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October 4, 2007

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



Re: **Finance Docket No. 33888 (Sub-No. <sup>101</sup>~~110~~), CSX Transportation, Inc. -  
Petition for Declaratory Order**

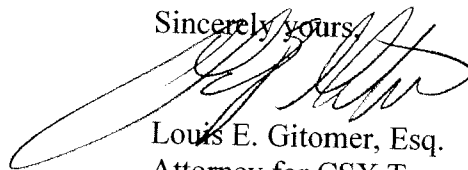
Dear Secretary Williams:

Enclosed for filing are the original and 10 copies of a Petition for Declaratory Order, a check for the filing fee of \$1,400.00, and a disc with the Petition in Word and pdf format. Color Maps are attached to the end of the Petition.

Please time and date stamp the additional copy of the pleadings and this letter and return it with our messenger. Thank you for your assistance.

If you have any questions please call or email me.

Sincerely yours,



Louis E. Gitomer, Esq.  
Attorney for CSX Transportation, Inc.

Enclosure

**FILED**  
OCT - 4 2007  
SURFACE  
TRANSPORTATION BOARD

ENTERED  
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SURFACE  
TRANSPORTATION BOARD



BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 33388 (Sub-No. 101)

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CSX TRANSPORTATION, INC.—PETITION FOR DECLARATORY ORDER  
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TRANSPORTATION BOARD

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TRANSPORTATION BOARD

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Attorneys for: CSX TRANSPORTATION, INC.

Dated: October 4, 2007

**ENTERED**  
Office of Proceedings  
OCT - 4 2007  
Part of  
Public Record

BEFORE THE  
SURFACE TRANSPORTATION BOARD



\_\_\_\_\_  
FINANCE DOCKET NO. 33388 (Sub-No. 101)

\_\_\_\_\_  
CSX TRANSPORTATION, INC.—PETITION FOR DECLARATORY ORDER  
\_\_\_\_\_

CSX Transportation, Inc. (“CSXT”), pursuant to the self-executing preemption provisions of 49 U.S.C. §11321, has terminated a contract that it has determined will interfere with the use of certain property that is necessary to carry out the split of Consolidated Rail Corporation (“Conrail”) as approved and authorized by the Surface Transportation Board (the “Board”) (the “Transactions”),<sup>1</sup> to hold, maintain, and operate the property, and to CSXT’s exercise of control of franchises acquired through the Transactions. CSXT is filing this Petition for Declaratory Order (the “Petition”) to confirm that the implementation of the contract would interfere with the implementation of its acquisition and operation of certain assets of Conrail.

CSXT respectfully requests the Board to institute a declaratory order proceeding pursuant to 5 U.S.C. §554(e) and 49 U.S.C. §721(a) to terminate a controversy or remove uncertainty that the approval by the Board in the *Conrail Consolidation* permits CSXT pursuant to 49 U.S.C. § 11321 to unilaterally terminate contracts that CSXT determines interfere with the implementation of the *Conrail Consolidation* as approved and conditioned by the Board.

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<sup>1</sup> *CSX Corp. et al.—Control—Conrail Inc. et al.*, 3 S.T.B. 196 (1988) (“*Conrail I*”) and *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company—Control and Operating Leases/Agreements—Conrail Inc. and Consolidated Rail Corporation [Petition for Supplemental Order]* Decision No. 2, STB Finance Docket No. 33388 (Sub-No. 94) (STB served November 7, 2003) (“*Conrail II*”). *Conrail I* and *Conrail II* are collectively referred to as the “*Conrail Consolidation*.”

The law is settled that the preemption of “all other law” in Section 11321(a) includes the preemption of contracts as necessary for a person to carry out a Board-approved transaction. *See, e.g., Norfolk & Western Railway Co. v. American Train Dispatchers’ Ass’n*, 499 U.S. 117 (1991); *Consolidation Coal Sales Co. v. Consolidated Rail Corp.*, STB Finance Docket No. 34169 (STB served May 24, 2002). The law is also clear that the Board has exclusive jurisdiction to determine the scope of preemption under Section 11321(a). *See, e.g., Union R. R. Co. v. United Steelmakers of Am.*, 242 F.3d 458 (3d Cir. 2001); *Railway Labor Executives’ Ass’n v. Southern Pacific Transp. Co.*, 7 F.3d 902 (9th Cir. 1993).

### **BACKGROUND**

By an Agreement dated February 20, 1986 (the “Agreement”) Conrail contracted to sell to Frank Vitale and Francis Vitale (collectively, the “Vitales”) “all of its right, title and interest in and the premises described in the Schedule attached hereto and enumerated as ‘Schedule A’, comprising approximately seven (7) acres, more or less, subject to a final survey.” Agreement, Article 1. Conrail reserved “a seventy-five (75) foot wide easement identified on the attached plans, which easement shall extend upward only to a horizontal plane, but running parallel to the underlying rail line and measured twenty-two (22) feet, vertically above top of rail of said Reserved Tracks (hereafter called ‘excepted space’) the foregoing easement being reserved by Conrail to use, operate, maintain, repair, replace and inspect the Reserved Tracks and Equipment as and when the same may be necessary or desirable.” Agreement, Article 2. A copy of the Agreement is attached as Exhibit 1.

In effect, Conrail contracted to sell the Vitales a segment of its railroad line about three (3) blocks long, on a plane above a cut traversed by three bridges, and running alongside the Brooklyn-Queens Expressway, in the Town of Woodside, Borough and County of Queens, City

and State of New York, as set forth on the maps in Exhibit 2 (the “Line”). The Vitales intend to build a multi-building apartment complex over the cut and between the three bridges. Conrail retained an easement to continue rail freight operations beneath this development project, while reserving rights with regard to the location of supports, access roads for repair and maintenance, lighting, and like concerns.<sup>2</sup> The Vitales made a down payment to Conrail of \$90,000, but have yet to pay the remaining principal or to take any other steps to fulfill the pre-conditions of the Agreement. The Vitales also have not provided Conrail with the plans and proposals required under the Agreement (see, *e.g.*, Sections 4(a)’s second paragraph, 4(c), 5(c), 6(d), 10, 17, 34, 40, and Agreement Schedule “C” (a) through (bb), and, attached as Exhibit 3, the email dated 11 March 2005 from CSXT’s counsel David Alan Richards to the Vitales’ counsel Gary Goodman and Richard M. Zuckerman).

A Transaction Agreement dated as of June 10, 1997 was concluded among CSXT, CSX Corporation (CSXC), Norfolk Southern Corporation (NSC), Norfolk Southern Railway Company (NSR), Conrail Inc. (CRR), Conrail, and CRR Holdings LLC (collectively referred to as “Applicants”) to acquire control of Conrail and split the assets of Conrail (the “Transactions”), including the Line. *Conrail I* at 219. On June 23, 1997, CSXC, CSXT, NSC, NSR, CRR, and Conrail filed a joint application under 49 U.S.C. 11323 for approval of the transaction outlined in the Transaction Agreement. Pursuant to 49 U.S.C. 11324(b and c), the Board granted the application. *Conrail I* at 371 and 385. The Transaction was consummated on June 1, 1999, at which time CSXT obtained control of the Line and began operating over the Line. CSXT acquired the Line pursuant to *Conrail II* on August 27, 2003. As a CSXT line, the Line is about

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<sup>2</sup> Conrail, CSXT and the Vitales have not sought a ruling from the Board as to whether the Vitales require Board authorization to acquire the Line.

0.28 miles long between milepost QVK 4.58 and milepost QVK 4.86.

## ARGUMENT

### **I. The Board should issue a declaratory order to terminate this controversy.**

#### **A. Background.**

Conrail entered the Agreement to sell the Line to the Vitales and retain an easement over 20 years ago. The purchase and sale has never been consummated. As part of the Transactions, CSXT acquired the Line on August 27, 2003. CSXT recognized that the Vitales' use of their rights under the Agreement would interfere with the implementation of the Transactions involving the Line. Even the Vitales' potential construction of an apartment complex has a chilling effect on CSXT's future use of the Line and planning to use the Line.

New York Central Lines, LLC ("NYC"), predecessor to CSXT, sent a letter to the Vitales on May 22, 2002 terminating the contract (Exhibit 4). Instead of accepting the termination, on July 18, 2002, the Vitales sought arbitration pursuant to Article 20 of the Agreement (Exhibit 5). Arbitration was held and an award by Professor Robert M. Zinman was entered on September 28, 2004 (Exhibit 6, the "Arbitration Award"). The Arbitration Award ordered specific performance of the Agreement by NYC.

Pursuant to authority granted in *Conrail I* and *Conrail II*, as of August 27, 2003, CSXT became the owner of the Line. CSXT has determined that the Agreement will interfere with its present and future implementation of the Transactions with respect to rail operations over the Line, and therefore has notified the Vitales of the termination of the Agreement.

## **B. Summary of the Conrail split.**

In *Conrail I*, the Board approved, subject to various conditions, a “control” application that had been filed by Applicants with the Board on June 23, 1997. The application that Applicants filed, and that the Board (with certain exceptions) approved, contemplated the acquisition by CSXC and NSC of control of Conrail, and the division of the assets of Conrail by and between CSXT and NSR, to the extent and in the manner provided for in the Transaction Agreement. Pursuant to *Conrail I*, acquisition of control of Conrail was effected by CSXC and NSR on August 22, 1998 (the “Control Date”), and the division of the assets of Conrail by and between CSXT and NSR was effected on June 1, 1999 (the “Split Date”).

On the Split Date, Conrail’s rail operating properties were divided into two categories: Allocated Assets (which were allocated either to NYC for operation by CSXT or to Pennsylvania Lines LLC (“PRR”) for operation by NSR) and Retained Assets (which were retained by Conrail for operation for the benefit of both CSXT and NSR). The properties in the Allocated Assets category were further divided into two additional categories: the “NYC Allocated Assets” (i.e., such of the Allocated Assets as were allocated to NYC for operation by CSXT) and the “PRR Allocated Assets” (i.e., such of the Allocated Assets as were allocated to PRR for operation by NSR). The “NYC Allocated Assets” included the Line.

Although the Transactions contemplated that the vast majority of Conrail’s assets (i.e., all assets included in the Allocated Assets category) would become part either of the CSXT rail system or of the NSR rail system, these assets were not transferred outright to CSXT and NSR. Rather, these assets were transferred to NYC and PRR for operation by CSXT and NSR, respectively; and each of NYC and PRR was a wholly owned subsidiary of Conrail. On the Split Date: (1) Conrail transferred to NYC ownership of the Conrail railroad assets designated

for CSXT's exclusive use and operation (i.e., the NYC Allocated Assets), and Conrail transferred to PRR ownership of the Conrail railroad assets designated for NSR's exclusive use and operation (i.e., the PRR Allocated Assets); and (2) NYC entered into an Allocated Assets Operating Agreement with CSXT, granting CSXT the exclusive right to operate and use the assets of NYC, and PRR entered into an Allocated Assets Operating Agreement with NSR, granting NSR the exclusive right to operate and use the assets of PRR. Ownership of the NYC and PRR Allocated Assets remained within the corporate structure of Conrail, but the operation and general day-to-day management of these assets was conducted separately by CSXT and NSR, respectively.

On June 4, 2003, Applicants filed with the Board a petition for a supplemental order pursuant to 49 U.S.C. §§11323-11327 authorizing the consolidation of NYC with CSXT and the consolidation of PRR with NSR, to effectuate the acquisition of full ownership and control of the assets and business of NYC by CSXT and of PRR by NSR. The proposal was to extend the existing rights of CSXT and NSR to control and operate NYC and PRR, respectively, to include full legal ownership of the properties and businesses of NYC and PRR, respectively.

In *Conrail II* at 8, the Board found "that ... consolidation of NYC within CSXT and the consolidation of PRR within NSR ... is consistent with the public interest." The Transactions have been approved twice by the Board under 49 U.S.C. Subtitle IV, Part A, Chapter 113, Subchapter II. As an approved transaction, the preemptive relief of Section 11321 is available to CSXT with respect thereto.

**B. Need to clarify that CSXT can terminate the Agreement.**

CSXT is not seeking review of the arbitration decision from the Board. Indeed, CSXT has used the self-executing nature of the preemption provision of Section 11321 and notified the

Vitales that CSXT terminated the Agreement. CSXT is requesting the Board to remove any potential controversy with respect to CSXT's ability to terminate the Agreement pursuant to Section 11321, to remove the uncertainty from the implementation of the Transactions.

The Board has ample cause to institute a declaratory order proceeding here. The Vitales' rejection of CSXT's termination of the Agreement demonstrates beyond question that there is an active controversy between the parties that is predicated on matters that lie exclusively within the jurisdiction of the Board. *See, e.g., Railway Labor Executives' Ass'n v. Southern Pacific Transp. Co.*, 7 F.3d 902 at 906 (9th Cir. 1993) ("[B]ecause the ICC had exclusive authority to approve the Rio Grande merger and thereby exempt the Railroads from any procedural or substantive law which might otherwise impede that merger, it should have exclusive authority to clarify the scope of its own approval and the corresponding breadth of the section 11341(a) [now 11321(a)] exemption."). *Accord Union R. R. Co. v. United Steelmakers of Am.*, 242 F.3d 458 (3d Cir. 2001).

## **II. Termination of the Agreement by CSXT is permitted under 49 U.S.C. §11321.**

### **A. The Vitales' proposal will severely restrict CSXT's use of the Line.**

As provided in the Agreement, the Vitales propose to construct a residential apartment complex over CSXT's operating railroad Line. In essence, the construction proposed by the Vitales will make the Line into a three block railroad of limited use. CSXT foresees the following problems that are highly likely to occur:

1. CSXT will be unable to expand the Line as may be needed in the future, due to the inability to relocate support structures once same are installed to under gird the apartment structures.
2. The transportation of certain commodities may be prohibited in such close

proximity to residential development (the apartments would be directly over the railroad).

3. CSXT will face unending litigation concerning such matters as noise, damage to the buildings (due to construction that does not fully account for the vibrations of rail service), the release of emissions from diesel electric locomotives, etc.

4. The attraction of people, in a high density area, to a protected open area where trains may pass by at any time.

5. The high probability of injury or death to homeless persons or other trespassers seeking shelter from the elements, under the apartment complex, but nonetheless on the active CSXT Line.

6. Maintenance of the Line will become more difficult as a result of CSXT having to work in a greatly restricted space.

7. Security considerations, which were important enough to be considered in the 1986 Agreement's provisions regarding lighting and access, are considerably more difficult in a post-9/11 world where transportation infrastructure is an announced target for terrorists.

8. There is a chill on any change to the Line by CSXT. Under the Agreement the Vitales could begin constructing the apartment complex, whether or not CSXT had made any changes to the Line or right-of-way.

**B. The Line is actively used and implementation of the Agreement by the Vitales would create a choke point to the only CSXT line on Long Island.**

Prior to the acquisition of the Line by CSXT, freight and passenger trains operated over the Line. After CSXT acquired the Line, not only did the previous trains continue to operate over the Line, but pursuant to *Conrail I*, Canadian Pacific Railway Company obtained trackage

rights over the Line<sup>3</sup> and Canadian National Railway Company haulage rights over the Line.<sup>4</sup> In addition, the Board urged negotiations to permit the Providence and Worcester Railroad Company to operate between New Haven, CT and Fresh Pond, NY, another route that would require use of the Line.<sup>5</sup>

The Board also recognized the limited capacity of the railroad lines in New York City east of the Hudson River. “There are some serious operational problems with introduction of any additional rail service in the New York metropolitan area east of the Hudson.”<sup>6</sup> “An even more difficult problem is the extremely limited amount of excess rail infrastructure, and the severe physical limitations that the densely built city imposes on any efforts to increase that capacity.”<sup>7</sup> The operational problems and limitations noted by the Board would be exacerbated were the Vitales to construct the apartment buildings over the Line.

In approving the Transactions, the Board recognized the substantial congestion problems that CSXT faced east of the Hudson River. In making its analysis, the Board did not consider the deleterious effect that the construction of the Vitales’ proposed apartment complex would have on congestion east of the Hudson River. Not only does the Agreement put a literal roof over CSXT’s Line, but it also restricts the width of the right-of-way. The choke point created by the Agreement will increase the congestion and lessen the opportunity for increased rail competition and infrastructure that the Board sought to ensure. CSXT urges the Board to confirm the appropriateness of CSXT’s termination of the Agreement under Section 11321 so that CSXT may comply with the letter and spirit of *Conrail I* concerning transportation competition in New

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<sup>3</sup> *Conrail I* at 282-283.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*, at 283-284.

<sup>6</sup> *Id.*, at 279-280.

<sup>7</sup> *Id.*, at 280.

York City east of the Hudson River and the potential for the reduction in truck traffic.

The Line is part of an alternate route east of the Hudson River to and from Selkirk. If some event were to force CSXT to reroute traffic for any period of time from its main line west of the Hudson River to the east, the Line would be part of that reroute. However, with the imposition of the apartment complex as proposed by the Vitales in the Agreement, CSXT's relief valve east of the Hudson River would be constrained, if not eliminated. With the limits imposed on the physical structure of the Line by the Agreement, not to mention any future security requirements imposed on railroads operating under residences, CSXT doubts that the line east of the Hudson River could serve as an alternate route.

**C. A greater public benefit would arise from acquisition of a part of the right-of-way by the state of New York.**

The New York Department of Transportation ("NYDOT") is seeking to acquire a portion of the right-of-way involving the Line for an expansion of the Brooklyn-Queens Expressway. CSXT has determined that sale of a portion of the right-of-way to NYDOT will not interfere with its current or future operations over the Line, as would the consummation of the over 20-year old Agreement. In addition, the sale of real estate would enhance CSXT's financial condition.

**D. Legal Argument.**

The Board has recently addressed the issue of preemption under Section 11321. The Board said:

Pursuant to 49 U.S.C. 11321(a), a person participating in a transaction approved by us under 49 U.S.C. 11321-25 "is exempt from the antitrust laws and from all other law . . . as necessary to let that . . . person carry out the transaction." This preemption of "all other law" extends not only to laws, but also to contracts, as necessary to let a person participating in a Board-approved 49 U.S.C. 11321-25 transaction carry out the approved transaction. *See Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117 (1991). As Justice Stevens explained regarding § 11321's predecessor (former § 11341), this section

“does not condition exemptions on the [agency's] announcing that a particular exemption is necessary to an approved transaction. Rather, § 11341 automatically exempts a person from ‘other laws’ whenever an exemption is ‘necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.’ The breadth of the exemption is defined by the scope of the approved transaction, and no explicit announcement of exemption is required to make the statute applicable.”

*ICC v. Locomotive Engineers*, 482 U.S. 270, 298 (1987) (Stevens, J., concurring) (footnote omitted). *See also Union Pacific/Southern Pacific Merger*, 1 S.T.B. 233, 454 (1996) (“Parties seeking approval of a transaction, whether by application or by exemption, have never been required to identify all anticipated changes that might affect [contract] rights. Such a requirement could negate many benefits from changes whose necessity only becomes apparent after consummation. Moreover, there is no legal requirement for identification because 49 U.S.C. 11341(a) is ‘self-executing,’ that is, its immunizing power is effective when necessary to permit the carrying out of a project.”); [*Conrail I*], 3 S.T.B. at 329 n.198 (“the courts have made clear that, under what is now 49 U.S.C. 11321(a), agency approval of a rail merger confers self-executing immunity on all material terms of the transaction from all other laws to the extent necessary to permit implementation of the transaction.”).

*Consolidation Coal Sales Company v. Consolidated Rail Corporation*, STB Finance Docket No. 34169 (STB served May 24, 2002), at 4.

The Agreement is a contract between CSXT, as successor to Conrail, and the Vitales. Based on CSXT’s acquisition of the Line, past operations over the Line, conditions imposed by the Board that require additional uses of the Line, CSXT’s future uses of the Line, the chilling effect that the Agreement has on any use of the Line by CSXT, the actual use to which the Line could be put by the Vitales, and the public use to which NYDOT seeks to put a portion of the Line, CSXT has determined that the Agreement could negate many benefits and must be terminated.

Even though CSXT has come to this conclusion after consummation of the Transactions,

as noted above, the Courts and Board permit the use of self-executing immunity after consummation. The Agreement was entered long before the Transaction Agreement. However, the Vitales have not acted to comply with numerous provisions of the Agreement, or to construct the apartment complex in the more than 20 years since the Agreement was first executed. CSXT, on the other hand has implemented a railroad transaction involving the entire eastern half of the United States, including the acquisition of the Line on August 27, 2003. CSXT has now terminated the Agreement in order to preserve the benefits of the Transactions and the obligations imposed on CSXT by the Board, and to prevent interference with the future operations of the Line and the creation of an unnecessary bottleneck on CSXT's rail system in the New York City area. Since Conrail and the vitals entered the Agreement in 1986, vast changes have occurred in the railroad industry. CSXT is not Conrail. CSXT serves the entire eastern United States, instead of portions of the northeast and Midwest that were served by Conrail. CSXT is different than Conrail in 1986, and should not be burdened with a contract from a different era that if allowed to be implemented will restrict the CSXT railroad that resulted from the Transactions.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

## CONCLUSION

CSXT respectfully requests the Board to issue a declaratory order that the termination of the Agreement by CSXT is in accord with the preemption provisions of 49 U.S.C. §11321.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'L. Gitomer', is written over the typed name.

Louis E. Gitomer, Esq.  
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600 Baltimore Avenue, Suite 301  
Towson, MD 21204  
(202) 466-6532

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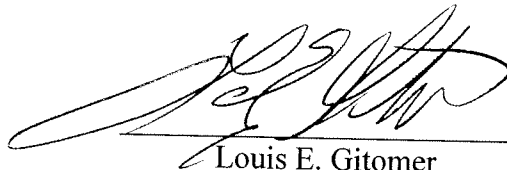
Attorneys for: CSX TRANSPORTATION, INC.

Dated: October 4, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that I have caused the Petition for Declaratory Order of CSX Transportation, Inc. to be served upon counsel for Mr. Frank Vitale and Mr. Francis Vitale by first class mail, postage pre-paid.

Richard M. Zuckerman, Esq.  
Sonnenschein Nath & Rosenthal LLP  
1221 Avenue of the Americas  
New York, NY 10020

A handwritten signature in black ink, appearing to read 'L. Gitomer', is written over a horizontal line.

Louis E. Gitomer  
October 4, 2007

Exhibit 1

Agreement dated February 20, 1986

THIS AGREEMENT made this 20th day of February, 1986 by and between CONSOLIDATED RAIL CORPORATION, a Corporation of the Commonwealth of Pennsylvania having offices at Rm. 901, 1528 Walnut St., Philadelphia, Pennsylvania, 19102 (hereinafter referred to as Conrail or Seller) which has agreed through George R. Scioli, its Manager-Real Estate whose office is located at Suite 423, 744 Broad St., Newark, N.J. 07102, to sell, quitclaim and release to FRANK VITALE & FRANCIS VITALE, residing at 27-17 216th Street, Bayside, N.Y. 11360 or assigns (hereinafter referred to as the Purchaser); all of Conrail's right, title and interest in and to the property hereinafter described and hereinafter called Premises.

W H E R E A S, Conrail is the owner of and in possession of certain lands situated in the Town of Woodside, County and Borough of Queens and State of and City of New York more particularly described in the Schedules attached to this Agreement, and

W H E R E A S, Purchaser is desirous of erecting a structure on premises located over Conrail's railroad tracks and of utilizing portions of the land owned or controlled by Conrail or assigning to an Assignee for such purpose:

NOW THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable consideration, it is hereby mutually A G R E E D as follows:

1. PROPERTY CONVEYED

That Conrail shall convey all of its right, title and interest in and the premises described in the Schedule attached hereto and enumerated as "Schedule A", comprising approximately seven (7) acres, more or less, subject to a final survey.

2. EASEMENTS

RESERVING UNTO CONRAIL a seventy-five<sup>(75)</sup> foot wide easement *JP*  
identified on the attached plans, which easement shall extend upward only  
to a horizontal plane, but running parallel to the underlying rail line and  
measured twenty-two (22) feet, vertically above top of rail of said Reserved  
Tracks (hereinafter called "excepted space") the foregoing easement being  
reserved by Conrail to use, operate, maintain, repair, replace and inspect  
the Reserved Tracks and Equipment as and when the same may be necessary or  
desirable.

3. PURCHASE PRICE

A. That as and for consideration for the conveyance and transfer  
described in Article 1 of this Agreement, Purchaser shall pay to Conrail the  
purchase price of NINE HUNDRED THOUSAND (\$900,000.00) Dollars in accordance  
with the following terms and conditions:

|                                                                                         |            |
|-----------------------------------------------------------------------------------------|------------|
| Upon execution of this Agreement a deposit of<br>receipt whereof is hereby acknowledged | 90,000.00  |
| By cash or certified check to be paid at<br>closing of title                            | 810,000.00 |
| Total                                                                                   | 900,000.00 |

B. In the event that prior to closing, Conrail shall abandon  
their rights or sell, lease or otherwise dispose of said rights to the cor-  
ridor with the exception of the premises, Purchaser shall pay the taxes as-  
sessed on the property from the date of assessment of said taxes for a period  
not exceeding eighteen (18) months from the date the contract has been fully  
approved and executed by Conrail. Liability for the payment of such property  
taxes shall be limited to FIFTY THOUSAND (\$50,000.00) Dollars.;

In the event of abandonment, Conrail shall give Purchaser thirty (30) days notice of such intention to abandon, in which event Purchaser shall have the option to cancel within said period without obligation to pay any such taxes. In the event, however, that Purchaser shall elect not to cancel, then any such taxes shall be apportioned as customary on the title closing date. In the event of such abandonment, sale or disposal of said rights and Purchaser elects to waive the right of cancellation, Conrail will waive the additional payments or consideration required of Purchaser under Paragraph 4B and the purchase price shall be increased from NINE HUNDRED THOUSAND (\$900,000.00) Dollars to NINE HUNDRED FIFTY THOUSAND (\$950,000.00) Dollars.

 C. ~~Conrail shall have sixty (60) days from the date this contract is signed by Purchaser to execute this contract, and in the event of failure to execute said contract, Conrail shall have the right within such sixty (60) days period to terminate this agreement, and thereupon the deposit of NINETY THOUSAND (\$90,000.00) Dollars shall be returned to the Purchaser.~~

D. In the event that the Purchaser shall breach any of the terms hereof as specified in this agreement and schedules, and except as otherwise hereinafter provided, and as a result thereof title shall not close, and providing Conrail shall not have defaulted in any of the terms of this agreement, then Conrail shall be entitled to retain the said deposit money as liquidated damages, and neither party shall have any further claim against the other.

E. In the event Purchaser is unable to obtain the necessary zoning and permits for development of the premises or if the Public and State agencies having jurisdiction thereof refuse to approve the development of said premises, as proposed by Purchaser, and as shown on the plans as annexed hereto and initialed by the parties, ~~then the deposit money shall be returned to Purchaser.~~ Purchaser shall have the right to a cancellation of the contract and to the return of its deposit at any time <sup>up</sup> prior to seventeen (17) months from the date this ~~contract is executed by all parties.~~ ~~until all of the foregoing approvals are obtained.~~ *AM. Jy.*

F. There will be no interest accrued or credited to the Purchaser on said deposit money (\$90,000.00).

#### 4. ADDITIONAL CONSIDERATION

A. In order to minimize the possibility of any damage to the structure on account of derailments occurring in the area, all trackage, including turnouts, shall be rebuilt at Purchaser's expense where caused by Purchaser's act. This rebuilding shall utilize continuous welded rail under the Building structure and shall extend beyond the Building for a minimum distance of 100 feet on either side. If additional guard rail protection is required, this also would be installed at Purchaser's expense.

Construction will have to provide for adequate clear sight distances to signals located under or near the structure. Grantor agrees to approve or disapprove said plans and specifications prior to the signing hereof and if approved then no further approval of said plans and specifications shall be required.

B. The Purchaser shall give Conrail at least three (3) months written notice prior to the commencement of the construction of the aforementioned structure or structures and, at the time of said written notice to Conrail and as an integral element of construction and in the interest of continued safe operations of trains, Purchaser agrees to pay to Conrail the sum of TWO HUNDRED THIRTY SIX THOUSAND (\$236,600.00) Dollars for the purpose of covering estimated costs of rehabilitation and relocation of tracks underlying and adjacent to the structure to be constructed by Purchaser, which Conrail will then undertake to do in an expeditious and workmanlike manner. If this estimated amount is insufficient, upon completion of the work Purchaser will reimburse Conrail for the difference between the estimated amount and the actual amount spent by Conrail, but not to exceed FOUR HUNDRED THOUSAND (\$400,000.00) Dollars. If the estimated amount is greater than the actual amount spent by Conrail, Conrail will repay to Purchaser the difference between the estimated amount and the actual amount. Construction by Purchaser will proceed in a manner that will not unreasonably interfere with the continued operation of trains beneath the area of Purchaser's ownership, said construction to be completed in accordance with the Construction Contract attached hereto as "Schedule C". Conrail shall have the right to inspect the construction from time to time in accordance with said Agreement. In the event Purchaser's construction is delayed, then Conrail's obligation to complete this rehabilitation will likewise be extended. Any such required payment shall be made within three (3) months after Purchaser gives said notice to Conrail. Reimbursement of any differences shall be reimbursed at the time of final computation of costs.

C. Conrail currently has facilities on its right of way and within Conrail's excepted and reserved area. Should it be mutually determined by Conrail and Purchaser, that under any state, local or federal law or ordinance, or under general accepted standards of safety, that the current facilities are not permitted under the structure or structures to be constructed by Purchaser, and Purchaser determines to proceed with the said structures, then Purchaser at its sole cost and expense will pay all cost associated with changing the location of the facilities and/or the purchase of and installation of replacement facilities deemed necessary to comply with said laws and ordinances, or safety standards. In the event that any such work is required by Conrail, Conrail will advise the Purchaser the details thereof and the cost therefor, and the Purchaser will be given a reasonable opportunity to obtain a lower bid for the performance thereof, providing, however, the railroad union will permit an outside contractor, and providing such new contract for such work meets railroad specifications.

D. Any costs stipulated in the Agreement and Schedules as estimates are merely estimates associated with the construction, rehabilitation and relocation of Conrail's facilities, and Purchaser's liability will include the actual cost of such construction and relocation at the time that they are actually performed.

5. TITLE CONVEYED

IV  
APW  
A. It is the intention of this Agreement to provide for the conveyance by Conrail of all its right, title and interest in and to the property described in "Schedule A". It is contemplated that Conrail shall convey its interest by Quitclaim Deed with ~~out any covenants or warranties of title, express or implied~~ to the premises described in "Schedule A" and will except and reserve from the deed of conveyance the excepted space. Conrail shall, in addition, grant to Purchaser a perpetual easement for and to the area necessary for the location, placement and maintenance of the various supports necessary for the structure, as may be described in "Schedule A", and such other easements as may be referred to in Article 5 of this Agreement. Title to the property described in "Schedule A" shall be insurable by a reputable Title Insurance Company authorized to do business in the State of New York without such exception as would render said title unmarketable in the State of New York. In the event that the title described in "Schedule A" cannot be delivered by Conrail herein, or that the title examination presents a cloud which cannot be removed by the Title Company, then Purchaser may have the right to accept such title as Conrail can deliver or Purchaser may elect to terminate this transaction, and thereby terminate all liability to Conrail in regard to this transaction, and the deposit money shall be returned to Purchaser.

6. FORM OF CONVEYANCE

IV  
APW  
A. Conrail agrees to deliver title to the property described in "Schedule A" by means of a Quitclaim Deed ~~with a covenant against encumbrances~~ in a form reasonable satisfactory to the Purchaser's Title Insurance Company. In addition, Conrail shall deliver as promptly as possible such Affidavits as Purchaser's Title Insurance Company may reasonably require in order to complete the conveyance.

113  
71 - B. Any local, federal, state approvals or any subdivision approval or other requirements required in connection with closing of title shall be accomplished by and completed by Purchaser, at its sole cost and expense, and Purchaser shall be responsible for recording and documenting said subdivision approval and any other approvals in the appropriate County Recording Office, subject however to the hereinbefore mentioned right of Purchaser to a cancellation of this contract and to the return of any monies paid under this agreement if such approvals are not forthcoming.

C. Conrail will cooperate in all respects with regard to any local, federal or state approvals and any subdivision requirements and agrees to execute as promptly as possible, any consents required therefor and the approved documents or drawing necessary to effectuate the closing of title and to obtain such approvals.

→ D. Without limiting the generality of the foregoing subparagraph, it is understood and agreed that Conrail will grant a permanent easement to Purchaser for the column placements support the structure and improvements to be erected over Conrail's excepted space, including easements of access.

E. It is understood and agreed that the supporting columns, piles, pile caps and supporting beams shall remain the property of Purchaser at all times and shall not be considered property of Conrail.

F. Nothing contained in this provision or in this Contract shall prevent Purchaser from assigning the Construction Contracts to any parties or entities it may designate, so long as Purchaser, or in lieu of purchaser, the Assignee as provided in Par.41, shall remain responsible pursuant to the terms and conditions of this Agreement and Schedules attached hereto and advise Conrail's Chief Engineer of such assignment.

7. COVENANTS OF SELLER

Conrail, for itself and its successors and assigns, covenants that:

*iv*  
*MS*  
A. ~~It has the sole, lawful and present title and possession of~~  
the property to be conveyed, transferred, and assigned by this Agreement and that it has full right, power and authority to convey, transfer and assign the same.

*MS*  
B. ~~It has not done or suffered any act or thing whereby the~~  
property to be conveyed under this Agreement now or at any time hereafter.  
~~shall or may be imperiled, encumbered or changed in any manner.~~

8. CONSTRUCTION CONTRACT

A. The parties hereto understand and agree that Purchaser herein is acquiring the property described in "Schedule "A" for the purpose of erecting and constructing certain improvements and structures thereupon and thereover. The present contemplated construction is more particularly set forth in the Schedule annexed hereto which depicts the structures to be constructed and approximately locates the support column placements.

B. The general plans and specifications comprising the construction of improvements and structures to be erected on the demised property provided for in the construction agreement, entered into between the parties simultaneous with this Agreement of Sale, are annexed hereto as "Schedule "C". The construction agreement sets forth with generality the plans, specifications, schedules and other data and

information necessary to complete the construction and improvements contemplated by Purchaser. The Final Plans and specifications will be subject to the final review and written approval of Conrail's Chief Engineer. Conrail hereby agrees to use its best efforts to approve such Building plans, specifications and design computations within ~~thirty (30)~~ <sup>sixty (60)</sup> days of their receipt at the office of Conrail's Chief Engineer Design and Construction in Philadelphia, or if such approval is not given, Conrail agrees to specify its objections thereto within such time.

C. The Construction Agreement will give the right to Purchaser to construct the structure in stages. The amount of construction work to be performed during each of the stages contemplated shall be within the discretion of Purchaser.

D. The parties understand and agree that the plans and specifications attached as Exhibit "B" are merely preliminary in nature and are for descriptive and informal purposes only. The placement of the support columns and structures plans shall be subject to the final review and written approval of Conrail's Chief Engineer with respect to ascertaining whether said columns and structures are within the limits set out in the various schedules and plans appended hereto.

Conrail agrees that within thirty (30) days after receiving written notice from Purchaser, as provided in Article <sup>21</sup>~~20~~ hereof, of the completion of all construction work in the excepted space acquired in connection with the construction of the improvements and structures to be made by Purchaser, Conrail will have the right to examine the location of the column replacements constructed in accordance with plans approved by Conrail for placement of same in the excepted space, and shall satisfy itself that there are no encroachments objectionable to Conrail and that Conrail's property was not utilized in excess of the amount contracted for herein, and shall furnish Purchaser with the following statement:

"Conrail has examined the column placements and support structures erected by Purchaser and has approved the location thereof and agrees that the said structures as finally placed do not interfere with the use by Conrail for railroad purposes of its retained property, and, Conrail hereby grants to Purchaser a perpetual easement to use that part, if any, of Conrail's property in which said structure or utilities may now be located."

E. In addition and if necessary, Conrail will execute such corrective easement or other property description as Purchaser may reasonably require to finally fix the location of the column placements or other supports for Purchaser's structure when evidenced by the appropriate accurate survey, and Purchaser shall be responsible for any costs or expenses reasonably necessary for issuance of a corrective easement.

9. USE OF SELLER'S PROPERTY

*3-11-15*  
~~Conrail hereby agrees to grant to Purchaser, without additional con-~~  
sideration, for temporary use during the construction of the structures to be erected  
in the excepted space, a temporary construction easement on such portions of Conrail's  
retained adjacent property as Purchaser may from time to time require and as may  
be more particularly described in the Construction Agreement. It is understood and  
agreed, however, that Conrail's use of its property shall be paramount to Purchaser's  
use and Conrail may when required by unforeseen circumstances affecting railroad  
operations rescind certain of such temporary construction easements, and Purchaser  
will comply with such revised arrangements so as not to interrupt Conrail's railroad  
operations. Conrail agrees to cooperate so as to minimize any interference with  
~~construction.~~

10. CLEARANCES

A minimum horizontal clearance of 16'00" from the center line of track  
on the east side and 10'00" from the center line of track on the west side and a  
verticle clearance of 22'00" from top of rail shall, at all times be maintained by  
Purchaser.

11. SAFETY AND PROTECTIVE DEVICES

A. Purchaser understands and agrees that certain types of protective  
devices and measures will be required during and after the matters contemplated in  
the Construction Agreement. Purchaser agrees to provide at its own cost and expense  
the necessary protective and safety measures, such as crash walls, warning signs,  
lighting, inspectors, watchmen, flagmen, and other matters reasonably

necessary for purposes of protection and/or safety. Crash walls designed in accordance with current AREA Specifications are required for the protection of supporting columns when they are located within 25 feet of the centerline of track.

B. It is understood and agreed that the placement of and exact nature of the safety and protective measures will be established as the construction progresses and as may be finally determined after completion thereof, and same will be subject to the final review and written approval of Conrail's Chief Engineer.

C. Any requests for safety and/or protective devices pursuant to this Article shall be directed in writing to Purchaser.

12. MAINTENANCE ACCESS

Purchaser agrees to grant such easements of access to rights of way as Conrail may require to allow their personnel access to any of its facilities, and agrees that any access will remain for as long as required by Conrail personnel, its successors and assigns.

13. INTERIM SAFETY PROCEDURES

It is understood and agreed that during the construction periods referred to in this Agreement, Purchaser shall be required to take such action as is necessary for the safety and preservation of its construction work in progress and of the personnel performing same. Upon notification by Purchaser to Conrail

that construction is about to commence, Purchaser agrees to confer with Conrail's Chief Engineer or his designee or representative and take action with respect to scheduling and to the imposition of such safety procedures as Conrail may require. Furthermore, Conrail agrees, insofar as it is reasonably able, to cooperate in all respects in a timely manner so as to allow the construction schedule to proceed in accordance with the notice given by Purchaser to Conrail. All costs incurred by Conrail in connection with this Article, including providing of inspection and protection personnel plus labor additives and expenses, shall and will be at the sole cost and expense of Purchaser.

#### 14 INDEMNITY

Purchaser further covenants and agrees that it shall defend, relieve, indemnify, and save harmless Conrail from and all damages and costs, and claims for same, growing out of loss of life or damage or injury to persons or property occasioned by any act or omission in its construction, maintenance, repair, renewal, use and operation of the structure on the premises and the fixtures and facilities therein contained, or occasioned by the failure of Purchaser to properly maintain the same in good condition and repair. Purchaser further agrees to defend, relieve, indemnify and save harmless Conrail, its successors and assigns from and against any and all loss of life or property or injury or damage to the person or property of any person occurring within the premises defined in "Schedule A", or occurring (with respect to the property or employees of Purchaser) within the excepted and reserved areas, however occurring, except where in whole or in part due to the fault or negligence of Conrail, but in any event purchaser will provide the insurance referred to in paragraph 15.

B. (b) Purchaser hereby agrees to waive any and all rights of subrogation against Conrail and other parties who have or may have the right to use Conrail's excepted space, from risks of fire and extended coverage perils, both during and after construction of any Building or improvements, if such endorsement is available.

B. (c) Purchaser, during the construction of any Building or improvements, shall furnish Conrail with evidence that Purchaser has provided all-risk Builders Risk insurance including debris removal, and providing for waiver of subrogation as agreed above. Such all-risk Builders Risk insurance shall cover any work which Purchaser shall perform in the excepted space. Upon completion of said Building or improvements, Purchaser shall furnish evidence of permanent fire and extended coverage insurance including debris removal, and providing for waiver of subrogation as agreed above, if available.

B. (d) All aforesaid policies of insurance shall be in companies of generally recognized responsibility. Purchaser shall submit to Conrail the original policy of Railroad Protective Liability insurance, and certificates evidencing proper coverage for all other policies. All policies of insurance shall provide that they may not be cancelled without at least thirty (30) days prior written notice to Conrail. Purchaser shall, if so requested, submit certified copies of policies to Conrail in lieu of certificates.

B. (e) Purchaser covenants and agrees that it shall, promptly upon the delivery of the deed and for so long thereafter as Conrail shall maintain its transportation operations in Conrail's excepted space, at its own cost and expense,

carry general public liability insurance, protecting Conrail against all claims arising out of the negligent acts or omission of Purchaser its agents, contractors, sub-contractors, except where occurring in, on or about the excepted space or the premises of Purchaser above or adjoining the excepted space, for bodily injury or death (including loss of service) to any and all persons, including employees of Conrail, and for damage to any and all property, including property rented or owned by or in the care of, custody or control of Conrail, and covering loss of use of any such property. Such insurance shall be written in form satisfactory to Conrail and by one or more insurance companies authorized to do business in the State of New York and approved for such purpose by Conrail, which approval shall not be unreasonably withheld. If Purchaser shall fail to carry such insurance and provide evidence to Conrail at all times that the same is in force, Conrail may forthwith and with notice itself proceed to purchase such insurance, whereupon the cost of such purchase, including premiums and brokerage, shall be and become a lien upon the land which is subject to this conveyance, subject to enforcement and foreclosure in accordance with the laws of the State of New York. The insurance required pursuant to this shall carry the same limits as specified in subparagraph (a) (1) above.

16. INTERPRETATION

All of the covenants and agreements contained in this Agreement and schedules shall run with the land and shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto, respectively, being the successors in title or by lease to the respective interests in the land above described owned by the parties hereto, respectively, and whenever the term "Purchaser" shall be used herein, the same shall be construed to mean FRANK VITALE, its successors and assigns, and whenever the term "Conrail" or "Seller" shall be used herein, the same shall be construed to mean Consolidated Rail Corporation, its respective successors and assigns.

17. VENTILATION, LIGHTING, DRAINAGE AND ACCESS  
REQUIREMENTS

Lighting shall be provided under the structure and an average lighting level of the following minimums shall be maintained:

- A. Switch points - 2 footcandles.
- B. Top of rails (non-working area) -  
1 footcandle.
- C. Top of rails (working areas) -  
3 footcandles.

The lighting shall be either mercury vapor, fluorescent or high pressure sodium lamps.

Ventilating systems must be provided. The exhaust ventilation fan or fans for the railroad area shall be capable of exhausting a minimum of 1 cubic foot of air per minute per square foot of covered area. The size of the ventilating shafts extending up and above the roof of the Building shall be of such proportion as to provide an air velocity not to exceed 1,000 feet per minute.

The lighting and ventilating facilities must be installed by the Purchaser who will also be responsible for the ensuing costs for operation and maintenance.

One emergency stairway exit is to be provided in the Building plans for the purpose of entrance and exit to and from the railroad area. This exit shall be constructed by the Purchaser.

2  
An access road shall be maintained through the area to provide accessibility for maintenance and emergency railroad company vehicles.

All drainage patterns through the area must be maintained.

18. DRAINAGE RELOCATION

Any existing drainage ditches shall be relocated at the sole cost and expense of Purchaser so as not to interfere with the proposed construction, existing facilities, existing access roadways and operations of Conrail and only upon approval of Conrail's Chief Engineer.

19. RESPONSIBILITY FOR TAXES

Purchaser shall be responsible for the payment of any and all real estate taxes levied upon the property and all improvements thereto, the supporting structures and appurtenances of Purchaser's property and in accordance with the bills rendered by the appropriate municipal or other authorities imposing or levying a tax on same, or for taxes levied against Conrail for Purchaser's improvements. Purchaser shall be responsible for any land taxes assessed as a result of Purchaser's improvements and rendered by any authority on property as a result of the premises or supporting structures in the excepted space. Conrail shall be responsible for taxes only so far as they affect Conrail's interest.

20. ARBITRATION PROCEDURE

If any dispute shall arise under the terms of this Agreement ~~or the~~ with the exception of the attached Schedules, it shall be determined by Arbitration. Either party may demand such arbitration by notice to the other party setting forth the point or points in dispute and the name and address of the person appointed by it to act as arbitrator. Within ten (10) days after such notice is given, the party to whom it is given shall give the party demanding arbitration a notice setting forth the name and address of the arbitrator selected by it and any additional point or points in dispute to be determined by arbitration. Within ten (10) days thereafter the two arbitrators thus named shall select a third and notify both parties of such selection. In case the party upon whom demand for arbitration is made fails within the said ten (10) days to select an arbitrator, then the single arbitrator selected by the party demanding arbitration shall act. In case the two arbitrators selected aforesaid fail within the time limit to select a third,

then either party may, after ten (10) days' notice to the other, apply to any Judge of the United States Court of general original jurisdiction for the District of New York or to any New York Court of appropriate jurisdiction for the selection of the third arbitrator. All the arbitrators selected shall be competent persons having no substantial interest in the matter in controversy. The arbitrator or arbitrators so selected shall, within ten (10) days after selection, designate a time not less than ten (10) days nor more than thirty (30) days thereafter, and a convenient place in the City of New York for a hearing, immediately notifying both parties thereof. The arbitrators shall meet at the time and place thus designated and the parties may then and there appear and offer evidence bearing upon the matters in controversy, and within thirty (30) days after the conclusion of such hearing the arbitrators shall render their decision in writing. The decision of the arbitrators or of a majority of them or of the sole arbitrator if there shall be but one, shall be final and conclusive upon the parties and each party shall abide by the same. Each party shall pay the fee of the arbitrator named by it and one-half of all other expenses of such arbitration, including, but not limited to, the fee of the third arbitrator, but counsel and witness fees of the parties shall not be included.

21. NOTICES

A. Any communications or notices provided for and permitted under this Agreement shall be in writing (which may include telegraphic or other record communications), where necessary, and copies should be mailed to the following:

Purchaser: Frank Vitale  
27-17 216th Street  
Bayside, N.Y. 11360

Seller:

Engineering Chief Engineer  
Matters: Design and Construction  
Consolidated Rail Corporation  
12th Floor - 15 N. 32nd St.  
Philadelphia, Pa. 19104

Operations General Manager  
Matters: Consolidated Rail Corporation  
PO Box 400  
Selkirk, N.Y. 12158

Real Estate Manager Real Estate  
Matters: Real Estate  
744 Broad St., Suite 423  
Newark, N.J. 07102

B. A properly addressed communication or notice shall be deemed to have been properly given upon its delivery by hand or, if mailed, by registered or certified mail, return receipt requested, upon its deposit in the United States mails. A communication or notice sent by telegram, telex or other mode of record communication shall be deemed to have been given twenty-four (24) hours after the time of dispatch.

22. SECTION HEADINGS

The headings or captions of Sections in this Agreement are inserted for convenience only, are not part of this Agreement and shall not be deemed to limit, extend or modify the provisions contained in the Sections to which they relate.

23. NEW YORK LAW

This Agreement shall be governed by and construed in accordance with the laws of the State of New York.

24. SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon and shall inure to the benefit of the respective parties hereto, their legal representatives, successors and assigns.

25. GENDER

In all reference herein to any parties, persons, entities or corporation, the use of any particular gender or the plural or singular number, is intended to include the appropriate gender or number as the text of the within instrument may require.

26. CLOSING DATE

Upon the effective date of this Agreement, Purchaser shall begin to make such title searches and determinations as may be necessary to satisfy itself as to the nature and extent of the title to be delivered by Conrail. Upon completion of same in a form and manner reasonably satisfactory to Purchaser, and in compliance with Article 35, hereof, Purchaser shall give Conrail not less than ninety (90) days notice of a date for closing and a list of all documents required to be executed and delivered by the Seller; closing, however, shall occur on or before but not later than eighteen (18) months from date contract executed by all parties thereto. This notice shall specify the time and place for said closing, which shall be either the office of Conrail or the office of Purchaser or such other place as the parties may mutually agree upon in writing.

27. ADJUSTMENTS

The parties shall adjust any rentals, real estate taxes, special assessments, water and sewer rents, and any other taxes due on the demised premises or any other charges thereon as of the date of delivery of said Deed as the case may be. Conrail, insofar as it is able to, will convey the property free and clear of any and all tax liens at closing.

Conrail shall not be liable for any real estate broker's commission, agent's commission, finder's fee, real estate transfer taxes or recording fees, survey or title company fees in connection with this sale, except the New York State "Capital Gains Tax" referred to in Par.33, and Purchaser shall indemnify Conrail against any and all claims for such commission or fees assessed to this transaction, as a result of any transaction between purchaser and any such claimant.

28. SURVIVAL OF TERMS

The covenants, conditions, representations and warranties of this Agreement shall survive the delivery of the Deed and the Closing of Title to the premises in question and they shall apply to and bind the heirs, executors, administrators, successors, transferees, and assigns of the respective parties. Purchaser in any assignment or conveyance of this Agreement must for each assignment or conveyance assign this Agreement in its entirety for all or any portion of the premises acquired hereunder. This Agreement must be assigned in its entirety to any third parties, prior to any assignment or conveyance of this agreement in whole or in part, Conrail shall receive written notice of all assignments or conveyances, and must agree in writing to such assignment or conveyances except where assigned to a corporation or entity in which Frank Vitale is interested.

29. APPROVAL

ANYTHING HEREIN TO THE CONTRARY NOTWITHSTANDING, IT IS DISTINCTLY UNDERSTOOD AND AGREED THAT THIS INSTRUMENT DOES NOT CONSTITUTE A BINDING AGREEMENT OR IMPOSE ANY OBLIGATION ON CONRAIL OR ITS SUCCESSORS OR ASSIGNS OR ITS AGENTS, UNLESS AND UNTIL CONRAIL'S ASSISTANT VICE PRESIDENT REAL ESTATE OR HIS DULY AUTHORIZED REPRESENTATIVE, AS AUTHORIZED BY CONRAIL'S SYSTEM REAL ESTATE OFFICE, GIVES WRITTEN NOTIFICATION TO PURCHASER TO THE EFFECT THAT THIS TRANSACTION HAS RECEIVED THE NECESSARY APPROVAL AND AUTHORIZATION OF CONRAIL'S SENIOR MANAGEMENT/OR BOARD OF DIRECTORS AND THAT CONRAIL IS LEGALLY BOUND.

30. SHORT FORM DOCUMENTS

Conrail and Purchaser, if necessary, agree to execute and record such short form memoranda as each of the parties may require with respect to the Title and any easements to be conveyed hereunder at any time after execution of this Agreement but prior to settlement.

31. NOTICE OF SALE

In the event Conrail intends to sell, lease or otherwise dispose of any part of its excepted space under or adjacent to the premises and easements granted hereunder to Purchaser, Conrail will first notify Purchaser in writing of such intention, in order to enable Purchaser to exercise any of its options under the Agreement.

32. USE RESTRICTIONS

Conrail and Purchaser agree, each with respect to its own interest, that the uses of the excepted space and premises shall be limited to those uses permitted under the applicable zoning laws governing the area in effect at the time of the execution of the Deed to Purchaser, except that the Purchaser shall have the right to apply for such zoning changes and variances as will be necessary to construct and maintain the improvements referred to in the plans and specifications of the Purchaser, in which case the premises may be used in accordance with such changes in zoning

or variances. Furthermore, it is agreed that the Purchaser shall have the right to cancel in the event that such zoning changes and variances applied for by the Purchaser shall not be granted or issued, and in such event upon cancellation of the contract all funds paid by the Purchaser as a down payment and on account of the purchase price shall be refunded to the Purchaser, and neither party shall have any further claim against the other. Other and different uses permitted by law in the future may be made of the said property provided that same shall not unreasonably endanger or interfere with the reasonable use and enjoyment of the property by Conrail and Purchaser; provided such other and different uses do not tend to subject the premises to wear, depreciation, unreasonable risk of damage or deterioration greater than the uses permitted on the date of this Agreement.

### 33. TAXES

Purchaser shall assume and pay all New York City Realty Transfer tax fees and the filing fees for the recording of any and all instruments connected with this transaction. The New York State Capital Gains Tax, if any, shall be paid by the Seller. All tax returns form shall be prepared and executed by the respective parties required by law to do so. The recording costs and realty transfer fees mentioned herein refer only to the conveyance between Purchaser and Conrail of the property as set forth in "Schedule A" of this Agreement.

34. SURVEYS AND DESCRIPTIONS

Purchaser shall and will furnish to Conrail a description and reproducible survey plan for Conrail's use in preparing the necessary Deed and easements for the areas described in this Agreement and Schedules. Such plan and description are to be furnished to Conrail's Real Estate Department in order that they may be verified and checked. As soon as possible after the execution of this Agreement, and upon the effective date, Purchaser with the cooperation of Conrail, shall act to obtain the <sup>if required</sup> approval/of this entire Agreement and the conveyance proposed thereunder by the new York Public Utility Commissioner and/or the New York Department of Transportation and any other approvals of other agencies that may be required. Purchaser shall be granted a period of one-hundred twenty (120) days to obtain said approval or such longer time as it reasonably deems necessary to effectuate said transaction. In the event Purchaser cannot obtain said approval, it shall have the option to terminate this Agreement in accordance with the express terms hereof, and be entitled to the return of all sums paid on account of the purchase price.

35. CONSENT

Wherever this Agreement so requires the consent of either party for any purpose, such consent will not be unreasonably or arbitrarily withheld by either party. The parties hereby impose a standard of reasonableness with respect to any consent required under this Agreement and Schedules.

36. CHIEF ENGINEER - DESIGNATION

For all purposes of this Agreement, the reference to Conrail's Chief Engineer shall refer to and designate Chief Engineer - Design and Construction or any successor in office thereto.

37. NOTICE OF CLAIMS

A. It is understood and agreed that in the event of any claim by Conrail under the indemnity provision of this Agreement (Article 13), Conrail, as a prerequisite of making such claim, must give written notice of the matter to be indemnified against to Purchaser after the occurrence of the act giving rise to said claim shall have come to Conrail's knowledge.

B. With respect to any such claim for which Conrail seeks indemnity from Purchaser pursuant to this Agreement, Purchaser reserves the right to employ attorneys and other representatives of its own selection to appear, defend, compromise and/or settle any action which may be instituted in the matter.

38. FITNESS AND PURPOSE

Purchaser acknowledges that it is purchasing the premises as is and acknowledges that Conrail has not made any representations or warranties, express or implied, as to value, use, condition, design, quality, durability, operation or fitness for use or purpose of the premises or any portion thereof, except as expressly set forth herein.

39. FIBER OPTICS

Conrail reserves, with the right of assignability, exclusive and perpetual sub-surface easements for all rights and privileges to lay, erect, construct, install, use, operate, maintain, repair, renew, replace and remove fiber optics cables for communication purposes within the limits of the excepted space; together with the right of ingress and egress over such excepted space for the exercise of the aforesaid rights and together with such surface easements necessary for the appurtenances, of said fiber optic cables.

40. GENERAL DEED PROVISIONS

In addition to the pertinent clauses contained in this Agreement and Schedules the provisions in the attached Schedule "C" (a) thru (bb) shall appear in the Deed of Consolidated Rail Corporation, as "Grantor", conveying to Frank Vitale, as "Grantee", the premises in the vicinity of 37th Avenue and Broadway to Woodside Avenue and 72nd Street and generally described in "Schedule A" hereof. In the event that there is any inconsistency between this Agreement of Sale and Schedule "C", the terms of Schedule "C" shall govern.

*Handwritten signature*

41. ASSIGNMENT

In the event an assignee of the Purchaser shall assume the obligation hereunder, then the Purchaser shall be relieved of all further liability under this agreement.

42. The premises shall be delivered free of any tenancies and all sign structures removed, except those in use of the seller required for the operation of the rail lines, and exception further that in the event Purchaser shall desire to have the tenancies of any existing advertising signs now on the premises remain, then seller shall assign same to the Purchaser and the rental shall be apportioned between seller and Purchaser as of the date of closing, and the seller shall thereupon be relieved of the obligation to remove said respective sign or signs and to cancel said respective leases.

Seller represent said leases are cancellable by seller, at any time and true notice to Transport-  
upon thirty (30) days  
Displays, Inc.  
copies of same are to be delivered to Purchaser on signing hereof.

ATTEST:

CONSOLIDATED RAIL CORPORATION

Robert J. Tracy Joseph L. Lee

Manager-Real Estate

SELLER

ATTEST:

FRANK VITALE

Frank Vitale

PURCHASER

FRANCIS VITALE

Francis Vitale

PURCHASER

SCHEDULE "A"

Proposed Description of the premises to be Conveyed and Proposed Survey Plan.

NOTE: The survey plan is subject to the final review and approval of Grantor and description is a preliminary description, also subject to Grantor's final review and approval.

SCHEDULE "A" (page 1 of 2)

General description of property to be conveyed:

All of those three (3) certain parcels of land along Conrail's right of way in the Town of Woodside, Borough and County of Queens, City and State of New York, known as and by the tax descriptions on the Tax Map of the Borough and County of Queens as Parcel 1 Block 1282 Lot 1, Parcel 2 Block 1303 Lot 1 and Parcel 3 Block 1312 Lot 1, as shown on plan prepared by A. H. Salkowitz, Architect, dated May 15, 1979 and designated thereon as "Parcel 1", which consists of approximately 87,400 square feet situated north of Roosevelt Avenue and known as Tax Block 1282 Lot 1, and as "Parcel 2", which consists of approximately 77,000 square feet located between 41st Avenue and Roosevelt Avenue and known as Tax Block 1303 Lot 1, and as "Parcel 3", which consists of approximately 140,125 square feet lying south of 41st Avenue and known as Tax Block 1312 Lot 1.

SCHEDULE "A"

Plan Prepared by: A. H. Salkowitz, Architect

Issued: August 6th, 1984 and August 10th, 1984

Together with easements under the space described as Volume I, II and III for supporting columns and any other appurtenances required.

Subject to the covenants and obligations of Frank Vitale or Assignee with respect to construction, repair and maintenance of any structure, structures, supporting columns and their appurtenances.

~~The elevation of each point referred to in the foregoing description and~~

~~elsewhere in this Indenture refers to NEW York Geodetic Control Datum mean~~

~~sea level at based on Monument No. \_\_\_\_\_ elevation of \_\_\_\_\_~~

SCHEDULE "B"

Proposed Preliminary Construction Plans of

Note: Plans are preliminary in nature and subject to final review and approval of Grantor.

SCHEDULE "C"

Proposed Construction Agreement

SCHEDULE :C:

Proposed Construction Agreement

This Construction Agreement made this       day of       , 19       by and between CONSOLIDATED RAIL CORPORATION, having its offices at Suite 423, 744 Broad Street, Newark, N.J. 07102 (hereinafter referred to as Conrail or Seller), and FRANK VITALE, having a mailing address of 27-17 216th Street, Bayside, New York (hereinafter referred to as Purchaser):

W H E R E A S, Purchaser has a Contract for the acquisition of the premises owned or controlled by Seller pursuant to an Agreement dated the       day of       , 19       (hereinafter referred to as a Primary Agreement) to which this Agreement is appended as Schedule "C"; and

W H E R E A S, the parties hereto are desirous of facilitating the construction of the planned improvements in conjunction with said Primary Agreement;

NOW, THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable consideration, it is hereby mutually A G R E E D as follows:

1. It is the basic and fundamental intent of the parties that whenever any construction, reconstruction, demolition, repair or maintenance work or any other work is contemplated by either party for the purpose of fulfilling its obligation or exercising its rights under the Primary Agreement, both parties will cooperate in good faith to provide for the expeditious and efficient prosecution of the work to be performed by each of them. All of such work shall be coordinated by the parties to the fullest extent practicable to the end that it be done in the most economical manner possible. Each party shall use its best efforts to keep interference with the property and operation of the other to a minimum.

2. (A) All notices shall be written and shall be given in a manner provided for in Article 21 of the Primary Agreement.

(B) Any place where consent is requested, it is hereby deemed that said consent will not be unreasonably withheld.

3. Purchaser will construct improvements, including but not limited to buildings, on the support easements acquired and in the premises purchased pursuant to the Primary Agreement and as follows:

(A) All plans and specifications for supporting members, horizontal and vertical clearances shall be subject to the approval of Conrail's Chief Engineer in accordance with the standards set out in the Primary Agreement and Schedules.

(B) Any construction shall be in accordance with plans referred to in paragraph (A) of this Section, and standards as may be set out in the Primary Agreement and Schedules.

4. (A) Purchaser may commence construction of the improvements upon the property described in the Primary Agreement and Schedules at any time upon execution of all agreements, and approval of plans by Chief Engineer, unless prevented by change in any statute or municipal ordinances or by other cause beyond the control of Purchaser. Purchaser will comply with such schedules of construction as may hereinafter be devised, unless prevented by fire, lockout, strike, act of war, or enemy hostilities or action, or other causes of casualty, beyond the control of Purchaser, including but not limited to delay in the commencement of the construction as aforesaid; and, in the case of failure to complete the improvement to be constructed on the parcel of land described in the Primary Agreement and Schedules within a reasonable time and by reason of any and all causes contained in the Primary Agreement and Schedules appended hereto, Purchaser shall have the construction completed and the improvement ready for occupancy for its contemplated use within such period as shall be equal to the time that Purchaser shall have been so delayed by any and all aforesaid causes.

(B) Purchaser has the right to construct the improvements described herein in stages. The amount of construction work to be performed during each of the stages contemplated shall be within the discretion of Purchaser. Conrail's Chief Engineer shall be provided with the proposed scheduling for each stage of construction, at least ~~thirty (30)~~ <sup>sixty (60)</sup> days prior to the proposed commencement of construction to allow for proper review and approval.

5. Purchaser may use Conrail's property in a manner which may affect or temporarily disrupt the operation of the railroad, on one or more of the tracks located on Conrail's property, subject to schedules submitted to and approved by Conrail's Chief Engineer and when practical from a railroad operating standpoint.

6. That in the event of any dispute between the parties relative to the provisions hereof the same shall be settled by arbitration as provided for in the Primary Agreement and Schedules.

7. That wherever herein the masculine gender is used, the masculine gender shall include the feminine and neuter genders, and vice versa, as the context shall require.

8. That the construction contemplated shall be performed in a manner consistent with the laws of the State of New York and any safety or other regulations promulgated by Conrail or an appropriate authority .

9. Pursuant to the insurance requirement specified in Article 15 (a) (ii) of the Agreement of Sale (Primary Agreement) between Conrail and Purchaser, Purchaser agrees to cause its contractor or contractors engaged in any building or construction of any facility or appurtenances to obtain and keep in effect during any construction, repair, renewal or removal, a Railroad Protective Liability Insurance Policy (AAR-AASHO FORM) issued to Conrail with the limits set forth in Article 15 of said Agreement of Sale.

Likewise, similar insurance shall be provided in reasonable amounts in the event of any future work in connection with any building, use or other improvements involving the area specified in Schedule "A" or referred to in Primary Agreement or Schedules.

10. (A) All costs incurred by Conrail in connection with Purchaser's construction shall be reimbursed to Conrail by Purchaser, including, but not limited to, construction, inspection, engineering review, flagmen, watchmen and guards reasonably required during construction for the protection of the transportation operations of Conrail. Purchaser agrees to reimburse Conrail for (1) the wages of Railroad Company forces at the prevailing rate of wages paid, plus a percentage of total amount of such wages at applicable burden rate to cover the actual cost of public liability

and employer's liability (force account) insurance, vacation allowances, paid holidays, health and welfare insurance, and such additional labor cost as may be necessary to comply with the provisions of existing laws, including payroll and other taxes covering Railroad Unemployment, Railroad Retirement and Social Security; (2) the cost of material necessary to perform such Railroad Company force account work, plus 15% of such cost for handling, storage expense and accounting, less the salvage value of such material as can be conveniently removed upon completion of the work; and (3) a percentage of gross labor, material, etc. based on a burden rate covering administrative relief.

(B) Reimbursement by Purchaser to Conrail will be made in estimated monthly progressive payments at 100% of Conrail's estimated expenditures subject to adjustments based on actual costs as determined by Conrail's Vice President and Controller.

Upon completion of any work by Conrail, final billing prepared in accordance with Conrail's accounting and billing procedures (Conrail billing supporting detail) will be submitted to Purchaser within ninety (90) days or as soon thereafter as practical, and Purchaser will reimburse Conrail within sixty (60) days, subject to adjustment for any differences developed by Purchaser and agreed to by Conrail's Vice President and Controller.

(C) Reimbursement will be made for expenditures for direct labor, including retroactive wage adjustments when paid, and any other payments Conrail is obligated to pay under union agreement, material, small tools, fuel and supplies, travel and business expenses, rentals of equipment, and payments to others incurred in performing agreed upon work. Standard new material taken from stock shall be priced in accordance with the pricing formula for railroad's established carrying value in effect in the account period when reported and/or charged. Non-standard material purchased and delivered to the site shall be priced at identified invoiced costs. Any freight charges payable to others shall be included in the cost billed. Standard fit material taken from or replaced in stock shall be priced at 75% of the applicable price for new material. Scrap will be priced at average current market value for the month in which reclaimed.

Purchaser shall pay to Conrail the ICC prescribed public tariff rates for freight transportation where Conrail transports over its own lines material and equipment for work to be performed. Purchaser shall reimburse Conrail for freight transportation upon receipt of freight bills, in accordance with the prescribed governmental regulations for payment of freight transportation.

(D) Reimbursement for use of Conrail owned or leased machinery, highway vehicles, etc., excluding costs for equipment leased specifically for the project, and for Conrail's work trains, locomotive cranes, cars and other rolling stock used on the work will be at standard rates specified by Conrail's Vice President and Controller. The minimum rental charge will be for one day.

(E) Reimbursement will include, but not be limited to, the cost of the following:

- a. Block operators and extra dispatchers
- b. Engineering services
- c. Site inspections
- d. Switchtenders
- e. Flagmen
- f. Surveying
- g. Security
- h. Foremen and assistants
- i. Special duty personnel
- j. Camp car cooks and attendants
- k. Crossing watchmen
- l. Field inspectors, production engineers and supervisors signal construction
- m. Non-revenue clerks assigned to project in office of controller
- n. Travel and business expenses of individuals included in this section

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals or request these presents to be signed by their proper corporate officers and their proper corporate seal to be hereto affixed the day and year first above written.

ATTEST:

CONSOLIDATED RAIL CORPORATION

Robert J. Tracy

Angela

ATTEST:

FRANK VITALE

\_\_\_\_\_

Frank Vitale

FRANCIS VITALE

Francis Vitale

Exhibit 2

CSXT Counsel Email  
To Vitales' Counsel  
11 March 2005

## Richards, David

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**From:** Richards, David  
**Sent:** Friday, March 11, 2005 3:01 PM  
**To:** 'Goodman, Gary A.'; Richards, David  
**Cc:** Wallach, William; Zuckerman, Richard M.; 'Hurley, Kevin'  
**Subject:** RE: CSXT/Vitales

Gary:

Please make reference to the Contract. There's a lot of things the Vitales can do after they take title, in the way of delayed construction under detailed and final plans and specifications, but the nature of the title they take seems to require some form of preliminary (and, as to weight and support locations, final) plans and specifications, at least as to weight of the structure and the locations and thus adequacy of the support easements for the intended purpose. We are not signing off on the location of 50- ton columns and then watch the developer post closing produce something that needs 500 ton columns, and thereafter litigate at our expense all the resultant questions.

Section 4(A) second paragraph requires Grantor to approve or disapprove plans and specifications "prior to the signing hereof and if approved then no further approval of said plans and specifications shall be required." Do you have some evidence that this happened before the contract (which can only mean the structure the Vitales are planning to build), because we think it patent that they have to be produced and approved prior to closing, not having been done prior to contract.

Section 4(C) asks for a judgment as to whether, under law, or "under general accepted standards of safety, that the current [railroad] facilities are not permitted *under the structure or structures to be constructed by Purchaser*", because then certain things have to be relocated at Purchaser's expense—and we won't allow that on a Purchaser promise to pay. How can that judgment made about the railroad's current facilities, unless we have some idea of "the structure or structures to be constructed by Purchaser" by virtue of some sort of plans and specs which cannot thereafter be changed as to that quality? You can hardly expect us to produce the plans for "mutual determination" under the twin standards that are established in that Section for a judgment which must be made.

Sections 5(C), 6(D), 6(E), 10, 17, 18, 34, and 40, in their various and minutely detailed ways (see my email of this morning) contemplate that the precise location of "the supporting columns, piles, pile caps and supporting beams" be in the Deed, and Section 34 mandates your providing us, now, before closing, with a survey which shows the proposed locations, for our client's approval before closing. How can you know where these are best to located, to support the proposed structure, unless you have some rough plans and specs that end up making weights and loads calculable? Let's be clear: CSXT has to sign off, in the Deed, on the location of all these items, including their adequacy for their support function, as well as avoidance of signal concerns, distance from center of track, etc., etc., all of which conditions were agreed and are spelled out in the Contract. It is hard to see how that can be done without some sort of plans and specifications of the structure above grade, in its intimate relation to the active railroad activity below grade which must not be impeded. Nothing in the recent arbitration award speaks to these points, and CSX, as the new owner with new engineers (not Conrail's) is not waiving them. I would note that your clients have been aware of the railroad's dissatisfaction with the lack of these very support locations data since about 1999, when they were noted on the spread sheet of open points. I have no idea why the parties left so much unattached to the Contract, but these were the Vitales to provide, and it's eighteen years after they made the promise to provide them.

I hope we are not headed back to arbitration, but this is not a fruitful approach.

Dave

David Alan Richards, Esq.  
McCarter & English LLP

3/11/2005

Exhibit 3

CSXT May 22, 2002  
Letter Terminating  
the Agreement



2 North Charles Street, 11<sup>th</sup> Floor  
Baltimore, Maryland 2120  
(410) 613-6151  
FAX: (410) 613-6151  
Kevin\_Hurley@CSX.com

D. Kevin Hurley  
Assistant Vice President

May 24, 2002

REGISTERED MAIL, RETURN RECEIPT REQUESTED

Frank Vitale and Francis Vitale  
27-17 216<sup>th</sup> Street  
Bayside, New York 11360

Re: Agreement dated 20<sup>th</sup> February 1986 by and between Consolidated Rail Corporation ("Seller") and Frank Vitale & Francis Vitale ("Purchaser"), as amended by agreement date May 26, 1999 (as so amended, the "Contract")

Gentlemen:

As you are aware, New York Central Lines, LLC has succeeded to the interest of Seller under the Contract by assignment. All capitalized terms used herein and not otherwise defined shall have the meanings for such terms set forth in the Contract. This letter notice is given in conformity with Contract Article 21(B), and shall serve to confirm, or otherwise put Seller on notice, of the following:

1. Seller has never delivered to Purchaser the notice in the form and manner required by Article 29 of the Contract, which delivery is a pre-requisite to making the Contract binding on Seller; consequently, the Contract is not binding on Seller at the date of this notice.
2. Purchaser failed to close title to the real property described in the Contract on or before August 20, 1987 (as required by Article 29 of the unmodified Contract), and once more failed to close title on or before August 31, 1999 (as required under Paragraph 2 of the modification agreement dated May 26, 1999).
3. Purchaser failed to send a timely notice to reclaim its \$90,000 Contract deposit by the final date set for such notice in the 1999 modification agreement, and such deposit is now forfeited to Seller in accordance with Contract Articles 3(D) and (E) as modified by Paragraphs 1 and 3 of the modification agreement.
4. After sixteen years of negotiations, the parties have failed to agree on the material terms of the Contract, including but not limited to total consideration, the description of the property conveyed and retained by Seller, and the insurance coverage for Seller.
5. Seller hereby abandons negotiations under the non-binding Contract.

Sincerely,

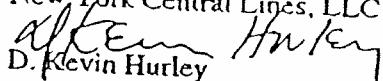
New York Central Lines, LLC  
  
D. Kevin Hurley

Exhibit 4

July 18, 2002 Vitale  
Request for Arbitration

FRANK VITALE AND FRANCIS VITALE  
27-17 216<sup>TH</sup> STREET  
BAYSIDE, NEW YORK 11360

July 18, 2002

**Certified Mail--Return Receipt Requested**

New York Central Lines, LLC  
c/o CSX Real Property, Inc.  
510 Thornall Street, Suite 42  
Edison, New Jersey 08837

New York Central Lines, LLC  
c/o CSX Real Property, Inc.  
2 North Charles Street, 11<sup>th</sup> Floor  
Baltimore, Maryland 21201-3814  
Attention: Mr. Jack E. Barber  
Mr. D. Kevin Hurley

**Agreement dated February 20, 1986,  
between Consolidated Rail Corporation, Seller,  
and Frank Vitale and Francis Vitale, Purchaser,  
as Amended**

**DEMAND FOR ARBITRATION  
AND  
APPOINTMENT OF ARBITRATOR**

Dear Sir or Madam:

Reference is hereby made to that certain Agreement dated February 20, 1986, between Consolidated Rail Corporation ("Conrail"), Seller, and Frank Vitale and Francis Vitale, Purchaser, as amended (as amended, the "Contract"). Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Contract.

The undersigned, Frank Vitale and Francis Vitale (collectively, "we" or "Purchaser"), are the Purchaser under the Contract. We have been advised that New York Central Lines, LLC, ("you" or "Seller") has succeeded to the interests of Conrail, as Seller, under the Contract. (Purchaser and Seller are referred to collectively as the "Parties.")

**PLEASE TAKE NOTICE** that, pursuant to Article 20 of the Contract, we hereby demand arbitration seeking the following relief: (1) a declaration that the Contract remains in full force and effect and otherwise declaring the rights and responsibilities of the Parties thereunder; (2) an Order directing you to fully cooperate with us to proceed towards a closing under the Contract including, without limitation, an Order directing you to cooperate in obtaining all necessary permits and approvals including, without limitation, approval and release under Section 18 of the Transportation Law of the State of New York (the "Section 18 Release"); (3) an Order preliminarily and permanently enjoining you from selling the property to any third parties

New York Central Lines, LLC

July 18, 2002

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in violation of our rights under the Contract; (4) an Order directing specific performance of the Contract; (5) damages which we sustained as a result of your breach of the Contract; (6) such other and further relief as the Arbitrator(s) shall deem appropriate; and (7) your share of the costs of the Arbitration, pursuant to the Contract.

**PLEASE TAKE FURTHER NOTICE** that, pursuant to Article 20 of the Contract, we hereby appoint, to act as Arbitrator:

Ivan W. Moskowitz, Esq.  
Mandel Resnik Kaiser Moskowitz & Greenstein, P.C.  
220 East 42<sup>nd</sup> Street  
New York, New York 10017  
(212) 573-0000  
Fax: (212) 573-0067

Mr. Moskowitz meets the qualifications to act as Arbitrator under the Contract, being a "competent person[]" having no substantial interest in the matter in controversy."<sup>1</sup>

**PLEASE TAKE FURTHER NOTICE** that, pursuant to Section 7503(c) of the Civil Practice Law and Rules of the State of New York, unless you apply to stay the arbitration within twenty(20) days after service of this Demand for Arbitration, you shall thereafter be precluded from objecting that a valid agreement was made or has not been complied with or from asserting in court the bar of a limitation of time. An application to stay arbitration must be made within twenty (20) days after the service of the demand for arbitration or shall be precluded.

The background of the dispute with respect to the Contract is as follows:

The Contract (Exhibit A hereto) was executed on or about February 20, 1986. Under the Contract, Conrail, your predecessor in interest, agreed to sell to us certain real property in Woodside, County of Queens, City and State of New York (the "Property"), for the purchase price of \$900,000. Purchaser made a \$90,000 deposit towards the purchase price.

Article 29 of the Contract provided, in part, that the Contract did not constitute a binding agreement upon Conrail unless and until Conrail (through its duly authorized representative) gave written notification (the "Article 29 Notice") to purchaser that the transaction had received the necessary approval and authorization of Conrail's senior management or board of directors, and that Conrail was legally bound. On or about December 4, 1986, a memorandum was prepared within Conrail, to seek the approval of Conrail's senior management, and thus make the Contract legally binding upon Conrail. On or about December 5, 1986, Michael D. Sims, a

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<sup>1</sup> In accordance with said Article 20 of the Contract, Seller may, if it so elects, serve a notice setting forth the name and address of the person it designates as its Arbitrator, and any additional points in dispute to be determined by arbitration, within 10 (ten) days from the date of the mailing of this notice, in accordance with Section 21(B) of the Contract. Within 10 (ten) days thereafter, the two arbitrators thus named shall select a third arbitrator and notify both parties of such selection. Pursuant to Article 20 of the Contract, if Seller fails to select an arbitrator within ten (10) days from the date of mailing of this notice, then the above-named arbitrator selected by Purchaser shall act as the sole arbitrator in this proceeding.

member of the senior management of Conrail, and L. Stanley Crane, Chairman and Chief Executive Officer of Conrail (and thus a member of the senior management of Conrail), approved the memorandum. Within a few days thereafter, Robert J. Tracy ("Mr. Tracy"), Conrail's duly authorized representative, gave written notification to purchaser that the transaction had received the necessary approval and authorization of Conrail's senior management, by handing a copy of the memorandum, with his business card attached, to Frank Vitale. Mr. Tracy had written, upon his business card attached to the memorandum, "Frank - Mr. Crane is the Chairman." The memorandum, with Mr. Tracy's attached business card, as handed by Mr. Tracy to Frank Vitale, constituted the Article 29 Notice (Exhibit B). Conrail, as your predecessor in interest, thus became legally bound to the Contract. A copy of the Delegation of Authority - Conveyances, to which reference is made in the Article 29 Notice, is annexed as Exhibit C.

Between 1986 and 1999, the Parties repeatedly adjourned the date of the closing pursuant to the Contract. On or about May 28, 1999 (the "May 1999 Modification"), Conrail and Purchaser executed a written agreement (Exhibit D) further adjourning the closing to August 31, 1999. Neither the Contract, nor the May 1999 Modification, made the closing "time of the essence."

After the execution of the May 1999 Modification, you succeeded to Conrail's interests under the Contract, and you designated Mr. Tracy, who had been Conrail's duly authorized representative with respect to the Contract, as your duly authorized representative with respect to the Contract.

Mr. Tracy, as Seller's duly authorized representative, met with us on July 1, 1999 and again on August 30, 1999, the day before the scheduled closing date. At the August 30, 1999 meeting, Mr. Tracy, on behalf of Seller, stated that Seller wanted to further adjourn the closing date five years, until June 2004, because, if the closing were to occur before that date, Seller would be obliged to share the proceeds of the sale with Norfolk-Southern. Purchaser had no objection to that long an adjournment of the closing date. The Parties therefore agreed, based upon Seller's request, to adjourn both the date of closing, and the date upon which Purchaser could cancel the Contract and obtain the return of its \$90,000 deposit. Therefore, based upon your request, the closing did not occur on August 31, 1999, and no new date for closing was set.

Through the remainder of 1999, 2000, and 2001, the Parties had several meetings in further preparation for the closing of sale under the Contract. There were two additional meetings in 1999. There were ten meetings in 2000, a meeting every month except for February and July. In 2001, Purchaser and Seller scheduled meetings for every month (except April) through October. However, Mr. Tracy postponed most of the meetings. Four meetings were held in 2001 — on March 23, May 4, May 30, and October 17. Purchaser continued to have telephone conversations with Mr. Tracy through November 2001 and, on several occasions in December 2001, Mr. Tracy returned the telephone calls of Purchaser's counsel, but they never spoke.

During these meetings, the Parties discussed possible modifications to the Contract, while always recognizing that the Contract remained a valid and binding Contract and that, if the

Parties did not agree upon the possible modifications, the Parties would be obliged to proceed to the closing of sale under the terms and conditions of the Contract. No further agreements modifying the Contract were executed by both Parties. At no time did either Party declare the Contract to be "time of the essence." At no time did either Party seek to declare the other Party to be in default. At no time did either Party take the position that the other Party had abandoned the Contract, or that the Contract was not a valid, binding, and enforceable contract.

Because of the breakdown in communications during December 2001, on December 27, 2001, Purchaser sent notice (Exhibit E) to Seller setting a closing date of April 15, 2002. The notice did not make the closing "time of the essence." The notice also specifically noted that the closing may be subject to the Parties' obtaining the Section 18 Release, and requested Seller's cooperation in obtaining the Section 18 Release. In response, Seller advised Purchaser that Mr. Tracy was no longer employed by Seller, and that Seller could not locate Mr. Tracy's files relating to the Contract.

On April 10, 2002, Purchaser's counsel wrote a letter (Exhibit F) to Seller with respect to the matter, asking whether Seller intended to proceed with the April 15, 2002 closing. On April 11, 2002, Seller wrote a letter to Purchaser's counsel (Exhibit G), stating that Seller would not proceed with the closing and taking the position, for the first time, that the Contract "expired in August, 1999."

On May 24, 2002, Seller sent a letter to us ("Seller's May 2002 Letter") (Exhibit H). Seller's May 2002 Letter claimed: (1) Seller never gave the Article 29 Notice; (2) Purchaser failed to close title on August 20, 1987 (the original closing date set in the Contract) and on August 31, 1999 (the closing date set in the May 1999 Modification); (3) Purchaser failed to send notice to reclaim its \$90,000 deposit under the Contract and therefore had forfeited its deposit; (4) the Parties failed to agree upon material terms of the Contract; and (5) the Contract was not binding, and Seller was abandoning any further negotiations relating thereto.

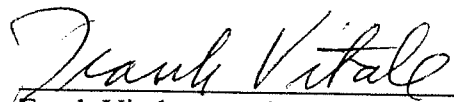
The following points are thus in dispute:

1. Seller's claim that it never gave the Article 29 Notice is without basis. The Article 29 Notice was duly and properly given in December 1986, and the Contract thus became binding upon Conrail, your predecessor-in-interest, and is binding upon you.
2. Seller's claim that Purchaser "failed" to close title to the Property on August 20, 1987 and again on August 31, 1999 is without basis. Closing of title did not occur on August 20, 1987 because the Parties mutually agreed to adjourn the closing. Closing of title did not occur on August 31, 1999, because you requested that the closing be adjourned. Moreover, even if Purchaser had "failed" to close title on either or both dates, that would not affect the fact that the Contract remains a valid and binding Contract because no Party has, at any time, scheduled a "time of the essence" closing. In addition, the Parties, by their conduct, have evidenced their understanding that the Contract remains in force and effect.

3. Seller's claim that Purchaser forfeited its \$90,000 deposit is without basis. When, at Seller's request, the Parties agreed to adjourn the closing date of August 31, 1999, the Parties also agreed to adjourn the date by which Purchaser could cancel the Contract and obtain the return of its deposit. Purchaser continues to have that right, but Purchaser has no present intent to exercise that right and instead intends to proceed to closing.
4. Seller's claim that the Parties have failed to agree upon material terms of the Contract is without basis. The Contract contains all of the material terms. The fact that the Purchaser has, in good faith, discussed possible modifications to the Contract with Seller does not negate that fact.
5. Seller's claim that the Contract is "non-binding" is without basis. The Contract remains valid and binding.
6. Purchaser seeks, and is entitled to: (1) a declaration that the Contract remains in full force and effect and otherwise declaring the rights and responsibilities of the Parties thereunder; (2) an Order directing you to fully cooperate with us to proceed towards a closing under the Contract including, without limitation, an Order directing you to cooperate in obtaining all necessary permits and approvals including, without limitation, the Section 18 Release; (3) an Order preliminarily and permanently enjoining you from selling the property to any third parties in violation of our rights under the Contract; (4) an Order directing specific performance of the Contract; (5) damages which we sustained as a result of your breach of the Contract; (6) such other and further relief as the Arbitrator(s) shall deem appropriate; and (7) your share of the costs of the Arbitration, pursuant to the Contract.

**PLEASE TAKE FURTHER NOTICE** that Purchaser shall be represented in the Arbitration by Richard M. Zuckerman, Esq. and Jacob Inwald, Esq., Sonnenschein Nath & Rosenthal, 30 Rockefeller Plaza, New York, New York 10112, Phone: (212) 398-5213; Fax: (212) 398-5245, to whom all further communications with respect to the Contract and the arbitration should be addressed.

Very truly yours,

  
Frank Vitale

  
Francis Vitale

New York Central Lines, LLC  
July 18, 2002  
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cc:

Ivan W. Moskowitz, Esq.  
Mandel Resnik Kaiser Moskowitz & Greenstein, P.C.  
220 East 42<sup>nd</sup> Street  
New York, New York 10017  
(212) 573-0000  
Fax: (212) 573-0067  
*Arbitrator*

David Alan Richards, Esq.  
McCarter & English, LLP  
300 Park Avenue  
New York, New York 10022  
(212) 609-6817  
Fax: (212) 609-6921  
*Attorneys for New York Central Lines, LLC, Respondent*

Richard M. Zuckerman, Esq.  
Jacob Inwald, Esq.  
Sonnenschein Nath & Rosenthal  
30 Rockefeller Plaza  
New York, New York 10112  
(212) 398-5213  
Fax: (212) 398-5245  
*Attorneys for Frank Vitale and Francis Vitale, Claimants*



THIS AGREEMENT made this 20th day of February, 1986 by and between CONSOLIDATED RAIL CORPORATION, a Corporation of the Commonwealth of Pennsylvania having offices at Rm. 901, 1528 Walnut St., Philadelphia, Pennsylvania, 19102 (hereinafter referred to as Conrail or Seller) which has agreed through George R. Scioli, its Manager-Real Estate whose office is located at Suite 423, 744 Broad St., Newark, N.J. 07102, to sell, quitclaim and release to FRANK VITALE & FRANCIS VITALE, residing at 27-17 216th Street, Bayside, N.Y. 11360 or assigns (hereinafter referred to as the Purchaser); all of Conrail's right, title and interest in and to the property hereinafter described and hereinafter called Premises.

W H E R E A S, Conrail is the owner of and in possession of certain lands situated in the Town of Woodside, County and Borough of Queens and State of and City of New York more particularly described in the Schedules attached to this Agreement, and

W H E R E A S, Purchaser is desirous of erecting a structure on premises located over Conrail's railroad tracks and of utilizing portions of the land owned or controlled by Conrail or assigning to an Assignee for such purpose:

NOW THEREFORE, in consideration of the mutual covenants herein contained and for other good and valuable consideration, it is hereby mutually A G R E E D as follows:

1. PROPERTY CONVEYED

That Conrail shall convey all of its right, title and interest in and the premises described in the Schedule attached hereto and enumerated as "Schedule A", comprising approximately seven (7) acres, more or less, subject to a final survey.

## 2. EASEMENTS

RESERVING UNTO CONRAIL a seventy-five<sup>(75)</sup> foot wide easement identified on the attached plans, which easement shall extend upward only to a horizontal plane, but running parallel to the underlying rail line and measured twenty-two (22) feet, vertically above top of rail of said Reserved Tracks (hereinafter called "excepted space") the foregoing easement being reserved by Conrail to use, operate, maintain, repair, replace and inspect the Reserved Tracks and Equipment as and when the same may be necessary or desirable.

## 3. PURCHASE PRICE

A. That as and for consideration for the conveyance and transfer described in Article 1 of this Agreement, Purchaser shall pay to Conrail the purchase price of NINE HUNDRED THOUSAND (\$900,000.00) Dollars in accordance with the following terms and conditions:

|                                                                                      |            |
|--------------------------------------------------------------------------------------|------------|
| Upon execution of this Agreement a deposit of receipt whereof is hereby acknowledged | 90,000.00  |
| By cash or certified check to be paid at closing of title                            | 810,000.00 |
| Total                                                                                | 900,000.00 |

B. In the event that prior to closing, Conrail shall abandon their rights or sell, lease or otherwise dispose of said rights to the corridor with the exception of the premises, Purchaser shall pay the taxes assessed on the property from the date of assessment of said taxes for a period not exceeding eighteen (18) months from the date the contract has been fully approved and executed by Conrail. Liability for the payment of such property taxes shall be limited to FIFTY THOUSAND (\$50,000.00) Dollars.;

In the event of abandonment, Conrail shall give Purchaser thirty (30) days notice of such intention to abandon, in which event Purchaser shall have the option to cancel within said period without obligation to pay any such taxes. In the event, however, that Purchaser shall elect not to cancel, then any such taxes shall be apportioned as customary on the title closing date. In the event of such abandonment, sale or disposal of said rights and Purchaser elects to waive the right of cancellation, Conrail will waive the additional payments or consideration required of Purchaser under Paragraph 4B and the purchase price shall be increased from NINE HUNDRED THOUSAND (\$900,000.00) Dollars to NINE HUNDRED FIFTY THOUSAND (\$950,000.00) Dollars.

 C. ~~Conrail shall have sixty (60) days from the date this contract is signed by Purchaser to execute this contract, and in the event of failure to execute said contract, Conrail shall have the right within such sixty (60) days period to terminate this agreement, and thereupon the deposit of NINETY THOUSAND (\$90,000.00) Dollars shall be returned to the Purchaser.~~

D. In the event that the Purchaser shall breach any of the terms hereof as specified in this agreement and schedules, and except as otherwise hereinafter provided, and as a result thereof title shall not close, and providing Conrail shall not have defaulted in any of the terms of this agreement, then Conrail shall be entitled to retain the said deposit money as liquidated damages, and neither party shall have any further claim against the other.

E. In the event Purchaser is unable to obtain the necessary zoning and permits for development of the premises or if the Public and State agencies having jurisdiction thereof refuse to approve the development of said premises, as proposed by Purchaser, and as shown on the plans as annexed hereto and initialed by the parties, ~~then the deposit money shall be returned to Purchaser.~~ Purchaser shall have the right to a cancellation of the contract and to the return of its deposit at any time <sup>up</sup> prior to seventeen (17) months from the date this ~~contract is executed by all parties.~~ ~~until all of the foregoing approvals are obtained.~~ *W. J.*

F. There will be no interest accrued or credited to the Purchaser on said deposit money (\$90,000.00).

#### 4. ADDITIONAL CONSIDERATION

A. In order to minimize the possibility of any damage to the structure on account of derailments occurring in the area, all trackage, including turnouts, shall be rebuilt at Purchaser's expense where caused by Purchaser's act. This rebuilding shall utilize continuous welded rail under the Building structure and shall extend beyond the Building for a minimum distance of 100 feet on either side. If additional guard rail protection is required, this also would be installed at Purchaser's expense.

Construction will have to provide for adequate clear sight distances to signals located under or near the structure. Grantor agrees to approve or disapprove said plans and specifications prior to the signing hereof and if approved then no further approval of said plans and specifications shall be required.

B. The Purchaser shall give Conrail at least three (3) months written notice prior to the commencement of the construction of the aforementioned structure or structures and, at the time of said written notice to Conrail and as an integral element of construction and in the interest of continued safe operations of trains, Purchaser agrees to pay to Conrail the sum of TWO HUNDRED THIRTY SIX THOUSAND (\$236,600.00) Dollars for the purpose of covering estimated costs of rehabilitation and relocation of tracks underlying and adjacent to the structure to be constructed by Purchaser, which Conrail will then undertake to do in an expeditious and workmanlike manner. If this estimated amount is insufficient, upon completion of the work Purchaser will reimburse Conrail for the difference between the estimated amount and the actual amount spent by Conrail, but not to exceed FOUR HUNDRED THOUSAND (\$400,000.00) Dollars. If the estimated amount is greater than the actual amount spent by Conrail, Conrail will repay to Purchaser the difference between the estimated amount and the actual amount. Construction by Purchaser will proceed in a manner that will not unreasonably interfere with the continued operation of trains beneath the area of Purchaser's ownership, said construction to be completed in accordance with the Construction Contract attached hereto as "Schedule C". Conrail shall have the right to inspect the construction from time to time in accordance with said Agreement. In the event Purchaser's construction is delayed, then Conrail's obligation to complete this rehabilitation will likewise be extended. Any such required payment shall be made within three (3) months after Purchaser gives said notice to Conrail. Reimbursement of any differences shall be reimbursed at the time of final computation of costs.

C. Conrail currently has facilities on its right of way and within Conrail's excepted and reserved area. Should it be mutually determined by Conrail and Purchaser, that under any state, local or federal law or ordinance, or under general accepted standards of safety, that the current facilities are not permitted under the structure or structures to be constructed by Purchaser, and Purchaser determines to proceed with the said structures, then Purchaser at its sole cost and expense will pay all cost associated with changing the location of the facilities and/or the purchase of and installation of replacement facilities deemed necessary to comply with said laws and ordinances, or safety standards. In the event that any such work is required by Conrail, Conrail will advise the Purchaser the details thereof and the cost therefor, and the Purchaser will be given a reasonable opportunity to obtain a lower bid for the performance thereof, providing, however, the railroad union will permit an outside contractor, and providing such new contract for such work meets railroad specifications.

D. Any costs stipulated in the Agreement and Schedules as estimates are merely estimates associated with the construction, rehabilitation and relocation of Conrail's facilities, and Purchaser's liability will include the actual cost of such construction and relocation at the time that they are actually performed.

## 5. TITLE CONVEYED

A. It is the intention of this Agreement to provide for the conveyance by Conrail of all its right, title and interest in and to the property described in "Schedule A". It is contemplated that Conrail shall convey its interest by Quitclaim Deed with ~~out any covenants or warranties of title, express or implied~~ to the premises described in "Schedule A" and will except and reserve from the deed of conveyance the excepted space. Conrail shall, in addition, grant to Purchaser a perpetual easement for and to the area necessary for the location, placement and maintenance of the various supports necessary for the structure, as may be described in "Schedule A", and such other easements as may be referred to in Article 5 of this Agreement. Title to the property described in "Schedule A" shall be insurable by a reputable Title Insurance Company authorized to do business in the State of New York without such exception as would render said title unmarketable in the State of New York. In the event that the title described in "Schedule A" cannot be delivered by Conrail herein, or that the title examination presents a cloud which cannot be removed by the Title Company, then Purchaser may have the right to accept such title as Conrail can deliver or Purchaser may elect to terminate this transaction, and thereby terminate all liability to Conrail in regard to this transaction, and the deposit money shall be returned to Purchaser.

## 6. FORM OF CONVEYANCE

A. Conrail agrees to deliver title to the property described in "Schedule A" by means of a Quitclaim Deed ~~with a covenant against quiet enjoyment~~ in a form reasonable satisfactory to the Purchaser's Title Insurance Company. In addition, Conrail shall deliver as promptly as possible such Affidavits as Purchaser's Title Insurance Company may reasonably require in order to complete the conveyance.

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71- B. Any local, federal, state approvals or any subdivision approval or other requirements required in connection with closing of title shall be accomplished by and completed by Purchaser, at its sole cost and expense, and Purchaser shall be responsible for recording and documenting said subdivision approval and any other approvals in the appropriate County Recording Office, subject however to the hereinbefore mentioned right of Purchaser to a cancellation of this contract and to the return of any monies paid under this agreement if such approvals are not forthcoming.

C. Conrail will cooperate in all respects with regard to any local, federal or state approvals and any subdivision requirements and agrees to execute as promptly as possible, any consents required therefor and the approved documents or drawing necessary to effectuate the closing of title and to obtain such approvals.

→ D. Without limiting the generality of the foregoing subparagraph, it is understood and agreed that Conrail will grant a permanent easement to Purchaser for the column placements support the structure and improvements to be erected over Conrail's excepted space, including easements of access.

E. It is understood and agreed that the supporting columns, piles, pile caps and supporting beams shall remain the property of Purchaser at all times and shall not be considered property of Conrail.

F. Nothing contained in this provision or in this Contract shall prevent Purchaser from assigning the Construction Contracts to any parties or entities it may designate, so long as Purchaser, or in lieu of purchaser, the Assignee as provided in Par.41, shall remain responsible pursuant to the terms and conditions of this Agreement and Schedules attached hereto and advise Conrail's Chief Engineer of such assignment.

7. COVENANTS OF SELLER

Conrail, for itself and its successors and assigns, covenants that:

*vi*  
*AK*  
A. ~~It has the sole, lawful and present title and possession of~~  
the property to be conveyed, transferred, and assigned by this Agreement and that it has full right, power and authority to convey, transfer and assign ~~the same.~~

*AK*  
B. ~~It has not done or suffered any act or thing whereby the~~  
property to be conveyed under this Agreement now or at any time hereafter. ~~shall or may be imperiled, encumbered or changed in any manner.~~

8. CONSTRUCTION CONTRACT

A. The parties hereto understand and agree that Purchaser herein is acquiring the property described in "Schedule "A" for the purpose of erecting and constructing certain improvements and structures thereupon and thereover. The present contemplated construction is more particularly set forth in the Schedule annexed hereto which depicts the structures to be constructed and approximately locates the support column placements.

B. The general plans and specifications comprising the construction of improvements and structures to be erected on the demised property provided for in the construction agreement, entered into between the parties simultaneous with this Agreement of Sale, are annexed hereto as "Schedule "C". The construction agreement sets forth with generality the plans, specifications, schedules and other data and

information necessary to complete the construction and improvements contemplated by Purchaser. The Final Plans and specifications will be subject to the final review and written approval of Conrail's Chief Engineer. Conrail hereby agrees to use its best efforts to approve such Building plans, specifications and design computations within ~~thirty (30)~~ <sup>sixty (60)</sup> days of their receipt at the office of Conrail's Chief Engineer Design and Construction in Philadelphia, or if such approval is not given, Conrail agrees to specify its objections thereto within such time.

C. The Construction Agreement will give the right to Purchaser to construct the structure in stages. The amount of construction work to be performed during each of the stages contemplated shall be within the discretion of Purchaser.

D. The parties understand and agree that the plans and specifications attached as Exhibit "B" are merely preliminary in nature and are for descriptive and informal purposes only. The placement of the support columns and structures plans shall be subject to the final review and written approval of Conrail's Chief Engineer with respect to ascertaining whether said columns and structures are within the limits set out in the various schedules and plans appended hereto.

Conrail agrees that within thirty (30) days after receiving written notice from Purchaser, as provided in Article <sup>21</sup>~~20~~ hereof, of the completion of all construction work in the excepted space acquired in connection with the construction of the improvements and structures to be made by Purchaser, Conrail will have the right to examine the location of the column replacements constructed in accordance with plans approved by Conrail for placement of same in the excepted space, and shall satisfy itself that there are no encroachments objectionable to Conrail and that Conrail's property was not utilized in excess of the amount contracted for herein, and shall furnish Purchaser with the following statement:

"Conrail has examined the column placements and support structures erected by Purchaser and has approved the location thereof and agrees that the said structures as finally placed do not interfere with the use by Conrail for railroad purposes of its retained property, and, Conrail hereby grants to Purchaser a perpetual easement to use that part, if any, of Conrail's property in which said structure or utilities may now be located."

E. In addition and if necessary, Conrail will execute such corrective easement or other property description as Purchaser may reasonably require to finally fix the location of the column placements or other supports for Purchaser's structure when evidenced by the appropriate accurate survey, and Purchaser shall be responsible for any costs or expenses reasonably necessary for issuance of a corrective easement.

9. USE OF SELLER'S PROPERTY

~~Conrail hereby agrees to grant to Purchaser, without additional con-~~  
sideration, for temporary use during the construction of the structures to be erected  
in the excepted space, a temporary construction easement on such portions of Conrail's  
retained adjacent property as Purchaser may from time to time require and as may  
be more particularly described in the Construction Agreement. It is understood and  
agreed, however, that Conrail's use of its property shall be paramount to Purchaser's  
use and Conrail may when required by unforeseen circumstances affecting railroad  
operations rescind certain of such temporary construction easements, and Purchaser  
will comply with such revised arrangements so as not to interrupt Conrail's railroad  
operations. Conrail agrees to cooperate so as to minimize any interference with  
~~construction.~~

10. CLEARANCES

A minimum horizontal clearance of 16'00" from the center line of track  
on the east side and 10'00" from the center line of track on the west side and a  
verticle clearance of 22'00" from top of rail shall, at all times be maintained by  
Purchaser.

11. SAFETY AND PROTECTIVE DEVICES

A. Purchaser understands and agrees that certain types of protective  
devices and measures will be required during and after the matters contemplated in  
the Construction Agreement. Purchaser agrees to provide at its own cost and expense  
the necessary protective and safety measures, such as crash walls, warning signs,  
lighting, inspectors, watchmen, flagmen, and other matters reasonably

necessary for purposes of protection and/or safety. Crash walls designed in accordance with current AREA Specifications are required for the protection of supporting columns when they are located within 25 feet of the centerline of track.

B. It is understood and agreed that the placement of and exact nature of the safety and protective measures will be established as the construction progresses and as may be finally determined after completion thereof, and same will be subject to the final review and written approval of Conrail's Chief Engineer.

C. Any requests for safety and/or protective devices pursuant to this Article shall be directed in writing to Purchaser.

12. MAINTENANCE ACCESS

Purchaser agrees to grant such easements of access to rights of way as Conrail may require to allow their personnel access to any of its facilities, and agrees that any access will remain for as long as required by Conrail personnel, its successors and assigns.

13. INTERIM SAFETY PROCEDURES

It is understood and agreed that during the construction periods referred to in this Agreement, Purchaser shall be required to take such action as is necessary for the safety and preservation of its construction work in progress and of the personnel performing same. Upon notification by Purchaser to Conrail

that construction is about to commence, Purchaser agrees to confer with Conrail's Chief Engineer or his designee or representative and take action with respect to scheduling and to the imposition of such safety procedures as Conrail may require. Furthermore, Conrail agrees, insofar as it is reasonably able, to cooperate in all respects in a timely manner so as to allow the construction schedule to proceed in accordance with the notice given by Purchaser to Conrail. All costs incurred by Conrail in connection with this Article, including providing of inspection and protection personnel plus labor additives and expenses, shall and will be at the sole cost and expense of Purchaser.

#### 14 INDEMNITY

Purchaser further covenants and agrees that it shall defend, relieve, indemnify, and save harmless Conrail from and all damages and costs, and claims for same, growing out of loss of life or damage or injury to persons or property occasioned by any act or omission in its construction, maintenance, repair, renewal, use and operation of the structure on the premises and the fixtures and facilities therein contained, or occasioned by the failure of Purchaser to properly maintain the same in good condition and repair. Purchaser further agrees to defend, relieve, indemnify and save harmless Conrail, its successors and assigns from and against any and all loss of life or property or injury or damage to the person or property of any person occurring within the premises defined in "Schedule A", or occurring (with respect to the property or employees of Purchaser) within the excepted and reserved areas, however occurring, except where in whole or in part due to the fault or negligence of Conrail, but in any event purchaser will provide the insurance referred to in paragraph 15.

B. (b) Purchaser hereby agrees to waive any and all rights of subrogation against Conrail and other parties who have or may have the right to use Conrail's excepted space, from risks of fire and extended coverage perils, both during and after construction of any Building or improvements, if such endorsement is available.

B. (c) Purchaser, during the construction of any Building or improvements, shall furnish Conrail with evidence that Purchaser has provided all-risk Builders Risk insurance including debris removal, and providing for waiver of subrogation as agreed above. Such all-risk Builders Risk insurance shall cover any work which Purchaser shall perform in the excepted space. Upon completion of said Building or improvements, Purchaser shall furnish evidence of permanent fire and extended coverage insurance including debris removal, and providing for waiver of subrogation as agreed above, if available.

B. (d) All aforesaid policies of insurance shall be in companies of generally recognized responsibility. Purchaser shall submit to Conrail the original policy of Railroad Protective Liability insurance, and certificates evidencing proper coverage for all other policies. All policies of insurance shall provide that they may not be cancelled without at least thirty (30) days prior written notice to Conrail. Purchaser shall, if so requested, submit certified copies of policies to Conrail in lieu of certificates.

B. (e) Purchaser covenants and agrees that it shall, promptly upon the delivery of the deed and for so long thereafter as Conrail shall maintain its transportation operations in Conrail's excepted space, at its own cost and expense,

carry general public liability insurance, protecting Conrail against all claims arising out of the negligent acts or omission of Purchaser its agents, contractors, sub-contractors, except where occurring in, on or about the excepted space or the premises of Purchaser above or adjoining the excepted space, for bodily injury or death (including loss of service) to any and all persons, including employees of Conrail, and for damage to any and all property, including property rented or owned by or in the care of, custody or control of Conrail, and covering loss of use of any such property. Such insurance shall be written in form satisfactory to Conrail and by one or more insurance companies authorized to do business in the State of New York and approved for such purpose by Conrail, which approval shall not be unreasonably withheld. If Purchaser shall fail to carry such insurance and provide evidence to Conrail at all times that the same is in force, Conrail may forthwith and with notice itself proceed to purchase such insurance, whereupon the cost of such purchase, including premiums and brokerage, shall be and become a lien upon the land which is subject to this conveyance, subject to enforcement and foreclosure in accordance with the laws of the State of New York. The insurance required pursuant to this shall carry the same limits as specified in subparagraph (a) (1) above.

16. INTERPRETATION

All of the covenants and agreements contained in this Agreement and schedules shall run with the land and shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto, respectively, being the successors in title or by lease to the respective interests in the land above described owned by the parties hereto, respectively, and whenever the term "Purchaser" shall be used herein, the same shall be construed to mean FRANK VITALE, its successors and assigns, and whenever the term "Conrail" or "Seller" shall be used herein, the same shall be construed to mean Consolidated Rail Corporation, its respective successors and assigns.

17. VENTILATION, LIGHTING, DRAINAGE AND ACCESS  
REQUIREMENTS

Lighting shall be provided under the structure and an average lighting level of the following minimums shall be maintained:

- A. Switch points - 2 footcandles.
- B. Top of rails (non-working area) -  
1 footcandle.
- C. Top of rails (working areas) -  
3 footcandles.

The lighting shall be either mercury vapor, fluorescent or high pressure sodium lamps.

Ventilating systems must be provided. The exhaust ventilation fan or fans for the railroad area shall be capable of exhausting a minimum of 1 cubic foot of air per minute per square foot of covered area. The size of the ventilating shafts extending up and above the roof of the Building shall be of such proportion as to provide an air velocity not to exceed 1,000 feet per minute.

The lighting and ventilating facilities must be installed by the Purchaser who will also be responsible for the ensuing costs for operation and maintenance.

One emergency stairway exit is to be provided in the Building plans for the purpose of entrance and exit to and from the railroad area. This exit shall be constructed by the Purchaser.

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An access road shall be maintained through the area to provide access-  
ability for maintenance and emergency railroad company vehicles.

All drainage patterns through the area must be maintained.

18. DRAINAGE RELOCATION

Any existing drainage ditches shall be relocated at the sole cost and expense of Purchaser so as not to interfere with the proposed construction, existing facilities, existing access roadways and operations of Conrail and only upon approval of Conrail's Chief Engineer.

19. RESPONSIBILITY FOR TAXES

Purchaser shall be responsible for the payment of any and all real estate taxes levied upon the property and all improvements thereto, the supporting structures and appurtenances of Purchaser's property and in accordance with the bills rendered by the appropriate municipal or other authorities imposing or levying a tax on same, or for taxes levied against Conrail for Purchaser's improvements. Purchaser shall be responsible for any land taxes assessed as a result of Purchaser's improvements and rendered by any authority on property as a result of the premises or supporting structures in the excepted space. Conrail shall be responsible for taxes only so far as they affect Conrail's interest.

20. ARBITRATION PROCEDURE

If any dispute shall arise under the terms of this Agreement ~~or the~~ with the exception of the attached Schedules, it shall be determined by Arbitration. Either party may demand such arbitration by notice to the other party setting forth the point or points in dispute and the name and address of the person appointed by it to act as arbitrator. Within ten (10) days after such notice is given, the party to whom it is given shall give the party demanding arbitration a notice setting forth the name and address of the arbitrator selected by it and any additional point or points in dispute to be determined by arbitration. Within ten (10) days thereafter the two arbitrators thus named shall select a third and notify both parties of such selection. In case the party upon whom demand for arbitration is made fails within the said ten (10) days to select an arbitrator, then the single arbitrator selected by the party demanding arbitration shall act. In case the two arbitrators selected aforesaid fail within the time limit to select a third,

then either party may, after ten (10) days' notice to the other, apply to any Judge of the United States Court of general original jurisdiction for the District of New York or to any New York Court of appropriate jurisdiction for the selection of the third arbitrator. All the arbitrators selected shall be competent persons having no substantial interest in the matter in controversy. The arbitrator or arbitrators so selected shall, within ten (10) days after selection, designate a time not less than ten (10) days nor more than thirty (30) days thereafter, and a convenient place in the City of New York for a hearing, immediately notifying both parties thereof. The arbitrators shall meet at the time and place thus designated and the parties may then and there appear and offer evidence bearing upon the matters in controversy, and within thirty (30) days after the conclusion of such hearing the arbitrators shall render their decision in writing. The decision of the arbitrators or of a majority of them or of the sole arbitrator if there shall be but one, shall be final and conclusive upon the parties and each party shall abide by the same. Each party shall pay the fee of the arbitrator named by it and one-half of all other expenses of such arbitration, including, but not limited to, the fee of the third arbitrator, but counsel and witness fees of the parties shall not be included.

21. NOTICES

A. Any communications or notices provided for and permitted under this Agreement shall be in writing (which may include telegraphic or other record communications), where necessary, and copies should be mailed to the following:

Purchaser: Frank Vitale  
27-17 216th Street  
Bayside, N.Y. 11360

Seller:

Engineering Chief Engineer  
Matters: Design and Construction  
Consolidated Rail Corporation  
12th Floor - 15 N. 32nd St.  
Philadelphia, Pa. 19104

Operations General Manager  
Matters: Consolidated Rail Corporation  
PO Box 400  
Selkirk, N.Y. 12158

Real Estate Manager Real Estate  
Matters: Real Estate  
744 Broad St., Suite 423  
Newark, N.J. 07102

B. A properly addressed communication or notice shall be deemed to have been properly given upon its delivery by hand or, if mailed, by registered or certified mail, return receipt requested, upon its deposit in the United States mails. A communication or notice sent by telegram, telex or other mode of record communication shall be deemed to have been given twenty-four (24) hours after the time of dispatch.

22. SECTION HEADINGS

The headings or captions of Sections in this Agreement are inserted for convenience only, are not part of this Agreement and shall not be deemed to limit, extend or modify the provisions contained in the Sections to which they relate.

23. NEW YORK LAW

This Agreement shall be governed by and construed in accordance with the laws of the State of New York.

24. SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon and shall inure to the benefit of the respective parties hereto, their legal representatives, successors and assigns.

25. GENDER

In all reference herein to any parties, persons, entities or corporation, the use of any particular gender or the plural or singular number, is intended to include the appropriate gender or number as the text of the within instrument may require.

26. CLOSING DATE

Upon the effective date of this Agreement, Purchaser shall begin to make such title searches and determinations as may be necessary to satisfy itself as to the nature and extent of the title to be delivered by Conrail. Upon completion of same in a form and manner reasonably satisfactory to Purchaser, and in compliance with Article 35, hereof, Purchaser shall give Conrail not less than ninety (90) days notice of a date for closing and a list of all documents required to be executed and delivered by the Seller; closing, however, shall occur on or before but not later than eighteen (18) months from date contract executed by all parties thereto. This notice shall specify the time and place for said closing, which shall be either the office of Conrail or the office of Purchaser or such other place as the parties may mutually agree upon in writing.

27. ADJUSTMENTS

The parties shall adjust any rentals, real estate taxes, special assessments, water and sewer rents, and any other taxes due on the demised premises or any other charges thereon as of the date of delivery of said Deed as the case may be. Conrail, insofar as it is able to, will convey the property free and clear of any and all tax liens at closing.

Conrail shall not be liable for any real estate broker's commission, agent's commission, finder's fee, real estate transfer taxes or recording fees, survey or title company fees in connection with this sale, except the New York State "Capital Gains Tax" referred to in Par.33, and Purchaser shall indemnify Conrail against any and all claims for such commission or fees assessed to this transaction, as a result of any transaction between purchaser and any such claimant.

28. SURVIVAL OF TERMS

The covenants, conditions, representations and warranties of this Agreement shall survive the delivery of the Deed and the Closing of Title to the premises in question and they shall apply to and bind the heirs, executors, administrators, successors, transferees, and assigns of the respective parties. Purchaser in any assignment or conveyance of this Agreement must for each assignment or conveyance assign this Agreement in its entirety for all or any portion of the premises acquired hereunder. This Agreement must be assigned in its entirety to any third parties, prior to any assignment or conveyance of this agreement in whole or in part, Conrail shall receive written notice of all assignments or conveyances, and must agree in writing to such assignment or conveyances except where assigned to a corporation or entity in which Frank Vitale is interested.

29. APPROVAL

ANYTHING HEREIN TO THE CONTRARY NOTWITHSTANDING, IT IS DISTINCTLY UNDERSTOOD AND AGREED THAT THIS INSTRUMENT DOES NOT CONSTITUTE A BINDING AGREEMENT OR IMPOSE ANY OBLIGATION ON CONRAIL OR ITS SUCCESSORS OR ASSIGNS OR ITS AGENTS, UNLESS AND UNTIL CONRAIL'S ASSISTANT VICE PRESIDENT REAL ESTATE OR HIS DULY AUTHORIZED REPRESENTATIVE, AS AUTHORIZED BY CONRAIL'S SYSTEM REAL ESTATE OFFICE, GIVES WRITTEN NOTIFICATION TO PURCHASER TO THE EFFECT THAT THIS TRANSACTION HAS RECEIVED THE NECESSARY APPROVAL AND AUTORIZATION OF CONRAIL'S SENIOR MANAGEMENT/OR BOARD OF DIRECTORS AND THAT CONRAIL IS LEGALLY BOUND.

30. SHORT FORM DOCUMENTS

Conrail and Purchaser, if necessary, agree to execute and record such short form memoranda as each of the parties may require with respect to the Title and any easements to be conveyed hereunder at any time after execution of this Agreement but prior to settlement.

31. NOTICE OF SALE

In the event Conrail intends to sell, lease or otherwise dispose of any part of its excepted space under or adjacent to the premises and easements granted hereunder to Purchaser, Conrail will first notify Purchaser in writing of such intention, in order to enable Purchaser to exercise any of its options under the Agreement.

32. USE RESTRICTIONS

Conrail and Purchaser agree, each with respect to its own interest, that the uses of the excepted space and premises shall be limited to those uses permitted under the applicable zoning laws governing the area in effect at the time of the execution of the Deed to Purchaser, except that the Purchaser shall have the right to apply for such zoning changes and variances as will be necessary to construct and maintain the improvements referred to in the plans and specifications of the Purchaser, in which case the premises may be used in accordance with such changes in zoning

or variances. Furthermore, it is agreed that the Purchaser shall have the right to cancel in the event that such zoning changes and variances applied for by the Purchaser shall not be granted or issued, and in such event upon cancellation of the contract all funds paid by the Purchaser as a down payment and on account of the purchase price shall be refunded to the Purchaser, and neither party shall have any further claim against the other. Other and different uses permitted by law in the future may be made of the said property provided that same shall not unreasonably endanger or interfere with the reasonable use and enjoyment of the property by Conrail and Purchaser; provided such other and different uses do not tend to subject the premises to wear, depreciation, unreasonable risk of damage or deterioration greater than the uses permitted on the date of this Agreement.

### 33. TAXES

Purchaser shall assume and pay all New York City Realty Transfer tax fees and the filing fees for the recording of any and all instruments connected with this transaction. The New York State Capital Gains Tax, if any, shall be paid by the Seller. All tax returns form shall be prepared and executed by the respective parties required by law to do so. The recording costs and realty transfer fees mentioned herein refer only to the conveyance between Purchaser and Conrail of the property as set forth in "Schedule A" of this Agreement.

34. SURVEYS AND DESCRIPTIONS

Purchaser shall and will furnish to Conrail a description and reproducible survey plan for Conrail's use in preparing the necessary Deed and easements for the areas described in this Agreement and Schedules. Such plan and description are to be furnished to Conrail's Real Estate Department in order that they may be verified and checked. As soon as possible after the execution of this Agreement, and upon the effective date, Purchaser with the cooperation of Conrail, shall act to obtain the approval<sup>if required</sup>/of this entire Agreement and the conveyance proposed thereunder by the new York Public Utility Commissioner and/or the New York Department of Transportation and any other approvals of other agencies that may be required. Purchaser shall be granted a period of one-hundred twenty (120) days to obtain said approval or such longer time as it reasonably deems necessary to effectuate said transaction. In the event Purchaser cannot obtain said approval, it shall have the option to terminate this Agreement in accordance with the express terms hereof, and be entitled to the return of all sums paid on account of the purchase price.

35. CONSENT

Wherever this Agreement so requires the consent of either party for any purpose, such consent will not be unreasonably or arbitrarily withheld by either party. The parties hereby impose a standard of reasonableness with respect to any consent required under this Agreement and Schedules.

36. CHIEF ENGINEER - DESIGNATION

For all purposes of this Agreement, the reference to Conrail's Chief Engineer shall refer to and designate Chief Engineer - Design and Construction or any successor in office thereto.

37. NOTICE OF CLAIMS

A. It is understood and agreed that in the event of any claim by Conrail under the indemnity provision of this Agreement (Article 13), Conrail, as a prerequisite of making such claim, must give written notice of the matter to be indemnified against to Purchaser after the occurrence of the act giving rise to said claim shall have come to Conrail's knowledge.

B. With respect to any such claim for which Conrail seeks indemnity from Purchaser pursuant to this Agreement, Purchaser reserves the right to employ attorneys and other representatives of its own selection to appear, defend, compromise and/or settle any action which may be instituted in the matter.

38. FITNESS AND PURPOSE

Purchaser acknowledges that it is purchasing the premises as is and acknowledges that Conrail has not made any representations or warranties, express or implied, as to value, use, condition, design, quality, durability, operation or fitness for use or purpose of the premises or any portion thereof, except as expressly set forth herein.

39. FIBER OPTICS

Conrail reserves, with the right of assignability, exclusive and perpetual sub-surface easements for all rights and privileges to lay, erect, construct, install, use, operate, maintain, repair, renew, replace and remove fiber optics cables for communication purposes within the limits of the excepted space; together with the right of ingress and egress over such excepted space for the exercise of the aforesaid rights and together with such surface easements necessary for the appurtenances, of said fiber optic cables.

40. GENERAL DEED PROVISIONS

In addition to the pertinent clauses contained in this Agreement and Schedules the provisions in the attached Schedule "C" (a) thru (bb) shall appear in the Deed of Consolidated Rail Corporation, as "Grantor", conveying to Frank Vitale, as "Grantee", the premises in the vicinity of 37th Avenue and Broadway to Woodside Avenue and 72nd Street and generally described in "Schedule A" hereof. In the event that there is any inconsistency between this Agreement of Sale and Schedule "C", the terms of Schedule "C" shall govern.

*Handwritten signature/initials*

41. ASSIGNMENT

In the event an assignee of the Purchaser shall assume the obligation hereunder, then the Purchaser shall be relieved of all further liability under this agreement.

42. The premises shall be delivered free of any tenancies and all sign structures removed, except those in use of the seller required for the operation of the rail lines, and exception further that in the event Purchaser shall desire to have the tenancies of any existing advertising signs now on the premises remain, then seller shall assign same to the Purchaser and the rental shall be apportioned between seller and Purchaser as of the date of closing, and the seller shall thereupon be relieved of the obligation to remove said respective sign or signs and to cancel said respective leases.

Seller represent said leases are cancellable by seller, at any time and true copies of same are to be delivered to Purchaser on signing hereof. upon thirty (30) days notice to Transportation Displays, Inc.

ATTEST:

CONSOLIDATED RAIL CORPORATION

Robert J. Tracy Joseph Lee SELLER  
Manager-Real Estate

ATTEST:

FRANK VITALE

Frank Vitale PURCHASER

FRANCIS VITALE

Francis Vitale PURCHASER

SCHEDULE "A"

Proposed Description of the premises to be Conveyed and Proposed Survey Plan.

NOTE: The survey plan is subject to the final review and approval of Grantor and description is a preliminary description, also subject to Grantor's final review and approval.

SCHEDULE "A" (page 1 of 2)

General description of property to be conveyed:

All of those three (3) certain parcels of land along Conrail's right of way in the Town of Woodside, Borough and County of Queens, City and State of New York, known as and by the tax descriptions on the Tax Map of the Borough and County of Queens as Parcel 1 Block 1282 Lot 1, Parcel 2 Block 1303 Lot 1 and Parcel 3 Block 1312 Lot 1, as shown on plan prepared by A. H. Salkowitz, Architect, dated May 15, 1979 and designated thereon as "Parcel 1", which consists of approximately 87,400 square feet situated north of Roosevelt Avenue and known as Tax Block 1282 Lot 1, and as "Parcel 2", which consists of approximately 77,000 square feet located between 41st Avenue and Roosevelt Avenue and known as Tax Block 1303 Lot 1, and as "Parcel 3", which consists of approximately 140,125 square feet lying south of 41st Avenue and known as Tax Block 1312 Lot 1.

SCHEDULE "A"

Plan Prepared by: A. H. Salkowitz, Architect

Issued: August 6th, 1984 and August 10th, 1984

Together with easements under the space described as Volume I, II and III for supporting columns and any other appurtenances required.

Subject to the covenants and obligations of Frank Vitale or Assignee with respect to construction, repair and maintenance of any structure, structures, supporting columns and their appurtenances.

~~The elevation of each point referred to in the foregoing description and elsewhere in this Indenture refers to New York Geodetic Control Datum mean sea level at based on Monument No.                      elevation of~~

**SCHEDULE "B"**

**Proposed Preliminary Construction Plans of**

**Note:** Plans are preliminary in nature and subject to final review and approval of Grantor.

**SCHEDULE "C"**

**Proposed Construction Agreement**

SCHEDULE :C:

Proposed Construction Agreement

This Construction Agreement made this            day of            , 19            ,  
by and between CONSOLIDATED RAIL CORPORATION, having its offices at Suite 423,  
744 Broad Street, Newark, N.J. 07102 (hereinafter referred to as Conrail or  
Seller), and FRANK VITALE, having a mailing address of 27-17 216th Street,  
Bayside, New York (hereinafter referred to as Purchaser):

W H E R E A S, Purchaser has a Contract for the acquisition of  
the premises owned or controlled by Seller pursuant to an Agreement dated  
the            day of            , 19            (hereinafter referred to as a Primary Agree-  
ment) to which this Agreement is appended as Schedule "C"; and

W H E R E A S, the parties hereto are desirous of facilitat-  
ing the construction of the planned improvements in conjunction with said  
Primary Agreement;

NOW, THEREFORE, in consideration of the mutual covenants herein contained  
and for other good and valuable consideration, it is hereby mutually A G R E E D  
as follows:

1. It is the basic and fundamental intent of the parties that whenever any construction, reconstruction, demolition, repair or maintenance work or any other work is contemplated by either party for the purpose of fulfilling its obligation or exercising its rights under the Primary Agreement, both parties will cooperate in good faith to provide for the expeditious and efficient prosecution of the work to be performed by each of them. All of such work shall be coordinated by the parties to the fullest extent practicable to the end that it be done in the most economical manner possible. Each party shall use its best efforts to keep interference with the property and operation of the other to a minimum.

2. (A) All notices shall be written and shall be given in a manner provided for in Article 21 of the Primary Agreement.

(B) Any place where consent is requested, it is hereby deemed that said consent will not be unreasonably withheld.

3. Purchaser will construct improvements, including but not limited to buildings, on the support easements acquired and in the premises purchased pursuant to the Primary Agreement and as follows:

(A) All plans and specifications for supporting members, horizontal and vertical clearances shall be subject to the approval of Conrail's Chief Engineer in accordance with the standards set out in the Primary Agreement and Schedules.

(B) Any construction shall be in accordance with plans referred to in paragraph (A) of this Section, and standards as may be set out in the Primary Agreement and Schedules.

4. (A) Purchaser may commence construction of the improvements upon the property described in the Primary Agreement and Schedules at any time upon execution of all agreements, and approval of plans by Chief Engineer, unless prevented by change in any statute or municipal ordinances or by other cause beyond the control of Purchaser. Purchaser will comply with such schedules of construction as may hereinafter be devised, unless prevented by fire, lockout, strike, act of war, or enemy hostilities or action, or other causes of casualty, beyond the control of Purchaser, including but not limited to delay in the commencement of the construction as aforesaid; and, in the case of failure to complete the improvement to be constructed on the parcel of land described in the Primary Agreement and Schedules within a reasonable time and by reason of any and all causes contained in the Primary Agreement and Schedules appended hereto, Purchaser shall have the construction completed and the improvement ready for occupancy for its contemplated use within such period as shall be equal to the time that Purchaser shall have been so delayed by any and all aforesaid causes.

(B) Purchaser has the right to construct the improvements described herein in stages. The amount of construction work to be performed during each of the stages contemplated shall be within the discretion of Purchaser. Conrail's Chief Engineer shall be provided with the proposed scheduling for each stage of construction, at least ~~thirty (30)~~ <sup>sixty (60)</sup> days prior to the proposed commencement of construction to allow for proper review and approval.

5. Purchaser may use Conrail's property in a manner which may affect or temporarily disrupt the operation of the railroad, on one or more of the tracks located on Conrail's property, subject to schedules submitted to and approved by Conrail's Chief Engineer and when practical from a railroad operating standpoint.

6. That in the event of any dispute between the parties relative to the provisions hereof the same shall be settled by arbitration as provided for in the Primary Agreement and Schedules.

7. That wherever herein the masculine gender is used, the masculine gender shall include the feminine and neuter genders, and vice versa, as the context shall require.

8. That the construction contemplated shall be performed in a manner consistent with the laws of the State of New York and any safety or other regulations promulgated by Conrail or an appropriate authority .

9. Pursuant to the insurance requirement specified in Article 15 (a) (ii) of the Agreement of Sale (Primary Agreement) between Conrail and Purchaser, Purchaser agrees to cause its contractor or contractors engaged in any building or construction of any facility or appurtenances to obtain and keep in effect during any construction, repair, renewal or removal, a Railroad Protective Liability Insurance Policy (AAR-AASHO FORM) issued to Conrail with the limits set forth in Article 15 of said Agreement of Sale.

Likewise, similar insurance shall be provided in reasonable amounts in the event of any future work in connection with any building, use or other improvements involving the area specified in Schedule "A" or referred to in Primary Agreement or Schedules.

10. (A) All costs incurred by Conrail in connection with Purchaser's construction shall be reimbursed to Conrail by Purchaser, including, but not limited to, construction, inspection, engineering review, flagmen, watchmen and guards reasonably required during construction for the protection of the transportation operations of Conrail. Purchaser agrees to reimburse Conrail for (1) the wages of Railroad Company forces at the prevailing rate of wages paid, plus a percentage of total amount of such wages at applicable burden rate to cover the actual cost of public liability

and employer's liability (force account) insurance, vacation allowances, paid holidays, health and welfare insurance, and such additional labor cost as may be necessary to comply with the provisions of existing laws, including payroll and other taxes covering Railroad Unemployment, Railroad Retirement and Social Security; (2) the cost of material necessary to perform such Railroad Company force account work, plus 15% of such cost for handling, storage expense and accounting, less the salvage value of such material as can be conveniently removed upon completion of the work; and (3) a percentage of gross labor, material, etc. based on a burden rate covering administrative relief.

(B) Reimbursement by Purchaser to Conrail will be made in estimated monthly progressive payments at 100% of Conrail's estimated expenditures subject to adjustments based on actual costs as determined by Conrail's Vice President and Controller.

Upon completion of any work by Conrail, final billing prepared in accordance with Conrail's accounting and billing procedures (Conrail billing supporting detail) will be submitted to Purchaser within ninety (90) days or as soon thereafter as practical, and Purchaser will reimburse Conrail within sixty (60) days, subject to adjustment for any differences developed by Purchaser and agreed to by Conrail's Vice President and Controller.

(C) Reimbursement will be made for expenditures for direct labor, including retroactive wage adjustments when paid, and any other payments Conrail is obligated to pay under union agreement, material, small tools, fuel and supplies, travel and business expenses, rentals of equipment, and payments to others incurred in performing agreed upon work. Standard new material taken from stock shall be priced in accordance with the pricing formula for railroad's established carrying value in effect in the account period when reported and/or charged. Non-standard material purchased and delivered to the site shall be priced at identified invoiced costs. Any freight charges payable to others shall be included in the cost billed. Standard fit material taken from or replaced in stock shall be priced at 75% of the applicable price for new material. Scrap will be priced at average current market value for the month in which reclaimed.

Purchaser shall pay to Conrail the ICC prescribed public tariff rates for freight transportation where Conrail transports over its own lines material and equipment for work to be performed. Purchaser shall reimburse Conrail for freight transportation upon receipt of freight bills, in accordance with the prescribed governmental regulations for payment of freight transportation.

(D) Reimbursement for use of Conrail owned or leased machinery, highway vehicles, etc., excluding costs for equipment leased specifically for the project, and for Conrail's work trains, locomotive cranes, cars and other rolling stock used on the work will be at standard rates specified by Conrail's Vice President and Controller. The minimum rental charge will be for one day.

(E) Reimbursement will include, but not be limited to, the cost of the following:

- a. Block operators and extra dispatchers
- b. Engineering services
- c. Site inspections
- d. Switchtenders
- e. Flagmen
- f. Surveying
- g. Security
- h. Foremen and assistants
- i. Special duty personnel
- j. Camp car cooks and attendants
- k. Crossing watchmen
- l. Field inspectors, production engineers and supervisors signal construction
- m. Non-revenue clerks assigned to project in office of controller
- n. Travel and business expenses of individuals included in this section

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals or request these presents to be signed by their proper corporate officers and their proper corporate seal to be hereto affixed the day and year first above written.

ATTEST:

CONSOLIDATED RAIL CORPORATION

Robert J. Tracy

Angela H. Cook

ATTEST:

FRANK VITALE

\_\_\_\_\_

Frank Vitale

FRANCIS VITALE

Francis Vitale



**CONRAIL**



*Hand -  
Mr. Crane is  
the Chairman*

CONSOLIDATED RAIL  
CORPORATION  
510 THORNALL ST  
SUITE 240  
EDISON, N.J. 08837

TELE. (201) 906-3000

**ROBERT J. TRACY**

ASSISTANT MANAGER REAL ESTATE  
REAL ESTATE DEPARTMENT

## MEMORANDUM

CONRAIL



|                                                       |  |                      |
|-------------------------------------------------------|--|----------------------|
| TO Michael D. Sims                                    |  | DATE Dec 4 1986      |
| 1434, Six Penn Center                                 |  | FROM John F. Jaeger  |
| Philadelphia, PA                                      |  | 901, 1528 Walnut St. |
| SUBJECT Woodside/Queens, New York -- Proposed sale to |  | PHONE                |
| Frank and Francis Vitale -- Case No. 68174            |  |                      |

Attached is a Delegation of Authority to complete a sale of property in Woodside, Queens Borough and County, New York for \$900,000 to Frank Vitale and Francis Vitale (father and son).

The property proposed to be sold contains 7.03 acres of land on Conrail's New York Connecting Branch (Bay Ridge Line) between 37th Avenue and Woodside Avenue. The sale area is bounded by the Brooklyn-Queens Expressway and a residential area. Conrail will reserve the track, a 75 foot wide by 22 foot high (above top of rail) easement and fiber optic rights. The purchaser proposes to build a residential complex adjacent to and above the sale area.

The necessary departments have approved this sale and the consideration being obtained represents a fair value. I recommend approval. If you concur, please forward this transaction to Mr. Crane.

FCF/nls  
attachment(s)

Date: December 5, 1986  
To: L. Stanley Crane  
From: Michael D. Sims

*MD Sims 12/5/86*

I approve.

Date: December 5, 1986  
To: John F. Jaeger  
From: L. Stanley Crane

*JS*

I approve.

cc: Allan Schimmel

cc: G. R. Scioli

J. T. Sullivan -- A copy of the agreement for development of the area rights is attached.

D. C. Kozior

1 2

R.E. Case No. 68174

DELEGATION OF AUTHORITY--CONVEYANCES

On the basis of the authority conferred upon me by the Board of Directors of Consolidated Rail Corporation (the "Corporation") at their meeting on August 10, 1976 to conduct the business and affairs of the Corporation, I hereby delegate to the Vice President-Information Systems and Administrative Services, and to the Assistant Vice President-Real Estate, or either of them, the authority to execute and deliver on behalf of the Corporation any and all documents necessary or desirable to transfer any and all right, title and interest in and to approximately 7.03 acres of the Corporation's property, between 37th Avenue and Woodside Avenue in the vicinity of 73rd Street, in Woodside, Queens Borough and County, New York, for a consideration of \$900,000 to Frank Vitale and Francis Vitale, or the nominee thereof.

Dated: 12-5-86

  
L. Stanley Crane, Chairman  
and Chief Executive Officer



May 26, 1999

Consolidated Rail Corporation —  
310 Thornall Street, Suite 390  
Edison, N.J. 08837

Attention: Robert J. Tracy

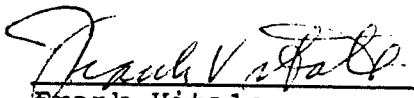
SUBJECT: Agreement dated as of February 20, 1986 between CONSOLIDATED  
RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE,  
Purchaser, for Case No. 68174.

This will confirm discussions regarding the purchase of the property  
referred to in the above contract to the effect that approval has been  
given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of  
the Purchaser to cancel the contract and obtain the return of the  
deposit as provided therein is extended to August 31, 1999.
2. Paragraph 26 is now modified so that the Closing of the Title shall  
occur on or before AUGUST 31, 1999 and is further modified that  
the Purchaser shall give Conrail not less than thirty (30) days  
notice of a date for Closing, instead of the date as now provided  
in Paragraph 26 of said contract.
3. In all other respects, the provisions of said contract shall  
remain in full force and effect.

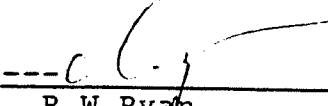
Please indicate your agreement and approval of the above modifications  
by signing on behalf of Conrail in the lower portion here indicated.

Very truly yours,

  
Frank Vitale

  
Francis Vitale

CONSOLIDATED RAIL CORPORATION

By:   
R.W. Ryan  
Director-Real Estate

Dated 5/28/99



**FRANK VITALE AND FRANCIS VITALE**  
**27-17 216<sup>th</sup> Street**  
**Bayside, New York 11360**

December 27, 2001

**Registered Mail – Return**

**Receipt Requested**

CSX Corp.  
510 Thornall Street  
Suite 42  
Edison, New Jersey  
Attention: Mr. Robert Tracy

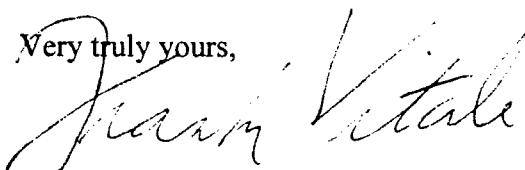
Gentlemen:

Reference is hereby made to a certain Agreement made February 20, 1986 between Consolidated Rail Corporation (predecessor in interest to CSX Corp.), as Seller and Frank Vitale and Francis Vitale, as Purchaser regarding the sale of certain real property located in Woodside, Queens, New York (said Agreement as the same has been amended from time to time is hereinafter referred to as the "Contract"). Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Contract.

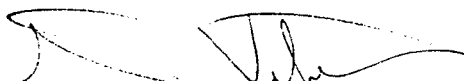
Pursuant to Section 26 of the Contract, Purchaser hereby sets April 1, 2002 as the closing date. The closing will take place at 10:00 a.m. at the offices of RubinBaum LLP, 30 Rockefeller Plaza, New York, New York. We will forward to you shortly a copy of the title report together with a list of closing documents.

Notwithstanding the foregoing, the closing may be subject to the parties obtaining the necessary approval/release required under Section 18 of the Transportation Law of the State of New York (the "Transportation Release"). We are prepared to take the steps necessary to obtain the Transportation Release, if necessary, however, we will need your cooperation as the owner of the Property. We look forward to closing this transaction with you.

Very truly yours,



Frank Vitale



Francis Vitale



Ronald Greenberg  
Michael J. Weinberger \*  
Martin R. Gold  
Stephen A. Marshall  
Edward Klimerman  
Allan M. Rosenbloom  
Thomas G. Barrett  
David A. Mandel, P.C.  
Alvin J. Goldman \*  
Stephen L. Solomon  
Matthew L. Lifflander  
Raymond J. Heslin  
Martin J. Schwartz  
Michael J. Emont  
Martin P. Michael  
Paul A. Gajer  
Paul V. LiCalsi  
Jane G. Stevens  
Brit L. Geiger \*  
Denise M. Tormey  
Robert W. Cockren \*†  
Arlene G. Dubin  
Robert B. Zimmerman  
Paul H. Aloe †  
Christine Lepera  
Marina Rabinovich  
Richard G. Primoff  
Mark S. Lafayette  
Norman Alpert  
Christine A. McGuinness  
Richard M. Zuckerman  
•

*Of Counsel*

Irving Constant, P.C.  
Burton R. Rubin, P.C.  
Carl Robert Aron  
Philip Dropkin  
Paul Katcher  
Daniel A. Besdin  
Richard I. Reich  
Carol R. Schepp

RUBINBAUM<sub>LLP</sub>

*Attorneys at Law*

30 Rockefeller Plaza  
New York, New York 10112  
212.698.7700 fax: 212.698.7825  
www.rubinbaum.com  
direct dial: 212.698.7878  
cam@rubinbaum.com

*New Jersey Office*

820 Morris Turnpike, Short Hills, NJ 07078  
973.564.6480 fax: 973.564.6493

April 10, 2002

Federal Express; Via Facsimile

Mr. Jack E. Barber  
CSX Real Property  
2 North Charles Street  
11th Floor  
Baltimore, MD 21201-3814

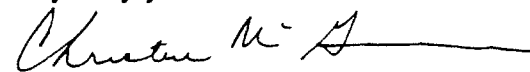
Re: Sale of Woodside, Queens Property

Dear Jack:

Reference is hereby made to a certain Agreement made February 20, 1986 between Consolidated Rail Corporation (predecessor in interest to CSX Corp.), as Seller and Frank Vitale and Francis Vitale, as Purchaser regarding the sale of certain real property located in Woodside, Queens, New York (said Agreement as the same has been amended from time to time is hereinafter referred to as the "Contract"). Capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Contract.

Pursuant to Purchaser's letter to Seller dated December 27, 2001, Purchaser set April 15, 2002 as the Closing Date. Since that time, we have furnished you with documentation relating to the transaction so that you can re-create Seller's file with respect to the Property. Please advise at this time if Seller intends to proceed with the closing on April 15, 2002.

Very truly yours,



Christine A. McGuinness

cc: Francis Vitale  
Richard Zuckerman, Esq.





2 North Charles Street, 11<sup>th</sup> Floor  
Baltimore, Maryland 21201  
(410) 613-6156  
FAX: (410) 613-6151  
Kevin\_Hurley@CSX.com

D. Kevin Hurley  
Assistant Vice President

April 11, 2002

Ms. Christine A. McGuinness  
RubinBaum, LLP  
30 Rockefeller Plaza  
New York, New York 10112

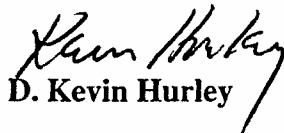
Dear Ms. McGuinness:

This will respond to your letter dated April 10, 2002 to Mr. Jack Barber of this office and confirm our telephone conversation today regarding your client, Mr. Vitale, and his desire to purchase certain air rights over New York Central Lines, LLC right of way in Queens, New York.

As I explained, we have not been able to locate Bob Tracy's file on these negotiations. You very graciously provided a copy of the original agreement of sale and documentation suggesting that Mr. Tracy continued to negotiate with Mr. Vitale after the original agreement of sale expired in August, 1999. We have not been provided with or know of any agreement in existence, which would require New York Central Lines to convey this property at this time. Unfortunately, we are not currently in a position to progress a sale of these air rights but would not rule out such a conveyance at some time in the future.

You mentioned that you would discuss this matter with your client and decide your position on this matter. We would appreciate being advised of any decisions you reach.

Sincerely,

  
D. Kevin Hurley

CC: Mr. Jack Barber





2 North Charles Street, 11<sup>th</sup> Floor  
Baltimore, Maryland 21201  
(410) 613-6156  
FAX: (410) 613-6151  
Kevin\_Hurley@CSX.com

D. Kevin Hurley  
Assistant Vice President

May 24, 2002

REGISTERED MAIL, RETURN RECEIPT REQUESTED

Frank Vitale and Francis Vitale  
27-17 216<sup>th</sup> Street  
Bayside, New York 11360

Re: Agreement dated 20<sup>th</sup> February 1986 by and between Consolidated Rail Corporation ("Seller") and Frank Vitale & Francis Vitale ("Purchaser"), as amended by agreement date May 26, 1999 (as so amended, the "Contract")

Gentlemen:

As you are aware, New York Central Lines, LLC has succeeded to the interest of Seller under the Contract by assignment. All capitalized terms used herein and not otherwise defined shall have the meanings for such terms set forth in the Contract. This letter notice is given in conformity with Contract Article 21(B), and shall serve to confirm, or otherwise put Seller on notice, of the following:

1. Seller has never delivered to Purchaser the notice in the form and manner required by Article 29 of the Contract, which delivery is a pre-requisite to making the Contract binding on Seller; consequently, the Contract is not binding on Seller at the date of this notice.
2. Purchaser failed to close title to the real property described in the Contract on or before August 20, 1987 (as required by Article 29 of the unmodified Contract), and once more failed to close title on or before August 31, 1999 (as required under Paragraph 2 of the modification agreement dated May 26, 1999).
3. Purchaser failed to send a timely notice to reclaim its \$90,000 Contract deposit by the final date set for such notice in the 1999 modification agreement, and such deposit is now forfeited to Seller in accordance with Contract Articles 3(D) and (E) as modified by Paragraphs 1 and 3 of the modification agreement.
4. After sixteen years of negotiations, the parties have failed to agree on the material terms of the Contract, including but not limited to total consideration, the description of the property conveyed and retained by Seller, and the insurance coverage for Seller.
5. Seller hereby abandons negotiations under the non-binding Contract.

Sincerely,

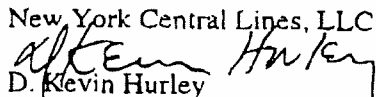
New York Central Lines, LLC  
  
D. Kevin Hurley

Exhibit 5

Arbitration Award

PRIVATE ARBITRATION AWARD

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Frank Vitale and Francis Vitale

Claimants

Vs

Prof. Robert M. Zinman  
Arbitrator

New York Central Lines, LLC, as Successor  
To Consolidated Rail Corporation,

Respondent

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This dispute involves an agreement (the "Agreement") dated February 20, 1986 between Consolidated Rail Corporation ("Conrail"), seller, and Frank Vitale and Francis Vitale ("Vitale"), purchaser, for the sale and purchase of seven acres of real property in the Borough of Queens, New York City. Although "New York Central Lines," now CSX, succeeded to the interest of Conrail on June 1, 1999, the seller under the Agreement will be referred to herein as "Conrail" except where specific reference is being made to CSX.).

This dispute involves, primarily, two questions: (1) was a binding contract for the sale of real estate entered into between Conrail and Vitale? (2) If the Agreement is or became a binding contract, is that contract still effective? It is my conclusion that the answer is yes to both questions.

1. *Was the Agreement a binding contract for the sale of the real estate?*

When executed, the Agreement did not constitute a binding contract. While the Agreement had all the essential elements of a contract – parties, agreement to sell and to buy, description of the property, terms of the sale and signatures of the parties,<sup>1</sup> Article 29 constituted a condition precedent to the effectiveness and enforceability of the Agreement. It provided that:

this instrument does not constitute a binding agreement or impose any obligation on Conrail . . . unless and until. Conrail's Assistant Vice President Real Estate or his duly authorized representative, as authorized by Conrail's System Real Estate Office, gives written notification to Purchaser to the effect that this transaction has received the necessary approval and authorization of Conrail's Senior Management/or Board of Directors and that Conrail is legally bound.

On or about December, 1996, Robert J. Tracy, Assistant Manager Real Estate, in Conrail's Real Estate Department, who had been charged with the duty to, and did conduct the contract negotiations with Vitale for most of the period prior to that date (but without authority to approve the Agreement under Article 29), delivered to Vitale a memorandum from John V. Jaeger, then Assistant Vice President Real Estate,<sup>2</sup> dated December 4, 1986, to Michael D. Sims, Vice President of Information Systems, describing the Agreement, stating that the "necessary departments have approved this sale," and that the sale price represented a "fair value." The memorandum recommended approval. Below the memorandum are the words "I approve" signed by Mr. Sims on December 5, 1986, and below that, "I approve" initialed by Mr. L. Stanley Crane, Conrail's Chairman of the Board on December 5, 1986. Attached to the memorandum was a delegation of authority dated December 5, 1986, from Mr. Crane to the Vice President-Information Systems and Administrative Services and to the Assistant Vice

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<sup>1</sup> See MILTON R. FRIEDMAN, CONTRACTS AND CONVEYANCES OF REAL PROPERTY, § 1.2(b) (5<sup>th</sup> ed.1991).

<sup>2</sup> The titles are obtained from the testimony of Robert Ryan, June 16, 2004, Transcript at 290.

President – Real estate, or either of them, to execute all documents necessary or desirable to effectuate the transfer. Stapled to the memorandum was Mr. Tracy's card on which he wrote: "Frank [apparently Frank Vitale]—Mr. Crane is the Chairman."

Conrail's argument that Article 29 was not complied with is based primarily on the fact that Mr. Tracy was not authorized to "give written notification to Purchaser" of the approval. Indeed, Conrail claims that it was the internal policy of that organization not to communicate its approval until the closing was about to take place,<sup>3</sup> which would leave Conrail free to back out of any agreement at any time prior or almost prior to the closing. Assuming this was the policy of Conrail, the argument appears, at best, to be an untenable one for Conrail to make, given the fact that Mr. Tracy was the person authorized to deal with Vitale and the memorandum he delivered clearly showed that approval was given by the appropriate officers of Conrail, and no evidence was offered to indicate that any such policy of Conrail was communicated to Vitale, who incurred substantial expenses after the approval was received. At worst, the argument, if successful, would allow Conrail to commit virtual fraud (which I am sure it would not intentionally do) on prospective purchasers by submitting evidence of approval and then claiming that the messenger did not have authority to make the delivery.

In the instant case, we have an unusual situation, since after Mr. Tracy's departure, Conrail maintains that all of Tracy's files, and all of Conrail's files in connection with this transaction – at its home office, engineer's office and at the offices of anyone else who dealt with the proposed sale – had disappeared. Mr. Robert Ryan, Director of Real Estate and Conrail's only witness, attributed this to New York Central Lines succeeding Conrail, downsizing, and the cleaning out of Tracy's office. He agreed

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<sup>3</sup> Testimony of Robert Ryan, June 16, 2004, Transcript at 295.

that “there probably are” e-mail messages at least in more recent times, but he stated that “I don’t have any of those.”<sup>4</sup> No witness was called who had been involved in the details of the transaction.<sup>5</sup> As a result, even if we were to accept Conrail’s argument, we do not have any evidence that the policy described by Mr. Ryan was applied in this case, or if it were, that Vitale had been informed of the policy, or even that Mr. Tracy had not been authorized in this case to deliver the approvals.<sup>6</sup> It would seem reasonable for the Vitale’s to have assumed that Tracy had at least the authority to deliver the approvals given by the appropriate officers of Conrail.<sup>7</sup>

Conrail contends, however, that the Agreement contains other conditions precedent to the binding nature of the Agreement. First, Conrail claims that Vitale failed to obtain approval of the transaction by the Department of Transportation as required by Article 34 of the Agreement. That article states, in part:

Purchaser with the cooperation of Conrail, shall act to obtain the approval if required of this entire Agreement and the conveyance proposed thereunder by the New York Public Utility Commissioner and/or the New York Department of Transportation and any other approvals of other agencies that may be required. Purchaser shall be granted a period of one-hundred twenty (120) days to obtain said approval or such longer time as

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<sup>4</sup> *Id.* at 317-18.

<sup>5</sup> Mr. Ryan testified that his involvement with the transaction was “not much other than signing the extension letters periodically to brief me on the situation periodically and especially at the time of signing these extensions.” He also stated that he was only “very vaguely” familiar with the rail line that is at issue in the project. Testimony of Robert Ryan, June 16, 2004 at 288-89.

<sup>6</sup> In prior litigation in this case on the issue of whether this arbitration should be held, the court stated that Mr. Tracy’s delivery of these documents constituted substantial compliance with Article 29. There is disagreement between the parties as to whether this determination became the law of this case. I need not consider whether that statement precluded a different determination in this arbitration, since my conclusion is consistent with the determination of the court.

<sup>7</sup> I do not agree with Conrail’s argument (Transcript August 4, 2004 at 49) that even if the approval of the transaction required by Article 29 were given and delivered, the requirements of Article 29 would still not have been met because the approvals and delegation of authority to execute documents did not specifically state that “Conrail is legally bound.” I believe that Conrail became legally bound upon delivery of the approval. While the use of the conjunctive creates an ambiguity, I would construe that ambiguity in favor of Vitale, not only because the contract was drafted by Conrail (Transcript June 15, 2004, Testimony of Frank Vitale, at 56) but also because the conjunctive would not alert a reasonable person to the fact that the delivered approvals would not be sufficient to meet the Article 29 requirements unless it contained the above quoted words.

it reasonably deems necessary to effectuate said transaction. In the event Purchaser cannot obtain said approval, it shall have the option to terminate this Agreement in accordance with the express terms hereof, and be entitled to the return of all sums paid on account of the purchase price.

Conrail is, of course, correct that without a Department of Transportation release, to the extent required by Section 18 of the Transportation Law, the closing cannot be held. Thus the release may be a precondition to closing. However it is not a precondition to the contract being considered binding on the parties. Nothing in Article 34 is similar to the requirements of Article 29 in making the obtaining of the governmental approvals a condition to the effectiveness of the Agreement.

While Conrail points out that Article 34 gave Vitale 120 days to obtain the approval, Article 34 also provided that Vitale shall have such extended time as Vitale "reasonably deems necessary to effectuate the transaction." Although the obtaining of approval within the required periods may simply be a precondition to the ability of Vitale to exercise the option to terminate the Agreement and become entitled to a return of the deposit as provided by that section, Conrail may be contending that the failure to obtain the approval within the 120 day period constituted a default on the part of Vitale under the Agreement. Such a possibility will be discussed in connection with the discussion in part 2 of this Opinion dealing with whether the Agreement is still effective between the parties. For the purposes of this part, I find that the Agreement is effective notwithstanding the failure to obtain Department of Transportation approval.

No other of the provisions cited by Conrail in my opinion could constitute a precondition to the Agreement's effectiveness. I am somewhat bewildered by the gratuitous statement in the letter of December 11, 1987 from Vitale's previous counsel, Brown & Wood, to the effect that the Article 29 approval had not been obtained from

Conrail.<sup>8</sup> A later letter from Brown & Wood dated April 16, 1990, clearly stated that the consent had been given<sup>9</sup> and that statement does not appear to have been controverted by Conrail at the time. It is unclear why the first statement was made, and it may be, as suggested by present counsel to Vitale,<sup>10</sup> that it was simply a mistake. Whether a mistake or not, the statement was incorrect and I so find. I conclude that the Agreement became a binding contract as of the date of the delivery of the Conrail approvals by Mr. Tracy.

## *2. Is the Agreement Still Effective?*

It is, at best, unusual for a contract of sale of real estate to be extended as long as this one. However parties to the contract have the power to extend a contract for sale by agreement and either party has a right to obtain an adjournment before time is made the essence of the contract.<sup>11</sup> In the instant case, the contract was extended numerous times by written agreement, the last written extension running out at the end of August 1999. Thereafter there were no written extensions of the agreement. On December 27, 2001, Vitale sent notice to Conrail on December 27, 2001 setting April 1, 2002 as the closing date. On April 11, 2002, Conrail stated that it did not know of any agreement requiring a conveyance of the property and that it was not in a position to "progress a sale." The issue then is whether the Agreement was still effective as a contract of sale when Vitale sent the notice and Conrail replied, and whether it remains in effect as of this date.

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<sup>8</sup> Respondent's Exhibit 72.

<sup>9</sup> Claimant's Exhibit 36.

<sup>10</sup> Transcript August 4, 2004 at 29.

<sup>11</sup> "Although time is not generally of the essence, where the date scheduled for closing has passed, a seller may make time of the essence by giving the purchaser notice to this effect." MILTON FRIDEDMAN, *CONTRACTS AND CONVEYANCES OF REAL PROPERTY*, § 12.1(c) (5<sup>th</sup> ed. 1991). No time is of the essence notice was ever sent from Conrail to Vitale.

Time is not of the essence in a contract for the sale of real estate unless the contract so provides or the contract is effectively made so by notice<sup>12</sup> In this case no party has made time of the essence and there is no written extension of the contract beyond August 31, 1999. Thus it is necessary to consider whether there is some evidence (i) that the parties had expressly or impliedly abandoned or otherwise terminated the contract, or (ii) that there was a default by Claimant that went to the essence of the contract, and relieved Respondent of its obligations thereunder.

At the expiration of the last written extension on August 31, 1999, Vitale contends that Conrail requested that the closing be extended for another five years, that Vitale agreed to such an extension, that, at the suggestion of Conrail's representative, Robert Tracy, the parties proceeded to negotiate an omnibus extension agreement dealing with other proposed modifications of the Agreement, and that these negotiations continued until Mr. Tracy was no longer employed by Conrail, and communications ceased. This contention is backed by Vitale's internal memoranda and drafts of proposed extension and modification agreements. Conrail does not dispute these contentions, and since, as previously discussed, all its files have disappeared, it offers no evidence to the contrary. Although Vitale did not act with alacrity, I find no evidence that Vitale intentionally surrendered or relinquished its rights under the contract. In light of this, I accept Vitale's contentions in this respect.

Given the foregoing facts, I conclude that there was no abandonment of the contract and that, by virtue of the course of dealings between the parties, both parties considered the contract effective until Conrail, in response to Vitale's letter of December 27, 2001 setting April 1, 2002 as a closing date subject to obtaining the necessary

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<sup>12</sup> *Id.*

approval/release from the Department of Transportation, disclaimed the existence of a binding contract in its letter of April 11, 2002. Finally on May 24, 2002, D. Kevin Hurley, Assistant Vice President of Conrail (CSX), in a letter to Vitale, for the first time maintained that Conrail had not given the Article 29 notice; that Vitale failed to close the title within the Agreement's time limits; that Vitale failed to send a timely notice to reclaim its deposit, which it contended was consequently forfeited; that the parties had failed to agree on "material terms" of the Agreement; and that Conrail thereby "abandoned negotiations under the non-binding Contract." I conclude that notwithstanding the contentions of Mr. Hurley, the contract remained in effect.

I also disagree with the contentions of Conrail that Vitale defaulted under the terms of the agreement by not complying with its provisions. I do not believe that the contentions made by Conrail with respect to Vitale's failure to obtain financing or a title report are germane. A purchaser may acquire real property without financing or title insurance. Actually Vitale maintains that it plans to close with its own funds, and evidence has been presented to show that the description has already been reviewed by a title company.

The only precondition to closing may be the notification or release under Section 18 of the New York Transportation Law. One of the reasons for the adjournments of closing apparently stems from the indication that the Department of Transportation may not give approval with respect to all three parcels because it may take part of the property for reconstruction of the Brooklyn-Queens Expressway. Article 34 of the Agreement clearly encompasses such notification or the obtaining of such a release to the extent it is required under the law. Article 34 also requires that Vitale "act to obtain" governmental

approvals “with the cooperation of Conrail.” The statute requires Conrail to give the notification and request any required release, and the Department of Transportation in its letter (with copy to Conrail) in response to Vitale’s former counsel’s inquiry of September 12, 1989,<sup>13</sup> so stated. Furthermore, Robert Ryan, testifying on behalf of Conrail, stated that in his experience, such applications were made by Conrail.<sup>14</sup> On the other hand it is also clear that Vitale did not pursue with vigor the cooperation of Conrail in taking the steps necessary to obtain such release. While the release may be a prerequisite to a closing, the fact that the release has not been given at this time does not appear to constitute a default on the part of either of the parties that goes to the essence of, and would terminate the Agreement. As pointed out above, the time limit in Article 34 of the Agreement appears to be for the benefit of Vitale, enabling Vitale to terminate the agreement and receive a return of its deposit if the necessary consents become unavailable. As a result, Article 34 gives Vitale the right to extend the time for a reasonable period. While Vitale has been less than aggressive in effectuating the approvals, I fail to see evidence of any demand on the part of Conrail for specific action on Vitale’s part or evidence that the conduct of Vitale has been unreasonable, given the open issue of the potential Brooklyn-Queens Expressway taking.

Conrail also contends that Vitale is not prepared to close on the closing date it set, citing these open items as evidence of that. I doubt that a closing can be held on the date specified without prior release from the Department of Transportation.<sup>15</sup> Had Conrail given notice making time of the essence, the Agreement would have terminated as of the closing date set if in fact Vitale would not have been in a position to close. In the

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<sup>13</sup> Claimant’s Exhibit 26.

<sup>14</sup> Transcript, Testimony of Robert Ryan, June 16, 2004, at 306.

<sup>15</sup> This is not intended as a conclusion that it is not possible to have a closing conditioned on the release.

absence of such a notice, however, I am not in a position to determine that the Agreement has been terminated.

I thus conclude that the Agreement represents a binding contract for the sale of the real estate described therein.

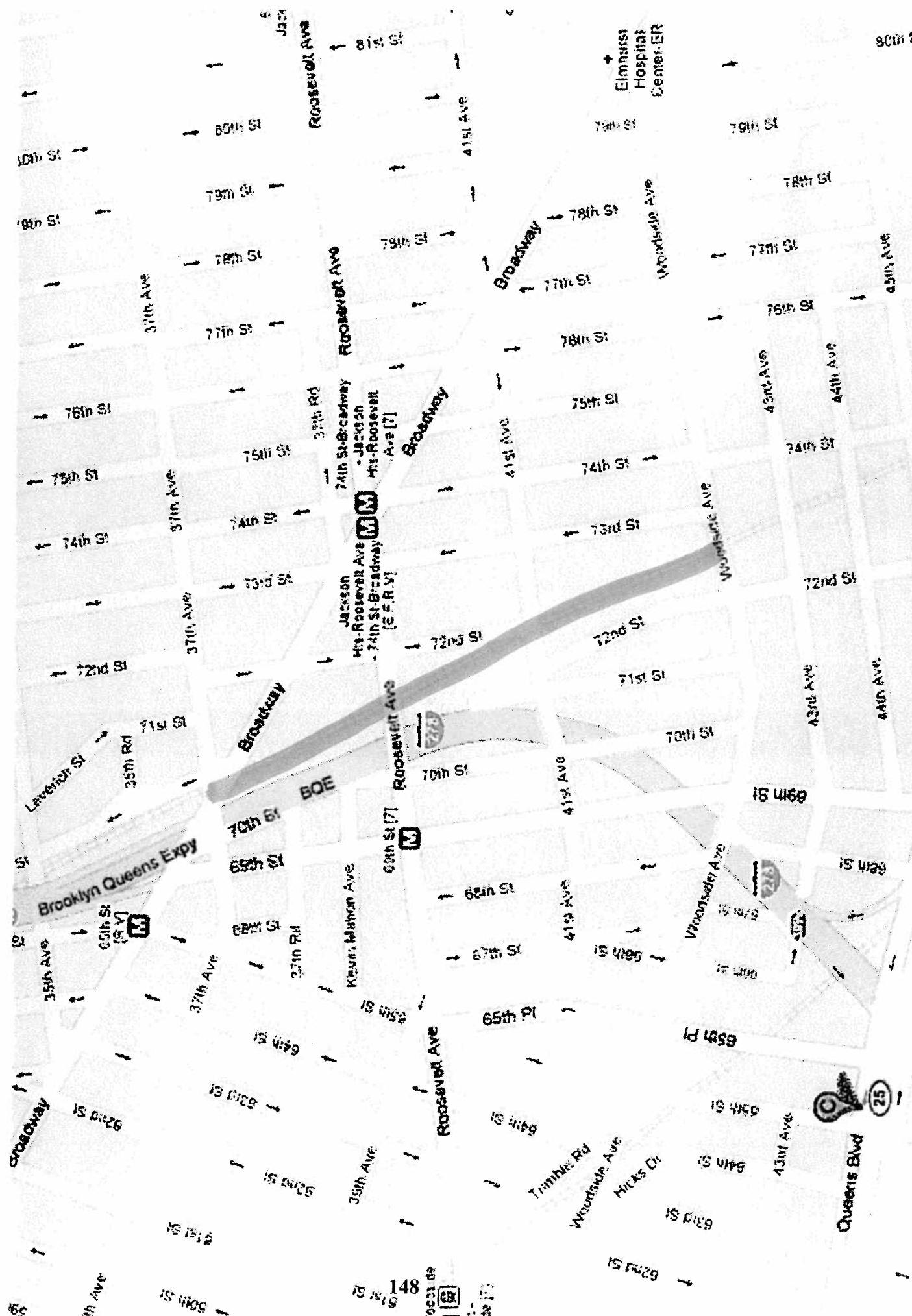
#### **AWARD**

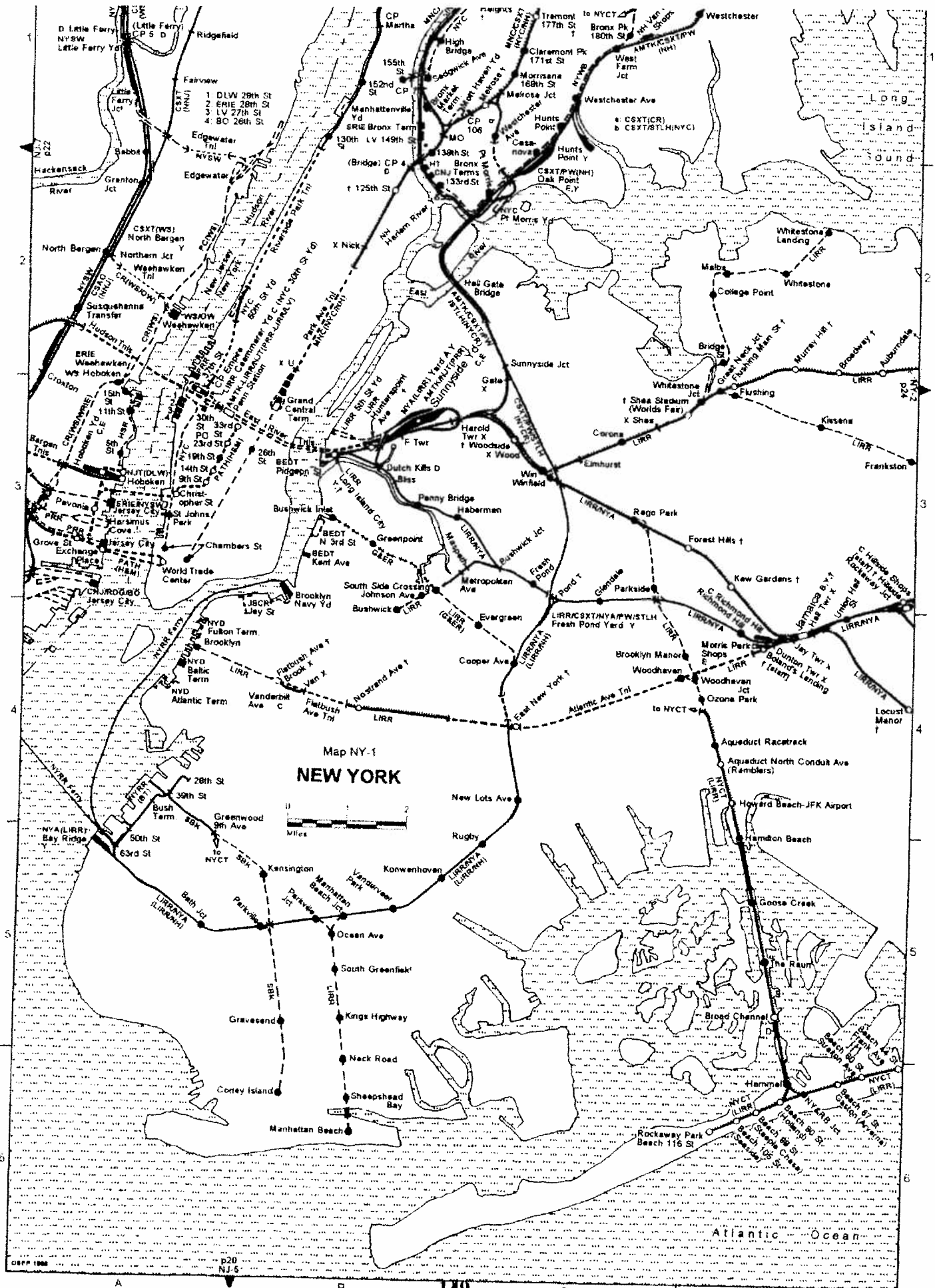
1. I order specific performance of the Agreement for the agreed purchase price of \$900,000., of which \$90,000 has been paid on the signing of the Agreement.
2. I order Conrail to cooperate in obtaining any required Section 18 Release from the Department of Transportation by filing separate applications for each of the three parcels in the property. I order Vitale to cooperate with Conrail in pursuing the release. Upon receipt thereof (for one or more of the parcels in whole or in part), I order Vitale and Conrail to proceed expeditiously with the closing of title.
3. I enjoin Conrail from selling the property covered by the Agreement to any third parties in violation of the rights of Vitale under the Agreement.
4. I order the parties to pay the costs of this arbitration as provided in Article 20 of the Agreement.



Exhibit 6

Line Maps





# ALBANY - HUDSON - FREMONT IND TRK

North  
VAL. SEC. 502 NY

