems and automatic speed control system, as the same may be modified from time to time.

6.5.6 The Freight Operator shall undertake to satisfy its obligation(s) under this Article 6.5 within a reasonable time after the LIRR notifies the Freight Operator of any condition which gives rise to such obligation.

6.5.7 The Freight Operator shall, as soon as is reasonably practicable, obtain its own radio frequency for communication within the Freight Premises. Until such condition is satisfied, the LIRR agrees to make available its channels for use by the Freight Operator; provided the Freight Operator shall use reasonable efforts to avoid undue interference with the LIRR's communications in the Passenger Operations.

6.6 <u>Compliance with LIRR Rules</u>

Freight Operations on the Joint Use Premises shall at all times be conducted in accordance with LIRR Operating Rules and LIRR Safety Rules, which LIRR shall provide to the Freight Operator in advance of the date they become effective, including amendments thereto.

6.7 Payment of Third Party Charges

6.7.1 The Freight Operator shall be responsible for the reporting and payment of any mileage, per diem, use, or rental charges arising from the Freight Operations including those incurred in connection with movements of Freight Rolling Stock over the Joint Use Premises. No car hire or rental will be payable by the LIRR for movement of freight cars and other Freight Rolling Stock over the Joint Use or Passenger Premises, except that the LIRR shall be responsible for any car hire charges arising from Company Traffic.

6.7.2 The Freight Operator will settle all car hire with foreign line railroads for movement of Company Traffic in foreign line cars, on the Operating Premises. The Freight Operator will bill the LIRR for all such payments made to foreign line railroads, in accordance with Article 4.4.2 hereof.

6.7.3 The Freight Operator shall be responsible for settlement of all interline freight revenues, collection of all freight accounts receivables and other revenues, and payment of all freight expenses and invoices.

6.7.4 It shall be the right and responsibility of the LIRR to collect all revenues and to pay all expenses referred to in Article 6.7.1, 6.7.2 and 6.7.3 on all Freight Rolling Stock interchanged with Conrail ("CR") or New York Cross Harbor ("NYCH") and the Freight

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Operations up to the day immediately preceding the Commencement Date. The Freight Operator will have the right and responsibility to collect all revenues and to pay all expenses referred to in Article 6.7.1, 6.7.2 and 6.7.3 on all Freight Rolling Stock interchanged with CR or NYCH and the Freight Operations on or after the Commencement Date.

6.8 Flagging

In the event the Freight Operator engages in any activity in the vicinity of the Joint Use Premises or the Passenger Premises which, in the reasonable judgment of the LIRR, poses a material risk of fouling tracks in said premises, LIRR may assign flag and other protective personnel and the Freight Operator shall pay the LIRR's cost for same as provided for in Article 4.4 hereof.

ARTICLE 7: FREIGHT OPERATOR'S EMPLOYEES

7.1 Qualifications of Freight Operator's Employees

7.1.1 Except as otherwise specifically provided in this Agreement, the Freight Operator shall have sole discretion to select Employees for Freight Operations.

7.1.2 The Freight Operator shall only use for its Freight Operations qualified individuals who are fit for duty

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and who meet the applicable requirements, if any, of any regulatory agencies.

7.1.3 All Employees of the Freight Operator engaged in train and engine service on or along the Joint Use Premises shall be qualified under the LIRR's Operating Rules, as well as those promulgated by the AAR, the FRA and other applicable regulatory agencies, all to the same extent as LIRR Employees, including being subject to periodic examinations. Engine service personnel employed by the Freight Operator on Joint Use Premises shall also be certified in accordance with regulations promulgated by the FRA to the same extent as LIRR Employees.

7.1.4 The Freight Operator shall make such arrangements with the LIRR as the LIRR may reasonably require to have all of the Freight Operator's Employees who shall operate its Freight Rolling Stock over the Joint Use Premises qualified for operation thereunder.

7.1.5 The Freight Operator shall pay, in accordance with Article 4.4 hereof, the cost of any training required for compliance with Article 7.1.3 hereof.

7.1.6 The Freight Operator will ensure that its Employees, agents and contractors comply with all laws and regulations promulgated by the FRA, the DOT, the STB, the AAR, and other regulatory and administrative agencies, including regulations relating to

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drug/alcohol testing, equipment safety, Hazardous Materials, etc.

7.2 Removal of Freight Operator's Employees

7.2.1 The LIRR may, in its sole discretion, direct the Freight Operator to temporarily or permanently remove an Employee from service on the Joint Use Premises for a significant safety violation and may require that such Employee be precluded from the Joint Use Premises, notwithstanding any determination under Article 7.2.2 hereof.

7.2.2 In the event a directive to remove an Employee is found to be wrongful under any applicable collective bargaining agreement between the Freight Operator and the union representing such Employee or, in the absence of such a collective bargaining agreement, under the dispute resolution procedure of Article 15.2, the LIRR will be obligated to compensate the Freight Operator solely for the additional wages, if any, incurred in connection with relieving such Employee from duty for a period not to exceed one year.

7.3 Hiring of Former Freight Operator Employees

7.3.1 To the extent permitted by law, the LIRR will not, within a period of one year after their employment with the Freight Operator is terminated, hire any train and engine personnel of the Freight Operator

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who voluntarily leave the employment of the Freight Operator.

ARTICLE 8: HAZARDOUS MATERIALS

8.1 <u>Transportation of Hazardous Materials</u>

8.1.1 Provided the Freight Operator complies with all applicable federal, and, to the extent not preempted, state and local laws, rules and regulations governing the transportation of Hazardous Materials, the Freight Operator may transport or permit to be transported Hazardous Materials over the Operating Premises.

8.1.2 Notwithstanding the foregoing, Freight Operator must notify the LIRR Movement Bureau prior to transporting any Hazardous Materials over the Joint Use Premises.

8.2 <u>Release of Hazardous Material</u>

8.2.1 In the event of any release of Hazardous Materials occurring on any segment of the Operating Premises from Freight Rolling Stock or freight facilities and regardless of the cause of such release, the Freight Operator at its sole expense shall immediately:

(a) Make any and all reports required by federal, state or local authorities;

(b) Advise both the owner/shipper and the LIRR of the Hazardous Materials in the release and their location;

(c) Arrange for and perform or cause the performance of any appropriate response action in connection with any release of Hazardous Materials from the Operating Premises, in accordance with all federal, state, or local laws, rules or regulatory requirements.

8.2.2 The LIRR may have representatives at the scene of the release to observe and provide information and recommendations concerning any response action effort and may perform such post-response testing as it may deem reasonably necessary to test the adequacy of the response action.

8.2.3 If (i) the Freight Operator fails to undertake an appropriate response action immediately on Joint Use Premises or to undertake prompt and appropriate follow-up measures, and if any such failure impacts the Passenger Operations, or violates federal, state or local laws, rules or regulations, or (ii) any LIRR labor agreement precludes the use of a third-party or the Freight Operator's labor to conduct the response action on the Joint Use Premises, then the LIRR may perform the response action or such follow-up measures at the Freight Operator's expense. In such event the Freight Operator shall remain liable to the LIRR for all Loss or Damage caused by the release. The LIRR shall consult with the Freight Operator in

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connection with any such response action and follow-up measures and shall provide documentation regarding the adequacy of the response action and follow-up measures. Notwithstanding any provision herein to the contrary, the Freight Operator shall be liable to the LIRR for lost revenues only to the extent the Freight Operator's insurance covers such claims.

8.3 Transfer of Hazardous Materials

If Hazardous Materials must be transferred to undamaged Rolling Stock, the Freight Operator shall perform the transfer, which shall be in compliance with applicable laws and regulations relating to safety and the environment; provided, however, that if the Hazardous Materials are in damaged cars that are blocking the Joint Use Premises or Passenger Premises, the LIRR, at its option and after notification to the Freight Operator, may transfer the Hazardous Materials and the Freight Operator shall pay all costs and expenses of such transfer in accordance with Articles 4.4.1 and 4.5.1, except to the extent the incident necessitating the transfer arises out of the gross negligence, recklessness or willful or wanton misconduct of the LIRR.

8.4 Response to Environmental Obligations

(a) The Freight Operator shall at all times protect and hold the LIRR (and its employees, officers, directors and agents) harmless of, from and against any and all kinds of claims (whether in

tort, contract or otherwise), demands, damages, losses, liabilities, costs or expenses (including, but not limited to costs of removal, response or remediation, or fines or penalties, either civil or criminal) which may arise or be claimed to arise, from (i) violations occurring on or after the Commencement Date through the date of termination of this Agreement, of any requirement under applicable law, ordinance or governmental rule, regulation or order caused or committed by Freight Operator, its agents, contractors, employees, licensees or others acting under its control or on its behalf; or (ii) the release or threatened release (including any spill, discharge, dumping, emitting or disposal) or presence of Hazardous Materials related to or arising from the conduct of the Freight Operations or caused by an Employee of the Freight Operator occurring on or after the Commencement Date through the date of termination of this Agreement.

(b) The LIRR shall at all times protect and hold the Freight Operator (and its employees, officers, directors and agents) harmless of, from and against any and all kinds of claims (whether in tort, contract or otherwise), demands, damages, losses, liabilities, costs or expenses (including, but not limited to, costs of removal, response or remediation, or fines or penalties, either civil or criminal) which may arise or be claimed to arise from (i) violations

of any requirement under applicable law, ordinance or governmental rule, regulation or order caused or committed by the LIRR, its agents, contractors, employees, licensees or others acting under its control or on its behalf; (ii) the release or threatened release (including any spill, discharge, dumping, emitting or disposal) or presence of Hazardous Materials released from the Freight Premises and/or the Joint Use Premises occurring prior to the Commencement Date or after the termination of this Agreement; and (iii) the release or threatened release (including any spill, discharge, dumping, emitting or disposal) or presence of Hazardous Materials other than related to Freight Operations or operations otherwise not under the control of the LIRR.

(c) The Freight Operator shall provide written notice to the LIRR of the receipt by the Freight Operator of any notice of any claim or threatened claim, and provide to the LIRR a copy of the notice, any additional or other documents provided by the person making the claim, and any response to the claim by the Freight Operator.

(d) For any claim under subparagraph (a) of this Article 8.4, the Freight Operator shall have the sole duty to defend or respond to any claim, and to take all actions required by applicable law, ordinance or governmental rule, regulation or

order to respond to any such claim or the events leading to such a claim, all at its sole and exclusive cost. The Freight Operator shall promptly provide the LIRR with a copy of all studies, expert reports, and other documents related to such claim, and shall consult with the LIRR concerning any response. The LIRR may, at its own expense, be represented in a proceeding related to the claim by counsel or other representative, and the Freight Operator (and its agents, consultants and counsel) shall cooperate with the LIRR regarding such participation.

(e) For any claim under subparagraph (b) of this Article 8.4, the LIRR shall have the duty to defend or respond to any claim, and to take any action required by applicable law, ordinance or governmental rule, regulation or order to respond to the claim or the events leading up to such claim, provided, however, that the Freight Operator shall provide the LIRR with access to the facilities and records necessary to respond, and shall cooperate in all respects with the LIRR in responding to the claim.

(f) For purposes of this Article 8.4, it shall be presumed that any claim, notice of which is received on or after the seven year anniversary of the Commencement Date, arises under subparagraph (a), unless the Freight Operator demonstrates that the claim arises under

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subparagraph (b). Notwithstanding the foregoing, no presumption shall apply in respect of underground storage tanks, if any, that as of the Commencement Date are located on the Freight Premises. For any claim which the claimant, or either party, asserts is within the time periods of both subparagraph (a) and (b) of this Article 8.4, the parties shall cooperate in responding to the claim, until such time as the issue of the application of subparagraph (a) or (b) or the allocation of responsibility to either party is resolved by agreement of the parties, the dispute resolution mechanism provided in Article 15.2 hereof, or by order of a court or other government authority with jurisdiction.

(g) To the degree response to any claim or event under this Article 8.4 requires the construction or operation of any facility to remediate the presence of Hazardous Materials, no such facility shall be constructed by the Freight Operator without the prior written consent of the LIRR (which consent shall not be unreasonably withheld). The LIRR may, as part of its response under subparagraph (b) construct and operate such facilities as may be required, provided that such facilities do not unreasonably interfere with the Freight Operations.

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ARTICLE 9: DISABLED EQUIPMENT

9.1 <u>Disabled Freight Rolling Stock</u>

9.1.1 The Freight Operator shall maintain its Freight Rolling Stock used on the Joint Use Premises in reasonable repair for the intended use.

9.1.2 If any Freight Rolling Stock becomes stalled and unable to proceed, or is unable to maintain the speed required by the LIRR on the Joint Use Premises or the Passenger Premises, or, if in an emergency a crippled or otherwise defective Freight Rolling Stock is set out on the Joint Use Premises or the Passenger Premises, the LIRR shall have the option to furnish motive power or such other assistance as may be necessary to haul, help, or push such train or equipment or to move it off the Joint Use or the Passenger Premises, and Freight Operator shall pay the LIRR for the cost of rendering any such assistance in accordance with Article 4.4.2 hereof.

9.1.3 If it is necessary that any Freight Rolling Stock be set out on the Joint Use Premises or the Passenger Premises, it shall be promptly repaired and picked up by the Freight Operator.

9.2 <u>Locomotive/Equipment Assistance</u>

Either party may request assistance or Rolling Stock from the other party. In the event any party agrees to provide such assistance or Rolling Stock to the

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other party, the assisting party shall charge the other party (i) the rate described in Exhibit 11 for locomotives and (ii) in accordance with Article 4.4.2 hereof for other Rolling Stock or assistance.

9.3 Repairs Performed by LIRR

9.3.1 In the event the LIRR performs repairs to Freight Rolling Stock as specifically permitted under the terms of this Agreement, the LIRR shall prepare and submit invoices directly to the Freight Operator, which will be paid by the Freight Operator in accordance with this Agreement. It shall be the responsibility of the Freight Operator to collect payments from the car owner owing in respect of "car owner responsibility items" as determined under the AAR Office Manual and the LIRR shall prepare and submit billing directly to and collect from the Freight Operator payments for handling "line responsibility items" as determined under the AAR Office Manual.

9.3.2 Repairs to cabooses shall be billed at the car repair billing rates set forth in the latest edition of the AAR Office Manual. Repairs to locomotives shall be billed as provided for in Article 4.4.2 hereof.

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ARTICLE 10: LIABILITY, INDEMNIFICATION AND CASUALTY

10.1 Liability of the Parties

Except where otherwise specifically provided in the Agreement, all Loss or Damage occurring on: (i) the Passenger Premises shall be borne entirely by the LIRR, and; (ii) the Freight Premises shall be borne entirely by the Freight Operator other than (a) injuries to employees of the LIRR, property loss or damage and environmental pollution occurring by reason of the LIRR's exercise of its rights under Article 13.2.1 or 13.2.5 if such injury loss or damage or pollution was caused by the LIRR's actions, and; (iii) the Joint Use Premises shall be borne by the parties as follows:

(a) The LIRR shall be responsible for Loss or Damage in connection with personal injuries to the LIRR Employees, Loss or Damage in connection with damage to the LIRR Rolling Stock and its contents, and facilities;

(b) the Freight Operator shall be responsible for Loss or Damage in connection with personal injuries to Freight Operator Employees, and Loss or Damage in connection with damage to Freight Rolling Stock and its contents, and facilities.

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10.2 Exceptions to Liability

10.2.1 Liability under Article 10.1 hereof shall not apply where the Loss or Damage results from an Accident/Incident involving:

(a) The gross negligence, recklessness or willful or wanton misconduct of the party (including its Employees and subsidiaries and affiliated companies and agencies) who would not have been liable had Article 10.1 hereof been applicable;

(b) Hazardous Material so long as such Hazardous Material is materially involved in causing or increasing the Loss or Damage resulting from such Accident/Incident;

(c) The Rolling Stock of either party and a third party (pedestrian, vehicular, or other property damage; for purposes hereof pedestrian shall not include passengers or persons waiting to board a passenger train);

(d) A derailment or work a party performs for the benefit of the other party; or

(e) Either party's failure to observe any of the LIRR Operating Rules or LIRR Safety Rules, including clearance restrictions.

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(f) Liabilities to the extent arising out of any Accident/Incidents that occurred prior to the Effective Date.

Notwithstanding anything herein to the contrary, neither party shall be liable for any punitive damages assessed against the other party, its Employees or its agents.

10.2.2 In the event the exceptions to liability described in Article 10.2.1 hereof apply or a situation occurs which is not covered by Article 10.1 hereof (other than any situation which is addressed in Article 8), the rules of ordinary negligence and liability shall be applicable; provided, that the LIRR shall be liable for (a) injuries to passengers for that amount of Loss or Damage, if any, in excess of the amounts set forth in Section 11.1(b) hereof, and (b) liabilities set forth in Section 10.2.1(f) hereof.

10.2.3 (a) With respect to liability which has been allocated to a party by the provisions of this Article 10, such party shall be responsible for all related Loss or Damage and shall defend, indemnify and hold harmless the other party (including officers, agents, employees, and subsidiaries and affiliated companies or agencies of the other party) against and from any and all Loss or Damage arising from or pertaining to such claims.

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(b) In the event that any indemnified party is made a defendant in or party to any claim, instituted by any third party for Loss or Damage, or otherwise receives any demand from any third party for Loss or Damage, the indemnified party (referred in this clause (b) as the "notifying party") shall give the indemnifying party prompt notice thereof. The failure to give such notice shall not affect whether an indemnifying party is liable for reimbursement unless the indemnifying party is materially prejudiced thereby. The indemnifying party shall be entitled to contest and defend such claim; provided, that the indemnifying party (i) diligently contests and defends such claim in accordance with this article, and (ii) acknowledges in writing that it is obligated to provide indemnification with respect to such claim. Notice of the intention so to contest and defend shall be given by the indemnifying party to the notifying party within 20 business days after the notifying party's notice of such claim (but, in all events, at least 5 business days prior to the date that an answer to such claim is due to be filed, if any). Such contest and defense shall be conducted by attorneys reasonably acceptable to the indemnified party employed by the indemnifying party. The notifying party shall be entitled at any time, at its own cost and expense (which expense shall not constitute a Loss or Damage unless the notifying party reasonably determines that the

indemnifying party is not adequately representing or, because of a conflict of interest, may not adequately represent, the interests of the indemnified parties, and only to the extent that such expenses are reasonable), to participate in such contest and defense and to be represented by attorneys of its own choosing. If the notifying party elects to participate in such defense, the notifying party will cooperate with the indemnifying party in the conduct of such defense but the indemnifying party shall control the defense (other than in the case of the circumstances described in the parenthetical contained in the immediately preceding sentence). Neither the notifying party nor the indemnifying party may concede, settle or compromise any claim without the consent of the other party, which consent will not be unreasonably withheld. Notwithstanding the foregoing, if the indemnifying party fails to acknowledge in writing its obligation to provide indemnification in respect of such claim, then the notifying party alone shall be entitled to contest, defend and settle such claim in the first instance (in which case, expenses incurred in connection therewith shall constitute a Loss or Damage) and, only if the notifying party chooses not to contest, defend or settle such claim, the indemnifying party shall then have the right to contest and defend (but not settle) such claim.

The provisions of this Article 10 are not intended to, and shall not, confer benefits upon any person not a party to this Agreement (other than the right of officers, agents, employees, subsidiaries and affiliates of a party hereto to be indemnified as described above).

ARTICLE 11: INSURANCE

11.1 Required Insurance

At its sole cost and expense, the Freight Operator will procure and maintain, during the period of this Agreement, and for all of its Freight Operations hereunder, the insurance set forth below:

(a) **New York State Workers Compensation & Employers Liability Insurance or Federal Employer's Liability Act Coverage** - as required by law. FELA coverage may be self-insured with proof of financial competency.

(b) **Commercial General Liability Insurance**, providing limits of $25,000,000 per occurrence (with no less than $50,000,000 annual aggregate) and including the following coverages: Bodily Injury or Death; Property Damage; Independent Contractors Coverage; Personal Injury; Contractual Liability; Products & Completed Operations; Broad Form Property Damage; Sudden & Accidental (caused by seepage, pollution and contamination). Contractual

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Liability Exclusion, applicable to work to be performed within 50 feet of railroad tracks, must be voided. "Additional Insured" endorsement shall name: the LIRR and MTA; provided, that the Freight Operator shall be permitted to self insure up to $500,000 subject to the annual delivery to the LIRR of a certificate of the Freight Operator's chief financial officer certifying as to the Freight Operator's ability to satisfy such deductible.

(c) Property Insurance, covering the property owned by the LIRR in the Freight Operator's care, custody and control, in an amount equal to the replacement cost, of like kind or quality, thereof, insuring against risk of loss. The policy should provide for a limit of no less than $25 million, subject to a deductible of not more than $500,000. Said policy must be endorsed to include the LIRR and the MTA as additional insureds. Losses are to be adjusted with the LIRR as its interest appears.

11.2 Form of Insurance

All insurance must be written in a form by an insurer reasonably satisfactory to the LIRR. Among other things, the Freight Operator shall furnish to the MTA/LIRR Risk Manager, seven days before the Commencement Date, the certificates of insurance evidencing policies listed in Articles 11.1(a)-(c) hereof, using the Railroad Insurance Certificate

form. These policies shall provide that thirty (30) days advance notification shall be given in writing to the LIRR of any material change, a failure to renew or cancellation of the policy.

11.3 Freight Operator Invitees

In addition to the specific requirements of this Article, in the event the Freight Operator shall require any insurance from any of its invitees of any nature, it shall require that the LIRR be an additional named insured on such policies.

11.4 Force Account Insurance

In the event any party shall perform any work on behalf of the other party, the party performing such work may procure and maintain, force account insurance until such work has been completed at the other party's expense. The policy will provide a combined single limit of $5,000,000 per occurrence covering the liability of the performing party under the Federal Employer's Liability Act and similar statutes for the protection of employees for injuries to or death of its employees engaged in the work. The limit of coverage may be changed from time to time by the performing party at its discretion.

11.5 Additional Named Insured

In the event any party hereunder shall require any insurance from a party to any of its contracts with

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respect to the Operating Premises, it shall require that the other party hereunder be an additional named insured on such policies to the extent actions under any such contracts could affect such other party or property for which such other property is responsible, provided that such requirement does not involve any additional cost.

11.6 No Modification

Nothing in this Article 11 shall be deemed or construed to modify the obligations imposed by Article 10 hereof.

11.7 Review of Insurance

The parties agree to review every three years, the form and content of any insurance required hereunder in light of the then current insurance market, the cost of required insurance, inflation and the continued appropriateness of any coverage limits to avoid inequitable results to any party.

ARTICLE 12: GOVERNMENTAL APPROVAL

12.1 Governmental Approval

The Freight Operator shall, at its own cost and expense, initiate by appropriate notice, application or petition and thereafter diligently and in good faith prosecute proceedings for the procurement of all necessary and appropriate consents, approvals, or

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authorizations (or exemptions therefrom) from any governmental agency for the sanction of this Agreement and the Freight Operations to be carried on by the Freight Operator hereunder. The Freight Operator shall deliver such notice, application or petition to the LIRR, for its comments thereon in order to facilitate such filings or approvals, within three (3) days after the LIRR's execution of this Agreement. The Freight Operator shall submit such notice, application or petition to the applicable governmental agency within seven (7) days of receipt of such comments or if the LIRR has no comments, promptly following notice thereof. The Freight Operator shall diligently make and pursue such applications and petitions before the STB. The LIRR shall assist and support said applications or petitions and shall furnish such information and execute, deliver, and file such instrument or instruments in writing as may be necessary or appropriate to obtain such governmental consent, approval, or authority. The Freight Operator and the LIRR agree to cooperate fully to procure all such necessary consents, approvals, or authorizations.

ARTICLE 13: LIRR COMPANY TRAFFIC - USE OF FREIGHT PREMISES

13.1 Interchange Track

The Freight Operator shall on the Commencement Date designate a track in Fresh Pond Yard which shall serve as the Interchange Track for Company Traffic.

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13.2 Company Traffic

13.2.1 Upon verbal consent of the Freight Operator (which consent shall not be unreasonably withheld), the LIRR shall have the right to enter the Freight Premises with its Employees, Rolling Stock and vehicles for the purpose of interchanging or receiving Company Traffic, including the right to enter Fresh Pond Yard with trucks for the purpose of transloading Company Traffic, which may include temporary storage of material on the ground at Fresh Pond Yard. The LIRR shall not unreasonably interfere in the Freight Operator's operations and shall not compete with the Freight Operator's exclusive right to conduct the Freight Operations pursuant to this Agreement. The Freight Operator shall not have any obligation to provide train services for the LIRR. The Freight Operator shall inspect and repair all Rolling Stock and vehicles prior to departure from the Freight Premises in accordance with FRA and AAR rules and regulations in connection with this Article 13.2.1.

13.2.2 Upon reasonable notice, the Freight Operator shall allow the LIRR to enter upon that portion of the Freight Premises consisting of sidings, team tracks or tracks accessible from the Joint Use Premises or Passenger Premises and to utilize the same to store Rolling Stock and other equipment which travels on rails, trucks and other vehicles, material used in maintenance or construction projects or debris resulting from the same. If as a result of the LIRR's actions pursuant to the foregoing, the whole

or any part or parts of the Freight Premises becomes unusable for Freight Operations for a period equal to an Abatement Period, the Freight Operator shall be entitled to an Equitable Abatement of the Annual Fee (other than as a result of the occurrence of an Event of Force Majeure).

13.2.3 The Freight Operator shall impose no freight, demurrage or other charges on Company Traffic pursuant to this Article 13.2.

13.2.4 The Freight Operator shall settle all car hire and freight loss and damage charges on freight shipments with foreign line railroads on behalf of the LIRR relating to Company Traffic. The LIRR shall be responsible for and shall pay all car hire and freight loss and damage charges on freight shipments to the Freight Operator in connection with transportation of Company Traffic in accordance with Article 4.4.2 hereof. The Freight Operator shall have no responsibility for freight loss and damage to such Company Traffic on the Freight Premises other than as a result of its or its Employees' gross negligence or willful misconduct.

13.2.5 In the event that Rolling Stock transporting Company Traffic should become disabled or crippled, the Freight Operator shall, at the LIRR's request, do any of the following:

(a) Perform expedited repairs on such equipment;

(b) Allow the LIRR to make such repairs or cause them to be made; or

(c) Allow the LIRR to enter upon the Freight Premises with the Freight Operator's permission, at such times and with such frequency which will not unreasonably interfere with the Freight Operations or with its Rolling Stock or other equipment and vehicles, for the purpose of moving or repairing the disabled equipment; provided, however, in such case, the LIRR shall be liable for any damage to Freight Rolling Stock or the Freight Premises resulting from such movement.

ARTICLE 14: TERMINATION

14.1 Termination for Default

14.1.1 The occurrence of any of the following shall constitute a material breach of this Agreement by the Freight Operator:

(a) The Freight Operator fails to make a payment pursuant to Article 4.1.1 or to make any other payments, which other payments, singly or in the aggregate, exceed $50,000, to the LIRR within one-hundred twenty (120) days of when it is due;

(b) The Freight Operator fails to comply in all material respects with any applicable federal, state or local safety standards and regulations,

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any environmental laws and regulations and, in regard to the Joint Use Premises, the LIRR Operating Rules which failure shall, singly or in the aggregate, cause a significant hazard or danger to the public or the Employees or property of the LIRR;

(c) The Freight Operator fails to maintain in all material respects the Freight Operations in accordance with its annual safety plan, a copy of which shall be delivered to the LIRR for its files promptly after it is approved as described in the next sentence. The Freight Operator's obligation hereunder shall require a licensed safety engineer to approve the safety plan and certify as to the Freight Operator's compliance therewith annually;

(d) The Freight Operator fails to commence the Freight Operations in compliance with Article 1.1.5 hereof;

(e) The Freight Operator abandons the Freight Operations or any part thereof without meeting applicable requirements of this Agreement;

(f) The Freight Operator unnecessarily or willfully interferes with the Passenger Operations;

(g) The Freight Operator makes an assignment of the Freight Operations or this Agreement to another without the LIRR's prior written consent, or an

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assignment of this Agreement for the benefit of its creditors;

(h) The Freight Operator fails to make good faith efforts to develop and expand the freight business. For purposes of this provision, commencing with the end of the first year of this Agreement and for the next four ensuing years, the Freight Operator shall be conclusively presumed to have exercised good faith if it achieves freight carload volume of 80% or greater of the freight carload volume projected in the Business Plan;

(i) The Freight Operator fails to maintain a drug testing program, including random testing as required by the FRA or any other authority with jurisdiction; or

(j) The Freight Operator becomes insolvent or any bankruptcy, insolvency, reorganization or receivership or similar proceeding is commenced against the Freight Operator and is not stayed, discharged or vacated for a period of more than 30 days or the Freight Operator commences a voluntary case or proceeding within the meaning of any applicable bankruptcy or similar law.

14.1.2 The Freight Operator will be in default if it fails to cure a material breach as defined in Article 14.1.1 hereof within ninety (90) days after a written notice of default is given to the Freight Operator,

except such ninety (90) days period shall be modified in the following circumstances:

(a) if such default cannot be cured within said ninety (90) days due to circumstances beyond the Freight Operator's control, the Freight Operator shall be given a reasonable additional time provided the additional time does not create a significant safety or operational risk as determined by the LIRR;

(b) in the event of a significant safety or operational emergency as determined by the LIRR, a reasonable shorter period of time within which to cure the default may be specified in the notice of default; or

(c) where a specific time is provided in Article 14.1.1 hereof.

14.1.3 The LIRR shall have the right to terminate, within three (3) years following the Commencement Date (other than with regard to Article 20.12 hereof, for which there shall be no time limitation) this Agreement, upon notice to the Freight Operator specifying that the Freight Operator misrepresented any material fact or submitted false and materially misleading information in its Proposals, or that the Freight Operator made a material misrepresentation in connection with Article 20.12 or 20.15 hereof. Said termination will not be subject to the cure provisions in Article 14.1.2 hereof.

14.1.4 If the LIRR terminates this Agreement under this Article 14.1, then, subject to Article 14.2.3 hereof, the Freight Operator shall, subject to applicable law, immediately cease performing all obligations under this Agreement upon the termination date specified in the notice of termination.

14.2 <u>LIRR Remedies</u>

14.2.1 On the Final Termination Date, the Freight Operator shall be obligated to pay the LIRR its damages, the amount of which shall, in the absence of mutual agreement between the parties, be determined pursuant to Article 15.2 hereof. "Final Termination Date" shall mean the date specified in the Termination Notice, or, if such termination is disputed, the date of a final determination in accordance with Article 15 hereof.

14.2.2 The failure of the LIRR to give notice of a default to terminate this Agreement in the event a default is not cured in a timely manner or to terminate under this Article 14.2, shall not constitute a waiver by the LIRR of any right afforded to it under this Article, nor shall any such failure constitute an approval of or acquiescence in any default, except as may be specifically agreed to in writing.

14.2.3 The provisions of this Article are in addition to and not a limitation of any other right or remedy the LIRR may have under this Agreement, at law or in equity, or otherwise.

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14.3 Termination by Freight Operator

14.3.1 The Freight Operator shall have the right to terminate the Agreement upon the occurrence and during the continuation of any of the following:

(a) A breach by the LIRR of any of its obligations hereunder, which breach is reasonably expected to cause a material adverse effect on the financial performance of the Freight Operations;

(b) A taking by the LIRR under clause 3.3.5(a) which significantly impairs the financial performance of the Freight Operations and the remedies provided for in clause 3.3.5(c) are materially inadequate; or

(c) The remedy of Equitable Abatement under Article 3.2, 5.2.2, or 5.3.5 is materially inadequate.

14.3.2 For termination under Article 14.3.1, the Freight Operator must provide the LIRR with written notice of its election to terminate with supporting documentation establishing the conditions that exist which afford the Freight Operator the right to terminate. The notice shall provide the termination date shall be at least ninety (90) days from the date of notice.

14.3.3 The sole remedy of the Freight Operator upon termination of this Agreement by the Freight Operator

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shall be to receive Termination Payments under Article 14.4.

14.4 <u>Termination Payments</u>

Within a reasonable time after termination of all Freight Operations in accordance with Article 14, the LIRR shall pay the Freight Operator against a written invoice furnished to the LIRR by the Freight Operator specifying the following:

(a) The pro rated portion of the Annual Fee or the Renewal Fee, as the case may be, for the period covered by such fee which has not yet elapsed;

(b) A pro rated portion of the Concession Fee equal to the Concession Fee multiplied by a fraction the numerator of which is the number of years remaining to the end of the Agreement term, and the denominator of which is twenty; and

(c) To the extent the Freight Operator has made any Capital Improvements related to real property, the unamortized cost of such improvements; based on a useful life not to exceed seven years; provided that the Freight Operator shall, unless otherwise instructed by the LIRR, transfer to the LIRR all valid right, title and interest in and to the asset as to which such payment is made (including the asset that is the subject of any relevant capital leases (free and clear of any liens or other encumbrances).

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14.5 Reconciliation of Payments

Upon termination of this Agreement by any party pursuant to this Article 14, the parties shall reconcile all amounts due to each other and any amounts owed shall be paid by such party.

14.6 Continued Operation

14.6.1 In the event this Agreement is terminated by either party, the parties shall continue to perform in accordance with this Agreement until such parties agree or a final determination as to such termination is made pursuant to Article 15.2 hereof.

14.6.2 A termination under this Agreement shall in no way affect the obligations or rights of the Freight Operator or the LIRR which have accrued prior to such termination, or affect or impair the right of the LIRR to pursue any other remedy for the breach of this Agreement.

14.6.3 Subject to Article 14.6.1 hereof, upon termination of this Agreement pursuant to Article 2 or Article 14 hereof:

(a) the Freight Operator shall be deemed to have relinquished, abandoned, surrendered, and renounced any and all rights possessed to operate over that part of the Operating Premises to which such termination applies (subject to obtaining any necessary regulatory approvals or

exemptions, it being understood that the Freight Operator shall take any and all actions necessary to obtain such approvals or exemptions and the LIRR shall, to the extent requested by the Freight Operator cooperate in such efforts (at no expense to the LIRR);

(b) the Freight Operator shall release and discharge the LIRR from all obligations, claims, demands, causes of action, or suits which the Freight Operator might have, or which might subsequently accrue to the Freight Operator growing out of or in any manner connected with, directly or indirectly, the obligations under this Agreement. However, the aforesaid relinquishment, abandonment, surrender, renunciation, release and discharge by the Freight Operator shall not affect any of the rights, liabilities and obligations of either the LIRR or the Freight Operator which may have accrued prior to such termination or partial termination; and

(c) the LIRR shall, as soon as reasonably practicable identify a successor operator for the Freight Premises.

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ARTICLE 15: LIRR RIGHT OF SELF HELP; DISPUTE RESOLUTION PROCEDURES, REMEDIES, COMPLIANCE WITH LAW, VENUE AND APPLICABLE LAW

15.1 LIRR Right of Self Help

15.1.1 In the event the Freight Operator fails to perform or provide for the performance of its duties or responsibilities provided for in this Agreement that pose a safety risk or interfere with the LIRR's Passenger Operations, the LIRR may by written notification to the Freight Operator request adequate assurances that the Freight Operator will perform or provide for the performance of those duties and responsibilities. In the event that the Freight Operator fails to provide such adequate assurances or fails thereafter to perform the duties or responsibilities within a time that prevents an immediate safety risk or an immediate risk of interference with Passenger Operations, then the LIRR shall be entitled to discharge such duties and responsibilities at the sole cost and expense of the Freight Operator until such time as the Freight Operator assumes responsibility for discharging its duties and responsibilities.

15.1.2 The LIRR shall promptly notify the Freight Operator of any work performed or expenses incurred under authority of this Article.

15.1.3 Failure of the LIRR to notify the Freight Operator of any such remedial action within sixty (60) days shall

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constitute a waiver of any right of compensation for such action.

15.1.4 If the LIRR performs or fulfills the Freight Operator's duties or responsibilities of the Freight Operator through a remedial action under authority of this Article, and that remedial action is not challenged by the Freight Operator within a reasonable time by notice to the LIRR, then the Freight Operator shall pay the LIRR the costs of such action in accordance with Article 4.4.2 hereof. If a remedial action by the LIRR under this Article is challenged in a timely manner, then the Freight Operator shall be required to bear all costs of the remedial action, including but not limited to legal fees and expenses, only if and when that remedial action is ultimately finally determined (by arbitration pursuant to Article 15.2 hereof) to have been justified.

15.2 <u>Arbitration</u>

15.2.1 The parties agree to negotiate in good faith to resolve any and all disputes or claims arising under or with respect to this Agreement. If any dispute or claim is not resolved by mutual agreement, it will be resolved pursuant to the following procedure:

Any dispute or claim arising under or with respect to this Agreement will be settled by arbitration. The party requesting arbitration shall serve upon the other party notice

demanding arbitration with the name and address of the arbitrator appointed by it and describing the issue or issues to be arbitrated; the other party shall, within twenty (20) days after receipt of that notice, appoint an arbitrator and notify the first party of the arbitrator's name and address and of any other issue or issues to be arbitrated. The two arbitrators so named shall appoint a third arbitrator within a period of thirty (30) days after the first party receives notice of appointment of the second arbitrator. If the party upon which demand for arbitration is served fails to appoint an arbitrator within twenty (20) days, or if the two arbitrators so named fail to appoint a third arbitrator within thirty (30) days, then the party demanding the arbitration in the first case and either party in the second case, may apply to an appropriate court to appoint an arbitrator; and in the case of a party failing to appoint an arbitrator, the party demanding arbitration may at the same time also request the court to appoint the third arbitrator. The decision or award of any two of the arbitrators will be final and binding upon the parties subject to the standards of review of the Federal Rules of Civil Procedure. The arbitrators will have the discretion to impose the cost of the arbitration upon the losing party or divide it between the parties on any terms which they deem equitable; each party, though will bear its own legal fees including

any fees with respect to Article 10. Any decision or award rendered by the arbitrators may be entered as a judgment or order in any court having jurisdiction.

15.2.2 Any party seeking relief under this Article 15.2 shall promptly notify the other party upon becoming aware of the event underlying the claim in order that the other party is not materially prejudiced thereby, whether by substantially increased damages or otherwise. Failure to provide notice in a timely manner as specified by this Article 15.2.2 shall constitute a waiver of such claim, and the claim shall be void. Notwithstanding anything to the contrary, any party disputing termination under Article 14 hereof shall serve notice of demand for arbitration within 30 days of the notice of the event causing the dispute.

15.2.3 Parties may offer such evidence as is relevant and material to the dispute in accordance with the Federal Rules of Civil Procedure Rules 26-38, and Federal Rules of Evidence Rules 103-1103, and shall produce such evidence as the arbitrators may deem necessary to an understanding and determination of the dispute.

15.2.4 Until the arbitrators shall issue the decision or award upon any question submitted for arbitration, performance under this Agreement shall continue in the manner and form existing prior to the rise of such question; provided, however, that in the event

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the question submitted for arbitration relates to safety or operations, then the performance of the Freight Operator shall be altered to conform with the discretion of the LIRR pending the issuance of such decision or award and in the event the Freight Operator prevails in the arbitration, the LIRR shall pay to the Freight Operator any cost incurred by the Freight Operator arising out of such conformity. After delivery of such decision or award, each party shall forthwith comply with said decision or award immediately after receiving it.

15.3 <u>Compliance with Governmental Requirements</u>

15.3.1 (a) Both parties shall comply with all laws and ordinances and governmental rules, regulations and orders now or at any time during the term of this Agreement which as a matter of law are applicable to such party. Subject to Article 3 hereof, the Freight Operator shall make any and all structural and non-structural improvements, alterations or repairs of the Freight Premises that may be required at any time hereafter by any such present or future law, rule, regulation, requirement, order or direction.

(b) Any fueling facility used on the Freight Premises shall be equipped with automatic shut-off fueling nozzles and overfill catch basins with associated oil/water separators.

(c) The Freight Operator shall inspect all Rolling Stock and trains prior to their departure from the Freight Premises to the Joint Use or Passenger Premises to ensure compliance with FRA and AAR rules and regulations, and the LIRR Operating Rules. The Freight Operator will keep records of all such inspections and the Freight Operator will dispatch Freight Rolling Stock on freight trains over the Joint Use Premises only if all relevant FRA and AAR rules and regulations and LIRR's Operating Rules are satisfied.

15.3.2 The Freight Operator shall, at its own expense, procure from all governmental authorities having jurisdiction over the operations of the Freight Operator hereunder and shall maintain in full force and effect throughout the term of this Agreement all licenses, certificates, permits or other authorization which may be necessary for the conduct of such operations.

15.3.3 The obligation of the Freight Operator to comply with governmental requirements is provided herein for the purpose of assuring proper safeguards for the protection of persons and property on the Freight Premises and the Joint Use Premises. Such provision is not to be construed as a submission by the LIRR to the application to itself of such requirements or any of them.

15.3.4 The Freight Operator shall during the term of this Agreement, for the LIRR's information, deliver to the LIRR promptly after receipt of any notice, warning, violation, order to comply or other document in respect of the enforcement of any laws, ordinances, and governmental rules, regulations and orders, a true copy of the same.

15.3.5 The Freight Operator shall furnish to the LIRR on an annual basis copies of any studies or tests conducted to achieve or determine compliance with laws, ordinances and governmental rules, regulations and orders during the term of this Agreement.

15.3.6 The Freight Operator shall have such time within which to comply with the aforesaid laws, ordinances, rules and regulations as the authorities enforcing the same shall allow.

15.3.7 The parties agree that this Agreement is governed by the laws of the State of New York except to the extent that federal law preempts New York law. The exclusive legal venue for any litigation arising under this Agreement shall lie in the United States District Court for the Southern or Eastern District of New York. The provisions of this Agreement shall be construed and interpreted in accordance with the law of the State of New York, including for the purpose of choice of law, as though all acts and omissions related to this Agreement occurred in New York.

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ARTICLE 16: CONDEMNATION

16.1 If a Condemnation shall occur, this Transfer Agreement shall not terminate or be otherwise affected thereby except that the Operating Premises which are affected thereby shall, from and after the date title shall vest in the condemning authority and subject to the provisions of Section 16.2 hereof, no longer be subject to this Transfer Agreement.

16.2 The LIRR shall be entitled to receive the entire award or payment in connection with any taking of the Operating Premises without deduction for any estate vested in the Freight Operator by this Transfer Agreement or any assignment, lease or other conveyance of the Operating Premises effected pursuant to a Condemnation thereof. The Freight Operator hereby expressly assigns to the LIRR all of its right, title and interest in and to every such award or payment. The Freight Operator shall be entitled to claim and receive any award or payment from the condemning authority expressly granted for the taking of the Freight Operator's property, the interruption of its business or the cost to procure substitute premises or facilities, but only if such award or payment shall be made in addition to the LIRR's award and if the Freight Operator's claim does not adversely affect or result in any reduction of the LIRR's award or interfere with the prosecution of a claim for the taking by the LIRR. If the Freight Operator intervenes in a condemnation proceeding in which the LIRR is a party, the LIRR and the LIRR's

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legal counsel shall manage and control the proceeding for the LIRR and the Freight Operator in good faith.

ARTICLE 17: PROHIBITION AGAINST LIENS; PAYMENT OF TAXES AND ASSESSMENTS

17.1 Prohibition on Liens

The Freight Operator shall not create, suffer, or otherwise permit any mechanic's, materialman's or similar lien (other than any lien in favor of the LIRR or the MTA) (hereinafter referred to as "Charge") to be filed against any or all of the Operating Premises, for any reason, subsequent to the date of this Agreement; provided that this clause shall not apply to any liens in favor of the LIRR or the MTA. However, in such event, the Freight Operator against whom such a Charge was asserted and filed shall cause same to be discharged of record within thirty days after the date of filing of the same. If the Freight Operator shall fail to discharge such Charge within such period, then, in addition to the other rights of the parties herein contained, the LIRR may, but shall not be obligated to, discharge the same by paying the amount claimed to be due upon ascertaining that same constitutes a valid charge. Any amount so paid, and all costs and expenses including reasonable attorneys' fee, incurred by the LIRR in making such payment shall be repaid by the Freight Operator against whom the Charge was originally asserted and filed. Notwithstanding the foregoing, however, the Freight

Operator shall have the right to contest any such Charge, provided that within twenty (20) days after any such Charge is filed, the Freight Operator shall give notice to the LIRR of its intention to contest such Charge, such notice to specify the amount of the Charge to be contested, and provided further that the Freight Operator shall proceed to contest the validity or amount of such Charge by appropriate legal proceedings when and if same are filed. Assuming such notice has been given, the LIRR may not pay, remove, or otherwise proceed to discharge any such Charge, provided that any legal proceedings resulting therefrom shall be prosecuted with due diligence and dispatch on the part of the Freight Operator against whom the Charge was asserted and filed, and provided further that the Freight Operator shall forever protect, indemnify, defend, and save harmless the LIRR from any matters arising therefrom, including without limitation the principal amount of the Charge and all costs and expenses arising out of such proceeding.

17.2 <u>Prohibition on Security Interests</u>

The Freight Operator shall not pledge as security for any loan any of the assets or interests in the Freight Premises.

17.3 <u>Payment of Taxes and Assessments</u>

The Freight Operator shall promptly pay applicable ad valorem property taxes and assessments, if any,

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license fees and any other taxes, charges, assessments or fees properly levied or assessed against the Freight Operator by virtue of the Freight Operator conducting the Freight Operations subject to the Freight Operator's right to contest same as provided by law.

17.4 No Payment in Lieu of Taxes

In the event that the Freight Operator is able to avoid any taxes by virtue of the LIRR's statutory exemptions or status as a governmental entity, the LIRR represents that it shall not seek to obtain from the Freight Operator any payment in lieu of taxes.

ARTICLE 18: ACCIDENTS/INCIDENTS, CRIMES AND LOSS OR DAMAGE TO PROPERTY

18.1 Reporting of Accident/Incidents

18.1.1 In addition to notifying the appropriate police and other agencies, the Freight Operator shall promptly report to the LIRR Movement Bureau any Accident/Incident or crime which arises in connection with the Operating Premises. In addition, in the event of an Accident/Incident involving Freight Rolling Stock or Employees on the Joint Use Premises, the Freight Operator will submit to the LIRR's Safety Department:

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(a) LIRR Form AR-1, Initial Report of Employee Accident/Incident or Form 3B, Non-employee Accident/Incident Report, as applicable.

(b) LIRR Form AR-20 - Employee Accident-Injury Report, and/or Form 1A - Supervisor's Report of Employee Accident/Incident, as applicable.

These submissions will be made in accordance with the LIRR's procedures contained in the LIRR Safety Rules or the LIRR's "Corporate Employee Safety Policy and Procedures," including any amendments thereto. The LIRR shall notify the Freight Operator of any Accident/Incident or crime which arises in connection with the Operating Premises to the extent that such Accident/Incident or crime materially impacts the Freight Operations.

18.1.2 The Freight Operator and the LIRR will comply with all rules and regulations issued by the FRA and other agencies concerning the reporting of Accidents/Incidents.

18.2 <u>Investigation of Accidents/Incidents on Joint Use Premises</u>

18.2.1 All Accidents/Incidents on the Joint Use Premises, involving Freight Rolling Stock or Employees will be investigated immediately in accordance with the LIRR's "Corporate Employee Safety Policy and Procedures" and any amendments thereto, unless, by mutual agreement between the parties, alternative investigation procedures are established in writing.

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18.2.2 All Accidents/Incidents on Joint Use Premises involving Freight Rolling Stock or Employees will be investigated by a committee, chaired by an LIRR Transportation supervisor. In addition, upon the request of the LIRR, such committee shall be limited to three representatives of the Freight Operator.

Notwithstanding the foregoing, the Freight Operator may, at its own expense, conduct its own independent investigation of any Accident/Incident occurring on the Joint Use Premises involving employees or equipment of the Freight Operator; provided that the Freight Operator shall not interfere with any operations (including Passenger Operations) thereon and the LIRR shall not be obligated to assist or cooperate with the Freight Operator with such investigation.

ARTICLE 19: SALE OR TRANSFER OF OPERATING PREMISES

19.1 <u>Sale or Transfer of Operating Premises</u>

19.1.1 The Operating Premises may be sold, assigned or otherwise transferred, in whole or in part, at any time by the LIRR. The Freight Operator shall be provided with written notice, at such time notice of sale is published, and written notice of the successful bidder, if any, and prospective date of closing of any such sale, assignment or transfer. The LIRR's rights and obligation under this Agreement may be assigned, in whole or in part in connection with such sale, transfer or assignment in accordance

with Article 19.1.2. hereof; provided that any sale, transfer or assignment by the LIRR hereunder shall not relieve the LIRR of any of its obligations under this Agreement. No amendment or modification of this Agreement shall be made by the Freight Operator and such assignee or transferee without the consent of the LIRR.

19.1.2 In the event of any sale, assignment or transfer of the Operating Premises, the LIRR shall include and require, as a condition of sale, assignment or transfer that the purchaser, transferee or assignee:

(a) assume all of the rights and duties and obligations of the LIRR, hereunder;

(b) ratify and confirm to Freight Operator that such assignee shall fully and completely abide by the terms and provisions hereof; and

(c) shall take subject to the rights, duties and obligations of the Freight Operator.

ARTICLE 20: MISCELLANEOUS PROVISIONS

20.1 No Assurances as to Volume

The Freight Operator acknowledges and agrees that the LIRR has not made any representations or assurances with respect to the volume of business which the Freight Operator will or may have in the exercise of the rights granted herein during the term of this

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Agreement. Except as otherwise expressly provided for in this Agreement, the LIRR shall not be responsible for damages, nor shall there by any diminution of payments due from the Freight Operator under this Agreement, for or on account of any decrease in the volume of the Freight Operator's business or any change in the Freight Operator's expenses.

20.2 <u>No Police Protection</u>

The LIRR shall have no obligation to provide police protection or security services on the Operating Premises. The Freight Operator acknowledges that the LIRR shall have no special duty to provide such police protection or security. Nothing in the foregoing shall be construed to limit any right LIRR police, investigators or other law enforcement persons may otherwise have to enter the Freight Premises at any time for official purposes in the exercise of their public duties, including but not limited to investigations, searches, inspections and examinations.

Nothing in this Article 20.2 shall prevent the Freight Operator from obtaining police protection or private security services on the Freight Premises.

20.3 <u>Assignments of Receivables</u>

Either party hereto may assign any receivables due them under this Agreement, provided, however, such

assignments shall not relieve the assignor of any rights or obligations under this Agreement.

20.4 **Binding Effect**

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

Nothing in this Agreement shall be construed as licensing or authorizing any party hereunder to use any trademark, trade name, symbol, copyright or service mark belonging to the other party or its affiliates without the prior written consent of such party. Each party agrees to defend, indemnify and hold the other party and its Employees, and affiliates against any loss or liability resulting from the wrongful use or appropriation of any such trademark, trade name, symbol, copyright or service mark referred to above.

20.5 **Beneficiaries**

This Agreement and each and every provision hereof is for the exclusive benefit of the LIRR and the Freight Operator and not for the benefit of any third party.

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Nothing herein contained shall be taken as creating or increasing any right in any third person to recover by way of damages or otherwise against either of the Parties hereto.

20.6 **Waivers**

No consent or waiver, express or implied, by either party to or of any breach or default by the other party in the performance by such other party of its obligations hereunder, shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance by such other party of the same or any other obligations of such party hereunder. Failure on the part of any party to complain of any act or failure to act of any other party or to declare such other party in default, irrespective of how long such failure continues, shall not constitute a waiver by such party or parties of their or its right hereunder.

20.7 **Notices**

Except for payments to be made by the Freight Operator in accordance with Article 4 above, all notices, demands, requests, submissions, or other communications which are required to be served pursuant to this Agreement shall be in writing and shall be deemed to have been properly served when mailed by first class mail, postage prepaid, facsimile, overnight hand delivery or other courier service addressed: (a) in the case of the LIRR, to

the President, with a copy to the General Counsel, in each case at Jamaica Station, Jamaica, New York 11435; and (b) in the case of the Freight Operator, Southern Empire State Railroad Company, c/o Anacostia & Pacific Company, Inc., 405 Lexington Avenue, 50th Floor, New York, NY 10174. Each party may designate by notice in writing a substitute party or a new address to which any notices, demands, requests, submissions, or communications shall thereafter be served.

20.8 Severability

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

20.9 Headings

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

20.10 No Discrimination

Freight Operator covenants that it will not violate any laws concerning discrimination, including but not

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limited to Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act, as amended, Americans With Disabilities Act, Section 1981 of the Civil Rights Act of 1870, Section 1983 or 1985 of the Civil Rights Act of 1871, Equal Pay Act, Executive Order 11246, Rehabilitation Act of 1993, Vietnam-Era Veterans' Readjustment Assistance Act, Immigration Reform and Control Act of 1985, the New York State Human Rights Law, the New York City Human Rights or Civil Rights Law, Executive Order 50 or any other federal, state or local laws, statutes, regulations, ordinances or orders concerning discrimination (the "Discrimination Laws"). Freight Operator further covenants to require any subcontractor to comply with the Discrimination Laws.

20.11 <u>Entire Agreement</u>

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

20.12 <u>Conflict of Interest; Public Officers Law</u>

20.12.1 The Freight Operator represents to the best of its knowledge that:

(a) No officer, director, employee, agent, or other contractor of the MTA, or its respective affiliates and subsidiaries (collectively the "Authorities") or a member of the immediate family or household of any of the aforesaid has directly or indirectly received or been promised any form of benefit, payment or compensation, whether tangible or not, in connection with the grant of this Agreement;

(b) This Agreement is entered into by the Freight Operator without any connection to any other entity or person making a proposal for the same purpose, and without collusion, fraud or conflict of interest. No elected or appointed officer or official, director, employee, agent or other contractor of the Authorities, the City or State of New York, the Counties of Nassau or Suffolk, or local units of government and districts within such jurisdictions (including elected and appointed members of the legislative and executive branches of government), or a member of the immediate family or household of any of the aforesaid:

(i) is interested on behalf of or through the Freight Operator directly or indirectly in any manner whatsoever in the execution or the performance of this Agreement, or in the services, supplies or work, to which this Agreement relates or in any portion of the revenues; or

(ii) is an employee, agent, advisor, or consultant to the Freight Operator or, to the best of the Freight Operator's knowledge, any subcontractor or supplier to the Freight Operator.

20.12.2 As an exception to the above, the Authorities, in their sole discretion, may consent in writing to waive this provision with respect to an individual or entity if the Authorities are provided with a written request for such waiver, in advance, which identifies all of the individuals and entities involved and sets forth in detail the nature of the relationship and why it would not constitute a conflict of interest.

20.12.3 Neither the Freight Operator nor any officer, director, employee, agency, parent, subsidiary, or affiliate of the Freight Operator shall have an interest which is in conflict with the Freight Operator's faithful performance of its obligations under this Agreement; provided that the Authorities, in their sole discretion, may consent in writing to such a relationship, provided the Freight Operator provides the Authorities with a written notice, in advance, which identifies all the individuals and entities involved and set forth in detail the nature of the relationship and why it is in the Authorities best interest to consent to such relationship.

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20.12.4 The provisions of this Article are supplemental to, not in lieu of, all applicable laws, rules and regulations with respect to conflict of interest. In the event there is a difference between the standards applicable under this Agreement and those provided by statute, the stricter standard shall apply.

20.12.5 In the event the Freight Operator has no prior knowledge of a conflict of interest as set forth above and acquires information which may indicate that there may be an actual or apparent violation of any of the above, the Freight Operator shall promptly bring such information to the attention of the LIRR. The Freight Operator shall thereafter cooperate with the Authorities' review and investigation of such information, and comply with the instructions the Freight Operator receives from the LIRR in regard to remedying the situation.

20.12.6 No employee of the LIRR or the MTA who at any time during his or her employment with the LIRR or the MTA, was directly concerned with the selection process in connection with this Agreement, personally participated in the selection process in connection with this Agreement, or had this Agreement under his or her active consideration, shall have any interest, direct or indirect, in this Agreement, the performance hereof, the Freight Operations or the Freight Operator. The Freight Operator

shall not employ any such individual to work in the Freight Operations for a period of two (2) years after employment with the LIRR or the MTA has been terminated, unless such individual is exempt from the Public Officers Law. Moreover, the Freight Operator shall not employ any individual in the Freight Operations who, at any time during his or her employment with the LIRR or the MTA, was directly concerned with the selection process in connection with this Agreement, personally participated in the selection process in connection with this Agreement, or had this Agreement under his or her active consideration.

20.13 <u>Survival</u>

Notwithstanding anything herein to the contrary, Article 10 shall survive the expiration or any other termination of this Agreement.

20.14 <u>Assignability</u>

Subject to Article 19.1 hereof, the rights and obligations under this Agreement may not be assigned by a party hereto without the consent of the other party; provided that the Freight Operator may assign its rights and obligations hereunder prior to the Effective Date to an entity, directly or indirectly owned or controlled by or under direct or indirect common control with the Freight Operator.

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20.15 Representation and Warranties

20.15.1 The parties hereby represent and warrant to the other, as of the date hereof and of the Commencement Date, as follows:

(a) such party is a corporation duly organized, validly existing and in good standing under the laws of the state of its incorporation; and

(b) such party has all necessary corporate power and authority to execute, deliver and perform its obligations under this Agreement and this Agreement shall be enforceable against it in accordance with its terms.

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20.15.2 The LIRR hereby represents and warrants to the Freight Operator that the grant of rights and other assets by the LIRR to the Freight Operator provides the Freight Operator with sufficient rights to conduct the Freight Operations in a manner substantially similar to that conducted by the LIRR on the Effective Date, subject to the expiration of customer and other contracts that do not extend past the Commencement Date and subject to the requirements of Article 15.3 hereof.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement in duplicate and have caused their corporate seals to be hereunto affixed the day and year first written below.

THE LONG ISLAND RAIL ROAD COMPANY

By: _____
Thomas F. Prendergast
President

Date: 11/19/96

SOUTHERN EMPIRE STATE RAILROAD COMPANY

By: _____

Print Name: R.L. McCaffrey, Jr.

Title: President

Date: 15 November 1996

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Corporate Acknowledgments

STATE OF NEW YORK)
) ss.:
COUNTY OF QUEENS)

On the 15th day of November, 1996, before me personally came R. Lawrence McCaffrey, Jr., to me known and who being by me duly sworn, did depose and say: that he resides at Brooklyn, New York; that he is the President of **SOUTHERN EMPIRE STATE RAILROAD COMPANY**, the corporation described herein and which executed the foregoing instrument; he signed his name thereto by like order.

Barbara J. Christopoulos
Notary Public

(Affix Notary Stamp)

BARBARA J. CHRISTOPOULOS
NOTARY PUBLIC, State of New York
No. 41-4800716, Queens County
Commission Expires Sept. 30, 1995/997

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STATE OF NEW YORK)
) ss.:
COUNTY OF QUEENS)

On the 19TH day of NOVEMBER, 1996, before me personally came Thomas F. Prendergast, to me known and who being by me duly sworn, did depose and say: that he has an office at Jamaica Station, Jamaica, New York; that he is the President of **THE LONG ISLAND RAIL ROAD COMPANY**, the corporation described herein and which executed the foregoing instrument; that he signed his name thereto by order of the Board of said corporation.

Mary A. Allocca
Notary Public

MARY A. ALLOCCA
NOTARY PUBLIC, State of New York
No. 4552505
Qualified in Nassau County
Commission Expires November 30, 1997

LIST OF EXHIBITS

Exhibit 1	Freight Premises
Exhibit 2	Joint Use Premises
Exhibit 3	Private Freight Sidings
Exhibit 4	[Intentionally Omitted]
Exhibit 5	Description of Yard A
Exhibit 6	Active Freight Switches
Exhibit 7	Inactive Freight Switches
Exhibit 8	Procedures for Installation of new Freight Switch
Exhibit 9	Condition of Tracks on Freight Premises
Exhibit 10	[Intentionally Omitted]
Exhibit 11	Equipment/Locomotive Rental Rates
Exhibit 12	Customer and Equipment Contracts
Exhibit 13	Freight Property Rental Agreements Rail Use
Exhibit 14	Yard A Tracks to Revert to the LIRR
Exhibit 15	Property at Arch Street Yard to be Used for Tie Storage
Exhibit 16	Maspeth Yard Schematic

EXHIBIT 1
MTA/LONG ISLAND RAIL ROAD
FREIGHT PREMISES

1. **Branches**
   a. Bay Ridge Branch (subject to New York City Transit Authority access on weekends)
   b. Central Extension, Franklin Avenue to Endo Blvd.
   c. Bushwick Branch
   d. North Shore Freight Branch (excluding NYC air rights above 22 ft. ATR)

2. **Yards**
   a. Fresh Pond Yard
   b. Yard-A (excluding NYC air rights above 22 ft. ATR)
   c. Arch Street yard (excluding NYC air rights above 22 ft. ATR)
   d. Blissville Yard (tracks not in service)
   e. Maspeth Yard
   f. Fremont Yard
   g. Bridgehampton North Siding and Team Yard
   h. Garden City Team Yard
   i. East Farmingdale (PW Long Siding, Wye and Team Yard)
   j. Richmond Hill Team Yard

   Several of the tracks in the yards listed above are out of service.

3. **Appurtenant Facilities**
   a. Atals Terminal (tracks not in service)
   b. Price Industrial Park
   c. Roosevelt Spur
   d. Kearney's Siding (tracks not in service)
   e. Degnon Terminal (tracks not in service)

4. **Buildings**
   a. Long Island City, Arch Street Freight House & Offices
   b. Long Island City, Yard-A Freight Car Repair Shop
   c. Long Island City, Yard A Yardmaster's Office
   d. Maspeth Yard Office
   e. Fresh Pond, Car Control Office (former Pond Tower)
   f. Fresh Pond, Welfare Facility
   g. PW Trailer
   h. Pine Aire (Brentwood) Trailer

5. **Team Tracks**
   a. Bay Shore
   b. Central Islip
   c. Eastport
   d. Farmingdale
   e. Greenlawn
   f. Huntington
   g. Islip
   h. Mattituck
   i. Medford
   j. Port Jefferson
   k. Riverhead
   l. Southampton
   m. Yaphank

EXHIBIT 2

MTA/LONG ISLAND RAIL ROAD

JOINT USE PREMISES

1. **Branches: Primarily Passenger Operations with Freight Operating Concession**
   a. Main Line, Jamaica to Greenport
   b. Montauk Branch, between Montauk and L.I. City Passenger Yard
   c. Port Jefferson Branch, Hicksville to Port Jefferson
   d. Central Branch, "B" Tower to Babylon
   e. Hempstead Branch, between Queens and Garden City Interlockings
   f. West Hempstead Branch, Valley to WM
   g. Montauk Cut-off

2. **Yard and Team Tracks: Primarily Passenger Operations with Freight Operating Concession**
   a. Port Jefferson
   b. Montauk
   c. Queens Village
   d. Speonk
   e. Hicksville
   f. Patchogue
   g. Sayville
   h. Richmond Hill
   i. Southhold
   j. Pinneaire north side

3. **Bridges**
   a. Cabin "M" Bride
   b. "DB" Bridge

EXHIBIT 3
MTA/LONG ISLAND RAIL ROAD
PRIVATE SIDINGS

Town	Consignee	Car Capacity
Babylon	Palm Trucking	18
Bedford	Glenwood Mason	2
	Brooklyn Terminal Market (2 tracks)	12
	Key Food	6
	Favorite Plastics	6
	Brooklyn Resource Recovery (proposed)	20
	Setco Plastics (2 tracks)	10
	NYCTA (multiple tracks)	20
	Heritage Corrugated	4
	CBS Foods	3
Blissville	Allied Extruders (2 tracks)	9
	Guinness Harp (not in use)	2
Brentwood	Marjam Supply (Ivy Hill)	4
	Nash Lumber (not in use)	2
	Pilgrim State Hospital	70
	Roblaw	3
	Pergament	3
	Former Hills Warehouse	25
Bridgehampton	Pulver Gas	5
	Hampton Materials	40
Bushwick	Maspeth Industrial Center (not in use)	2
	Standard Folding Cartons	4
	Western Beef	4
	Bleyer	1
	JIJ Recycling (2 tracks)	6
	Filiberto Recycling	3
	Star Recycling (loads on main)	1
	Feldman Lumber	4
	Bass Oil (not in use)	2
	Rosen Baking	1
	A.J. Bart (not in use)	2
	Supreme Poly	2
	Von Damm	1
	Miron Lumber	6
	Afghan Foods (not in use)	2
Calverton	C&H Sand (Proposed)	10
Central Islip	Kaufman Allied	2
Deer Park	Pinter Bros.	10
	Eldee Complex (5 sidings not in use)	10
	Southern Container	8
	Georgetown Manor (not in use)	2
	Sabbeth Lumber (not in use)	5
	Giani Enterprises (not in use)	2
	Southern Milwork (not in use)	2
	Windowrama (not in use)	3

EXHIBIT 3
MTA/LONG ISLAND RAIL ROAD
PRIVATE SIDINGS

Town	Consignee	Car Capacity
Eastport	Eastport Feed	8
Farmingdale	Georgia Pacific	3
	J & S Trucking	5
	Price Industria Park (12 sidings not in use)	52
	Amco Plastics (2 tracks)	6
	Boening Bros.	3
	Pergament	3
	Wellwood (6 sidings not in use)	14
Freeport	Quality Lineals	1
Fresh Pond	Pen Tab	3
	Centre Lumber	2
	Dubovsky (not in use)	1
	Chemrex	1
Garden City	Aaron Packaging	2
	Garden City Refrigeration	1
	Esselte Pendaflex (not in use)	4
	5 Sidings (not in use)	Various
Hicksville	Firestone Plywood	4
	Inland Plastic	4
	Ruco Polymer	10
	LILCO	20
	Clare Rose (not in use)	4
Huntington	Kleet Lumber	5
	Nassau Suffolk Lumber	7
	Gaylord Bag (not in use)	12
	RB Hamilton (not in use)	1
Islip	84 Lumber	5
Jamaica	Giove Company (not in use)	2
	Honeywell	7
	Jamaica Water Supply (not in use)	6
	7 Sidings (not in use)	Various
Long Island City	Case Paper	7
	Egleston Bros. (not in use)	4
	Thypin Steel (not in use)	3
	Duane Reade (not in use)	1

EXHIBIT 3
MTA/LONG ISLAND RAIL ROAD
PRIVATE SIDINGS

Town	Consignee	Car Capacity
Long Island City (Cont.)	New York Envelope (not in use)	4
	Lighthouse (not in use)	1
	Akzo Salt	25
	Hampton Materials	25
Medford	Gershow Recycling	8
	Synergy Gas (not in use)	10
Mineola/Garden City	Nestle	10
	Feldman Wood Products (not in use)	4
New Hyde Park	Chesler Plywood	2
	Urethane Products (not in use)	4
Nichols Siding	Alfred Bleyer	3
	Boro Lumber	1
	Coors	4
	Manufacturers Corrugated (2 tracks)	9
	Star Corrugated	5
	16 Sidings (not in use)	Various
Port Jefferson	Nassau Suffolk Lumber	5
Riverhead	Riverhead Building Supply	4
	L.I. Cauliflower	1
	Paraco Gas (effective 10/9/95)	4
	Slater Supply (not in use)	5
Southhampton	Southampton Lumber (not in use)	5
Syosset	New Breed Trucking	6
	Gallo Wine	4
Upton	Brookhaven National Laboratory	94
Valley Stream	Baisley Lumber	2
Westbury	Nassau Cold Storage (not in use)	3
	Jamaica Ash	3
Wyandanch	Conservative Gas	5
	Combined Container	3
Yaphank	Georgia Pacific	10
	Arriva Ready Mix	16

EXHIBIT 4

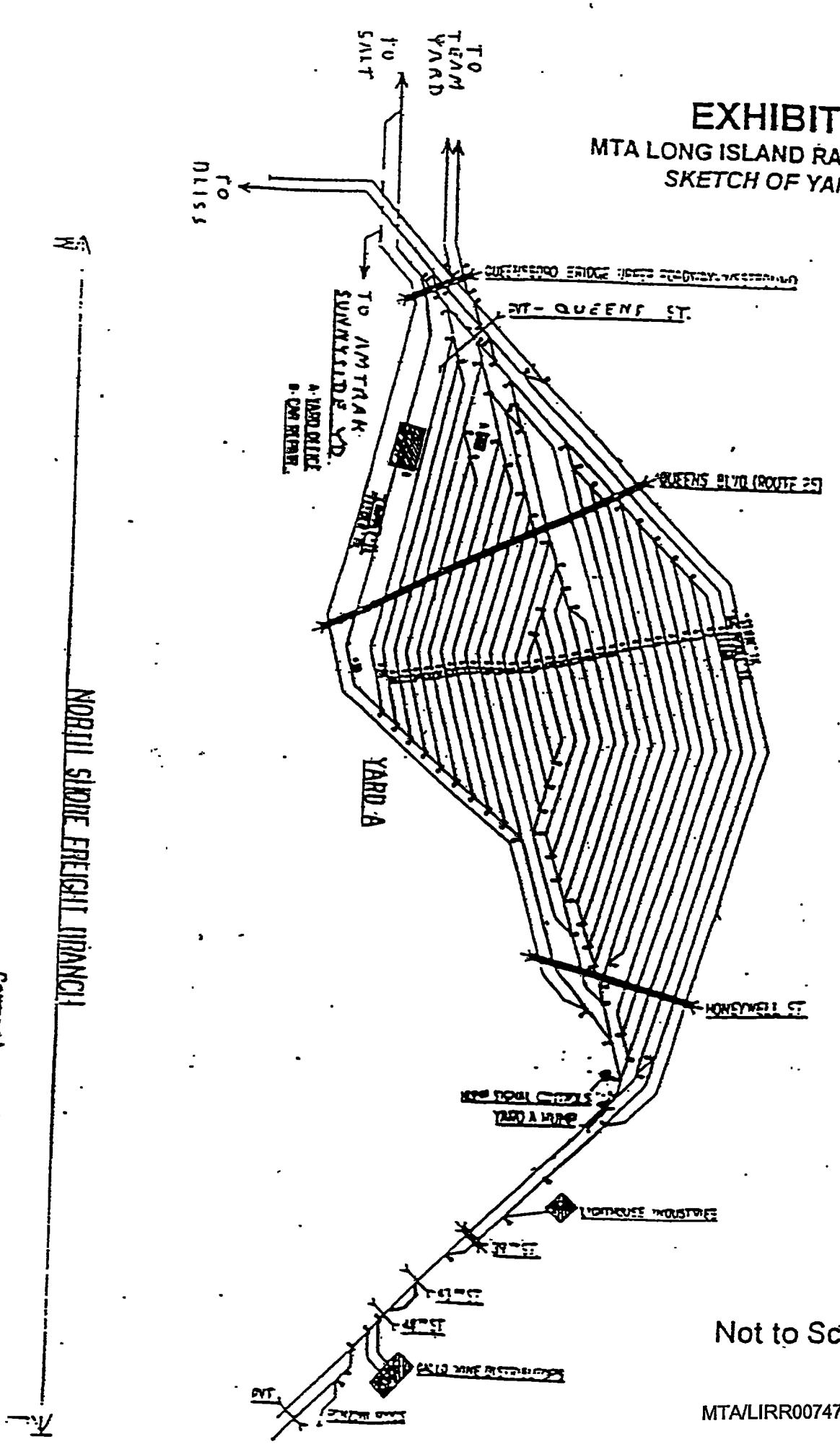
MTA LONG ISLAND RAIL ROAD

Intentionally Omitted

EXHIBIT 5

MTA LONG ISLAND RAIL ROAD

SKETCH OF YARD A



Not to Scale

Contract as of 9-1-96

Exhibit 6

MTA/Long Island Rail Road
Active Freight Switches on Joint Use Premises

Switch Description/Location	Customer(s)	No. of Switches	Branch	Mile Post
CATEGORY C				
Amco Plastics, So. Farm.	Amco Plastics	1	Central	31.2
Ruco Polymer, Hicksville	Ruco Polymer	1	Main Line	26.3
Synergy, Medford	Synergy	1	Main Line	55.0
Firestone Plywood, Hicks.	Firestone Plywood	1	Port Jeff	26.4
Chesler Plywood, New Hyde Park	Chesler Plywood	1	Main Line	16.4
Chemrex (Welbilt), Maspeth	Chemrex	1	Montauk	3.4
New Breed Trucking, Syosset	New Breed (Waldbaums)	1	Port Jeff	27.2
Paraco Gas, Riverhead	Paraco Gas	1	Main Line	71.5
Islip Team Track	Velvetop	1	Montauk	42.2
Brookhaven Labs, Upton	Brookhaven Labs	1	Main Line	62.3
Greenlawn Runaround	General Freight Use	2	Port Jeff	37.2
Central Islip Team Track	General Freight Use	1	Main Line	42.4
Riverhead Team Track	General Freight Use	1	Main Line	73.2
Bay Shore Team Track	Inactive Customer	1	Montauk	40.2
Wellwood Siding, Central Branch	Boening Bros.	2	Central	32.5
Kaufman Allied, Central Islip	Kaufman Allied	1	Main Line	43.3
L.I. Cauliflower, Riverhead	L.I. Cauliflower	1	Main Line	73.4
LILCO, Hicksville	LILCO	1	Main Line	25.5
U.S. Plywood, Farmingdale	U.S. Plywood	1	Main Line	31.1
Freeport	Quality Lineals	1	Montauk	22.7
Eastport Feed & Team Track	Eastport Feed	1	Montauk	69.2
Huntington Team Track	General Freight Use	1	Port Jeff	34.3
Port Jefferson	Nassau Suffolk Lumber	1	Port Jeff	57.8
Mattituck Team Track	General Freight Use	1	Main Line	82.3
Port Jefferson Team Track	General Freight Use	1	Port Jeff	57.8
		30		

Exhibit 6

MTA/Long Island Rail Road
Active Freight Switches on Joint Use Premises

Switch Description/Location	Customer(s)	No. of Switches	Branch	Mile Post
CATEGORY A				
Glendale Crossover	General Freight Use	2	Montauk	5.1
East Lead, Fresh Pond	General Freight Use	1	Montauk	5.0
Crossovers, Fresh Pond	General Freight Use	4	Montauk	4.1
Prima Asphalt, Holtsville	Prima/ProGo/Pure	2	Main Line	50.7
North Siding, Bridgehampton	HMH/Pulver/General Frt.	2	Montauk	93.7
Deer Park South Side	Pinter/General Freight Use	4	Main Line	36.4
Jamaica Ash, Westbury	Jamaica Ash	1	Main Line	22.0
Georgia Pacific, Yaphank	Georgia Pacific	1	Main Line	58.7
Maspeth Yard	Grow/Star/Boro Hall Lbr	1	Montauk	2.9
Southern Container, Deer Park	Southern Container	1	Main Line	38.0
North Siding, Wyandanch	Combine/Conservative	2	Main Line	34.4
Allied Extruders, Blissville	Allied Extruders	1	Montauk	1.2
Riverhead Building, Riverhead	Riverhead Building	1	Main Line	72.2
Fonda Group (Bleyer), Maspeth	Fonda Group (Bleyer)	1	Montauk	3.3
Pineaire North Siding	Roblaw/general Frt. Use	2	Main Line	38.9
Maspeth Crossover	General Freight Use	2	Montauk	2.7
Syosset	Gallo Wine	1	Port Jeff	28.2
Hicksville	Atlantic Pipe	1	Main Line	23.9
North Side, Framingdale (PW)	General Freight Use	2	Main Line	31.4
		32		
CATEGORY B				
Kleet Lumber, Huntington	Kleet Lumber	1	Port Jeff	35.4
Nassau/Suffolk Lbr, Huntington	Nassau/Suffolk Lumber	1	Port Jeff	34.9
Pergament, So. Farmingdale	Pergament	1	Central	31.9
North Side, Maspeth	Coors/Manufacturers Corr	1	Montauk	2.6
Gershow Recycling, Medford	Gershow Recycling	1	Main Line	54.5
Marjam Supply, Brentwood	Marjam Supply	1	Main Line	39.6
Medford Team Track	General Freight Use	1	Main Line	54.4
Baisley Lumber, Valley Stream	Baisley Lumber	1	W. Hempstead	16.6
Garden City Lead	Circus	1	Central Ext.	18.7
American Lumber, Holtsville	American Lumber	1	Main Line	51.9
		10		

Exhibit 7

MTA/Long Island Rail Road
Inactive Freight Switches on Joint Use Tracks

Switch Description/Location	Customer(s)	No. of Switches	Branch	Mile Post
Guinness Harp, Maspeth	Guinness Harp	1	Montauk	1.3
Atlas Terminal, Glendale	Atlas Terminal	1	Montauk	5.3
Water Works, Jamaica	Various	1	Montauk	11.3
Fiore Bros., Bay Shore	Fiore Bros.	1	Montauk	41.5
Team Track, Southampton	General Freight Use	1	Montauk	88.4
Southampton Lbr, Southampton	Southampton Lumber	1	Montauk	88.6
Kearney Siding, Long Island City	Various	1	Montauk Cut-off	0.9
Gaylord Paper, Huntington	Gaylord Paper	1	Port Jeff	36.1
North Siding, Mineola	None	1	Main Line	19.0
Allied Baking, Westbury	Allied Baking/ Nassau Cold Storage	1	Main Line	21.9
Harbor Dist., Hicksville	Harbor Distribution	1	Main Line	23.8
Inland Plastics, Hicksville	Inland Plastics	1	Main Line	26.1
Price Industrial Park, Farmingdale	Various	1	Main Line	30.5
L.I. Macaroni, Deer Park	L.I. Macaroni	1	Main Line	37.4
Team Track, Yaphank	General Freight Use	1	Main Line	58.8
Arriva Ready Mix, Yaphank	Arriva Ready Mix	1	Main Line	59.6
Shulman, Mattituck	Shulman	1	Main Line	82.3
		17		

EXHIBIT 8

MTA LONG ISLAND RAIL ROAD
PROCEDURES FOR INSTALLATION OF
NEW FREIGHT SWITCH

PROCEDURE FOR NEW SWITCH CONNECTION TO JOINT-USE TRACK:

1. The Freight Operator shall prepare detailed, scale drawings of the proposed switch and sidetrack, identifying:
   a. The exact point of connection to the joint-use track;
   b. The size, type and orientation of the proposed switch;
   c. The layout of the siding, showing radius of all curves and distances to joint-use track, and relationship to property lines and existing improvements.

2. The plans shall be submitted to the LIRR Chief Engineer for review and approval, which shall be based on a) conformance with LIRR standards for sidetrack construction, b) potential impact on LIRR safety and operations, and c) potential impact on planned work or infrastructure modifications.

3. If approved by the LIRR, the LIRR will prepare an estimate of force account labor costs associated with required modifications to existing facilities (eg. Third rail, signal system, utility relocations; etc.) and the installation of the main track switch and such portion of the siding as may be necessary to extend beyond the clearance point of the adjacent joint-use track. Prior to the commencement of any work on-site by the LIRR, the Freight Operator shall deposit with the LIRR the full amount of the force account estimate.

4. The Freight Operator shall be responsible for the procurement and on-site delivery of all materials required by the LIRR for the construction and installation of the switch and siding.

5. The Freight Operator will be responsible for securing all rights, permits, title, etc. from the prospective consignee and any third party that may be required to accommodate the construction and/or use of the proposed siding.

6. The Freight Operator will be responsible for undertaking or arranging for the construction of all portions of the siding, which are not performed by LIRR force account labor, and shall reimburse the LIRR for any and all costs, including applicable overhead rates in effect at the time the work is performed, which may be incurred by the LIRR in support of such work (eg. inspection, protection, etc.).

7. Once completed, the siding must be inspected and approved by the LIRR prior to placing a new siding in service.

EXHIBIT 9

MTA/LONG ISLAND RAIL ROAD

CONDITION OF TRACKS ON FREIGHT PREMISES

Location/Facility	Status (000s out of Service)	Meets or Exceeds FRA Class I
Branches (Lead Tracks):		
Bay Ridge	Active	Yes
Bushwick	Active	Yes
Central Extension	Active	Yes
North Shore Freight	Active	Yes
Yards:		
Fresh Pond Yard	Active	Yes
Yard "A"		
Tracks 1 and 2	Inactive	No
Tracks 3 thru 13	Active	Yes
Track 14	Inactive	No
Tracks 15 thru 17	Active	Yes
Tracks 18 thru 20	Inactive	No
Track 21	O.O.S.	No
Tracks 22 and 23	Active	Yes
Track 24	O.O.S.	No
Track 25	Active	Yes
Tracks 26 and 27	O.O.S.	No
Tracks 28 thru 30	Active	Yes
Stink Track	Active	Yes
Big Middle Track	Active	Yes
Feeder Track	Active	Yes
Arch Street Yard	Active	Yes
Blissville	O.O.S.	No
Maspeth East Yard		
Sub track 1 -3	O.O.S.	No
Sub Track 4	Active	Yes
Maspeth West Yard		
Track 5	Inactive	No
Tracks 6 thru 8	Active	Yes
Maspeth Team Yard	Active	Yes
Fremont Yard		
Tracks 1, 2 & 4 Iron	Active	Yes
Track 5 Interchange	O.O.S.	No
Tracks 6 and 7	Active	Yes
Track 2 Tunnel	O.O.S.	No
Bridgehampton North Siding and Team Yard	Active	Yes
Garden City Team Yard	Active	Yes
East Farmingdale PW Long Siding, WYE & Team Yard	Active	Yes
Richmond Hill Team Yard	Active	Yes

EXHIBIT 9

MTA/LONG ISLAND RAIL ROAD

CONDITION OF TRACKS ON FREIGHT PREMISES

Location/Facility	Status (000s out of Service)	Meets or Exceeds FRA Class I
Appurtenant Facilities:		
Atlas Terminal	O.O.S.	No
Price Industrial Park	Active	Yes
Roosevelt Spur	Active	Yes
Kearney's Siding	O.O.S.	No
Degnon Terminal	O.O.S.	No
Team Tracks:		
Bay Shore	Active	Yes
Central Islip	Active	Yes
Eastport	Active	Yes
Farmingdale (PW)	Active	Yes
Greenlawn	Active	Yes
Huntington	Active	Yes
Islip	Active	Yes
Mattituck	Active	Yes
Medford	Active	Yes
Port Jefferson	Active	Yes
Riverhead	Active	Yes
Southhampton	Active	Yes
Yaphank	Active	Yes

EXHIBIT 10

MTA LONG ISLAND RAIL ROAD

Intentionally Omitted

Exhibit 11

MTA LONG ISLAND RAIL ROAD
EQUIPMENT/LOCOMOTIVE RENTAL RATES[1]
BILLING RATES
(BASED ON 1995 DATA)

Equipment Description	Rental Rates Daily	Rental Rates Hourly
Backhoe	$ 66.22	$ 8.28
Ballast Compactor	180.88	22.61
Ballast Regulator	411.48	51.44
Brush Chipper	4.00	0.50
Brush Saw	1.61	0.20
Brush Cutter	282.79	35.35
Compressor Air	3.25	0.41
Crane-Rail	163.10	20.39
Grinder	2.66	0.33
Loader	69.08	8.63
Loader-Traxcavator	54.75	6.84
Magnet/Tie Unloader	118.35	14.79
Motor Car	49.77	6.22
Plate Placer	16.50	2.06
Push Cart	5.50	0.69
Rail Saw	37.58	4.70
Rail Shearer	6.25	0.78
Rail Threader	0.76	0.09
Snow Blower-Jet	42.18	5.27
Spk. Drvr. Hydraulc	139.56	17.44
Spike Puller	12.70	1.59
Stabilizer	668.01	83.50
Tamper	382.77	47.85
Tamping Gun	7.25	0.91
Tie Borer	71.47	8.93
Tie Crane	32.18	4.02
Tie Extractor	47.25	5.91
Tie Inserter	181.73	22.72
Tie Remover-Inserter	140.45	17.56
Tie Remover	109.21	13.65
Tie Sacrficr Omsi	191.15	23.89
Tie Spacer	58.37	7.30
Undercutter	179.33	22.42
Vibrator Car	13.25	1.66
Welder	6.25	0.78

Locomotives[2]

Horsepower	Daily	Hourly
1000	$466.27	$ 58.28
1500	673.83	84.23
2000	723.78	90.47

[1] Tentative rates. To be updated annually. All rates exclude cost of crews or operator.
[2] Excludes fuel and crew costs.

Equip.wpd

EXHIBIT 12
MTA/LONG ISLAND RAIL ROAD
LIRR CUSTOMER AND EQUIPMENT CONTRACTS [1] [2]
AS OF 11/1/96

CONTRACT NO.	COMPANY NAME	Effective DATE	Termination DATE
LI-C-302	Brooklyn Resources	10/29/96	Ongoing
ICC-LI-202	Canada Dry	11/1/95	When $5,200 is reimbursed
LI-C-9608	CBS Foods	1/1/96	12/31/96
LI-C-9607	Kea Farms	6/1/96	5/31/97
LI-C-166A	Marjam	1/1/96	12/31/97
LI-C-215	Prima Asphalt	1/1/96	6/1/97
LI-C-026-A	R.F. Cunningham	8/1/96	7/31/97
LI-C-9606	Southern Container	9/1/96	8/31/97
LI-S-08	SparTech Films	1/1/92	Ongoing
LI-9613	Star Corrugated	6/1/96	5/31/97
LI-9604	Supremo Rice	4/15/96	4/14/97
GS-2712	Ore Jennys (separate file)	1993	1997
LI-C-9614	JJT Trucking	8/15/96	8/31/99
LI-9615[3]	C&H Sand and Stone Corp.[3]	Under negotiation	To be determined
LIRR-C-D-9616	Pure Recycling	10/15/96	End of project
LI-C-9609	Laquila Construction	9/1/96 (Signed 10/10/96)	3/1/97

(1) Most of the contracts are cancellable on 30 days notice.

(2) The number of contracts is subject to change as old contracts expire or are terminated, and new contracts are signed.

(3) This contract is currently under negotiation.

EXHIBIT 13
MTA/LONG ISLAND RAIL ROAD
FREIGHT PROPERTY RENTAL AGREEMENTS
(RAIL USE)

NAME	Amount	Owner/MTA Assignable	Non-Assignable
Akzo Salt 200-201-0478-1	$4508.63		Needs MTA approval
Alfred Bleyer/Fonda 200-209-0730-1	$312.60	X	
Allied Extruders 200-201-0474-1	$312.60	X	
Boro Hall Lumber 200-209-0719-1	$60.42	X	
Pulver Gas 900-931-8820	$40.10	X	
Favorite Plastics 300-003-1332-1	$500.00	X	
General Builders 800-803-6470-1	$71.90	X	
Independent Chemical 200-209-0755-1	$60.00	X	
Manufacturers Corrugated 200-209-0753-1	$547.05	X	
Newport Associates 200-209-0715-1	$175.00	X	
84 Lumber 900-903-7905-1	$216.67	X	
MONTHLY	$6754.97		
12-MONTH TOTAL	81,059.64		
RENTALS			

EXHIBIT 13
MTA/LONG ISLAND RAIL ROAD
FREIGHT PROPERTY RENTAL AGREEMENTS
(RAIL USE)

NAME	Amount	Owner/MTA Assignable	Non-Assignable
Akzo Salt 200-201-0478-1	$4508.63		Needs MTA approval
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Allied Extruders 200-201-0474-1	$312.60	X	
Boro Hall Lumber 200-209-0719-1	$60.42	X	
Pulver Gas 900-931-8820	$40.10	X	
Favorite Plastics 300-003-1332-1	$500.00	X	
General Builders 800-803-6470-1	$71.90	X	
Independent Chemical 200-209-0755-1	$60.00	X	
Manufacturers Corrugated 200-209-0753-1	$547.05	X	
Newport Associates 200-209-0715-1	$175.00	X	
84 Lumber 900-903-7905-1	$216.67	X	
MONTHLY	$6754.97		
12-MONTH TOTAL	81,059.64		
RENTALS			

EXHIBIT E

WEINER, BRODSKY, SIDMAN & KIDER
PROFESSIONAL CORPORATION

1300 NEW YORK AVENUE, N.W., SUITE 100
WASHINGTON, D.C. 20005-4797
(202) 628-2000
TELECOPIER (202) 628-2011

December 5, 1996

BY HAND

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
12th & Constitution Avenue, N.W.
Washington, D.C. 20423

Re: Finance Docket No. 33390, New York & Atlantic Railway Company — Operation Exemption — The Long Island Rail Road Company; and

Finance Docket No. 33391, Peter A. Gilbertson, et al. — Continuance in Control Exemption — New York & Atlantic Railway Company

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceedings are an original and 10 copies of each of (i) the verified notice of exemption of New York & Atlantic Railway Company ("NYAR") under 49 C.F.R. § 1150.31(a), and (ii) the verified notice of exemption of Peter A. Gilbertson, et al. under 49 C.F.R. § 1180.2(d)(2) for the continuation in control of NYAR. Also enclosed is our check in the amount of $1,950 to cover the cost of both filings.

Please acknowledge receipt of this letter by date-stamping the enclosed acknowledgment copy and returning it to our messenger.

Very truly yours,

Paul C. Oakley

Paul C. Oakley

Enclosures

ENTERED
Office of the Secretary
DEC - 6 1996
5 Part of Public Record

FILED
DEC - 5 1996
SURFACE TRANSPORTATION BOARD

8808

NEW YORK & ATLANTIC RAILWAY COMPANY
— OPERATION EXEMPTION —
THE LONG ISLAND RAIL ROAD COMPANY

VERIFIED NOTICE OF EXEMPTION

PURSUANT TO 49 C.F.R. § 1150.31

FINANCE DOCKET NO. 33300

DEC 25 1996

Applicant's full name and current mailing address:

New York & Atlantic Railway Company
405 Lexington Avenue
50th Floor
New York, New York 10174

Applicant's representative to receive correspondence:

Paul C. Oakley
Weiner, Brodsky, Sidman & Kider, P.C.
Suite 800
1350 New York Avenue, N.W.
Washington, D.C. 20005-4797
(202) 628-2000

New York & Atlantic Railway Company ("NYAR"), a non-carrier, and The Long Island Rail Road Company, a New York State public benefit corporation, ("LIRR"), Jamaica Station, Jamaica, New York 11435, have entered into a Transfer Agreement, dated November 15, 1996, (the "Agreement") under which NYAR will acquire the freight operations of the LIRR, including the right to operate the freight business on an exclusive basis, and conduct other freight operations, on approximately 268.6 route miles of rail line owned by LIRR, as follows:

Bay Ridge Branch (mp 4.0 to mp 16.0)
Central Extension (mp 19.1 to mp 21.2)
Bushwick Branch (mp 4.0 to mp 6.0)
(collectively, the "Freight Line")

Main Line (mp 9.3 to mp 94.3)
Montauk Branch (mp 0.0 to mp 115.8)
Port Jefferson Branch (mp 24.9 to mp 58.0)
Central Branch (mp 28.7 to mp 15.9)

ENTERED
Office of the Secretary
DEC - 6 1996
Part of
Public Record

FILED
DEC - 6 1996
SURFACE
TRANSPORTATION BOARD

Central Extension (mp 18.7 to mp 19.1)
Hempstead Branch (mp 13.3 to mp 18.7)
West Hempstead Branch (mp 15.5 to mp 20.1)
Montauk Cut-off (mp 0.3 to mp 1.3)
(collectively the "Joint Use Line," and, together with the Freight Line, the "Subject Line")

A map of the Subject Line is attached hereto as Exhibit A. The transaction is expected to be consummated in the first quarter of 1997. LIRR will continue to provide passenger operations on the Joint Use Line. Under the terms of the Agreement, NYAR's right to conduct exclusive freight operations on the Subject Line shall be for an initial term of twenty (20) years, with an extension option under certain circumstances for an additional ten (10) years.

In connection with this proceeding, Peter A. Gilbertson, II, Terry Hearst, Bruce A. Lieberman, R. Lawrence McCaffrey, Jr., and Harold F. Parnly ("Gilbertson, et al.") have filed, in Finance Docket No. 33301, a verified notice of exemption, pursuant to 49 C.F.R. § 1180.2(d)(2), to continue in control of NYAR, Chicago SouthShore & South Bend Railroad Co. and Louisville & Indiana Railroad Company, when NYAR becomes a common carrier upon consummation of its proposed transaction with LIRR.

Pursuant to the Interstate Commerce Commission's decision in Ex Parte No. 55 (Sub-No. 27A), Implementation of Environmental Laws, 7 I.C.C.2d 807 (1991) ("Environmental Laws"), environmental documentation normally need not be prepared for an acquisition that does not involve either the diversion from rail to motor carriage of more than (A) 1,000 rail carloads a year, or (B) an average of 50 rail carloads per mile per year for any part of the affected line (49 C.F.R. § 1105.7(e)(4)) on the one hand, or (A) an increase in rail traffic of at least 100 percent or an increase of at least eight trains a day on any segment of the affected line, (B) an increase in rail yard activity of at least 100 percent or (C) an increase in truck traffic of more than 10 percent of the average daily traffic or 50 vehicles a day on any affected road segment (49 C.F.R. § 1105.7(e)(5)), on the other hand. See 49 C.F.R. § 1105.6(c)(2).

NYAR's freight operations on the Subject Line will not result in changes in carrier operations that exceed the above-listed thresholds nor will the acquisition have the "potential for significant environmental impacts." See 49 C.F.R. § 1105.6(d). NYAR understands that LIRR conducted an environmental analysis pursuant to the New York State Environmental Quality Review Act that confirmed these findings. Therefore, no environmental documentation is required for this Verified Notice of Exemption.

Pursuant to the Environmental Laws decision, transactions involving a sale, lease or transfer of rail line for the purposes of continued operation are exempt from the historic report requirements of 49 C.F.R. § 1105.8(a) if termination of such operation requires further Board approval and there are no plans to dispose of or alter properties adjacent to the rail line that are 50 or more years old. See 49 C.F.R. § 1105.8(b)(1).

Common carrier service on the Subject Line will be continued. NYAR has no plans to dispose of or alter the Subject Line or any adjacent properties that are 50 or more years old. Therefore, a historic report is not required for this filing. See 49 C.F.R. § 1105.8(a) and (b).

The undersigned hereby certifies that NYAR's projected revenues do not exceed those that would qualify it as a Class III carrier.

Respectfully submitted,

Mark H. Sidman
Jo A. DeRoche
Paul C. Oakley
Weiner, Brodsky, Sidman & Kider, P.C.
Suite 800
1350 New York Avenue, N.W.
Washington, D.C. 20005-4797
(202) 628-2000

Attorneys for:

New York & Atlantic Railway Company

Dated: December 5, 1996

VERIFICATION

I, Paul C. Oakley, certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief. Further, I certify that I am qualified and authorized to file this Verified Notice of Exemption.

Paul C. Oakley, Esq.

Dated: December 5, 1996

[illegible]

VERIFIED NOTICE OF EXEMPTION

PURSUANT TO 49 C.F.R. § 1150.31

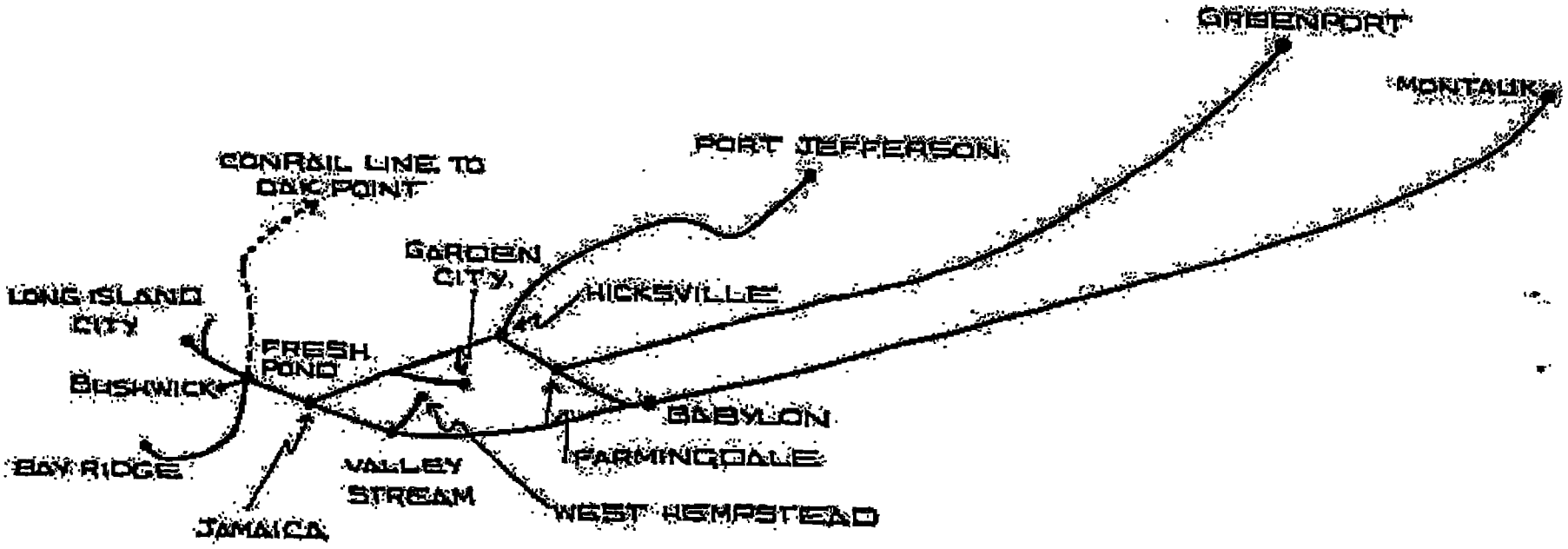
Finance Docket No. 33300

NEW YORK & ATLANTIC RAILWAY COMPANY
--OPERATION EXEMPTION--
THE LONG ISLAND RAIL ROAD COMPANY

EXHIBIT A

MAP OF SUBJECT LINE

NEW YORK & ATLANTIC RAILWAY COMPANY



SURFACE TRANSPORTATION BOARD

VERIFIED NOTICE OF EXEMPTION

Finance Docket No. 33306

NEW YORK & ATLANTIC RAILWAY COMPANY
-- OPERATION EXEMPTION --
THE LONG ISLAND RAIL ROAD COMPANY

New York & Atlantic Railway Company ("NYAR"), a non-carrier, has filed a verified notice under 49 CFR 1150 Subpart D -- Exempt Transactions to acquire the freight operations of the LIRR, including the right to operate the freight business on an exclusive basis, and conduct other freight operations, on approximately 268.6 route miles of rail line owned by The Long Island Rail Road Company ("LIRR"), as follows:

Bay Ridge Branch (mp 9.0 to mp 16.0)
Central Extension (mp 19.1 to mp 21.2)
Bushwick Branch (mp 4.0 to mp 6.0)
(collectively, the "Freight Line")

Main Line (mp 9.3 to mp 94.3)
Montauk Branch (mp 0.0 to mp 115.8)
Port Jefferson Branch (mp 24.9 to mp 58.0)
Central Branch (mp 28.7 to mp 35.9)
Central Extension (mp 18.7 to mp 19.1)
Hempstead Branch (mp 13.3 to mp 18.7)
West Hempstead Branch (mp 15.5 to mp 20.1)
Montauk Cut-off (mp 0.1 to mp 1.3)
(collectively the "Joint Use Line," and, together with the Freight Line, the "Subject Line")

The exemption will become effective December 12, 1996, and the parties expect to consummate the transaction in the first quarter of 1997. LIRR will continue to provide passenger operations on the Joint Use Line.

This proceeding is related to Peter A. Gilbertson, et al. -- Continuance in Control Exemption -- New York & Atlantic Railway Company, STB Finance Docket No. 33301, wherein Peter A. Gilbertson, H. Perry Hearst, Bruce A. Lieberman, R. Lawrence McCaffrey, Jr., and Harold F. Parmly ("Gilbertson, et al.") have concurrently filed a verified notice of

exemption to continue to control NYAR and two other carriers on NYAR's becoming a common carrier.

If the verified notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 33300, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Branch, 1201 Constitution Avenue, N.W., Washington, DC 20423. In addition, a copy of each pleading must be served on Paul C. Oakley, Weiner, Brodsky, Sidman & Kider, P.C., Suite 800, 1350 New York Avenue, N.W., Washington, D.C. 20005-4797.

Decided

By the Board.

Gilbertson et al. now control through stock ownership and/or managerial control, Chicago SouthShore & South Bend Railroad Co. and Louisville & Indiana Railroad Company

EXHIBIT F

1 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
2
----------X
3 05-CV-02032
COASTAL DISTRIBUTION, LLC, et al.,
4
Plaintiffs,
5
v. United States Courthouse
6 Central Islip, New York
THE TOWN OF BABYLON, et al.,
7 May 19, 2005
Defendants. 9:30 a.m.
8
----------X
9
10 TRANSCRIPT OF HEARING
BEFORE THE HONORABLE E. THOMAS BOYLE
11 UNITED STATES MAGISTRATE JUDGE
12
APPEARANCES:
13
For the Plaintiffs: JAMES F. GAUGHRAN, ESQ.
14 Coastal Distribution LLC 191 New York Avenue
Huntington New York 11743
15
16 JOHN F. McHUGH, ESQ.
6 Water Street
17 New York, New York 10004
18 New York and Atlantic RONALD A. LANE, ESQ.
Fletcher & Sipple LLC
19 29 North Wacker Drive
Chicago, Illinois 60606-2875
20
21 For the Defendant:
Town of Babylon JAMES P. CLARK, ESQ.
22 HOWARD M. MILLER, ESQ.
Bond, Schoeneck & King, PLLC
23 1399 Franklin Avenue
Garden City, New York 11530-1679
24
25 (Cont'd)

Page 162

1 was ambiguous and we proceeded to respond in a letter form
2 to Mr. Alberti, and we had a meeting. I think Mr. Krebs
3 and I attended the meeting.
4 **Q Now, when you left the meeting with the Town on the**
5 **29th, what was your understanding of the permit that you**
6 **didn't have? What permit did you not have? Did he tell**
7 **you?**
8 A We did not have a building permit. Therefore, we
9 should cease from the erection of the structure, which was
10 99 percent complete. The only thing missing was the trim,
11 which we obliged, and waiting, I think, until we had the
12 stay to complete.
13 **Q Then what happened?**
14 A It moved quickly. After speaking to the Town,
15 corresponding with the Town, sometime during that week
16 also, we were served, then, with a summons from Pinelawn
17 Cemetery.
18 **Q That's the action in Supreme Court, Suffolk County?**
19 A Correct. It was Coastal Distribution, New York and
20 Atlantic Railroad, Long Island Rail Road and MTA were sued
21 by Pinelawn Cemetery and Farrell, Fritz, which represented
22 them.
23 **Q Now, what did -- what, if anything, did Coastal do**
24 **with regard to the stop work order itself other than have**
25 **the meeting with the Town attorney?**

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1 A We had a meeting with the Town attorney and then we
2 were mulling over our options, and everyone, the attorneys
3 involved came up with that we should appeal the stop work
4 order to the ZBA, and we followed that course.
5 MR. McHUGH: Your Honor, I will offer Exhibit 7.
6 It is read into the minutes of the August -- the September
7 meeting of the Town zoning board. I will just offer that
8 without a witness, your Honor, because this witness was
9 not there, and I don't want to put a witness on just to
10 offer it.
11 MR. CLARK: What is it?
12 THE COURT: Is this a Town record, interoffice
13 memorandum, Town of Babylon, Supervisor Vallone to the
14 chairman of the ZBA?
15 Does anyone want to be heard on this? I assume
16 you produced it over in discovery.
17 MR. CLARK: No, it was read into the record. We
18 have no objection, your Honor.
19 THE COURT: Good. Admitted as 7.
20 **Q Now, did there come a time, sir, when the New York**
21 **State Department of Environmental visited your facility?**
22 A Yes, Coastal continued to do transloading of freight
23 at the facility. The stop work order was to the erection
24 of the building. So Coastal ceased the erection of the
25 building, completed some scale work and track work up to

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1 the site. We continued that on.
2 We were told not to stop that, because some of
3 the track was disconnects from the main line, thereby
4 rendering the yard inaccessible to Mr. Krebs and New York
5 and Atlantic Railroad. We had some scale work to do. We
6 completed that. During that time, we filed with the
7 ZBA -- what is it called, to get a stay?
8 **Q An appeal.**
9 A Appeal with the ZBA to get a stay, and we commenced
10 operations of our transloading.
11 Back to the DEC question, I lost my way.
12 **Q When you started operating the transload section of**
13 **your facility, did the DEC come to visit you?**
14 A The DEC came down sometime in late July, early
15 August. We were asked by the DEC if they could enter the
16 site and view the operation.
17 **Q And did you object to that?**
18 A No, we obliged.
19 **Q In fact, did you object to anyone entering the site**
20 **during the operation?**
21 A Never. The site is wide open. The gates are wide
22 open. We're right on New Highway. Other than some
23 fencing, so we're not unsightly, we're wide open.
24 **Q Now, what did the DEC, other than drop in that day,**
25 **what did they do?**

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1 A The DEC dropped in. An inspector from the DEC, his
2 first name is Depak, D-E-P-A-K, last name I don't recall,
3 dropped off a card, met with me in the office. He said,
4 let's go out and look at the operation. By all means.
5 Okay, thank you. We'll be calling you.
6 **Q Did he inspect the operations?**
7 A Yes, walked through, around the facility, had a few
8 questions, and left a card and left.
9 **Q And was the facility operating essentially the same**
10 **way it was operating today?**
11 A Yes, it was.
12 **Q And let's get into that operation a little bit. With**
13 **regard to the C&D, just the C&D, how does your facility**
14 **operate?**
15 A Just the C&D portion, basically Coastal accepts less
16 than rail carload ships from local businesses. Most of
17 our local businesses are transfer stations. They deliver
18 them, the material to us after they process and have gone
19 through it. Again, that represents 90 percent of
20 Coastal's business, transfer station. They bring it to us
21 after they process it and we facilitate the outbound
22 shipment to Ohio. This material was going there via truck
23 and rail. It's a cost-efficient alternative to them.
24 **Q And the other 10 percent, the not transfer stations?**
25 A The other 10 percent is representative of a

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1 homogeneous load, a roofer, a roofing company, if a roof
2 of a home was removed, it won't receive any benefit by
3 going through a transfer station. A transfer station
4 benefits by reducing the material, removing the
5 recyclables and basically processing material. Coastal
6 does not process material.
7 **Q Now, a truck arrives at your facility, is that**
8 **correct, by highway?**
9 A A truck arrives by highway, some by highway, some by
10 roadway, because we have many businesses in the area that
11 doesn't need access to a highway, just by regular road.
12 **Q So you are making a distinction between long distance**
13 **and short distance?**
14 A Yes, some customers need to use the LIE and some need
15 to only make a left or right turn to come into our
16 facility.
17 **Q From the time a truck comes through the door or the**
18 **gate to the time the truck leaves the gate, what happens?**
19 A A vehicle enters the facility from the north, and in
20 this diagram it actually is perfect. They would enter
21 from the northernmost yellow portion. There's a gate,
22 they will proceed over a scale at which time the whole
23 vehicle, the gross weight is taken.
24 They will proceed to the area marked "New
25 Building" drive around the new building, enter through the

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1 side door, at which point a ticket will be viewed by a
2 Coastal employee, and we can basically gauge the size of
3 the vehicle which is captured, and we try to ballpark the
4 weight of the material. Is it high density or low density
5 material?
6 **Q Why do you do that, sir?**
7 A Because that becomes a factor in the loading. You
8 like to get all the high density material in the bottom of
9 the car to avoid the lean that Mr. Krebs spoke about.
10 **Q And then the vehicle discharges its load. How does**
11 **it do that?**
12 A They are all self-discharging vehicles. Either they
13 tilt up in the area or there is a walking floor or a live
14 conveyor built. All self-discharging vehicles.
15 **Q They discharge onto the floor of the building?**
16 A They discharge onto an asphalt floor. The whole yard
17 was asphalted, impermeable.
18 **Q So it's basically just over a driveway?**
19 A Yes, a three-sided structure. The whole front facing
20 northwest on this drawing, where the word "new" is, is
21 wide open. It's 150 foot wide by 150 foot long, and it
22 comes over the tracks. This drawing is very good, because
23 it shows how we come over the track, and the track goes
24 right through the building.
25 **Q Okay. Then the truck is discharged. What happens to**

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1 **the truck after that?**
2 A The truck is discharged, discharges his load, returns
3 his body back to the driving position and he will proceed
4 to an outbound scale.
5 **Q Then he's weighed out?**
6 A Weighed out. His load is documented as to the
7 delivering company, point of origin.
8 **Q Now, inside that shed, what do your employees do with**
9 **that load at that point?**
10 A At that point the material again is visually
11 inspected to see if it is high density material or low
12 density material. We'll visually inspect for
13 nonpermissible material for the state of Ohio. We're
14 obligated under the transportation contract with CSX not
15 to have any material go into the state of Ohio that the
16 state of Ohio will not accept.
17 **Q There was some testimony about some mattresses.**
18 **Please explain mattresses.**
19 A These are definitions, from one state to another,
20 from one county to another. Amongst this room – a
21 definition of a mattress falls in kind of a Neverland.
22 Construction debris, it contained anything to be in a
23 man-made structure.
24 In certain municipalities or areas of the
25 country, a mattress in a structure when the structure goes

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1 on fire or is knocked down is construction demolition
2 debris. The state of Ohio have a big issue with
3 mattresses, I don't know why, and they will not allow them
4 in C&D material. So our receiving customer on the other
5 end is very strict about having any mattresses delivered
6 in the rail car.
7 **Q And when you find a mattress coming out of a truck,**
8 **what do you do?**
9 A If it is spotted where we can grab it, it will go
10 right back in the truck it came on, and if not, it will be
11 placed back on the truck the next time he comes.
12 **Q So you know who left it?**
13 A You kind of put a laundry tag on it and everything
14 goes back.
15 THE COURT: Does everything go to Ohio?
16 THE WITNESS: Yes, the customer receiving the
17 material in Ohio is receiving it in Ohio, although they
18 are planning to expand.
19 **Q Now, as to the loading of the rail car, Mr. Krebs**
20 **discussed this with you, can you tell us what the criteria**
21 **are for loading the car?**
22 A A rail car is basically a big container, almost 5,000
23 cubic feet, and they sit up quite high, about 13 feet off
24 the track, and there was a learning curve for Coastal to
25 keep the gravity low also opposed to listing to one side.

EXHIBIT G

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

----------X

PINELAWN CEMETERY,

Plaintiff,

- against -

COASTAL DISTRIBUTION, LLC, METROPOLITAN TRANSPORTATION AUTHORITY, THE LONG ISLAND RAIL ROAD COMPANY, and THE NEW YORK AND ATLANTIC RAILWAY,

Defendants.

----------X

AFFIDAVIT IN OPPOSITION

Index No. 04-8599

STATE OF NEW YORK)
) ss.:
COUNTY OF SUFFOLK)

STEPHEN D. LOCKE, being duly sworn, deposes and says:

1. I am the President of Pinelawn Cemetery ("Pinelawn"). I am fully familiar with the facts and circumstances set forth herein, except those set forth on information and belief and as to matters that Pinelawn's counsel has advised me.

2. I submit this affidavit in opposition to the motions for summary judgment submitted by defendants Coastal Distribution, LLC ("Coastal") and defendant New York and Atlantic Railway ("NYAR").

NATURE OF THE MOTION

3. In this action, Pinelawn maintains that defendants Metropolitan Transportation Authority ("MTA") and its subsidiary the Long Island Rail Road ("LIRR") failed to renew a certain lease for the property described herein. I have been advised by counsel that in their motions for

summary judgment, Coastal and NYAR argue that Pinelawn cannot maintain this action without first seeking an order for abandonment pursuant to 49 U.S.C. § 10903 from the United States Surface Transportation Board ("STB"). I have been further advised by counsel and as is set forth in the accompanying Memorandum of Law, the STB only has jurisdiction for abandonments when a "rail line" operated by a "rail carrier" is at issue. Coastal is not a "rail carrier" nor is the facility involved here a "rail line" as these terms are defined in 49 U.S.C. § 10903. In addition, as further advised by counsel and as set forth in the accompanying Memorandum of Law, the facility in question fits within the definition of "spur, industrial, team, switching or side track," which are specifically exempted from STB jurisdiction pursuant to 49 U.S.C. § 10906.

4. In support of their motions, Coastal and NYAR have submitted the Affidavits of Joseph Rutigliano dated May 10, 2004 ("Rutigliano Affidavit") and Fred L. Krebs dated April 22, 2004 ("Kreb's Affidavit"). The Rutigliano and Krebs Affidavits were submitted in opposition to Pinelawn's motion for a preliminary injunction in May 2004. They provide no knowledgeable or factual support for the federal preemption now arguments made by Coastal and NYAR in their motions for summary judgment. Rather, they merely articulate the reasons why Coastal and NYAR were opposed to Pinelawn's motion for a preliminary injunction, an issue that has already been decided by this court. The few allegations made by Coastal in support of its motion for summary judgment are set forth in the affirmation of its attorney John McHugh ("McHugh Affirmation"). The McHugh Affirmation is without any factual substantiation and has absolutely no probative value.

BACKGROUND

5. Pinelawn is located in Farmingdale, Town of Babylon, Suffolk County (the "Town"), and is the largest cemetery in the State of New York. Among the properties that Pinelawn owns are two parcels along New Highway (hereinafter collectively the "Premises" or "Rail Yard"). A map and description of the parcels are collectively annexed hereto as Exhibit "A". At the turn of the last century, each parcel was separately leased from Pinelawn to the LIRR at different times approximately one year apart.

THE LEASES

6. The first lease was signed on August 30, 1904. Part of the area covered by the lease is shown in red cross-marking on the map contained in Exhibit "A" (the "August New Highway Property"). A copy of the lease is annexed hereto as Exhibit "B" and is referred to as the "August New Highway Lease." The August New Highway Lease ran for 99 years and expired by its terms on August 30, 2003 and contained a renewal provision whereby LIRR (today the MTA) could exercise an option to extend the lease for another 99 years by giving written notice no later than three months prior to August 30, 2003, i.e., on or before May 30, 2003.

7. On November 1, 1905, Pinelawn leased the second parcel to the LIRR. Part of the parcel is shown in yellow on the map contained in Exhibit "A" (the "November New Highway Property"). A copy of the lease is annexed hereto as Exhibit "C" and is referred to as the "November New Highway Lease." The November New Highway Lease ran for 99 years and expired by its terms on October 30, 2004 and contained a renewal provision whereby LIRR could exercise an option to extend the lease for another 99 years by giving written notice no later than three months prior to October 30, 2004, i.e., on or before July 31, 2004.

8. There is a third parcel of property on Wellwood Avenue, to the east and adjacent to the Premises (the "Wellwood Property"), which was owned by the LIRR (and now is owned by the

MTA) and leased to Pinelawn. A copy of the lease is annexed as Exhibit "D" and is referred to as the "Wellwood Lease". The Wellwood Lease ran for 99 years and expired by its terms on August 30, 2003, and contained a renewal provision whereby Pinelawn could exercise an option to extend the lease for another 99 years by giving written notice no later than three months prior to August 30, 2003, i.e., on or before May 30, 2003.

9. The Wellwood Lease is dated August 30, 1904, the very same date as the August New Highway Lease. They appear to have been signed on the same day. However, prior to January 2005, I did not know about the August New Highway Lease. I thought there was only one lease dated August 30, 1904 and that was the Wellwood Lease.

10. The Wellwood Property was condemned by the MTA, in or about 1986 (the "1986 Condemnation"). The extent of the 1986 Condemnation was uncertain to Pinelawn prior to January 2005. I believed that the whole property was condemned and was entirely owned by the MTA.

11. On or about May 28, 2003, Pinelawn notified the MTA, that it was exercising its right to renew the Wellwood Lease. The notice was given in case I was wrong and Pinelawn still owned a portion of the Wellwood Property. I understood that, prior to giving notice to MTA, counsel for Pinelawn had made inquiry of the MTA as to the extent of the property that was condemned and what portion of the property was still owned by Pinelawn. I understood that counsel received information that did not provide an answer, so notice was given.

12. As explained previously, prior to January 2005, Pinelawn was unaware of the existence of the August New Highway Lease. Pinelawn records contained copies of just two leases with the LIRR, the November New Highway Lease and the Wellwood Lease. Furthermore, I understood that counsel for Pinelawn had asked the MTA what leases were entered into between

Pinelawn and the LIRR and prior to January 2005 received from MTA's sources copies of the same two leases. So prior to January 2005 I did not know of the existence of the August New Highway Lease.

13. I am advised by counsel that the MTA had to give notice on or before May 30, 2003 that the MTA wished to renew the August New Highway Lease. No such notice was received prior to May 30, 2003 or even before its termination date of August 30, 2003.

14. Upon information and belief, MTA, at some time prior to October, 2003 learned of the existence of the August New Highway Lease and their failure to renew same, but did not disclose the existence to Pinelawn and send a copy of the lease to Pinelawn until January 2004.

15. In or about October, 2003, Pinelawn received a letter from the LIRR dated October 17, 2003 (the "Letter"). A copy of the Letter is annexed hereto as Exhibit "E".

16. The Letter states, in pertinent part, as follows:

> We are also hereby agreeing to reinstate and extend the lease dated August 30, 1904 for 99 more years through July 31, 2102. Please have an authorized party concur by signing below, and return one original copy of this letter to my attention.

17. The Letter, as drafted, requests Pinelawn to "concur" in the LIRR's agreement to reinstate and extend a lease dated August 30, 1904, without further description of the lease. There is no reference in the Letter as to any description of the properties that were the subject of the leases even though I now understand that MTA knew that there were two leases with the same date and upon information and belief the MTA knew that Pinelawn was unaware of the existence of the August New Highway Lease. There was no description by metes and bounds, by use of names of the leases, or by the location of the properties. Pinelawn signed the Letter for the purpose of confirming the LIRR's willingness to reinstate the Wellwood Lease, which

Pinelawn believed was the subject of the 1986 Condemnation. Pinelawn intended to concur as to the Wellwood Lease only and indicated same by referring in the concurrence to a lease dated August 30, 1904, the date of the Wellwood Lease.

18. I am advised by counsel that the August New Highway Lease is terminated since it was neither renewed by the MTA according to its terms nor was it intentionally extended or reinstated by Pinelawn.

19. I am advised by counsel that this Court has not ruled on the merits of whether the August New Highway Lease is terminated. I am further advised by counsel that his case is still in the discovery phase and that only one deposition has been taken.

20. Upon information and belief, shortly after leasing the Premises from Pinelawn, the LIRR constructed a railway spur on the properties. The spur consists of two rail tracks on the New Highway Properties. Each track is approximately one-quarter mile long and together they form, what I am advised by counsel, is commonly referred to as a "wye track" in the railroad industry.

21. There is also a track that runs parallel to the main line of the Long Island Rail Road to the north of the tracks and to the south of the New Highway Properties. I am advised by counsel that it is commonly referred to as a "rail siding" in the railroad industry.

THE USE OF THE PREMISES

22. I have been affiliated with Pinelawn Cemetery for 32 years and for the past 19 years have been its President. My father, Alfred Locke was affiliated with Pinelawn from 1948 to 1992 and prior to that my grandfather William H. Locke was with Pinelawn from 1902-1922. As such, I am very familiar with the activities that have occurred at the Rail Yard. Upon information and belief, at the turn of the century, the Rail Yard was used to turn around rail cars that carried

funeral parties from the City of New York and by farmers shipping produce from Long Island to New York City.

23. Upon information and belief, from 1960 to 2004 when Coastal began its operations, there was little or no activity at the Rail Yard.

24. I am advised by counsel that in its Memorandum of Law, Coastal claims, without any factual substantiation, that the facility in issue was "used as a transload facility for the railroad's freight services continuously since shortly after" 1904. The statement is erroneous.

THE NATURE OF THE CURRENT OPERATIONS AT THE RAIL YARD

25. I am advised by counsel that in 1996, the New York & Atlantic Railroad ("NYAR"), a rail carrier licensed to operate by STB, took over control of the freight operation of the LIRR pursuant to a transfer agreement dated November 18, 1996 ("Transfer Agreement"). A copy of the Transfer Agreement is annexed as Exhibit "F". Under the Transfer Agreement, NYAR acquired, *inter alia*, the right to operate at the Rail Yard and characterized the Transfer Agreement labels the Premises as a "yard" that consists of "PW Long Siding, Wye and Team Yard."

26. I am further advised by counsel that on or about March 22, 2002, NYAR entered into a sublease agreement for the Rail Yard with Coastal, which sublease was subsequently revised on or about July, 2002. Coastal operates what it terms as a "transloading facility" at the Premises where it processes Construction and Demolition ("C&D") materials and loads those materials onto rail cars. On or about October 2003, Coastal began construction of a large building at the Premises.

27. Attorneys for Pinelawn sent a letter to the Town of Babylon ("Town") on December 18, 2003 advising the Town that Pinelawn (and not the MTA or Coastal) was the owner of the

Premises and requesting the Town issue a cease and desist order against Coastal because they had commenced operations and the erection of a structure without the benefit of permits from the Town. A copy of that letter is annexed hereto and made a part hereof as Exhibit "G".

28. I am advised by counsel, and it is a matter of public record, that on or about March 29, 2004, the Town of Babylon ("Town") issued a Stop Work Order to Coastal for "working without a permit" and on or about April 2004, Coastal and NYAR appealed the issuance of the Stop Work Order to the Town of Babylon Zoning Board of Appeals ("ZBA").

29. I am further advised by counsel that on or about August 6, 2004, approximately one month before the hearing before the ZBA, NYAR and Coastal terminated their lease agreement and entered into a "Transload Facility Operations Agreement." Counsel further advises that there was no change in the way Coastal operated its facility after entering into the Operations Agreement as compared to how it had been operated under the prior lease agreement. Coastal's attorney, Mr. McHugh, has admitted that Coastal would not be entitled to NYAR's rail carrier exemption (the basis by which it claims that federal law preempts local land use regulations) while operating under the lease agreement.

30. On April 21, 2005, the ZBA denied the plaintiffs' appeal and upheld the issuance of the Stop Work Order. Immediately thereafter on April 26, 2005, Coastal commenced an action in the United States District Court for the Eastern District of New York and sought a preliminary injunction, arguing that the ICCTA preempted the Town from enforcing its local zoning regulations against NYAR and Coastal by dint of its contractual relationship with NYAR.

31. Coastal currently runs what it has described as a "transloading facility" at the New Highway Properties (the operations at the New Highway Properties are hereinafter referred to as the "Coastal Facility").

32. The "transloading facility" has been described by counsel for Coastal as:

> ...is one at which cargo is transferred between modes of transportation, in this case between highway vehicles and railway vehicles. **Transload is the modern term for a "team track"** the name referred to the teams of horses that pulled "drays" (wagons) to the side of rail cars so that freight could be transferred and then delivered to locations beyond the physical limits of the railroad's track. Modern transload facilities include machinery needed to move commodities efficiently between modes.

McHugh Affirmation, n. 1 (emphasis added).

33. The operations at the Coastal Facility were the subject of a two-day preliminary injunction hearing in front of United States Magistrate Judge E. Thomas Boyle, on May 19-20, 2005. A copy of the transcript from that hearing is annexed hereto as Exhibit "G" During the course of that hearing Mr. Joseph Rutigliano, a principal in Coastal, claimed that he had invested several million dollars in the Coastal Facility. Exhibit "H," p. 194. Rutigliano further testified that the normal activities at the site consist of the following:

a. trucks loaded with C&D debris enter the site and are weighed;

b. they proceed to discharge their load of C&D debris on the floor of the building at the facility;

c. the emptied truck is weighed and then exits the facility;

d. the C&D debris is sorted and loaded onto rail cars by mechanical loading machines; and

e. the rail cars leave the facility bound for Ohio.

Exhibit "H," pp. 165-69.

34. At the hearing, Fred Krebs, the president of NYAR conceded that Coastal was not a licensed by the STB as a rail carrier. Exhibit "H," p. 83.

35. Ultimately, the Magistrate Boyle issued a Report and Reconciliation dated ("R&R") that granted Coastal a preliminary injunction because it would suffer irreparable harm if its facility was closed and further found that Coastal was likely to succeed on the merits of its arguments. United States District Judge Joanna Seybert adopted the R&R in a decision dated January 31, 2006. The Town of Babylon and Pinelawn immediately appealed this decision to the United States Court of Appeals for the Second Circuit.

36. I am advised by counsel that a grant of preliminary injunction in federal court is reviewed for an abuse of discretion and can only be reversed when a lower court makes an error of a law or clear error of fact. Given the limited scope of such Appellate review, Pinelawn was very encouraged by the decision of the Second Circuit dated February 6, 2007 (a copy of which is annexed as Exhibit "I") where the Second Circuit took the extraordinary step of modifying the preliminary injunction to allow the parties to petition the STB for a declaratory judgment on the scope of its jurisdiction" and noted that "'[a]s the agency authorized by Congress to administer [The ICCTA], the [STB] is uniquely qualified to determine whether state law should be preempted by the Termination Act.'" Exhibit "H," p. 8.

37. On July 2, 2007, the attorneys for the Town of Babylon and Pinelawn submitted a Petition to the STB for a Declaratory Order.

38. I am advised by counsel that Coastal's argument that it qualifies as a rail carrier will likely be decided by the STB and, depending upon the outcome could be subject to further litigation or an appeal. In any event, Coastal's argument that the abandonment provisions of 49 U.S.C. § 10903 divest this Court of jurisdiction is dependent, in part, upon it being deemed a "rail carrier". Insofar as the Second Circuit has advised that, in this issue of federal law, the STB is uniquely qualified to make this determination, Pinelawn respectfully requests that this issue be determined in the manner directed by the Second Circuit.

39. In accordance with the opinion of the Second Circuit, Pinelawn has filed a Petition with the STB. A copy of the Petition is annexed as Exhibit "P".

40. For this reason and those set forth herein and in the accompanying memorandum of law, it is respectfully requested that the motions for summary judgment submitted by Coastal and NYAR be denied in their entirety.

Stephen D. Locke

Sworn to before me this
23rd day of July, 2007

Notary Public

MICHAEL F. SCEPPA
Notary Public, State of New York
No. 01SC4714731
Qualified in Suffolk County
Commission Expires 7/21/2012

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
ss.:
COUNTY OF SUFFOLK)

I, Doreen Flanagan, being duly sworn, depose and say:

I am not a party to the action, am over 18 years of age and reside at East Northport, New York.

On July 23, 2007, I served a true copy of the within Affidavit in Opposition and Memorandum of Law by overnight mail addressed to:

Donald Jay Schwartz, Esq.
Forchelli, Curto, Schwartz, Mineo,
Garlino & Cohn, LLP
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Suite 3200 – 3rd Floor
Central Islip, New York 11772

Doreen Flanagan
Doreen Flanagan

Sworn to before me this 23rd
day of July, 2007

Notary Public