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219688

July 2, 2007

VIA FEDEX

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



Re: Town of Babylon and Pinelawn Cemetery – Petition for Declaratory Order
Finance Docket No. 35057

Dear Secretary Williams:

Enclosed for filing are the original and ten copies of the Petition of the Town of Babylon and Pinelawn Cemetery for a Declaratory Order. Also enclosed is a check for \$1,400 for the filing fee. Although the filing fee is subject to waiver under 49 CFR § 1002.2(e)(1) since the Town of Babylon is a local government entity, we are nevertheless remitting it in order to ensure that the Petition is accepted for filing at this time.

Please acknowledge receipt of the Petition for filing by date-stamping the enclosed extra copy and returning it to us in the self-addressed pre-paid FedEx envelope.

A Certificate of Service is attached to the Petition. Copies of the Petition and this cover letter have been mailed to New York and Atlantic Railway Company and Coastal Distribution, LLC and their counsel.

If you have any questions or require any other information, please let me know.

Respectfully,

Howard M. Miller

Enclosures

cc: Parties on Certificate of Service (w/encls.)
Fran M. Jacobs, Esq.
Mark A. Cuthbertson, Esq.

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BEFORE THE
SURFACE TRANSPORTATION BOARD

OFFICE COPY

STB Finance Docket No. 35057

PETITION OF THE TOWN OF BABYLON AND
PINELAWN CEMETERY FOR DECLARATORY ORDER

FILED

JUL 5 - 2007

SURFACE
TRANSPORTATION BOARD

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JUL 5 - 2007

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Public Record

June 29, 2007

Attorneys for Pinelawn Cemetery

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35057

PETITION OF THE TOWN OF BABYLON AND
PINELAWN CEMETERY FOR DECLARATORY ORDER

Nature of the Proceeding

This is a case of national importance. In Hi Tech Trans., LLC, STB Finance Doc. No. 34192, 2003 STB LEXIS 475 at *16 (Aug. 14, 2003) , this Board held that, when a non-rail carrier leases railroad property to conduct its own operation, it is not entitled to federal preemption. In the face of this clear decision, the New York and Atlantic Railway Company (the “NYAR”) and Coastal Distribution LLC (“Coastal”), who had been parties to a lease agreement indistinguishable from the lease in Hi Tech, entered into a sham “agency” agreement pursuant to which Coastal – a non-rail carrier – is solely responsible for the operation of a transfer station/transloading facility and retains all of the revenues and profits in connection with that facility.

NYAR and Coastal apparently recognized that this Board would see through their arrangement, even after it was changed from a lease to a purported “agency” relationship. They therefore chose not to inform the Board of their arrangement. Instead, while claiming that the Board had exclusive regulatory jurisdiction over them – even though the Board did not even know that Coastal’s facility exists – NYAR and Coastal commenced a lawsuit in federal court in New York seeking a determination that Coastal’s facility was subject to federal preemption under the Interstate Commerce Commission Termination Act (“ICCTA”) and exempt from any kind of state or local regulation. Under their theory, Coastal’s facility is unregulated by anyone;

it is not regulated by this Board, which has been kept unaware of its existence, and, at the same time, it cannot be regulated by state or local authorities because it is supposedly within the Board's exclusive jurisdiction.

The federal case that NYAR and Coast brought made its way to the United States Court of Appeals for the Second Circuit in the context of a motion for a preliminary injunction. Based on this Board's expertise in the area of preemption, the Second Circuit invited the parties to ask the Board whether Coastal's operation was within its exclusive jurisdiction. The petitioners herein – the Town of Babylon and Pinelawn Cemetery – have accepted that invitation; NYAR and Coastal, on the other hand, are doing everything in their power to avoid Board scrutiny.

Stated simply, this case is Hi Tech in disguise. NYAR and Coastal have attempted to repackage their relationship to avoid the Hi Tech precedent. But that precedent is binding and cannot be avoided by making a few superficial changes. Companies like Coastal, which are conducting independent businesses on railroad property, should not be allowed to evade state and local regulations by teaming up with rail carriers like NYAR who are willing to lend their rail carrier status to private companies whose operations have never been authorized by the Board.

Background

This petition is filed on behalf of the Town of Babylon (the "Town") and Pinelawn Cemetery ("Pinelawn") in support of their joint request that the Surface Transportation Board (the "Board") enter a declaratory order pursuant to its authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721(b)(4) for the purpose of terminating a controversy and removing uncertainty concerning the scope of preemption under ICCTA.

The Town and Pinelawn seek a declaration that, to the extent that New York and Atlantic Railway Company ("NYAR") has authorized Coastal Distribution LLC ("Coastal") – which is

not a rail carrier – to build and operate a facility for processing construction and demolition debris and other solid waste and to conduct other business on land owned by Pinelawn (the “Farmingdale Property” or “the “Property”), such activities do not qualify for preemption under 49 U.S.C. § 10501(b) and, in any event, are subject to the Town’s health and safety regulations. Although NYAR and Coastal have taken the position that Coastal’s operation falls within the Board’s exclusive jurisdiction, neither NYAR nor Coastal has made any type of application to the Board with respect to the facility. As a result, the facility has been operating on the Farmingdale Property without regulation or oversight by the Board or any other federal, state, or local authority.

Statement of Facts

A. Identity and Addresses of Parties

The Town is a New York municipal corporation located in Suffolk County. Its address is 200 East Sunrise Highway, Lindenhurst, New York 11757.

Pinelawn is a not-for-profit corporation. Its address is P.O. Box 420, Farmingdale, New York 11735-0420. Pinelawn is the fee owner of the Farmingdale Property.

NYAR, a Delaware corporation, is a rail carrier operating under authority from the Board. Its principal office is located at 68-01 Otto Road, Glendale, New York 11385.

Coastal is a New York limited liability company. Its address is 1633 New Highway, Farmingdale, New York 11735. Coastal has never sought or obtained authority from the Board to operate as rail carrier. It does not own a locomotive and its employees are not railroad employees. Although Coastal itself was not formed until 2001, its principals have been in the waste disposal business for many years.

B. NYAR Leased the Farmingdale Property to Coastal

The Farmingdale Property is located in an area zoned for residential use. It is bounded by New Highway on the west and by Pinelawn on the south, east, and north.

Pinelawn leased the Farmingdale Property to the entity now known as the Metropolitan Transportation Authority – the parent of the Long Island Railroad (the “LIRR”) – in the early 1900s. In 1996, the LIRR entered into a transfer agreement (the “Transfer Agreement”)¹ with NYAR under which NYAR acquired all of the LIRR’s freight operations, including its interest in the Farmingdale Property. The Transfer Agreement, which the Board apparently approved, authorized NYAR to sublease the Farmingdale Property. (See Ex. A at ¶ 3.1.2.)

On March 22, 2002, NYAR leased the Farmingdale Property to Coastal.² The Lease gave Coastal the right to the “exclusive use” of the Farmingdale Property for a term of five years from the date on which the first rail car consigned to Coastal was brought to the Property. (Ex. B at ¶ A.) In return, Coastal agreed to pay NYAR \$2,000 per month in rent. (Id. at ¶ C.1.) The Lease permitted Coastal to make improvements to the Property at its own expense, and did not purport to relieve Coastal of its obligation to comply with any state or local law applicable to the Property. It also required Coastal to pay NYAR’s freight bills within 15 days of receipt. (Id. at ¶ C.12.)

¹ A copy of the Transfer Agreement is annexed hereto as Exhibit A. The Town and Pinelawn do not have, and have never been provided with, a copy of the Transfer Agreement containing pages 13 and 14.

² The Lease, a copy of which is annexed hereto as Exhibit B, was superseded by another lease dated July 11, 2002. The new lease, a copy of which is annexed hereto as Exhibit C, added a provision relating to payment to the LIRR to buy-out its right to use a portion of the Property, and was otherwise substantially similar to the Lease.

When Coastal signed the Lease, it intended to use the Property as a distribution center for construction materials that it planned to ship to Long Island by rail.³ But, according to Coastal, the market for construction materials turned out to be smaller than it had anticipated, and it decided to offer a different service on the Property: it was going to arrange to transport construction and demolition debris and other waste to landfills in Ohio. To provide this waste disposal service, Coastal needed a place to load and unload, sort, and store construction and demolition debris and other waste. In late 2003, it therefore began building a structure on the Farmingdale Property. The structure is covered on three sides.⁴ The fourth side is entirely open and exposed to the elements. (See Ex. E-1.)

Neither Coastal nor NYAR made an application of any sort to the Board concerning Coastal's waste disposal business or the unenclosed structure Coastal was building for use in that business. The Board has thus made no assessment of the environmental impact of Coastal's waste disposal business. In fact, it does not appear that the Board is even aware that Coastal exists – much less that it is operating a waste disposal business on property leased to a railroad.

On March 29, 2004, after learning that Pinelawn (and not the LIRR) owned the Property, the Town issued a Stop Work Order to Coastal based on Coastal's failure to obtain a construction permit. After issuing the Stop Work Order, the Town asked Coastal to explain "the proposed use of the site." NYAR responded to the Town's inquiry, stating that it had "granted Coastal

³ In an affidavit submitted in a case involving a different railroad property – Buffalo Southern R.R., Inc. v. Village of Croton-on-Hudson, 434 F. Supp. 2d 241 (S.D.N.Y. 2006) – one of Coastal's members stated that "Coastal transports and distributes essential building materials and products to customers throughout the Northeast." The court in Buffalo Southern described Coastal as "a construction firm" which had an agreement with the railroad for the shipment of construction materials to be offloaded in railroad property. Id., 434 F.Supp. 2d at 246.

⁴ Copies of photographs showing the structure that Coastal built are annexed hereto as Exhibit E.

Distribution the right to make improvements and operate the Property in an agreement penned in July 2002.” Since the Stop Work Order was issued before construction was completed, Coastal had not yet begun to use its three-sided structure in its waste disposal business. Thus, while the Town knew when it issued the Stop Work Order that Coastal had not obtained a construction permit, it did not know whether Coastal’s proposed use of the Farmingdale Property violated any other local law.

Following the Town’s issuance of the Stop Work Order, NYAR and Coastal could have petitioned the Board for a declaratory order determining that the facility was within the Board’s exclusive jurisdiction. Instead of doing so, they avoided subjecting Coastal’s operation to Board scrutiny and filed an appeal to the Town’s Zoning Board of Appeals. The basis of their appeal was that the issuance of the Stop Work Order was improper because the Farmingdale Property was expressly exempt from state and local regulation under ICCTA and was within the Board’s exclusive jurisdiction. While the appeal was pending, enforcement of the Stop Work Order was automatically stayed, and Coastal was able to finish building its three-sided structure. In late August 2004, Coastal began receiving and processing construction and demolition debris on the Farmingdale Property. At that point, it became clear that Coastal was operating a transfer station from an unenclosed structure on the Property.

The Code of the Town of Babylon (the “Code”) defines a “transfer station” as a “solid waste management facility, including a recyclables handling and recovery facility or a construction and demolition debris processing facility . . . where solid waste [which, by definition, includes construction and demolition debris] is received for the purpose of subsequent transfer to another solid waste management facility for . . . disposal.” Under Section 213-281(F) of the Code, processing of solid waste is only permitted in “enclosed structures” and cannot

occur outdoors. Section 213-279 of the Code establishes standards for granting special exception permits for transfer stations, including a requirement that the proposed use not result in unacceptable levels of noise, dust, or odor; that it not pose risks to public health or safety; and that it meet certain environmental standards.

C. The Repackaging of the Coastal-NYAR Lease As An "Operations Agreement"

Between the time that Coastal signed the Lease in 2002 and the date on which the Stop Work Order was issued in 2004, the Board rendered its decision in Hi Tech Trans., LLC, STB Finance Doc. No. 34192, 2003 STB LEXIS 475 (Aug. 14, 2003), which held that a business which was not itself licensed as a rail carrier could not claim that its activities were exempt from state and local regulation simply because it had arranged to conduct those activities on property leased from a rail carrier. The issue in Hi Tech was whether an arrangement between a waste disposal company and a railroad – an arrangement virtually indistinguishable from the arrangement between Coastal and NYAR – fell within the Board's exclusive jurisdiction and therefore preempted local regulation. The Board concluded that the waste disposal company's "relationship with [the rail carrier] is that of a shipper with a carrier," and was therefore outside the Board's exclusive jurisdiction. As a result, the waste disposal company was subject to local regulation. The Board noted that the situation in Hi Tech was substantially different from one in which a carrier builds and owns a facility and holds itself out to the public as the owner of the facility, but arranges for the facility to be run by a contractor. Id., at *7 n.13, 2003 STB LEXIS 475, at *15 n.13.

Once the Town issued the Stop Work Order and began questioning the basis of Coastal's claim that it was exempt from local law, Coastal must have realized Hi Tech would prevent it from successfully arguing that its Lease with NYAR placed it under the Board's exclusive

jurisdiction and preempted the Town from enforcing its regulations: NYAR had not built the facility on the Farmingdale Property; it made no contribution to the cost of constructing the facility; it did not hold itself out to the public as the owner of the waste processing facility on the Farmingdale Property; and Coastal was NYAR's tenant, not its agent.

In a blatant attempt to get around Hi Tech, Coastal and NYAR recast their arrangement, substituting in place of the Lease what they called a Transload Facility Operations Agreement (the "Operations Agreement").⁵ There was no business reason for replacing the Lease with the Operations Agreement. Rather, the change was an obvious legal maneuver made "on advice of counsel" in the face of the Board's decision in Hi Tech. The Operations Agreement was tailored to make Coastal's relationship with NYAR look different from Hi Tech's relationship with the rail carrier from which it leased railroad property. Indeed, in preparing the Operations Agreement, NYAR was even represented by the same law firm which had represented Hi Tech before the Board – Fletcher & Sippel, LLC. (See Ex. D at p. 13.)

The changes that Coastal and NYAR made were purely cosmetic. Thus, the Operations Agreement recites that NYAR "desires to engage COASTAL as RAILROAD's contractor, to operate the Facility on RAILROAD'S behalf" and that "RAILROAD shall control all aspects of the Facility's transloading operations." (Ex. D ¶ 1.02.) But, as NYAR has admitted, nothing actually changed in the operation of the Farmingdale Property when the Lease was replaced by the Operations Agreement: NYAR cannot hire or fire Coastal employees; it does not set the prices Coastal charges for loading waste; it is not a party to Coastal's agreements with its customers; it does not make any financial contribution to the maintenance or operation of the Property; and it is not involved in how Coastal employees load the rail cars. For its part, Coastal

⁵ A copy of the Operations Agreement is annexed hereto as Exhibit D.

could not point to anything NYAR did to “control its transloading operations.” And, even under the Operations Agreement, Coastal was required to obtain all applicable permits, waivers, or other governmental authority needed to operate the facility. (Ex. D ¶ 4.01(d).)

Far from giving NYAR “control” over Coastal’s operation, the only thing the Operations Agreement allows NYAR to do is “review and audit” Coastal’s records relating to the Farmingdale Property and “inspect” Coastal’s operation. (Ex. D ¶ 1.02.) NYAR cannot even use the tracks at the Farmingdale Property if its use would “unreasonably interfere” with Coastal’s operation. (Id. at ¶ 1.03.)

The economics of the deal between Coastal and NYAR also remained the same when the Lease was repackaged as the Operations Agreement. Instead of paying NYAR \$24,000 per year in rent, Coastal agreed to pay NYAR the same amount under the Operations Agreement in the form of a fee of \$20 per rail car for 1,200 cars a year – which was the number of rail cars Coastal committed to deliver to NYAR per year under both the Lease and the Operations Agreement. (Ex. D ¶ C; ¶ 3.02.) Even though Coastal was ostensibly operating the Farmingdale Property on NYAR’s “behalf” under the Operations Agreement, Coastal sets and collects the loading fee, which it alone keeps. NYAR does not receive any part of Coastal’s loading fee and does not even know how much the fee is. Moreover, NYAR has admitted that it does not quote the fee to its own customers or offer Coastal’s loading services as part of the services it offers.

The Operations Agreement expressly authorizes Coastal to conduct its own waste disposal business and states that, “[t]o the extent that COASTAL enters into any agreement with a Customer for disposition of Commodities after transportation of the Commodities by RAILROAD, COASTAL shall not do so as an agent of RAILROAD and shall indemnify, defend and hold the RAILROAD harmless from any claims or liability arising out of COASTAL’S

activities on its own behalf.” (Ex. D ¶ 1.09; emphasis added.) Paragraph 2.01(b) of the Operations Agreement further provides (Id. at ¶ 2.01(b)):

COASTAL may enter into separate agreements (collectively, “Disposal Agreements”) in its own name with Customers whereby COASTAL shall be responsible to such Customer for obtaining the disposal of COMMODITIES. In entering into and performing any Disposal Agreements, COASTAL shall not make any statement or take any action or fail to take any action that suggests that RAILROAD is in any way participating in or approving any Disposal Agreement of [sic] disposal arrangement. Any Disposal Agreements shall be entirely independent from the transportation and loading service provided under this agreement. Coastal shall separately invoice and collect any fees or charges on its own behalf under any Disposal Agreements.

(Emphasis added.)

To the extent that NYAR derives any benefit from the Farmingdale Property, it does so incidentally at best; it provides shipping services for Coastal’s customers. The real beneficiary of the Operations Agreement is Coastal, which is able to use the Farmingdale Property to generate between \$4.8 and \$6.8 million in annual loading fees⁶ and undisclosed additional amounts under its Disposal Agreements – so far free from any type of federal, state, and local regulation. NYAR pays Coastal nothing for supposedly operating the facility on the railroad’s behalf, nor does NYAR share in Coastal’s enormous profits. All NYAR receives is an amount equivalent to the \$24,000 it was to collect in rent under the Lease, and its own freight charges, which it also would have received under the Lease.

⁶ Coastal has admitted that it charges a loading fee of \$27 per cubic yard and \$57 per ton. The average rail car is between 70 and 100 tons and 163 cubic yards. Thus, the loading fees on 1,200 cars per year would be between \$4,788,000 (for 70 tons) and \$6,840,000 (for 100 tons).

The only responsibility that NYAR has under the Operations Agreement is to “provide reasonable rail service to the Facility.” (Ex. D ¶ 1.04.⁷) That responsibility is limited in ¶ 1.05 of the Operations Agreement, which states that NYAR’s “responsibility and liability for the cars and their contents bound to or from the Facility ends when the cars are uncoupled from the RAILROAD’S locomotive at the Facility, and the RAILROAD’S responsibility and liability is resumed when the cars are coupled to RAILROAD’S locomotive.” (Id. ¶¶ 4.02, 4.04.)

In short, the Operations Agreement creates no more than the thinnest facade of control. Apart from the calculated insertion of the words “agent” and “control,” the arrangement between Coastal and NYAR is no different from the one this Board held was insufficient to entitle Coastal’s counterpart in Hi Tech to preemption. Like Hi Tech, Coastal contracts with shippers for the transportation of construction and demolition debris⁸; like Hi Tech, Coastal unloads the debris at its facility on railroad property; like Hi Tech, Coastal later reloads the debris onto rail cars; like Hi Tech, Coastal loads the rail cars at its own expense; and like Hi Tech, Coastal is solely responsible for the cost of building and maintaining its facility. Hi Tech Trans, LLC, supra, STB Finance Doc. No. 34192, at **2-3, 2003 STB LEXIS 475, at **4-5 (Aug. 14, 2003).

The only differences that Coastal and NYAR pointed to between the situation in Hi Tech and the situation here are imaginary. First, they claimed that Hi Tech’s facility was not held out to the public. However, the Board’s decision makes clear that Hi Tech was doing the same thing that Coastal does: it “contracts with shippers for the transportation of C&D debris.” Hi Tech Trans, LLC, supra, STB Finance Docket No. 34192, at *2, 2003 STB LEXIS 475, at *4. The

⁷ The Operations Agreement contains two paragraphs numbered 1.04.

⁸ To date, the Town and Pinelawn have not had the benefit of any discovery and have not seen any of Coastal’s shipping contracts. It is possible, if not likely, that Coastal is still receiving shipments at the Property as NYAR’s “consignee.”

other alleged distinction was that Hi Tech did not itself purport to be a rail carrier. In actuality, Hi Tech made the same argument that Coastal and NYAR made in claiming that Coastal was entitled to rail carrier status. Hi Tech asserted that it “operates a “railroad” insofar as it operates intermodal equipment used by or in connection with a railroad and operates a terminal facility and yard and ground used for transportation.” Hi Tech Trans, LLC v. State of New Jersey, 382 F.3d 295, 306 (3d Cir. 2004) (quoting Hi Tech’s brief).

There are other similarities between Coastal’s arrangement with NYAR and the arrangement in Hi Tech. Like NYAR, the railroad in Hi Tech does not set or quote rates for transloading, disclaims responsibility or liability for the waste processing company’s operations, and is responsible for nothing except transporting the loaded railcars. Ibid. (Ex. D ¶¶ 1.05, 3.01.) The only real “distinction” between this case and Hi Tech is that Coastal and NYAR added some cosmetic references to control. That is not enough to bring Coastal’s operation under the Board’s jurisdiction.

D. The Zoning Board of Appeals Saw Through Coastal’s Attempt to Manufacture a Difference Between Itself and Hi Tech

Although the Town had issued its Stop Work Order while the relationship between Coastal and NYAR was that of lessee-lessor, they had replaced the Lease with the Operations Agreement by the time the Zoning Board of Appeals heard their appeal. Over the course of a two-day hearing on Coastal’s appeal, the Zoning Board of Appeals listened to testimony from representatives of Coastal, NYAR, Pinelawn, and other neighboring property owners. At the hearing, Coastal’s representatives described their operation. They admitted that waste was tipped onto a pad in their three-sided structured where Coastal employees sorted through it to extract recyclable scrap which they then sold for a profit. Copies of photographs showing Coastal’s waste disposal business in operation are annexed hereto as Exhibit E. They leave no

doubt that Coastal is sorting waste in an unenclosed structure from which dust is released into the atmosphere and water runs off into neighboring properties.

Coastal's attorney also testified as an expert on railroad law at the hearing before the Zoning Board of Appeals. He admitted that, where the relationship between a rail carrier and the party operating a waste disposal facility on railroad property was that of landlord-tenant, the waste disposal operation was not within the Board's exclusive jurisdiction and was subject to state and local regulation. While NYAR and Coastal contended that the change from the Lease to the Operations Agreement was more than cosmetic, the limited information available to the Town and Pinelawn indicates that Coastal is running its own business on the Farmingdale Property for its own benefit; it was not retained by NYAR to provide a service that NYAR agreed to provide to its customers.

On April 15, 2005, the Zoning Board of Appeals issued a decision denying Coastal's appeal and upholding the issuance of the Stop Work Order.⁹ The Zoning Board of Appeals explained that Coastal's use of the Farmingdale Property did not constitute "'transportation by rail carrier' so as to come within the Surface Transportation Board's jurisdiction pursuant to the ICC Termination Act" because Coastal – and not NYAR – "is controlling the operation of the site." (Ex. F at p. 16.) It added:

Coastal is marketing the site, erecting structures that it requires on the site and repairing tracks at the site, not New York and Atlantic, who is the party actually certified as a railroad. Coastal is fundamentally operating independently of the railroad.

(Ex. F at p. 16; emphasis added.)

⁹ A copy of the decision of the Zoning Board of Appeals is annexed hereto as Exhibit F.

The Zoning Board of Appeals further found that Coastal's activities on the Farmingdale Property were not limited to transloading, which was the only activity that NYAR purported to supervise in any respect. Referring to the Disposal Agreements that Coastal was authorized to make with its customers, the Zoning Board of Appeals wrote that "this disposal use of the site by Coastal is independent of New York and Atlantic, based on the language of the agreement, and does not in any way constitute transportation or a transit purpose. This is an independent proprietary use of the premises, not involving the railroad" and "is not exempt from local zoning." (Ex. F at pp. 17-18.)

The Zoning Board of Appeals went on to find that the facts before it "are extremely similar to the facts of the Hi Tech case wherein the Court determined the activity at the site to be at most, transportation 'to rail carrier.'" (Ex. F at pp. 18-19; emphasis in original.)

With respect to the business Coastal was conducting on the Farmingdale Property, the Zoning Board of Appeals found that it was not simply transloading. Rather, it involved recovering recyclable scrap from the debris it received and selling it for a profit. The Zoning Board of Appeals held that "this money-making endeavor by Coastal of presorting construction and demolition material prior to its transport does not constitute transportation purposes" (Ex. F at p. 28.)

E. Coastal's Operation Exposes the Public to Health and Safety Risks

At the time of the hearings before the Zoning Board of Appeals, Coastal had only recently begun operating its waste disposal facility. Despite the limited period of period of operation, it had already become apparent that trucks were coming to the facility directly from construction sites and were depositing roofing materials and other unprocessed construction debris onto the floor of the unenclosed facility where it was disturbed and released into the

atmosphere as dust and run-off. Indeed, in its decision, the Zoning Board of Appeals commented on the roofing material that was being brought to the facility. (Ex. F at p. 9.) Although roofing material is known to contain asbestos, Coastal subjects such material to the same treatment as non-hazardous debris, and has not complied with any of the federal, state, or local laws designed to protect the public from exposure to potentially hazardous materials.

In the years since the hearings before the Zoning Board of Appeals, the situation has not improved. The Town and Pinelawn have observed no decrease in the amount of dust generated by Coastal's facility. On the contrary, because Coastal's volume commitments to NYAR increase over time (Ex. D at ¶ 5.01(c)), the Town and Pinelawn have every reason to believe the conditions will continue to worsen. In the meantime, Coastal has not voluntarily adopted the safeguards reflected in the federal, state, and local laws by which it would be bound – and by which other waste disposal facilities are bound – if it were not operating on property leased to a rail carrier.

F. Coastal and NYAR Challenged the Determination of the Zoning Board of Appeals in Federal District Court – and Not Before this Board

Coastal and NYAR had acknowledged that, once the Zoning Board of Appeals ruled on their appeal, they could ask this Board for an advisory opinion on the question of whether it had exclusive jurisdiction over Coastal's operation. However, they did not seek such an opinion. Once again, they avoid exposing Coastal's operation to Board scrutiny and instead filed an application in the United States District Court for the Eastern District of New York (the "District Court") for a preliminary injunction barring the Town from enforcing the Stop Work Order. No discovery was conducted in the District Court action.

The District Court granted the application on January 31, 2006.¹⁰ Its decision was based on its conclusion that Coastal and NYAR had shown a greater than 50 percent chance of success on their claims that the Operations Agreement made Coastal NYAR's agent and that, even though Coastal had not sought or obtained Board approval to operate as a rail carrier, Coastal nevertheless qualified as a rail carrier and, as such, was within the Board's exclusive jurisdiction. The District Court made no attempt to explain how Coastal could itself be treated as a rail carrier even though Coastal never assumed any of the obligations of a rail carrier, is not licensed by the Board to operate as a rail carrier, and does not itself connect to the national rail transportation system. The District Court also ignored the fact that Coastal employees are not railroad employees and, unlike railroad employees, they participate in the Social Security System and are eligible for worker's compensation. The District Court thus allowed Coastal to enjoy the benefits of rail carrier status without bearing any of the burdens.

G. The Second Circuit Modified the Injunction to Permit the Town and Pinelawn to Petition the Board Concerning Its Jurisdiction

The Town and Pinelawn filed appeals from the District Court order granting preliminary injunctive relief barring them from taking any steps to enforce the Stop Work Order. Although the United States Court of Appeals for the Second Circuit declined to reverse the District Court's order, it modified the preliminary injunction to make clear that the Town and Pinelawn – or Coastal and NYAR – were free to petition this Board for a declaratory judgment as to whether Coastal's operations are within the scope of the Board's jurisdiction.¹¹ The Second Circuit expressly held that "it is wholly appropriate that the parties should seek further guidance from

¹⁰ A copy of the District Court's decision is annexed hereto as Exhibit G.

¹¹ A copy of the Second Circuit's decision is annexed hereto as Exhibit H.

the STB notwithstanding the pendency of litigation in federal court.” Coastal Distribution LLC v. Town of Babylon, 216 Fed. Appx. 97, 103, 2007 U.S. App. LEXIS 3042, at *14 (2d Cir. Feb. 6, 2007).

Having been authorized to present the issue to the Board, the Town and Pinelawn have now filed this petition in order to obtain a determination from the Board about whether Coastal’s operation is subject to the Board’s exclusive jurisdiction. Coastal and NYAR could have sought the same determination from the Board. But, while claiming that the Board alone has jurisdiction over Coastal’s operation on the Farmingdale Property, Coastal and NYAR appear to be reluctant to submit to the Board’s jurisdiction and have consistently chosen to proceed elsewhere.

It does not appear that the issue this petition raises will be determined by the decision the Board renders in New England Transrail, STB Finance Doc. No. 34797, 2006 STB LEXIS 364 (June 12, 2006). Unlike the rail carrier in New England Transrail, NYAR is an existing carrier which is already authorized to use the Farmingdale Property. Based on its status as an existing rail carrier, NYAR has taken the position that it need not seek any type of permission from the Board concerning Coastal’s operation or the Farmingdale Property. New England Transrail, on the other hand, has asked the Board for an exemption permitting it to operate a new facility in Massachusetts and the Board can therefore condition its approval of New England Transrail’s application on compliance with certain state and local regulations.

Moreover, unlike New England Transrail and the New York, Susquehanna, and Western Railway Corporation (the “Susquehanna”) in the case now before the Third Circuit (see New York, Susquehanna, and Western Railway Corp. v. Jackson, New Jersey Meadowlands Comm’n, 2007 U.S. Dist. LEXIS 11907 (D.N.J. Feb. 20, 2007)), which were themselves operating or

planning to operate their own waste disposal facilities, NYAR does not purport to be conducting the waste disposal operation on the Farmingdale Property. Rather, Coastal is doing so for its own benefit – and reaping a huge profit. And, unlike the *Susquehanna*, Id. at * 20, Coastal has not voluntarily enclosed its loading operation, nor is there any evidence that it has voluntarily reduced the size of debris piles or instituted flow control measures to limit the amount of waste dumped at the facility on a daily basis.

This petition thus raises a question about whether a company which is not a rail carrier can form an alliance with a railroad and then claim that, by virtue of its private arrangement with the rail carrier, it has annexed the rail carrier's exemption from state and local regulation and can run its own business on railroad property using the railroad as its shipper. If rail carriers are allowed to delegate to non-rail carriers the special privileges they receive under ICCTA, companies like Coastal will be able to continue to exploit an unintended loophole in the law: they will be able to operate waste disposal businesses for their own benefit without having to comply with state and local regulations intended to protect the public and the environment – and without any review by the Board. In enacting ICCTA, it was not Congress' intent to make it possible for non-rail carriers to operate independent businesses outside the law by teaming up with existing rail carriers.

Neither Coastal nor NYAR asked this Board to approve the waste disposal facility Coastal is operating on the Farmingdale Property, and the Board had no opportunity to subject the facility to any type of environmental review. At the same time, by claiming that the facility is within the Board's exclusive jurisdiction, Coastal and NYAR have avoided having to comply with state and local regulations. As a result, Coastal has managed to operate its facility free from any regulation at all.

The Town and Pinelawn also seek a determination from the Board that Coastal's operation implicates health and safety concerns – and raises serious environmental issues – which make regulation by the Town appropriate. Because Coastal is tipping waste onto the floor of an unenclosed structure and sorting it there, it is releasing potentially hazardous dust into the atmosphere and contaminated water into the soil. Accordingly, even if Coastal's operation is within the Board's jurisdiction, the Town should still be permitted to enforce regulations which are designed to protect the public and the environment from the kind of hazards Coastal is creating.

H. No Discovery To Date

Even though this dispute dates back to 2004, the Town and Pinelawn have never had the benefit of any discovery. They have not seen any of Coastal's agreements with its customers; no documents showing the origin of the Operations Agreement have been produced; and the degree of control – if any – that NYAR exerts over Coastal has not been explored. Accordingly, the Town and Pinelawn are seeking discovery in the context of this proceeding to determine the real relationship between Coastal and NYAR.¹² They believe that discovery will confirm that Coastal and NYAR still have the same relationship that Hi Tech had with the rail carrier with which it was affiliated: NYAR is simply the shipper that Coastal uses in Coastal's private waste disposal and distribution business.

Once the Town and Pinelawn have had the benefit of discovery, they will supplement this Petition and, based on the entire record, the Board should find that Coastal's operation is not within the Board's exclusive jurisdiction.

¹² A copy of the document request that the Town and Pinelawn are serving on NYAR and Coastal with this Petition is annexed hereto as Exhibit I.

CONCLUSION

This Board has never allowed a rail carrier unilaterally to bestow rail-carrier preemption on a non-rail carrier. The Hi Tech decision reflected the well-reasoned policy of this Board. The facts of this case do not warrant a wholesale change in the Board's policy. While NYAR and Coastal may not have liked the decision in Hi Tech, that did not entitle them to circumvent it by entering into a sham agreement. NYAR and Coastal should not be permitted to avoid this Board's jurisdiction –while at the same time claiming that this Board has exclusive jurisdiction over them. This Board should not tolerate such gamesmanship and should make it clear that its precedent cannot be circumvented.

In the end, as the Board found in Hi Tech, Congress did not intend for non-rail carriers to be immune from regulation. Since the non-rail carrier in this case, Coastal, is willing to accept the profits from its non-rail operations and is not simply running the Facility for NYAR's benefit, it must also accept that it is subject to state and local regulation.

WHEREFORE, the Town and Pinelawn respectfully request that this Board grant the petition and enter a declaratory order holding that local regulation may be enforced in relation to Coastal's use of the Farmingdale Property.

Dated: New York, NY
June 29, 2007

Respectfully Submitted,

BOND SCHOENECK & KING, PLLC

By: HM me
Howard M. Miller

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Attorneys for the Town of Babylon

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-and-

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By: Fran M. Jacobs
Fran M. Jacobs

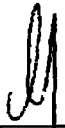
1540 Broadway
New York, NY 10036-4086
212-692-1000
Attorneys for Pinelawn Cemetery

VERIFICATION

My name is Dennis M. Cohen. I am Town Attorney and an officer of the Town of Babylon, one of the petitioners herein.

I declare under the penalty of perjury that the facts set forth in the foregoing petition for a declaratory order are true and correct. Further, I certify that I am qualified and authorized to file this testimony.

Executed on this 29th day of June 2007.



Name

CERTIFICATE OF SERVICE

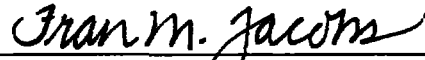
I hereby certify that copies of the foregoing Petition and Exhibits were served on July 3, 2007 by U.S. mail, postage prepaid, first class or equivalent, on the following parties and their counsel:

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

NEW YORK AND ATLANTIC RAILWAY COMPANY
68-01 Otto Road
Glendale, NY 11385

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

COASTAL DISTRIBUTION, LLC
1633 New Highway
Farmingdale, NY 11735



Fran M. Jacobs

EXHIBIT A

TRANSFER AGREEMENT

BETWEEN

THE LONG ISLAND RAIL ROAD COMPANY

AND

SOUTHERN EMPIRE STATE RAILROAD COMPANY

Dated as of November 18, 1996.

EXHIBIT

NYA 2

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

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

WITNESSETH:

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

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

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

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

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

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

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

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

ARTICLE 1: AGREEMENT AND DEFINITIONS

1.1 The Agreement

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

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

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

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

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

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

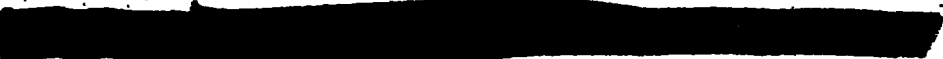
- (ii) The Freight Operator secures approval or exemption for the transactions contemplated by this Agreement from the STB consistent with Article 12.1 hereof.

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

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

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

1996. For purposes of this Article 1.1.6 the expiration of any contract by its terms, including, without limitation, any cancellation by a party other than the LIRR, shall not, nor shall the effects thereof, constitute or be considered as a contributing factor to a material adverse change, provided that the failure to commence, or the termination prior to the Commencement Date, of the contract for movement of excavated rock in the volume


deemed a material adverse change for purposes of this Article. In the event of a material adverse change, this Agreement shall be deemed terminated and the Concession Fee shall be promptly refunded.

1.2 Definitions

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

1.2.2 "AAR" means the Association of American Railroads.

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

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

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

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

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

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

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

- 1.2.27 "Freight Premises" means the real property, including the right-of-way, tracks, appurtenances, buildings, facilities, other physical plants, and improvements thereto used by the Freight Operator pursuant to this Agreement. Freight Premises shall include only the properties identified in Exhibit 1 hereto and all Sidetracks.
- 1.2.28 "Freight Rolling Stock" means Rolling Stock under the control of or operated by the Freight Operator.
- 1.2.29 "Freight Switch" means a rail switch and other track components connecting Joint Use Premises with Freight Premises that is used to switch Freight Rolling Stock from and to Joint Use Premises and Freight Premises.
- 1.2.30 "Hazardous Material" means (i) "hazardous substance" as defined under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601 et seq., and any regulations promulgated thereunder, each as it may be in effect from time to time, (ii) "hazardous materials" as defined under the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801 et seq., and any regulations promulgated thereunder, each as it may be in effect from time to time, (iii) "hazardous waste" as defined under New York Environmental Conservation Law Section 27-0901 et seq., and any regulations promulgated thereunder, each as it may be in effect from time to time, (iv) "hazardous substance" as defined under the Clean Water Act, 33 U.S.C. Section 1321 et seq., and any regulations promulgated thereunder, each as it may be

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARTICLE 2: TERM AND RENEWAL

2.1 Term

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

2.2 Renewal

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

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

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

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

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

- (d) In respect of Capital Improvements for the period from the Commencement Date to the date of the Renewal Notice, the Freight Operator has invested or has caused to be invested in the [REDACTED]

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

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

- (a) The Freight Operator shall pay to the LIRR a [REDACTED] the commencement of the Extension Period, and ten equal annual [REDACTED] on each anniversary of the commencement of the Extension Period.

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

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

ARTICLE 3: GRANT OF RIGHTS TO USE

3.1 Right to Operate and Use

- 3.1.1 The Freight Operator shall have the exclusive right to use the Freight Premises and the Joint Use Premises to conduct Freight Operations in accordance with the provisions of this Agreement.
- 3.1.2 The Freight Operator shall have the exclusive right to manage, direct and control the Freight Premises; provided, that the Freight Operator shall not enter into any contracts, leases or other agreements which extend past the Initial Expiration Date or, if the Agreement is extended, such other applicable termination date, without the LIRR's prior written consent.
- 3.1.3 The Freight Operator may, at its sole risk and expense, construct or relocate freight-related facilities and infrastructures (such as transloading facilities, shops, team tracks, yards, sidings, etc.) within the Freight Premises, subject to prior review and approval by the LIRR of the Freight Operator's plans, which approval will not unreasonably be withheld; provided that such approval shall be deemed to be granted if the LIRR has not objected to such construction within 45 days of notice thereof. All

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

3.2 Assignment of Contracts

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

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

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

3.3 Limitations on Grant

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

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

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

- (b) Any subsurface or air rights in or associated with the Freight Premises or elsewhere in or associated with the Operating Premises, which subsurface and air rights shall remain with the LIRR.
- (c) All utility occupancies currently located on the Freight Premises, including, but not limited to, the Buckeye Pipeline and all easements and reservations of record. To the extent any such utility has provided the LIRR with any indemnification, the LIRR shall use reasonable efforts to enforce such indemnification in favor of the Freight Operator, if and when applicable.
- (d) Any rights to property encumbered by encroachments, tenants, licensees, squatters or other occupancies currently on the Freight Premises. There shall be no obligation on the part of the LIRR to take any action to remove the same except that the LIRR shall continue to pursue litigation pending on the Effective Date and the LIRR shall take actions to remove any encroachment that arose after September 16, 1996 and is existing on the Commencement Date that prevents the movement of Rolling Stock on lines being actively used immediately before the Commencement Date in connection with Freight Operations on the Freight Premises; provided that, encroachment in this sentence shall mean a permanent structure and provided, further that the Freight Operator shall inform the LIRR of

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

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

- (i) Tenancies not directly related to the Freight Operations;
- (ii) Utility right-of-way or crossings, including electrical and telephone wires, fiber optic cables and pipelines of any kind (unless such utility is installed for the benefit of the Freight Operator or a permitted subtenant, with the prior permission of the LIRR); and
- (iii) Advertising or billboards of any kind and signage not directly related to the Freight Operations.

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

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

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

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

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

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

(i) The right to conduct Passenger Operations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.4 Additions to Freight Premises

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

3.5 Reversion of Freight Premises to the LIRR Under
Certain Circumstances

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

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

Article 3.5.1 hereof.

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

3.6 Condition of Freight Premises

- 3.6.1 The Freight Operator acknowledges that it has conducted due diligence to its satisfaction prior to signing this Agreement.
- 3.6.2 The LIRR has conducted an environmental audit dated July 12, 1996, which was made available for the Freight Operator's review.
- 3.6.3 The Freight Operator acknowledges and agrees that the Freight Premises are being transferred hereunder on an "as is/where is" basis and the Freight Operator shall, subject to the provisions of Article 8.4 hereof, be responsible for the condition of the Freight Premises as of the Commencement Date.
- 3.6.4 The Freight Operator is prohibited from selling, salvaging, demolishing or removing any part of the Freight Premises, including but not limited to the track, ties, ballast and track supports, without the prior written consent of the LIRR.
- 3.6.5 Notwithstanding any provision herein to the contrary:
(i) the Freight Operator may, upon prior written notification to the LIRR, salvage and sell all surplus track materials stored on the right-of-way

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

3.7 Freight Switches

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

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

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

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

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

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

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

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

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

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

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

(c) The LIRR's obligation to repair Category C Freight Switches during the first 18 months shall be limited to repairs costing in the aggregate for any [REDACTED] In the event the aggregate cost is projected to exceed \$15,000, the LIRR shall furnish notice to the Freight Operator of the required repairs and the associated cost. Within 30 days of such notice, the Freight Operator shall by written notice to the LIRR elect to (i) pay for that portion of the costs related to such repair which [REDACTED] (ii) deactivate the switch.

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

ARTICLE 4: COMPENSATION

4.1. Compensation

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

20.15.2

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

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

THE LONG ISLAND RAIL ROAD
COMPANY

By: Thomas F. Prendergast

Thomas F. Prendergast
President

Date: 11/12/96

SOUTHERN EMPIRE STATE RAILROAD
COMPANY

By: R. L. McCaffrey Jr.

Print Name: R. L. McCaffrey Jr.

Title: President

Date: 15 November 1996

EXHIBIT 1
MTA/LONG ISLAND RAIL ROAD
FREIGHT PREMISES

1. Branches

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

2. Yards

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

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

3. Appurtenant Facilities

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

4. Buildings

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

5. Team Tracks

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

XHIBIT 2
ISLAND RAIL ROAD
USE PREMISES

ger Operations with Freight Operating

Greenport
een Montauk and L.I. City Passenger Yard
. Hicksville to Port Jefferson
wer to Babylon
etween Queens and Garden City Interlockings
ich, Valley to WM

arily Passenger Operations with Freight

EXHIBIT B

LEASE AGREEMENT: FARMINGDALE - 1 - ADDENDUM

March 22, 2002

Mr. Joseph Rutigliano
Mr. Martin Sternberg
Coastal Distribution, LLC.
30 A Glen Street
Glen Cove, New York 11542

Dear Joe and Marty:

As you now realize, the Long Island Rail Road (LIRR) is occupying a portion of the Premises that New York & Atlantic Railway Company (NYA) intends to lease to Coastal Distribution, LLC (Lessee) in Farmingdale, NY (Premises) as more specifically stated in Lease Agreement FARMINGDALE -1 (Agreement). NYA feels that the LIRR has no right to occupy this portion of the Premises and is going to pursue dialogue with the LIRR to force LIRR to vacate this portion of the Premises. It is understood between NYA and Lessee that signing the Agreement will help Lessee in their efforts to market the Premises and will serve as an important document for NYA to present to LIRR in our upcoming dialogue. NYA is agreeable to signing the Agreement with Coastal under two conditions:

- 1) Lessee agrees that it shall not hold NYA responsible in any way should LIRR not vacate the Premises in a way that allows Lessee to begin to operate, including the possibility of legal action against NYA. Further, Lessee shall not make any commitments to their clientele that, should the Premises not be utilized by Lessee, would force Lessee's clientele to seek legal action against NYA.
- 2) Lessee agrees that ninety (90) days after the signing date of the Agreement, if Lessee has still not affected a Commencement Date, the Agreement shall terminate immediately.

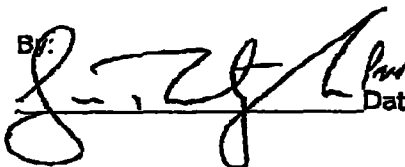
All back rent shall be reimbursed to Lessee by NYA should LIRR not vacate Premises in a timely manner and therefore cause Agreement to terminate as more specifically stated in section 2) herein.

AGREED AND ACCEPTED:

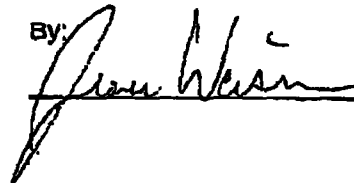
Lessee
Coastal Distribution, LLC.
30 A Glen Street
Glen Cove, New York 11542
Tel. 516-676-3700

Lessor
New York & Atlantic Railway Co.
68-01 Otto Road
Glendale, New York 11385
Tel. 718-497-3023

By:


Date 3/22/02

By:


Date 3/22/02**EXHIBIT**

NYA 6

LEASE AGREEMENT: FARMINGDALE - 1

THIS LEASE AGREEMENT ("Agreement") made and entered into this 22nd day of March, 2002, by and between New York & Atlantic Railway Co., hereafter referred to as "NYA" and Coastal Distribution, LLC. (and any of its agents, licensees and/or assignees), hereafter referred to as "Lessee".

A. **Premises.** NYA hereby agrees to let and Lessee hereby agrees to hire of NYA certain property located at Farmingdale Team Yard (PWV) as more particularly described by the drawing attached hereto as Exhibit A (the "Premises"), for Lessee's exclusive use, at the rate and for the term set forth herein.

B. **NYA Warranties.** NYA warrants it is the owner (or agent for the owner) of the Premises that it is fully authorized to enter into this agreement and has the right to grant Lessee the use of the Premises and each and all of the rights herein granted.

C. **Agreements.** It is mutually agreed by and between the parties hereto as follows:

1. **Rent.** The rate for Lessee's use of the Premises as provided herein shall be \$2,000.00 per month, payable in advance, as provided in section C.14 hereof.
2. **Improvements.** Lessee shall have the right to make improvements to the premises. All investments, made by Lessee, including pavement, lighting, fencing, security of any kind, etc. shall be at the sole expense of Lessee with no reimbursement of any kind.
3. **Term.** This Agreement shall remain in effect for five (5) years from the date when the first railcar consigned to Lessee is brought to the Premises (the "Commencement Date"). The Agreement shall terminate five (5) years after the Commencement Date ("Termination Date"). The initial term of the volume commitment of the Agreement shall begin on the Commencement Date and shall end exactly one year later (i.e. if the Commencement Date is on March 3rd, 2002, then the initial term shall end on March 2nd, 2003). Each term following the initial term shall begin on the anniversary of the Commencement Date and shall end the following year. After the initial term of the Agreement, Lessee shall automatically be entitled to another year until Termination Date provided that:
 - I. Lessee will meet a volume commitment of 1,200 carloads in the initial term, 1,800 carloads in the second term, 2,400 carloads in the third term, and 3,200 carloads for each term thereafter.
 - II. Lessee has not been in any material breach of any of the provisions of this Agreement.
 - III. NYA agrees to work with Lessee to renew Agreement after its expiration based on adherence by Lessee to all of the statutes as laid forth in this Agreement over its five-year term. The Agreement cannot be renewed past March 31st, 2017.
4. **Damage Vandalism Graffiti, etc.** NYA will not be held responsible for any damage/vandalism/graffiti, etc. to any material or equipment stored on the premises.
5. **Indemnification.** Lessee hereby assumes, releases and agrees to protect, save harmless, defend and indemnify NYA, MTA and LIRR, and its respective officers, shareholders, directors, employees, agents and assigns from and against any

and all claims and liability caused by, arising out of or resulting in any manner from the condition, existence, use or occupancy of the Premises and any adjoining lands used by Lessee during the term of this agreement, including but not limited to:

- I. All loss and damage to any property whatsoever, including property of NYA, MTA, LIRR and of all other persons whomsoever placed or stored upon Premises and upon any temporary usage area(s), and the loss of interference with any use or service thereof;
- II. All loss and damage on account of injury to or death of any person whomsoever, including but not limited to employees and patrons of the parties hereto and all other persons whomsoever on the Premises and upon such temporary usage area(s); and
- III. All consequential loss or damage occurring off the Premises but arising from acts or events on the Premises.

Notwithstanding the foregoing, Lessee shall not be responsible for and will not indemnify NYA, MTA or LIRR from and against any claims or liability arising out of or in connection with the gross negligence or gross willful misconduct of NYA, MTA or LIRR.

6. Required Insurance. Lessee shall maintain the following types of insurance with insurance carriers having a current A.M Best rating of not less than A-VIII, in the amounts provided for below and otherwise in form and substance acceptable to NYA:

- I. Comprehensive General Liability Insurance with minimum limit per any one occurrence of \$5,000,000. All exclusions as relating to Railroad Right of Way must be deleted from the policy. If this is not the case, then Insurance as set forth in Section 6.IV shall be provided by the lessee.
- II. Automobile Liability Insurance (covering owned, hired and non-owned vehicles) in minimum limits of \$2,000,000 for injury to or death of any one person, of \$5,000,000 for injury to or death of more than one person in any one accident, of \$5,000,000 for damage to property in any one accident.
- III. Workers Compensation Insurance in an amount not less than required by The State of New York and as follows:

Coverage A – Statutory Policy form

Coverage B – Employer's Liability
 - Bodily Injury by Accident: \$1,000,000 each accident
 - Bodily Injury by Disease: \$1,000,000 each employee & Policy Limit
- IV. Railroad Protective Liability Insurance in the amount of at least \$10,000,000. The form shall be on an occurrence basis and be executed in favor of NYA as a named insured.

- V. Lessee and all of its insurer(s) agree to waive subrogation (including without limitation Worker's Compensation) against NYA, URR, MTA, their agents and employees, which waiver(s) by insurer(s) shall also be expressed and evidenced in the certificates of insurance (including without limitation Worker's Compensation).
- VI. All of Lessee's insurance shall be primary insurance with respect to the additional insureds and will not participate with any other available insurance (and upon NYA's request Lessee's certificates of insurance shall reflect the foregoing primary aspect). All deductibles shall require written consent of NYA. All of Lessee's insurance of any type shall be from insurer(s) approved by NYA. Failure by NYA to object to the lack or contents of any of the certificate(s) or coverage(s) to be provided by Lessee shall not serve to waive or limit NYA's rights or remedies nor to eliminate or effect Lessee's obligations, waivers or liabilities under this contract.

Lessee shall furnish NYA Certificates of Insurance, in duplicate, evidencing all required insurance to be in full force and effect and that the same will not be canceled without at least thirty (30) days advance written notice by Insurance Company to NYA. The New York and Atlantic Railway, the Metropolitan Transit Authority and the Long Island Rail Road shall be shown as additional insured.

7. Condition of Premises. NYA does not warrant the condition of its property, equipment and facilities for any purpose. Lessee assumes the risk of using the Premises for any purpose, and accepts all conditions and defects present thereon, or associated therewith.
8. Removal of Improvements. At the end of the project, Lessee shall have the right to remove all of its structures and other material and equipment from said premises at the sole cost and expense of Lessee if they so desire; provided, that removal of such structures and other material and equipment will not damage the Premises in any way.
9. Emergency Interruptions. When requested by NYA, Lessee agrees to stop any activity in which it is engaged whenever NYA deems an emergency, as necessary to insure the timely and safe operations of the railroad and in no event will train operations or safety be jeopardized.
10. Compliance with Procedures and Instructions. Lessee, its officers, employees, agents, contractors and invitees agree to comply with all NYA operating procedures, safety rules and instructions from NYA personnel.
11. Liability. Lessee agrees that when railcars are placed for unloading/loading at Premises, the security of the railcars and their contents shall remain with Lessee.
12. Freight Payments. Lessee shall maintain good credit with NYA. Lessee shall pay freight bills within fifteen (15) days of receipt. If account of Lessee is in arrears at any time during the term of the Agreement, this will be considered a violation of the Agreement, and NYA will be entitled to terminate the Agreement as specified in section 13.1 hereof.
13. Termination.
- I. This Agreement is subject to immediate termination by either party in the event of violations by the other party of any of the terms and conditions of this Agreement. Lessee shall have been given sixty (60) days written notice to cure any breach of any obligations of

the Agreement. However, Lessee shall have been given fifteen (15) days written notice to cure violations as proscribed in section C.12 hereof.

- II. Lessee shall have the right to cancel this agreement on sixty (60) days written notice.
- III. NYA shall have the right to cancel this agreement on sixty (60) days written notice provided the railcar volume commitments as stated in section C.3.1 hereof are not met.

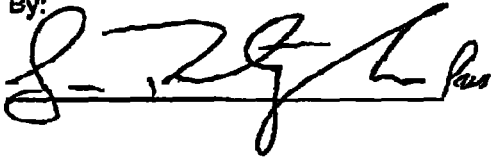
14. Effective Date. This Agreement shall not become effective until Lessee has returned a signed copy of this Agreement, furnished evidence of insurance as specified in section C.6 hereof, and submitted payment of Two Thousand and xx/100 Dollars (\$2,000.00) to NYA for the first month's rent. All subsequent monthly rent is due on the first day of every month. Lessee shall have a ten-day grace period for payment of rent.

AGREED AND ACCEPTED:

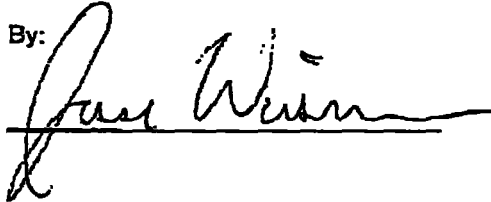
Lessee
Coastal Distribution, LLC.
30 A Glen Street
Glen Cove, New York 11542
Tel. 516-676-3700

Lessor
New York & Atlantic Railway Co.
88-01 Otto Road
Glendale, New York 11385
Tel. 718-497-3023

By:



By:



DATED: March 22, 2002

Check Payable To:
New York & Atlantic Railway Co.
Accounting Office
53 West Jackson Boulevard, Suite 335
Chicago, IL 60604
Fed. I.D.#: 13-3926500

DATED: March 22, 2002

EXHIBIT C

Town
B.LEASE AGREEMENT: FARMINGDALE - 1

Tell THIS LEASE AGREEMENT ("Agreement") made and entered into this 11 day of July, 2002, by and between New York & Atlantic Railway Co., hereafter referred to as "NYA" and Coastal Distribution, LLC. (and any of its agents, licensees and/or assignees), hereafter referred to as "Lessee".

A. Premises. NYA hereby agrees to let and Lessee hereby agrees to hire of NYA certain property located at Farmingdale Team Yard (PW) as more particularly described by the drawing attached hereto as Exhibit A (the "Premises"), for Lessee's exclusive use, at the rate and for the term set forth herein.

B. NYA Warranties. NYA warrants it is the owner (or agent for the owner) of the Premises, that it is fully authorized to enter into this agreement and has the right to grant Lessee the use of the Premises and each and all of the rights herein granted. It is agreed to by the Lessee the rights conveyed by this lease are subject to, and limited by, the rights conferred to NYA by the Transfer Agreement between the Long Island Rail Road and NYA.

C. Agreements. It is mutually agreed by and between the parties hereto as follows:

1. Rent / Rebates. The rate for Lessee's use of the Premises as provided herein shall be \$2,000.00 per month, payable in advance, as provided in section C.14 hereof. The NYA and Lessee hereby agree to the following payment/rebate arrangement regarding the movement of LIRR material from the premises:

a. Lessee will make \$115,000 in funds available to NYA

NYA will contribute the following to achieve a \$65,000 payment to Lessee, which is equal to one-half of total funds required.

b. NYA will add \$15,000 to figure in "1-a" above, and submit funds to the LIRR in the amount of \$130,000.

c. NYA will rebate Lessee in the amount of \$10 per rail car shipped where "Coastal Distribution", or affiliates as specified, show as consignee, at the station of Farmingdale, NY. This rebate will remain in effect until the amount of \$25,000 has been apportioned to the Lessee. The term of this rebate shall not exceed three years from the effective date.

d. NYA will reduce the rent on premises for the first twenty-four months of the agreement, to the amount of \$1000 per month. The security payment made by Lessee for the previously cancelled contract will be applied as the payment for September 2004 rent.

2. Improvements. Lessee shall have the right to make improvements to the premises. All investments, made by Lessee, including pavement, lighting, fencing, security of any kind, etc. shall be at the sole expense of Lessee with no reimbursement of any kind.

3. Term. This Agreement shall remain in effect for five (5) years from the date when the first railcar consigned to Lessee is brought to the Premises (the "Commencement Date"). The Agreement shall terminate five (5) years after the Commencement Date ("Termination Date"). The initial term of the volume commitment of the Agreement shall begin on the Commencement Date and shall end exactly one year later (i.e. if the Commencement Date is on August 1st, 2002, then the initial term shall end on August 1st, 2003). Each term following the initial term shall begin on the anniversary of the Commencement Date and

shall end the following year. After the initial term of the Agreement, Lessee shall automatically be entitled to another year until Termination Date provided that:

- I. Lessee will meet a volume commitment of 1,200 carloads in the initial term, 1,800 carloads in the second term, 2,400 carloads in the third term, and 3,200 carloads for each term thereafter.
 - II. Lessee has not been in any material breach of any of the provisions of this Agreement.
 - III. NYA agrees to work with Lessee to renew Agreement after its expiration based on adherence by Lessee to all of the statutes as laid forth in this Agreement over its five-year term. The Agreement cannot be renewed past March 31st, 2017.
4. Damage, Vandalism, Graffiti, etc. NYA will not be held responsible for any damage/vandalism/graffiti, etc. to any material or equipment stored on the premises.
5. Indemnification. Lessee hereby assumes, releases and agrees to protect, save harmless, defend and indemnify NYA, MTA and LIRR, and its respective officers, shareholders, directors, employees, agents and assigns from and against any and all claims and liability caused by, arising out of or resulting in any manner from the condition, existence, use or occupancy of the Premises and any adjoining lands used by Lessee during the term of this agreement, including but not limited to:
- I. All loss and damage to any property whatsoever, including property of NYA, MTA, LIRR and of all other persons whomsoever placed or stored upon Premises and upon any temporary usage area(s), and the loss of interference with any use or service thereof;
 - II. All loss and damage on account of injury to or death of any person whomsoever, including but not limited to employees and patrons of the parties hereto and all other persons whomsoever on the Premises and upon such temporary usage area(s); and
 - III. All consequential loss or damage occurring off the Premises but arising from acts or events on the Premises.

Notwithstanding the foregoing, Lessee shall not be responsible for and will not indemnify NYA, MTA or LIRR from and against any claims or liability arising out of or in connection with the gross negligence or gross willful misconduct of NYA, MTA or LIRR.

6. Required Insurance. Lessee shall maintain the following types of insurance with insurance carriers having a current A.M Best rating of not less than A-VIII, in the amounts provided for below and otherwise in form and substance acceptable to NYA:
- I. Comprehensive General Liability Insurance with minimum limit per any one occurrence of \$5,000,000. All exclusions as relating to Railroad Right of Way must be deleted from the policy, if this is not

the case, then Insurance as set forth in Section 6.IV shall be provided by the lessee:

- II. Automobile Liability Insurance (covering owned, hired and non-owned vehicles) in minimum limits of \$2,000,000 for injury to or death of any one person, of \$5,000,000 for injury to or death of more than one person in any one accident, of \$5,000,000 for damage to property in any one accident.
- III. Workers Compensation Insurance in an amount not less than required by The State of New York and as follows:

Coverage A – Statutory Policy form

Coverage B – Employer's Liability

- Bodily Injury by Accident: \$1,000,000 each accident
- Bodily Injury by Disease: \$1,000,000 each employee & Policy Limit

- IV. Railroad Protective Liability Insurance in the amount of at least \$10,000,000. The form shall be on an occurrence basis and be executed in favor of NYA as a named insured.
- V. Lessee and all of its insurer(s) agree to waive subrogation (including without limitation Worker's Compensation) against NYA, LIRR, MTA, their agents and employees, which waiver(s) by insurer(s) shall also be expressed and evidenced in the certificates of insurance (including without limitation Worker's Compensation).
- VI. All of Lessee's insurance shall be primary insurance with respect to the additional insured and will not participate with any other available insurance (and upon NYA's request Lessee's certificates of insurance shall reflect the foregoing primary aspect). All deductibles shall require written consent of NYA. All of Lessee's insurance of any type shall be from insurer(s) approved by NYA. Failure by NYA to object to the lack or contents of any of the certificate(s) or coverage(s) to be provided by Lessee shall not serve to waive or limit NYA's rights or remedies nor to eliminate or effect Lessee's obligations, waivers or liabilities under this contract.

Lessee shall furnish NYA Certificates of Insurance; in duplicate, evidencing all required insurance to be in full force and effect and that the same will not be canceled without at least thirty (30) days advance written notice by Insurance Company to NYA. The New York and Atlantic Railway, the Metropolitan Transit Authority and the Long Island Rail Road shall be shown as additional insured.

7. Condition of Premises. NYA does not warrant the condition of its property, equipment and facilities for any purpose. Lessee assumes the risk of using the Premises for any purpose, and accepts all conditions and defects present thereon, or associated therewith.
8. Removal of Improvements. At the end of the project, Lessee shall have the right to remove all of its structures and other material and equipment from said premises at the sole cost and expense of Lessee if they so desire; provided, that removal of such structures and other material and equipment will not damage the Premises in any way.

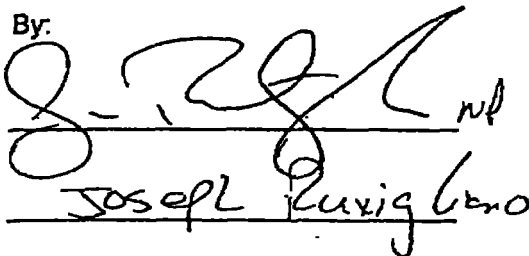
9. Emergency Interruptions. When requested by NYA, Lessee agrees to stop any activity in which it is engaged whenever NYA deems an emergency, as necessary to insure the timely and safe operations of the railroad and in no event will train operations or safety be jeopardized.
10. Compliance with Procedures and Instructions. Lessee, its officers, employees, agents, contractors and invitees agree to comply with all NYA operating procedures, safety rules, and instructions from NYA personnel.
11. Liability. Lessee agrees that when railcars are placed for unloading/loading at Premises, the security of the railcars and their contents shall remain with Lessee.
12. Freight Payments. Lessee shall maintain good credit with NYA. Lessee shall pay freight bills within fifteen (15) days of receipt. If account of Lessee is in arrears at any time during the term of the Agreement, this will be considered a violation of the Agreement, and NYA will be entitled to terminate the Agreement as specified in section 13.1 hereof.
13. Termination.
- I. This Agreement is subject to immediate termination by either party in the event of violations by the other party of any of the terms and conditions of this Agreement. Lessee shall have been given sixty (60) days written notice to cure any breach of any obligations of the Agreement. However, Lessee shall have been given fifteen (15) days written notice to cure violations as proscribed in section C.12 hereof.
 - II. Lessee shall have the right to cancel this agreement on sixty (60) days written notice.
 - III. NYA shall have the right to cancel this agreement on sixty (60) days written notice provided the railcar volume commitments as stated in section C.3.1 hereof are not met.
14. Effective Date. This Agreement shall not become effective until Lessee has returned a signed copy of this Agreement, furnished evidence of insurance as specified in section C.6 hereof. All rental payments are due on the first day of every month. Lessee shall have a ten-day grace period for payment of rent.

AGREED AND ACCEPTED:

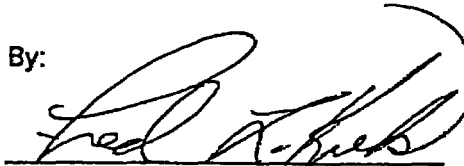
Lessee
Coastal Distribution, LLC.
30 A Glen Street
Glen Cove, New York 11542
Tel. 516-676-3700

Lessor
New York & Atlantic Railway Co.
68-01 Otto Road
Glendale, New York 11385
Tel. 718-497-3023

By:


Joseph Pugigano

By:



Check Payable To:
New York & Atlantic Railway Co.
Accounting Office
53 West Jackson Boulevard, Suite 335
Chicago, IL 60604
Fed. I.D.#: 13-3926500

DATED: July 11, 2002

DATED: July 11, 2002

EXHIBIT D

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TRANSLOAD FACILITY OPERATIONS AGREEMENT

5-6 This TRANSLOAD FACILITY OPERATIONS AGREEMENT, effective as of August 6, 2004, is made and entered into by and between New York & Atlantic Railway Company ("Railroad"), and Coastal Distribution, LLC, a limited liability company of the State of New York ("Coastal").

RECITALS

WHEREAS, RAILROAD is a common carrier by rail conducting freight operations over certain tracks and facilities of The Long Island Rail Road Company pursuant to a Transfer Agreement dated November 18, 1996 (the "Transfer Agreement") that permits RAILROAD to lease or license certain properties for use in furtherance of freight operations; and

WHEREAS, RAILROAD and COASTAL are parties to a Lease agreement dated July 11, 2002 (the "Lease") providing for the lease of a yard and transloading facility ("the Facility") at the Farmingdale (P.W.) Rail Yard, located in Babylon, New York (the "Yard"); and

WHEREAS, the parties desire to cancel the Lease and modify their relationship in accordance with the following agreement; and

WHEREAS, RAILROAD desires to continue to offer and provide transloading and rail transportation services via carload to certain railroad customers ("Customers") at the Facility in conjunction with RAILROAD's rail line and the interstate railroad network; and

WHEREAS, COASTAL desires to continue to operate the Facility for and on behalf of RAILROAD; and

WHEREAS, RAILROAD desires to engage COASTAL as RAILROAD's contractor, to operate the Facility on RAILROAD's behalf; and

WHEREAS, the services shall be limited to providing transloading services between rail and truck for such non-hazardous freight, as may be agreed upon as provided herein, such freight being referred to generally as "Commodities" in this agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the representations, warranties, covenants and agreements set forth in this Agreement:



ARTICLE I – TRANSLOADING OPERATIONS

1.01. COASTAL Transloading Services. COASTAL shall, and shall have the exclusive right to, transload Commodities between trucks and rail cars at the Facility, for and on behalf of Railroad, pursuant to the terms of this Agreement. This right and obligation shall not be construed as a property interest in the Yard or the Facility, and is subordinate and subject in all respects to the terms and conditions of the Transfer Agreement.

1.02. RAILROAD Control of Operations. RAILROAD shall control all aspects of the Facility's transloading operations. RAILROAD shall have the right to review and audit COASTAL's business records related to the operation of Facility during regular business hours and shall have the right to inspect COASTAL's operation of the Facility at any time. COASTAL operations at the Facility and the Yard shall be subject to the supervisory authority of the RAILROAD's General Manager at Glendale.

1.03. RAILROAD Obligations. RAILROAD shall provide the existing Facility, AS IS, WHERE IS. RAILROAD shall have the right to change the configuration of track at the Yard so long as such change does not unreasonably interfere with COASTAL'S operations. RAILROAD does not warrant the condition of the Facility or the surrounding areas, the Yard or its equipment for any purpose. COASTAL has examined the premises and assumes the risk of using the premises for any purpose, and accepts all conditions and defects present thereon or associated therewith, known or unknown, provided however, that COASTAL does not waive or relinquish any rights it may have against RAILROAD under the Lease as a result of or arising from the claim of Pinelawn Cemetery to property rights in the Yard as are, or may be, alleged in Pinelawn Cemetery v. Coastal Distribution, LLC, et al., County of Suffolk No. 04-8599. Any such claim shall survive this agreement and the cancellation of that Lease contained herein.

1.04 Rail Service: Railroad shall provide reasonable rail service to the Facility.

1.05 Custody of Lading and Equipment: RAILROAD'S responsibility and liability for the cars and their contents bound to or from the Facility ends when the cars are uncoupled from the RAILROAD'S locomotive at the Facility, and the RAILROAD'S responsibility and liability is resumed when the cars are coupled to RAILROAD'S locomotive.

1.04. COASTAL Obligations.

(a) COASTAL shall perform transloading services between rail cars and trucks at the Facility for Customers of the RAILROAD. Such services shall include only those commodities, movements and equipment allowed by applicable law and regulations and approved by RAILROAD which approval will not be unreasonably withheld. COASTAL shall immediately cease and desist from any operations which shall be found to be in violation of any contractual or other obligation of RAILROAD upon notice from Railroad.

(b) COASTAL shall enforce all rules and regulations, as promulgated by RAILROAD as to all Customers, COASTAL employees and visitors at the Yard. Railroad may

establish rules related to safety and train operation which are consistent with industry norms or which are mandated by law or regulation. RAILROAD and COASTAL will jointly determine all such other rules as will apply to the operation of the facility, such rules will be to assure the efficient operation of the facility and will be designed to minimize adverse impacts on neighbors. Further, Coastal shall comply with any and all applicable governmental health, safety and environmental rules or regulations.

(c) COASTAL shall, at its sole cost, acquire or provide any additional loading equipment (not owned by RAILROAD) reasonably necessary for the efficient handling of material and conducting transloading operations at the Facility and Yard. COASTAL shall clearly identify all such equipment as COASTAL equipment. All such equipment will comply with all applicable regulations. COASTAL will have the right to install and remove such equipment as the market may dictate, subject to the approval of RAILROAD (and LIRR to the extent required under the Transfer Agreement).

(d) COASTAL may market the Facility and the services of RAILROAD available by use of the Facility. COASTAL shall obtain RAILROAD's advance written approval of all written materials, including brochures and other marketing material used by COASTAL in marketing RAILROAD's transload and transportation services related to the Facility. Unless RAILROAD otherwise provides to the contrary, any such marketing material and any signage located inside or outside of the Yard shall prominently indicate RAILROAD's name and/or logo.

1.06. Railcars: Unless otherwise agreed by the parties hereto in writing:

- (a) COASTAL will provide railcars to be used for any movement of construction and demolition debris or other long-term, repeat Commodity shipments from the Facility. Such railcars must be in good condition and provide appropriate protection to maintain the quality of their lading. Railcars provided by COASTAL and used under this Agreement will be subject to prior approval of RAILROAD, which approval shall not be unreasonably withheld. COASTAL equipment will not earn per-diem while on RAILROAD. COASTAL will provide maintenance for such equipment except that, as necessary to provide running repairs, RAILROAD may repair en route and bill COASTAL in accordance with current Association of American Railroads (AAR) Rules or COASTAL's own repair standards.
- (c) Equipment Compliance: All railcars used to transport the Commodities pursuant to this Agreement shall comply with AAR and American National Standard Institute (ISO) specifications, as well as all applicable laws, rules and regulations. It shall be the responsibility of the party providing the equipment in any case to assure such compliance.
- (d) Supplemental Equipment: If COASTAL'S need for railcars exceeds its own supply, RAILROAD will, upon request, use its reasonable best efforts to obtain suitable railcars on such terms as may be applicable to such equipment, but at the sole cost of COASTAL. RAILROAD will provide equipment for all non-regular

customers of the facility on terms applicable to such shipments in railroad-supplied equipment.

- (e) Equipment Availability: RAILROAD will provide storage for empty COASTAL equipment not to exceed 50 rail cars at no cost to COASTAL.

1.07. Track Inspection: RAILROAD will remain responsible for the inspection of all tracks within the facility. Coastal will make such repairs as RAILROAD shall reasonably determine are necessary to maintain the facility in compliance with applicable regulations. Should Coastal fail to make necessary repairs RAILROAD will close the track in question until such repair is made.

1.07. Tender of Shipment: COASTAL shall ensure that each tender of Commodities for outbound rail shipment is made by or on behalf of RAILROAD'S Customer by e-mail, Electronic Data Interchange or other electronic means as agreed by the parties on a Uniform Straight Bill of Lading for carload shipments, properly classifying the Commodity to be shipped.

1.08. Loading and Unloading of Lading:

- (a) Compliance with Loading Rules: COASTAL shall have the sole responsibility, at its sole expense, for properly packaging, labeling, marking, blocking, bracing, placarding, and loading and unloading the Commodities tendered by Customers at the Facility to or from equipment to be transported pursuant to this Agreement. COASTAL shall comply with the loading rules of the AAR and applicable law. COASTAL shall further be responsible for insuring that the load limits of any equipment used for transporting the Commodities under this Agreement are not exceeded.
- (b) Overloaded or Improperly Loaded Equipment: In the event it is discovered that equipment has been overloaded or improperly loaded, RAILROAD may set out such equipment at a location convenient to RAILROAD and shall notify COASTAL by facsimile or e-mail of the location of the overloaded or improperly loaded equipment. COASTAL shall have 24 hours to remove excess weight or adjust load; or, if deemed safe, RAILROAD will move the overloaded or improperly loaded equipment to the nearest appropriate site. In any event, COASTAL shall be responsible for all costs for movement of the overloaded or improperly loaded equipment, and payment of any additional expenses incurred by RAILROAD due to improper loading or overloading of equipment. RAILROAD will move the affected equipment to its destination in such manner and at such time as is practicable after RAILROAD receives notice from COASTAL that the problem has been corrected.

1.09. No Selection of Landfill: In the event the Commodities include construction and demolition debris neither RAILROAD, nor COASTAL on behalf of RAILROAD, shall participate in, or take any active interest in, the site selection for the storage or disposal of the materials transported hereunder. RAILROAD shall have no obligation with regard to disposition of Commodities tendered to it for transportation other than to deliver it to the consignee or to

another railroad for interchange. To the extent that COASTAL enters into any agreement with a Customer for disposition of Commodities after transportation of the Commodities by RAILROAD, COASTAL shall not do so as an agent of RAILROAD and shall indemnify, defend and hold the RAILROAD harmless from any claims or liability arising out of COASTAL's activities on its own behalf. For the purpose of monitoring compliance with this agreement, COASTAL shall provide RAILROAD, upon request, a copy of any contract it or any Customer enters into with a destination landfill or treatment site prior to shipping Commodities to that landfill or treatment site.

1.10. Commodity and Analysis Reports: If requested, COASTAL shall provide RAILROAD with a copy of any commodities analysis report that is required to be submitted to any federal, state or local agency or to the operator of any destination disposal sites.

1.11. Incidents: In the event of an incident during transportation over RAILROAD's lines under this Agreement, which involves a release of the Commodities, RAILROAD shall immediately notify COASTAL, and each party shall take immediate action.

(a) In any such incident where the release was caused by an act or omission of RAILROAD, the expenses of cleanup shall be the obligation of RAILROAD under the terms of this Agreement, and COASTAL shall, upon request of RAILROAD and to extent it is authorized by law and regulation:

- (1) provide containers for loading of Commodities and accept for disposal Commodities being disposed of by RAILROAD as a result of the cleanup ("RAILROAD's Cleanup Waste"), subject to the parties' mutual agreement on the cost of disposal for RAILROAD's cleanup waste to the extent the net tonnage of that waste exceeds the net tonnage of the original Commodities; and
- (2) credit against RAILROAD's disposal costs for RAILROAD's Cleanup Waste any monies already collectible by COASTAL from other parties for the original disposal of the Commodities involved in the incident.

(b) In any such incident where the release was caused by an act or omission of COASTAL, the expenses of cleanup shall be the obligation of COASTAL under the terms of this Agreement, and RAILROAD shall, upon request of COASTAL and to the extent it is authorized by law and regulation:

- (1) transport the Commodities being disposed of by COASTAL as a result of the cleanup ("COASTAL's Cleanup Waste"); and
- (2) credit against COASTAL's transportation costs for COASTAL's Cleanup Waste any monies already payable by COASTAL to RAILROAD for the original transportation of the Commodities involved in the incident.

1.12. RAILROAD Use. COASTAL acknowledges that RAILROAD may use the tracks and other yard facilities from time to time for railroad purposes so long as that use does not unreasonably interfere with Coastal's operation.

1.13 Exclusive Use: So long as the terms of this Agreement remain in effect, RAILROAD shall not authorize any other party to conduct transloading activities at the Farmingdale (P.W.) Yard or operate the Facility on RAILROAD'S behalf.

1.14 Non Interference: The parties shall use their best efforts to conduct their respective operations so as not to interfere with the operations of the other.

ARTICLE II – DOCUMENTS AND BILLING

2.01. Transport Documentation.

(a) All bills of lading and similar documents for outbound rail shipments from the Facility (collectively, "Transport Documentation") for the Commodities transloaded at the Facility shall be between RAILROAD and the Customer, but COASTAL, as RAILROAD'S agent, may execute such Transportation Documentation on behalf of RAILROAD. COASTAL shall advise RAILROAD from time to time of the names of the COASTAL officers and employees who will execute such Transport Documentation, and shall apply prudent internal control procedures to ensure compliance with the provisions of this Agreement.

(b) All Transport Documentation shall be on a form approved in writing by RAILROAD and shall specifically state that neither RAILROAD nor COASTAL shall take title to any Commodities and that RAILROAD shall not, under any circumstances, be responsible or liable for disposal of Commodities. COASTAL may enter into separate agreements (collectively, "Disposal Agreements") in its own name with Customers whereby COASTAL shall be responsible to such Customer for obtaining the disposal of COMMODITIES. In entering into and performing any Disposal Agreements, COASTAL shall not make any statement or take any action or fail to take any action that suggests that RAILROAD is in any way participating in or approving any Disposal Agreement of disposal arrangement. Any Disposal Agreements shall be entirely independent from the transportation and loading service provided under this agreement. Coastal shall separately invoice and collect any fees or charges on its own behalf under any Disposal Agreements.

2.02. Billing and Collection. COASTAL shall promptly bill and collect from Customers all Loading Fees (as defined below) for loading or unloading services rendered to the Customer by COASTAL. COASTAL shall remit to RAILROAD within two business days of clearance of funds by COASTAL'S bank such portion of the Loading Fees for RAILROAD'S corresponding Usage Fee (as defined below). COASTAL shall provide RAILROAD with a monthly accounting of the rail cars and trucks loaded by COASTAL under this Agreement, amounts billed and funds received. Loaded freight transportation charges will be collected by the Class I carrier unless otherwise provided by applicable transportation contract or tariff.

ARTICLE III - LOADING AND USAGE FEES

3.01. Rates and Charges. For and as its sole compensation for per transloading services, COASTAL shall be entitled to charge a Loading Fee ("Loading Fee") for such services, which fee shall be in addition to the rail freight transportation charge payable to RAILROAD for loaded freight car movements.

3.02 Use Charge: COASTAL shall pay to RAILROAD, for the use of the Facility in recognition of the previous contributions to construction of the Facility by the par fee (the "Usage Fee") of twenty dollars (\$20) per loaded rail car (inbound or outb Usage Fee for each loaded car in excess of 1,200 in any contract year (as determ anniversary of the effective date) shall be reduced to five dollars (\$5).

3.03 Payment. Usage Fees payable to RAILROAD under this agreement : as provided in Section 2.02 above.

3.04 Discrepancies: Any discrepancy in billing or charges provided fo agreement shall be reconciled between the parties. Any claim for adjustment or c charges paid, collected or remitted shall be made in writing by the party making th delivered to other party within six (6) months of the date upon which the charg collected or remitted or shall be deemed waived. Any such claim shall be resolved Section 7.03.

ARTICLE IV - COVENANTS OF COASTAL

4.01. Use of the Facility. During the term of this Agreement, COASTAL covenants as follows:

- (a) COASTAL shall use the Facility only for the transfer of Commodit trucks and railcars transported by RAILROAD.
- (b) COASTAL shall access the Facility using only RAILROAD's pri route off New Highway and shall not load or unload railcars outside th
- (c) COASTAL may not allow other persons to operate the Facility witho written permission of RAILROAD which permission may be withl reason.
- (d) COASTAL shall, at its sole cost and expense, obtain any applica permits, licenses, waivers, consents or other governmental authority it to operate the Facility. Any costs incurred by RAILROAD in th obtaining any permits or operating authority for COASTAL will COASTAL, provided however COASTAL will not be responsible f fees incurred by RAILROAD in reviewing submissions made by C costs incurred by RAILROAD in obtaining any additional permits, exemptions in the name of RAILROAD.

- (e) Should RAILROAD'S operations be interrupted by any government agency, public authority or any entity authorized to do so, due to any deficiency in COASTAL'S permits or as the result of COASTAL's failure to obtain or comply with same, COASTAL shall defend, indemnify and hold RAILROAD harmless from any and all costs, including attorney's fees.
- (f) COASTAL shall take reasonable steps to assure that any hauler, motor carrier or other person, party or entity operating to, at or from the Facility is duly licensed and authorized to so operate under applicable law.
- (g) COASTAL and its affiliates, agents, contractors, employees and invitees shall adhere to RAILROAD's standard safety policies then in effect based on rule books, and revisions thereto, as provided to COASTAL by RAILROAD.
- (h) COASTAL covenants that as of the Effective Date of this agreement, the Facility has been constructed and operated in compliance with (i) any applicable laws and regulations, and (ii) all buildings on the premises were built and all buildings to be built will comply with all requirements of the LIRR as may be imposed under the Transfer Agreement and with any applicable standards contained in any building and or fire codes and any other standard, law or regulation, except to the extent that RAILROAD and COASTAL agree such standards are not applicable. COASTAL covenants that it will maintain the Facility in compliance with such requirements during the term of this agreement. If COASTAL fails to take action within a reasonable time to comply with any such requirements, RAILROAD shall have the right, but not the obligation, to take the action required to comply with said requirements at the sole cost of COASTAL.

4.02. Condition of the Facility.

- (a) COASTAL promises: 1) not to damage or misuse the Facility or allow its employees, contractors, agents or invitees to do so; 2) not to make any structural changes to the Facility without the prior written consent of RAILROAD; 3) to immediately notify RAILROAD of any conditions at the Facility that are dangerous to human health or safety, or that may damage the Facility; 4) that if COASTAL vacates the Facility, all fixtures and improvements will be left in good condition, except for ordinary wear and tear and shall become the property of RAILROAD and The Long Island Railroad; and 5) not to permit waste of the Facility. Notwithstanding the foregoing, unless COASTAL is in material breach of this agreement, upon the termination of this agreement COASTAL may elect, subject to requirements of the Transfer Agreement, to remove any improvements made at its own cost and leave the premises in its pre July 11, 2002 condition.
- (b) COASTAL, at its expense, shall be solely responsible for all necessary repairs, maintenance and upkeep of the Facility.

- (c) COASTAL shall not permit any liens to encumber the Facility for any labor or material furnished in connection with any work performed or claimed to have been performed in or about the Facility.
- (d) If the Facility is destroyed or damaged so it is unfit to be used for the purposes existing prior to COASTAL'S occupancy, COASTAL will be responsible for returning the Facility to that condition which existed on July 11, 2002.

4.03. Insurance. Coastal shall maintain the following types of insurance with insurance carriers having a current AM Best rating of not less than A-VIII, in the amounts provided for below and otherwise in form and substance acceptable to RAILROAD:

- (a) Comprehensive General Liability Insurance with minimum limit per any one occurrence of \$5,000,000. All exclusions as relating to Railroad Right of Way must be deleted from the policy, if this is not the case, then insurance as set forth in Section 4.03(d) shall be provided by COASTAL.
- (b) Automobile Liability Insurance (covering owned, hired and non-owned vehicles) in minimum limits of \$2,000,000 for injury to or death of any one person, of \$5,000,000 for injury to or death of more than one person in any one accident, of \$5,000,000 for damage to property in any one accident.
- (c) Workers Compensation Insurance in an amount not less than required by The State of New York and as follows:
 - Coverage A – Statutory Policy form
 - Coverage B – Employer's Liability
 - Bodily injury by Accident: \$1,000,000 each accident
 - Bodily Injury by Disease: \$1,000,000 each employee & Policy Limit
- (d) Railroad Protective Liability Insurance in the amount of at least \$10,000,000. The form shall be on an occurrence basis and be executed in favor of RAILROAD as a named insured. Coastal and all of its insurer(s) agree to waive subrogation (including without limitation Worker's Compensation) against RAILROAD, LIRR, MTA, their agents and employees, which waiver(s) by insurer(s) shall also be expressed and evidenced in the certificates of insurance (including without limitation Worker's Compensation).
- (e) All of Coastal's insurance shall be primary insurance with respect to the additional insured and will not participate with any other available insurance (and upon RAILROAD'S request Coastal's certificates of insurance shall reflect the foregoing primary aspect). All deductibles shall require written consent of RAILROAD. All of COASTAL'S insurance of any type shall be from insurer(s) approved by RAILROAD. Failure by RAILROAD to object to the lack or contents of any of the certificate(s) or coverage(s) to be provided by Coastal shall

not serve to waive or limit RAILROAD'S rights or remedies nor to eliminate or effect COASTAL'S obligations, waivers or liabilities under this contract.

COASTAL shall furnish RAILROAD Certificates of Insurance, in duplicate, evidencing all required insurance to be in full force and effect and that the same will not be canceled without at least thirty (30) days advance written notice by Insurance Company to RAILROAD. The New York and Atlantic Railway, the Metropolitan Transit Authority and The Long Island Railroad shall be shown as additional insured.

4.04. Maintenance. COASTAL shall obtain and pay for all utility charges for the Facility. COASTAL shall also pay the costs of maintenance and repair of the Facility.

4.05. Compliance with Regulations. COASTAL agrees to use the Facility in strict conformance with all applicable rules, regulations and ordinances of federal, state and municipal authorities including without limitation, any regulations concerning the handling of construction and demolition debris, except to the extent that RAILROAD and COASTAL agree such standards are not applicable.

ARTICLE V – TERM

5.01. Initial Term. The Agreement shall expire on the date five years after the effective date of this agreement (the "Initial Term"); provided, however, that RAILROAD shall also have the right to terminate this Agreement prior to expiration in the event:

- (a) COASTAL breaches or fails to comply with any of the covenants, terms or conditions of this Agreement;
- (b) RAILROAD loses the right to provide COASTAL with access to the Facility for any reason; or
- (c) The Facility fails to meet the following minimum volume levels during the respective contract years (measured from the anniversaries of the effective date):
 - (i) 1200 carloads in the first contract year,
 - (ii) 1800 carloads in the second contract year,
 - (iii) 2400 carloads in the third contract year, and
 - (iv) 3200 carloads in the fourth and all subsequent contract years.

5.02. Renewal: The parties agree to discuss renewal terms for this agreement on and after the first anniversary of the Effective Date, unless COASTAL is in material breach of this agreement. Provided however, in no event will this agreement be renewed or extended to apply after March 31, 2017.

5.04 Dangerous or Unlawful Condition: Notwithstanding section 5.03 above, should any condition be created by COASTAL on the Facility that creates or contributes to a dangerous condition or results in RAILROAD or COASTAL being cited for a violation of any federal, state or local law, rule, ordinance or regulation regulating health, safety or the environment or which could result in conviction of a crime, misdemeanor or violation, RAILROAD, in its sole and absolute discretion, may immediately limit COASTAL's rights under this Agreement to prohibit the activity giving rise to such safety or environmental hazard or violation pending a final determination of the facts or of liability. However, to the extent that any such citation is not made against RAILROAD (i.e. is made against COASTAL alone) or does not relate to an immediate dangerous human health or safety condition, RAILROAD shall not have the right to terminate the activity until there is a non-appealable finding by the agency or the court with applicable jurisdiction, so long as (i) COASTAL is contesting the rule, regulation, citation or charge in good faith; and (ii) COASTAL and RAILROAD are legally able to continue to operate the Facility under the terms of this Agreement.

5.05 Coastal Termination. COASTAL shall have the right to terminate this agreement on sixty (60) days written notice to RAILROAD.

5.06 Effect of Termination. Upon termination COASTAL shall cease using the Facility and shall immediately remove its personal property there from. Except for termination by reason of breach, upon termination, the parties' obligations to each other shall immediately cease and, except for money then currently due and owing, and the indemnification rights provided herein, the parties' financial obligations to the other shall cease.

ARTICLE VI--INDEMNIFICATION

6.01. Indemnification. Coastal hereby assumes, releases and agrees to protect, save harmless, defend and indemnify RAILROAD, the Metropolitan Transit Authority and Long Island Rail Road Company, and their respective officers, shareholders, directors, employees, agents and assigns from and against any and all claims and liability caused by, arising out of or resulting in any manner from the condition, existence, use or occupancy of the Premises by COASTAL during the term of this agreement, including but not limited to:

- (a) All loss and damage to any property whatsoever, including the Facility, the property of NY&A, MTA, LIRR and of all other persons whomsoever placed or stored at the Facility and including the loss or interference with any use or service thereof;
- (b) All loss and damage on account of injury to or death of any person whomsoever, including but not limited to employees and patrons of the parties hereto and all other persons whomsoever on or around the Facility; and
- (c) All consequential loss or damage occurring off the Facility premises but arising from acts or events on or around the Facility.

Notwithstanding the foregoing, COASTAL shall not be responsible for and will not indemnify RAILROAD, Metropolitan Transit Authority or Long Island Rail Road Company from and against any claims or liability arising out of or in connection with their own gross negligence or gross willful misconduct.

ARTICLE VII - MISCELLANEOUS

7.01 Termination of Lease. This Agreement supercedes the Lease dated July 11, 2002 by and between the parties and all amendments, modifications and interpretations thereof, and said Lease shall be hereby terminated and of no further force and effect.

7.01 Amendment and Waiver. This Agreement may not be amended or waived except in a writing executed by the party against which such amendment or waiver is sought to be enforced. No course of dealing between or among any persons having any interest in this Agreement will be deemed effective to modify or amend any part of this Agreement or any rights or obligations of any person under or by reason of this Agreement.

7.02 Notices. All notices, demands and other communications to be given or delivered under or by reason of the provisions of this Agreement will be in writing and will be deemed to have been given when personally delivered or three business days after being mailed, if mailed by first class mail, return receipt requested, or when receipt is acknowledged, if sent by facsimile, telecopy or other electronic transmission device. Notices, demands and communications to COASTAL or RAILROAD will, unless another address is specified in writing, be sent to the address indicated below:

Notices to COASTAL:

Joseph Rutigliano, Principal
Coastal Distribution LLC
1633 New Highway
Farmingdale, N.Y. 11735
631-756-2000
Fax 631-756-2001

With a copy to:

John F. McHugh, Esq.
6 Water Street, Suite 401
New York, N.Y. 10004
212-483-0875
Fax: 212-483-0876

Notices to RAILROAD:

Fred L. Krebs, President
New York & Atlantic Railway Company
68-01 Otto Road
Glendale, New York 11385

With a copy to:

Ronald A. Lane, Esq.
Fletcher and Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2875
312-252-1500
Fax: 312-252-2400

7.03 Arbitration. Any controversy or claim arising out of or relating to this Agreement or the breach thereof, other than disputes which are within the exclusive jurisdiction of the Surface Transportation Board, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules (including the Emergency Interim Relief Procedures), and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Notwithstanding the foregoing, the parties hereto shall first use commercially reasonable efforts to settle any dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of ten (10) days, then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration as provided herein. The arbitrator shall be selected by the parties. In the event that they are unable to agree on the selection of an arbitrator within ten (10) days, the parties or their attorneys may request the American Arbitration Association to appoint the arbitrator. Prior to the commencement of hearings, the arbitrator shall provide an oath or undertaking of impartiality. The place of arbitration shall be New York, New York. Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under this Agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the arbitration. The award shall be made within two (2) months of the filing of the notice of intention to arbitrate (demand), and the arbitrator shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by mutual written agreement of the parties. The prevailing party shall be entitled to an award of reasonable attorney fees. The determination as to which party, if any, is the prevailing party and whether and how much in attorney's fees shall be awarded will be made by the arbitrator.

7.04 Assignment. This Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. Neither this Agreement nor any of the rights, interests or obligations hereunder may be assigned by COASTAL without the prior written consent of RAILROAD, which consent will not be unreasonably withheld. A Change of Control shall be deemed an assignment for the purposes

of this Agreement. RAILROAD shall have the right to assign this Agreement to any carrier which should succeed it as authorized by the Surface Transportation Board.

7.05 No Third Party Beneficiaries. Nothing in this Agreement shall confer any rights upon any person or entity that is not a party or permitted assignee of a party to this Agreement.

7.06 Severability. Whenever possible, each provision of this Agreement will be interpreted in such a manner as to be effective and valid under applicable Law, but if any provision of this Agreement is held to be prohibited by or invalid under applicable Law, such provision will be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

7.07 Complete Agreement. This Agreement, and the other documents referred to herein contain the complete agreement among the parties and supersede any prior understandings, agreements or representations by or among the parties, written or oral, which may have related to the subject matter hereof in any way. However, the letter agreement entered into by the parties on June __, 2004 in connection with LIRR's endorsement of COASTAL's application for zoning changes shall remain in effect unchanged. The section and paragraph headings of this Agreement are for reference purposes and shall not affect the meaning or interpretation of the Agreement.

7.08 Time of Essence. With regard to all dates and time periods set forth or referred to in this Agreement, time is of the essence.

7.09 Signatures; Counterparts. This Agreement may be executed in one or more counterparts, any one of which need not contain the signatures of more than one party, but all such counterparts taken together will constitute one and the same instrument. A facsimile signature will be considered an original signature.

7.10 Governing Law. This agreement shall be interpreted under the applicable laws of the United States and the regulations of such Federal Authorities as have exclusive jurisdiction over the activities contemplated. In matters involving the construction and interpretation of this document the internal laws, without regard for conflicts of laws principles, of the State of New York will apply.

7.11 Force Majeure. If either party is unable to meet its obligations hereunder as a result of acts of God, war, terrorism, insurrection, floods, strikes, derailments, or any like causes beyond its reasonable control, that party's obligations and those of such other party affected by such force majeure event, will be suspended for the duration of same; provided, however, that the parties will make all reasonable efforts to continue to meet their respective obligations during the duration of the force majeure event; and, provided further, that the party declaring a force majeure event shall promptly notify the other party of the same (including its anticipated duration), the nature of the force majeure event, and when it is completed. The suspension of any obligation owing to a force majeure event will neither cause the term of this Agreement to be extended nor affect any rights accrued under this Agreement prior to the force majeure event.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed
as of the day and year first above written.

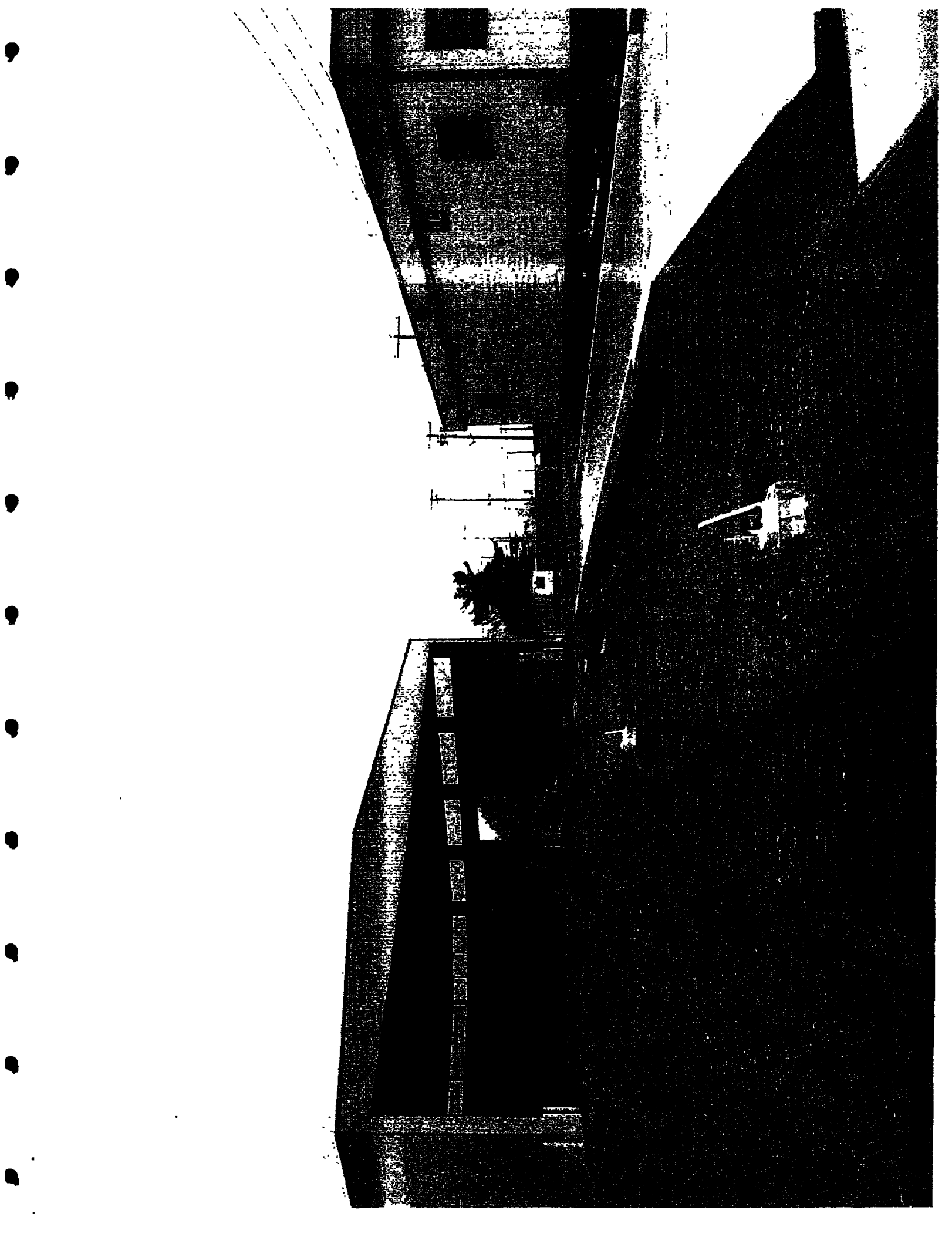
COASTAL DISTRIBUTION, LLC

NEW YORK & ATLANTIC
RAILROAD CO. INC.

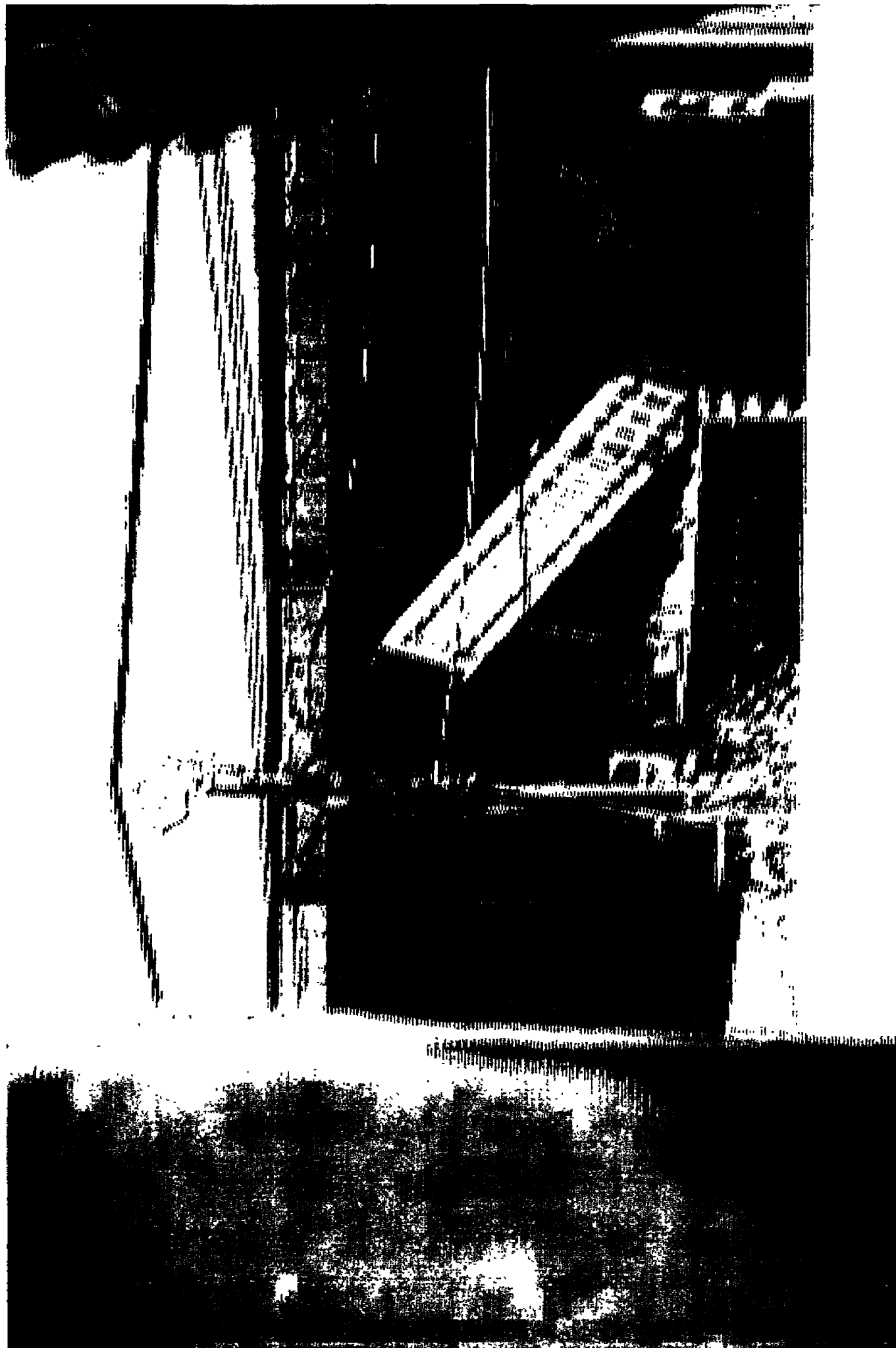
By: [Signature]
Its: Member
Date: 8/5/04

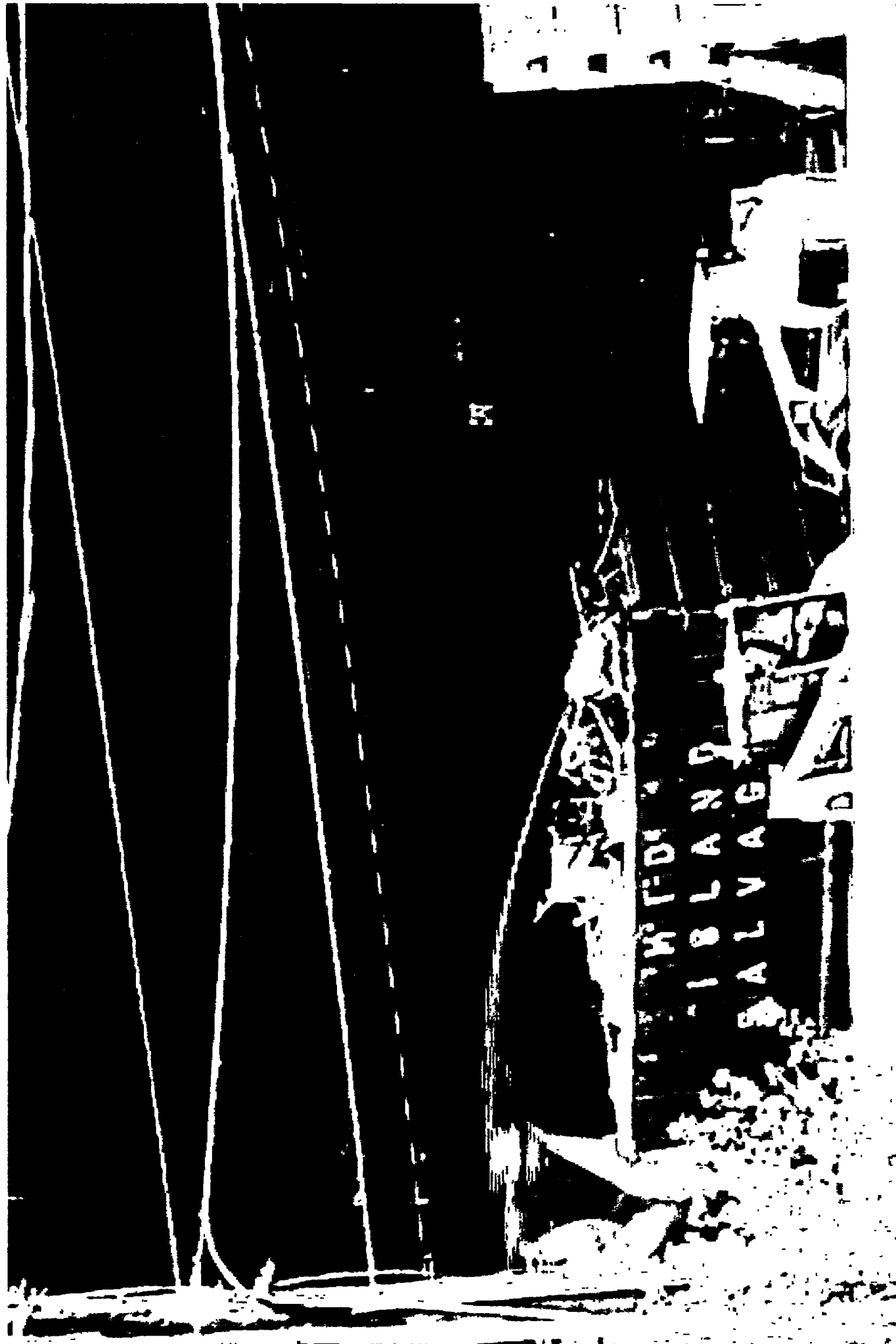
By: [Signature]
Its: PRESIDENT
Date: 8/5/04

EXHIBIT E

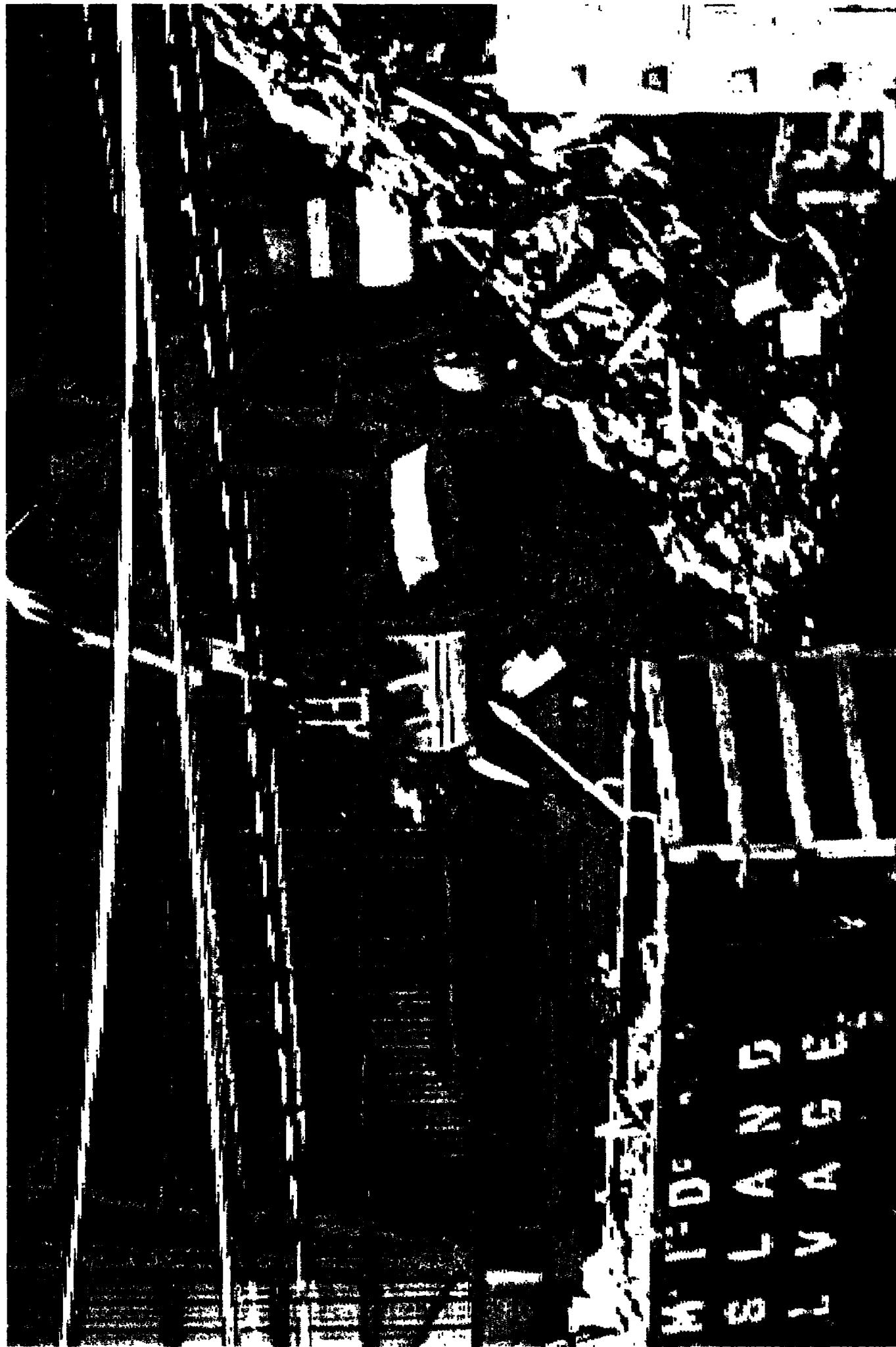












WILD
BLAND
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EXHIBIT F

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TOWN OF BABYLON

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**TOWN OF BABYLON
BOARD OF APPEALS**

200 East Sunrise Highway
North Lindenhurst NY 11757-2598
(631) 957-3011

Case: 04-267

Applicant: Coastal Distribution, LLC, 1633 New Hwy., E. Farmingdale, NY

Location: on the northeast corner of New Hwy. & Conklin St., E. Farmingdale,
NY

Suffolk County Tax Map: #0100-35-2-2

Variances requested: Permission for relief in the form of
vacating and annulling a Stop Work Order issued by Building Inspector Bassamar
on or about 3-25-04. Residence A Zone

the Zoning Board of Appeals has decided it is: DENIED;
PURSUANT TO ANNEXED FINDINGS

FINDINGS ADOPTED

At the meeting of: APRIL 21, 2005


THOMAS C. YOUNG, ACTING CHAIRMAN

As per application and building plans filed with Zoning Board of Appeals, when all fees are paid as required. The permit holder is responsible for knowing the Town ordinances and restrictive covenants relevant to this variance. Violations may be penalized by fines and/or revocation of the permit. Use permits are to be kept on the subject site. All variances become void if the use does not start or the site work does not begin within 180 days of granting. Subject to Sect. 57 of the New York State Workmen's Compensation Code. This is not a building permit.

Application of: Coastal Distribution, LLC (Application No. 04-267)
 Address: 1633 New Highway, East Farmingdale, New York
 Location: n/c of New Highway & Conklin Street, East Farmingdale
 Public Hearing(s): September 9, 2004 and February 3, 2005
 Relief Sought: Permission for relief in form of vacating and annulling a Stop Work Order issued by Building Inspector Bessemer on or about 3/25/04
 Decision of Board: Referred to counsel for preparation of written findings in contemplation of upholding Stop Work Order
 Date of Decision: February 10, 2005

INTRODUCTION

The applicant Coastal Distribution, LLC seeks relief in the form of vacating and annulling a Stop Work Order issued by Town of Babylon Building Inspector Bessemer on or about March 25, 2004. The applicant claims that it is operating a railroad transporting facility as an agent for New York-Atlantic Railroad. It claims that its use of the subject site (1633 New Highway in East Farmingdale) is an activity that Federal Law and State Law recognizes as exempt as it relates to the Town's jurisdiction. The applicant therefore claims to be exempt from any Town of Babylon permitting process. The applicant further claims that the stop work order issued by the Building Inspector is a nullity and therefore challenges the issuance of same herein. For the reasons proffered below, the Board herein upholds the issuance of the stop work order.

STATEMENT OF FACTS

a. Public Hearing of September 9, 2004:

The first public hearing conducted regarding this matter was held on September 9, 2004. The applicant, appearing by its attorney, testified that Coastal Distribution, as an agent of New York and Atlantic Railway, operated a transload facility for railroad freight purposes at the subject site on New Highway in East Farmingdale. The applicant

claimed that the use of the site was "to move freight between trucks and railway cars" and further claimed that this type of activity had occurred on this site for approximately one hundred (100) years.

The basis of the applicant's appeal to the within Board was that it claimed to be a railroad transloading facility, and as such, that it was exempt from local zoning pursuant to federal law. The applicant also claimed that its operations at the site were in conformance with the federal exemption to which it claimed to be entitled.

The subject property is owned by Pinelawn Cemetery. The history of the site is that since 1904, it has been leased to the Long Island Railroad (now owned by the MTA). In 1996, the Long Island Railroad, in an attempt to privatize freight rail service, entered into an agreement with New York and Atlantic Railway for its use of the subject site. The applicant Coastal Distribution became involved with the property in 2002 when it began operating on the site as, what it terms, an "appointed agent" for New York and Atlantic Railroad.

In 2003, the applicant erected a building on the site which it claimed was necessary so that materials could be loaded and unloaded on and off the railroad cars without creating dust and noise. The applicant stated that the building, "provide[d] better service for the customers" and that said structure was "essential" for the operation of a modern transloading facility.

The applicant proffered that its use of the site was only as a transloading facility. When asked by the Board to define a transloading facility, the applicant replied that it was just taking the materials from the trucks, putting it on railroad cars, and loading materials onto the trucks from rail cars to send to New York and other places and vice versa.

Mr. Fred Krebs, the President of New York and Atlantic Railway, spoke on the applicant's behalf. He indicated that New York and Atlantic Railway was registered with the Federal Railroad Administration and with the Surface Transportation Board. He stated that New York and Atlantic was a railroad and that they had "worked out a deal" where Coastal became its agent. (Minutes of public hearing of September 9, 2004, at page 38).

Mr. Krebs testified concerning the operation of the site. He stated that "on that particular site what they're doing is, they're - they're bringing in construction demolition debris and they're taking it off the trucks and putting it into the [rail] cars." (Minutes of September 9, 2004 at page 40). When asked by the Board what constituted "demolition debris," Mr. Krebs stated that "basically, it's everything that's not trash. It cannot have any MSW (municipal solid waste) in it. It's got to be what they call clean debris." (Minutes of September 9, 2004 at page 40).

Mr. Krebs added regarding the site's operation that there was a sorting process to eliminate the items that would ultimately be rejected by landfills. He testified that the final destination for the construction and demolition debris (hereinafter C&D) was landfills in the State of Ohio. (Minutes of September 9, 2004 at pages 40-41).

Martin Sternberg of Coastal Distribution, LLC also testified at the public hearing of September 9, 2004 regarding the day-to-day operation of the site. He stated that Coastal had been operating for approximately three weeks. Coastal was operating five days a week from 7:00 am to 5:00 pm and was accepting predominantly "C&D" material - construction and demolition material. When asked by the Board whether a truck with "C&D" could come to the site and simply dump its load out, Mr. Sternberg replied that Coastal was presently only taking materials that previously went through transfer

stations. (Minutes of public hearing of September 9, 2004 at page 52). He stated that trucks are dumping loads from transfer stations and that the material was thereafter loaded onto rail cars.

Regarding items that were not permitted at landfills (which are the ultimate destination for C&D materials), Mr. Sternberg stated that Coastal was not conducting any sorting on site. He stated that "the material is placed on the floor, we pick it up and put it in the rail cars." He offered that "we're visually looking for materials that we know Ohio [landfill] will not take which would be things - there are many things...of course; liquids, 55-gallon drums, sofas, bedding, tires, and the list goes on and on, as I had said before. Any of that [prohibited] material that we see, we extract it. It goes back onto the truck that delivered it if we see it at that moment. If not, there are containers there to take that type of material which then is transported to an incinerator and disposed of." (Minutes of September 9, 2004 at page 53). When asked by the Board if there was a fee charged for that service, Mr. Sternberg indicated that there was.

Mr. Sternberg claimed that this activity was not sorting, but instead Coastal was "only extracting" the materials which were not allowed to be transported. (Minutes of September 9, 2004 public hearing at page 53).

Two local business owners appeared regarding the application. The first, Mr. Michael Delmonico, operating his business at 1630 New Highway stated that he owned a concrete plant and that he was located directly across the street from the Coastal site. He stated that he was impressed with the operation and that it appeared to be "clean and orderly." Second, Mr. Kurt Schneider of GE Modular Space, 967 Conklin Street, Farmingdale, appeared in opposition to the application. He expressed concern with the increased truck traffic that he felt was accessing the subject site. He also voiced his

concern regarding increased dust in the area that had been generated by the applicant's use of the site. (For full comments by neighboring business owners, see minutes of September 9, 2004 at pages 60-62).

Pinelawn Cemetery, the owner of the subject property, also appeared in opposition to the subject application. The attorney representing Pinelawn Cemetery expressed Pinelawn's concern regarding the operation of the site, including what he believed to be a lack of oversight of Coastal. He raised questions regarding the safety of the site and stated that the applicant's use of the premises was increasing truck traffic "tremendously" on New Highway. (Minutes of September 9, 2004 at page 64).

Pinelawn also contended that Coastal was a profit making organization and that its use of the premises was a "propriety purpose" rather than a governmental purpose. For this reason, they claimed that Coastal was not entitled to any exemption from local zoning.

At the close of the public hearing, both the applicant and Pinelawn Cemetery submitted legal briefs. Both requested a period of time to review the other's brief and submit a reply. Therefore, at the close of the hearing the Board held the record open for a period of two weeks for the submission of further "legal point and briefs to come in" and reserved its decision. (Minutes of September 9, 2004 hearing at page 81).

b. Reopening of the Public Hearing:

After the close of the public hearing of September 9, 2004, both parties submitted a reply to the other's memorandum of law. Pinelawn Cemetery's reply brief included three affidavits by persons that had not attended the hearing of September 9, 2004. The Board deemed the affidavits to be new evidence not presented during the course of the

public hearing and submitted after the hearing had been closed. The Board considered the submission of this new factual evidence to be improper and promptly rejected and returned same to the attorney for Pinelawn. See October 12, 2004 letter from Louis D'Amaro, Chairman of the Zoning Board of Appeals, to John Armentano (counsel to Pinelawn) and James Gaughran (counsel to the applicant) rejecting and returning the offending affidavits, annexed hereto as Exhibit "A".

Pinelawn, through its counsel, thereafter requested that the Board reopen the hearing for the submission of new factual evidence based on the fact that they were unaware that the record was held open for only further legal points and that there were several statements made by the applicant that had come to light for the first time at the public hearing which they wanted the opportunity to address. See October 15, 2004 letter from John Armentano, Esq. to the Board of Appeals in which he requested a reopening of the hearing, annexed hereto as Exhibit "B".

On October 20, 2004, the Board voted to reopen the hearing and record upon Pinelawn's compliance with the Board's notice requirements. Same is reflected in the Board's minutes of October 20, 2004, annexed hereto as Exhibit "C". The Board's basis for reopening the public hearing were its own Rules of Procedure, Section XII (F)(3), which provides that "in its discretion by motion adopted, the Board may continue the hearing to another date for the purpose of enlisting further testimony or receiving other evidence with respect thereto" and Section XII (F)(4) which states that the Board "may on motion duly adopted request further proof from whatever source deemed appropriate in the discretion of the Board." Further, the case law on the matter is clear - new evidence submitted after the close of a public hearing cannot be considered by a Board except at a new hearing. The Board therefore reopened the hearing to ensure that both

the applicant and Pinelawn Cemetery would have an opportunity to present and rebut any new factual evidence.

Furthermore, because the ex parte affidavits had been submitted to the Board by Pinelawn, and despite the Board's rejection of same, the Board wanted to dispel any appearance of impropriety by continuing the hearing, having the affidavits submitted properly (during the course of a public hearing) and providing the applicant with an opportunity to review and rebut them.

c. Public Hearing of February 3, 2005:

The continued hearing took place on February 3, 2005. At the hearing, the attorney for Pinelawn Cemetery discussed the agency agreement between New York and Atlantic Railway which it called "tremendously disingenuous." (Minutes of public hearing of February 3, 2005 at page 33). According to the attorney for Pinelawn, a month before the last hearing (9/9/04), Coastal and New York and Atlantic "broke the lease" and entered into a new agreement to say that [Coastal] was no longer a tenant, that instead they [Coastal] were an agent. (Minutes of February 3, 2005 at page 33).

Pinelawn also maintained that that the essential element for an agency relationship is the principal's control over the alleged agent. He claimed the necessary control was lacking as indicated by the agreement itself, wherein paragraph 1.05 sets forth that "New York [and] Atlantic's responsibility and liability for the cars and their contents bound to or from the facility end when the cars are uncoupled from New York [and] Atlantic's locomotive at the facility and the railroad's [New York and Atlantic] responsibility and liability is resumed when the cars are coupled to the locomotives." (Minutes of February 3, 2005 hearing at page 33). He claimed that the fact that New

FROM : DAN MCCORMICK

FAX NO. : 6317548299

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York and Atlantic's responsible began when the rail cars were connected to its locomotive and ended when the rail cars were uncoupled, evidenced the lack of control by New York and Atlantic regarding the actual operation of the subject site.

Coastal Distribution also testified at the second public hearing regarding the agreement between the Coastal Distribution and New York and Atlantic Railway. Mr. Rutigliano of Coastal Distribution, LLC testified that the agency agreement between the parties went into effect on August 5, 2004. When the agreement was executed Coastal was operating the site. Coastal was not the owner of the site, but was upgrading the site by erecting the building. Coastal admitted that it was previously operating under a lease agreement, subleasing the property from New York and Atlantic Railway. Mr. Rutigliano stated that the lease was no longer valid. When asked by the Chairman of the Board of Appeals what had prompted the change from a lease agreement to an agency agreement, the applicant replied "advice of counsel." (Minutes of public hearing of February 3, 2005 at pages 49-50).

In addition to a discussion regarding the relationship between the applicant and New York and Atlantic Railway, Pinelawn brought in a number of witnesses in opposition to the application. First, Michael Poscillico, a business owner operating at 1600 New Highway, Farmingdale, New York testified regarding his first hand knowledge of the site. He stated that he was able to view the operation of the site from his own building located directly across the street. Mr. Poscillico further indicated that he observed trucks, generally tractor trailer trucks, bringing material in. The material was being dumped on a pad inside of the building. He claimed to have personally witnessed either a bobcat or pay loaders pushing the material around. (See minutes of public hearing of February 3, 2004 at page 34).

Mr. Poscillico further offered that his knowledge of "transloading" operations, in his professional experience as a civil engineer and as the president of Blue Water Environmental, means that "you take material from one mode and move it to another mode, and the rule of waste hauling is it never hits the ground." (Minutes of public hearing of February 3, 2005 at page 34).

Mr. Murphy, a private investigator, also appeared in opposition to the application. He stated that he observed a truck being loaded with debris, specifically construction debris, leaving Metropolitan Transfer [station] in the Bronx and coming to the Coastal site. It was material brought from the city out to the Coastal location in Farmingdale. (Minutes of February 3, 2005 at page 35).

Mr. Murphy's second observation was dump trucks from Reality Roofing in Mineola driving into the Coastal site. When the trucks were followed back to Reality Roofing, the witness observed roofing material coming off of a home in Nassau County and being directly delivered to the subject site. (Minutes of February 3, 2005 at page 35). Mr. Murphy proffered that in his opinion the materials being brought to the subject site, "a great portion of that is coming from New York City and very little of it is going to any transfer station." (Minutes of February 3, 2005 at page 36).

After this evidence was presented to the Board by Mr. Murphy, the Board asked the applicant if they were taking materials from New York City and bringing them to the subject site. The attorney for the applicant stated that "as an agent of New York Atlantic we do not have a choice, we have an obligation under the law to accept legally whatever a customer wants to bring." (Minutes of February 3, 2005 at page 43). The attorney for the applicant continued stating that "we cannot discriminate. It's interstate commerce you can't discriminate where they are coming from..." (Page 43). When the Board

expressed that it didn't appear that the applicant's use of the site was actually taking any trucks off of the road, as the applicant had claimed at the September 9, 2004 hearing, the attorney for the applicant replied that some of the material is coming from New York City and some is coming from Long Island. He reiterated that the applicant cannot discriminate. He offered that "we [Coastal] can't tell people that they can't come here." (Minutes of public hearing of February 3, 2005 at page 44).

The attorney for the applicant concluded the second hearing by reiterating that New York and Atlantic and the MTA consented to the application being brought, that the applicant was entitled to an exemption from local zoning, and that if the Town wanted to observe the site's operation, that Coastal was obligated to allow the Town to do so. He stated that the Town was able to issue comments and recommendations, however, the applicant's operation of the site was one that he believed it was entitled to continue.

FEDERAL EXEMPTION CLAIMED BY COASTAL

At the public hearing of September 9, 2004, John F. McHugh, an expert in railroad law, appeared on the applicant's behalf to discuss Coastal's alleged statutory exemptions under federal law. Mr. McHugh explained that the ICC Termination Act vested the Surface Transportation Board with "all control over railroads." He stated that the ICC Termination Act removed jurisdiction over railroad activities from anyone other than the Surface Transportation Board. Mr. McHugh continued, stating that the site was an active railroad operation that was being conducted by Coastal as an agent of New York and Atlantic Railroad, which has a "federal franchise." For this reason, he claimed

that the Board had no jurisdiction. (Minutes of public hearing of September 9, 2004 at page 27).

To further flesh out the applicant's position, Mr. McHugh proffered that a "common carrier" in the railroad industry has a federal franchise which is "a right to provide freight service and an obligation to provide freight service." Because New York and Atlantic Railroad has said federal franchise and was a common carrier, he claimed Coastal, as its agent, had the same rights and obligations. He stated that all [Coastal] was doing at the site was loading and unloading cars for the New York and Atlantic Railroad which he claimed New York and Atlantic had an obligation to do pursuant to its franchise. He claimed that New York and Atlantic "basically delegated the responsibility to another operator." (Minutes of September 9, 2004 at page 32).

Responsibility for the operation of the site was delegated to Coastal through the "Transload Facility Operations Agreement" between the applicant and New York and Atlantic Railroad. The applicant claimed that the agreement detailed Coastal's obligations and ensured that Coastal was only involved in transloading activities. The applicant claimed that it was under the complete control of New York and Atlantic Railway, pursuant to this agreement, and that the agreement established an agency relationship between New York and Atlantic Railway and Coastal, thereby entitling Coastal, as an agent of New York and Atlantic Railway, to the federal exemption pursuant to the ICC Termination Act.

Lastly, the applicant's expert, Mr. McHugh, also set forth some examples of when the federal exemption did not apply to a particular operation. He stated that where there was just a lease and no control by the railroad no exemption applied. (Minutes of September 9, 2004 at page 33). He also stated that storing items for long periods of time

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was considered activity that was not covered by the exemption. (Page 33). Also, using railroad property as an aggregate distribution center for one's own product is also not exempt activity. (Page 33).

**BOARD'S FINDINGS REGARDING APPLICANT'S CLAIM OF FEDERAL
PREEMPTION PURSUANT TO ICC TERMINATION ACT**

a. **The Applicant Is Not Entitled to An Exemption From Local Zoning Regulation
As Its Use of the Site Does Not Qualify As "Transportation By Rail Carrier"**

The Board finds that Coastal Distribution's use of the site is not "transportation by rail carrier" so as to come within the Surface Transportation Board's jurisdiction pursuant to the ICC Termination Act. Congress has granted the Surface Transportation Board with exclusive jurisdiction over "transportation by rail carriers" and its regulation of rail carriers preempts state regulation with respect to rail transportation. 49 U.S.C. §10501(h). Thus, to qualify for the exemption claimed pursuant to the ICC Termination Act, the applicant must be conducting "transportation by a rail carrier."

First, the Board finds that the applicant fails to qualify as a "rail carrier". Under the ICC Termination Act, a "rail carrier" is a "person providing common carrier railroad transportation for compensation." 49 U.S.C. §10102(5). There are formal procedures that must be followed to obtain the Surface Transportation Board's authorization to act as a rail carrier. 49 U.S.C. §10910. The record before the Board indicated that it was New York and Atlantic Railway, and not Coastal, who had been granted a federal franchise from the Surface Transportation Board. See testimony of Fred Krebs, President of New York and Atlantic Railway wherein he indicated that New York and Atlantic Railway

was registered with the Federal Railroad Administration and with the Surface Transportation Board, minutes of September 9, 2004 hearing at page 37.

While the applicant conceded that it did not go through the arduous process of becoming a certified railroad, it claimed to be an agent of New York and Atlantic Railway, which entitled it to the exemption that would be enjoyed by a party that was a "rail carrier" and was engaged in "transportation by a rail carrier".

The Board finds, based upon substantial evidence in the record, that New York and Atlantic Railway does not have the necessary control over the applicant to create an agency relationship. Evidence presented at the public hearing was that New York and Atlantic had "worked out a deal" where Coastal would become its agent, and that it had done so on the advice of counsel. (Minutes of public hearing of September 9, 2004 at page 38).

Originally, the parties had entered into a simple lease agreement. (Agreement entered into on July 11, 2002, see Exhibit "B" of Coastal's memorandum to the Board). Under the lease agreement, New York and Atlantic Railway agreed to lease the subject premises for Coastal's "exclusive use". (Lease Agreement, paragraph A, Exhibit "B" of Coastal's memorandum to the Board). Coastal had the right to make improvements to the premises. (Lease Agreement, paragraph C(2)). All investments made by Coastal including pavement, lighting, fencing, and security were at the sole expense of Coastal, with no reimbursement by New York and Atlantic. (Lease Agreement, paragraph C(2)). The lease required Coastal to "meet a volume commitment of 1,200 carloads in the initial term of the lease, 1,800 carloads in the second term, 2,400 carloads in the third term, and 3,200 carloads in the fourth term of the lease, with each term representing one year of the five year lease. (Lease Agreement, paragraph C(3)). Under the lease, Coastal agreed to

indemnify New York and Atlantic Railway, the MTA and the LIRR from any and all claims arising out of the use or occupation of the premises and all loss and damage to any property whatsoever on the site. (Lease Agreement, paragraph C(5)). At the end of the project, Coastal had the right to remove all of its structures and other materials and equipment from the premises. (Lease Agreement, paragraph C(8)).

The applicant conceded that a lease agreement between the parties would not have been sufficient to extend the federal exemption from local zoning to the applicant. Mr. McHugh, the applicant's expert, stated that where there was just a lease and no control by the railroad no exemption applied. (See minutes of September 9, 2004 at page 33). On the advice of counsel, New York and Atlantic and Coastal terminated the lease agreement and thereafter, and only one month prior to the September 9, 2004 hearing before the instant Board, the parties entered into the "Transload Facility Operations Agreement" on or about August 6, 2004. (Exhibit "C" of Coastal's memorandum to the Board). The applicant stated this was "a fairly new agreement" which it claimed detailed Coastal's obligation and ensured that Coastal was only involved in transloading activities. The applicant claimed that it was under the complete control of New York and Atlantic Railroad pursuant to this agreement. The Board disagrees based on the terms and conditions contained within the aforementioned agreement.

The Board finds that New York and Atlantic does not have the necessary control over the applicant so as to establish a principle - agent relationship. Same is indicated by each party's obligations as set forth in Article I - Transloading Operations.

Paragraph 1.03 entitled "RAILROAD OBLIGATIONS" sets forth that the railroad (New York and Atlantic) must provide that existing facility "as is, where is." The railroad does not warrant the condition of the facility or the surrounding areas, the yard

or its equipment for any purpose. Paragraph 1.03 stated that Coastal has examined the premises and assumes the risk of using the premises for any purpose, and accepts all conditions and defects present thereon. (See paragraph 1.03 of Transload Facility Operations Agreement, Exhibit "C" of Coastal's memorandum).

Paragraph 1.04 states that the railroad (New York and Atlantic) "shall provide reasonable rail service to the Facility." (Exhibit "C" of Coastal's memorandum). The above constitutes the entire set of obligations and duties set forth in the agreement for New York and Atlantic.

Paragraph 1.05 sets forth that "New York [and] Atlantic's responsibility and liability for the cars and their contents bound to or from the facility end when the cars are uncoupled from New York [and] Atlantic's locomotive at the facility and the railroad's responsibility and liability is resumed when the cars are coupled to the locomotives." (Transload Facility Operations Agreement, Exhibit "C" of Coastal's memorandum). Based on this section of the agreement, the Board finds that New York and Atlantic, the certified railroad in this case, is not responsible or involved in, the activity and operation of the site. Its responsibility and involvement only begins at the point when the rail cars are connected to New York and Atlantic's locomotive and ends when the railcars are disconnected from the locomotive. Same indicates that Coastal is essentially on its own regarding loading and unloading of cars and other site activities.

As for the applicant's duties and obligations relating to the site, paragraph 1.07 of the transload agreement requires that the applicant, and not New York and Atlantic Railway, repair any tracks at the facility. (Exhibit "C" of Coastal's memorandum). Paragraph 1.04(a) provides that the applicant shall perform transloading services between rail cars and trucks at the facility for customers of the railroad. (Exhibit "C").

Paragraph 1.04(b) provides that Coastal shall enforce all rules and regulations at the site, as promulgated by the railroad as to all customers, Coastal employees and visitors at the Yard. (Exhibit "C"). Paragraph 1.04(c) provides that Coastal at its sole cost shall acquire or provide any addition loading equipment and that it has the right to install and remove such equipment as the market shall dictate. Paragraph 1.04(d) provides that Coastal can also market the facility and the services of the railroad available by use of the facility. (Exhibit "C").

Based on the above provisions, the Board finds that Coastal is controlling the operation of the site. Coastal is marketing the site, erecting structures that it requires on the site and repairing the tracks at the site, not New York and Atlantic, who is the party actually certified as a railroad. Coastal is fundamentally operating independently of the railroad. It is for this reason that the Board finds that Coastal is not an agent of New York and Atlantic and is thus not entitled to exemption from local zoning pursuant to the ICC Termination Act.

This is further confirmed by Article II of the Agreement - Documents and Billing. Paragraph 2.01 of the agreement provides that "all bills of lading and similar documents for outbound rail shipments from the Facility (collectively, "Transport Documentation") for the Commodities transloaded at the Facility shall be between Railroad and the Customer, but Coastal, as the Railroad's agent, may execute such Transportation Documentation on behalf of Railroad. Coastal shall advise Railroad from time to time of the names of the Coastal officers and employees who will execute such Transport Documentation, and shall apply prudent internal control procedures to ensure compliance with the provisions of this Agreement." (Paragraph 2.01 of Agreement, Exhibit "C" of Coastal's memorandum to Board).

The Board finds in reviewing this provision that while the bills and documents for outbound rail shipments are to be made between the Railroad (New York and Atlantic) and the Customer, the Railroad is not actually reviewing those documents. Coastal is executing the documents and the Railroad's only oversight mechanism is that Coastal must from "time to time" advise the Railroad of the name of the officers and employers executing the documentation.

The Board finds this provision, too, shows the true nature of the relationship between Coastal and New York and Atlantic. Coastal is essentially operating on its own by making the agreements, even though they are in the name of the Railroad, with New York and Atlantic exerting little, if any, control over Coastal's operations (ie. merely being advised from time to time of the names of the persons in charge of this documentation).

Moreover, Article II - Documents and Billing, also sets forth that Coastal may enter into its own agreements with customers "whereby Coastal shall be responsible to such Customer for obtaining the disposal of Commodities. In entering into and performing any Disposal Agreements, Coastal shall not make any statement or take any action or fail to take any action that the Railroad is in any way participating in or approving any Disposal Agreement. Any Disposal Agreements shall be entirely independent from the transportation and loading service provided under this agreement." Paragraph 2.01(b) of Transload Facility Operations Agreement.

The Board finds that this additional activity at the site involving the disposal of commodities does not in any way involve the Railroad. The Railroad completely separates itself from any involvement in the disposal of commodities and those agreements are entirely separate from New York and Atlantic. The Board finds that this

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disposal use of the site by Coastal is independent of New York and Atlantic, based on the language of the agreement, and does not in any way constitute transportation or a transit purpose. This is an independent proprietary use of the premises, not involving the railroad. Thus, Coastal's use and operation of the site is not exempt from local zoning.

Finally, the Board finds that what is actually occurring at the site is transportation to a rail carrier, rather than transportation by a rail carrier. As stated hereinbefore, Coastal Distribution is not formally certified by the Surface Transportation Board. It is New York and Atlantic Railway, and not the applicant, who went through the arduous procedure of becoming a railroad. The applicant is processing the C&D material prior to New York and Atlantic transporting it. The applicant is essentially getting the property to the railroad - New York and Atlantic.

The Board finds the facts of the instant matter to be incredibly analogous to the facts of the Hi Tech Trans, LLC v. New Jersey case wherein Hi Tech operated a transload facility; trucks hauling C&D waste arrived at the facility; the trucks discharged C&D into a hopper that Hi Tech provides at the facility; and the C&D waste is then loaded directly into rail cars from the hoppers; C&D waste was neither stored nor processed at the facility; and once the rail cars were full, the railroad (CPR in that case) would remove the material to an out-of-state disposal facility. Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295, 299 (3d Cir. 2004).

Here, the facts indicated by the applicant itself are that trucks enter the site and dump C&D material on a pad inside the building. Any non-permitted material is extracted from the pile. Thereafter the remaining clean debris is loaded onto rail cars and removed by New York and Atlantic (the certified railroad). The facts are extremely similar to the facts of the Hi Tech case wherein the Court determined the activity at the

site to be at most, transportation "to rail carrier." Hj Tech Trans LLC v. New Jersey, 382 F.3d at 308. Thus, the Board finds that herein, at most, Coastal's use of the site constitutes transportation to rail carrier, rather than by rail carrier. For this reason, as well as the reasons set forth hereinbefore, the Board finds that Coastal is not entitled to an exemption from local zoning regulations pursuant to the ICC Termination Act.

b. The Board Finds that Coastal Distribution is Not Merely Transloading at the Site and Therefore Its Operation Not Preempted by Federal Law

Based upon the evidence submitted at the public hearings, the Board finds that the applicant is not merely transloading at the site. The evidence introduced at the public hearing was that the applicant was to some extent sorting the materials that were deposited at the site, and doing so for a profit. As the applicant appeared to be using the site for more than just "transloading," the Board finds that its operation is not preempted by federal law.

The Board finds that the applicant itself claimed that Coastal's agency, as well as its operating authority, were limited to the operation of transload facilities on the property (i.e. facilities for moving freight between railway cars and trucks as part of New York and Atlantic's line haul common carrier-rail services). The applicant stated that Coastal is not permitted to engage in any other use of the property. (Applicant's Memorandum of Law, pages 1-2).

Same was also communicated to the Board through an Affidavit by Mr. Roco Kraulic, Director of Real Estate for the MTA, who swore to the statement that "it is [the MTA's] understanding that the operators of the facility do not contemplate that there will be any processing or operation related to the freight materials passing through the

site, other than transferring the freight from one mode of transportation (ie. rail) to another (ie. truck). (Exhibit "A" of Coastal's memorandum to the Board).

The applicant reiterated same at the public hearing of September 9, 2004, stating that its use of the site was only as a transloading facility. The applicant defined transloading facility as "basically taking - just taking the materials from the trucks, putting on railroad cars, loading it onto the trucks to send to New York and other places and vice versa, materials coming out from the city and eastern Long Island and coming into the site and being transferred onto automotive vehicles, mostly trucks, for the area." (Minutes of September 9, 2004 at page 23).

The Board finds based upon the evidence presented that the applicant is operating more than just a "transload facility" at the site. Because it is doing more than merely loading materials from trucks onto the railway and vice versa, the Board finds that the applicant is operating outside the scope of the federal exemption to which it claims to be entitled. Evidence presented by both the applicant and Pinelawn Cemetery support this finding.

First, the evidence presented by the applicant itself was that Coastal was conducting "sorting" at the site. Mr. Fred Krebs, the President of New York and Atlantic Railway testified at the first public hearing that "well. Basically the site is permitted to transload materials...from truck to rail or from rail to truck." (Minutes of September 9, 2004 at page 37). He continued that on the site "they're [Coastal is] bringing in construction demolition debris and they're taking it off the trucks and putting it into the cars. They weigh the car because we have a weight limit." (Minutes of September 9, 2004 at page 40). He claimed that demolition debris was "everything that's not trash...it cannot have any MSW in it. It's got to be what they call clean debris." (Page 40). He

further stated that "the operation is really good. They actually sort out the metal from - from the "C&D" and they take out anything that would be MSW and do not allow it in the car. I mean they're very good about that." (Page 40).

The Chairman of the Zoning Board asked Mr. Krebs about when a pile of debris comes in to the site or several truck loads of debris goes into the building, whether it goes through the sorting process that he had described, and what happened to the items that were prohibited or not allowed to go into the cars. Mr. Krebs responded that "well, actually, Marty needs to address that" and further offered that "I just know they do it. I've seen them do it. I don't know what they do (inaudible). I know it doesn't go in the car." (Minutes of September 9, 2004 hearing at page 41).

The Board of Appeals thereafter called Mr. Martin Sternberg, a partner in Coastal Distribution, to testify regarding the operation of the site. He began his testimony by stating that "we do ship out to C&D...C&D comes in and if there are items within the C&D that are not allowed to go and be transported to the State of Ohio which is ruled over by Department of Health in the State of Ohio and they have an agent at the site everyday watching each car as it's off-loading, that item, such as a mattress, is taken out of the load and either put back onto the truck that deposited it or if we didn't see it at that moment, there is a special container on the side in which that material is put into and then brought to an incinerator or class one landfill." (Minutes of September 9, 2004 hearing at page 47-48). Mr. Sternberg was asked by the Board if a truck load of C&D material could be dumped at the site. Mr. Sternberg claimed that they were only taking materials that had already been processed at a transfer station where "it's presorted." (Minutes of September 9, 2004 at page 52). He further stated that "we're not taking

individuals that may have a truckload or just an unauthorized truck of material, no." (Page 52).

Lastly, the Board asked Mr. Sternberg whether any sorting was being conducted at the site to which Mr. Sternberg replied, "we're not doing any sorting on site. The material is placed on the floor, we pick it up and put it in the rail cars. What - we're doing that, we're visually looking [f]or materials that we know Ohio will not take which would be things - there are many things, but of course, liquids, 55-gallon drums, sofas, bedding, tires, and the list goes on and on...Any of that material that we see, we extract it. It goes back onto the truck that delivered it if we see it at that moment. If not, there are containers there to take that type of material which then is transported to an incinerator and disposed of." (Minutes of September 9, 2004 at page 53). Mr. Sternberg stated that there was a fee charged for this service. (Page 53).

Based upon the testimony of Mr. Krebs and Mr. Sternberg, the Board finds that the applicant is temporarily storing and sorting on the site and doing so for a profit. The Board finds this activity conducted on the site to be over and above the applicant's own definition of a transload facility - merely loading truck materials into rail cars and vice versa - and its claimed exemption based on the use of the property.

In addition to the testimony of Mr. Krebs and Mr. Sternberg, the evidence presented on the behalf of Pinelawn Cemetery also confirmed that the site was being used for more than just a transload facility. Michael Poscillico, a neighboring business owner with offices at 1600 New Highway, in Farmingdale, who is also a civil engineer and the President of Blue Water Environmental, testified that he regularly observed tractor trailer trucks bringing material into the site. He stated that the trucks were dumping onto a pad inside of the building and that he has witnessed either a bobcat or

pay loaders pushing the material around. (Minutes of February 3, 2005 at page 34). Mr. Poscillico also offered that in his experience "transload" means to "take material from one mode and move it to another mode, and the rule of waste hauling is it never hits the ground." (Minutes of public hearing of February 3, 2005 at page 34).

Finally, the Transload Facility Operations Agreement itself sets forth in Article II - Documents and Billing, that Coastal may enter into its own agreements with customers "whereby Coastal shall be responsible to such Customer for obtaining the disposal of Commodities. In entering into and performing any Disposal Agreements, Coastal shall not make any statement or take any action or fail to take any action that the Railroad is in any way participating in or approving any Disposal Agreement. Any Disposal Agreements shall be entirely independent from the transportation and loading service provided under this agreement." Paragraph 2.01(b) of Transload Facility Operations Agreement. This clause contained within the agreement further proves that the premises are being utilized for more than just "transloading."

The Board finds that based on the agreement between the parties, the applicant's own presentation regarding the use of the site, as confirmed by Mr. Poscillico's personal observations as a neighboring business owner, that the materials being transported at the Coastal site are clearly "hitting the ground." The materials deposited at the Coastal site were not merely being loaded into rail cars from trucks. Instead, trucks visiting the site were dumping onto a pad inside the building and their loads were being sorted to some extent - either through visual inspection with prohibited items being "extracted" as stated by the applicant or by being pushed around by a bobcat or payloader, according to Mr. Poscillico. Further, the applicant admitted to conducting this extracting/sorting for a profit.

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Based on these facts, the Board finds that the applicant is operating more than just a transload facility and is operating in excess of the federal exemption to which it claims to be entitled.

**STATE LAW EXEMPTION CLAIMED BY THE APPLICANT PURSUANT TO
PUBLIC AUTHORITIES LAW §1266(8)**

At the outset of the September 9, 2004 public hearing, the applicant stated that the basis of its appeal to the Board was that the subject site, as a railroad transloading facility property was exempt from local zoning under both federal and state laws. The applicant testified that the property in question is owned by Pinelawn Cemetery but has since 1904 been leased to the Long Island Railroad (now, the MTA). (Minutes of public hearing of September 9, 2004 at page 22). The applicant claimed that the MTA had jurisdiction over the property and that they had reviewed and approved of the applicant's building plans for the site. (Page 23). Other than the above statements, the applicant failed to expound on its exemption pursuant to State Law at either of the two public hearings.

The applicant did claim in its memorandum to the Board that municipal zoning authority over the subject premises was superseded by the New York State Public Authorities Law §1266(8) which provided that "the authority (Metropolitan Transportation Authority, hereinafter "MTA") may do all things it deems necessary, convenient or desirable to manage, control and direct the maintenance and operation of transportation facilities, equipment or real property operated by or under contract, lease or other arrangement with the authority and its subsidiaries, and New York city transit authority and its subsidiaries. Except as hereinafter provided, no municipality or

political subdivision, including but not limited to a county, city, village, town or school or other district shall have jurisdiction over any facilities of the authority and its subsidiaries, and New York city transit authority and its subsidiaries, or any of their activities or operations." However, other than setting forth the statute at page two (2) of its memorandum to the Board, the applicant fails to further detail its entitlement to an exemption from local zoning pursuant to State Law.

BOARD'S FINDING REGARDING STATE EXEMPTION CLAIMED BY THE APPLICANT

The Board finds that the applicant's use of the subject premises does not entitle the applicant to an exemption from local zoning as the applicant use of the site is not purely and entirely for "transportation or transit purposes" as required by Public Authorities Law §1266(8). Section 1266(8) dictates that "the local laws, resolutions, ordinances, rules and regulations of a municipality or political subdivision, heretofore or hereafter adopted, conflicting with this title or any rule or regulation of the authority or its subsidiaries, or New York city transit authority or its subsidiaries, shall not be applicable to the activities or operations of the authority and its subsidiaries...except such facilities that are devoted to purposes other than transportation or transit purposes." Because the evidence presented at the public hearings was that the applicant was operating the site in a manner in which more than merely transloading materials, the Board finds that the applicant is not entitled to an exemption from local zoning pursuant to Public Authorities Law §1266(8).

First, the Board finds that the property in question is not owned by the MTA. The property in question is owned by Pinelawn Cemetery, who leased the property to

the LIRR (now owned by the MTA) in 1904. The MTA entered into a transfer agreement for the property with New York and Atlantic Railway in 1996 in an attempt to privatize its freight services, who in turn subleased to the applicant (lease dated July 11, 2002). Thereafter, in August of 2004, the sublease to Coastal was replaced with the Transload Facility Operations Agreement, discussed hereinbefore. Thus, the MTA, the "authority" bestowed with the exemption set forth in Public Authorities Law §1266(8) merely holds the lease from Pinelawn. The operation of the site has been privatized (transferred to New York and Atlantic for this purpose) and thereafter subleased to Coastal. The sublease was later replaced with the Transload Facility Operations Agreement. Based on this history, the Board finds the applicant's use of the site too far removed from the MTA, for its exemption to apply to the applicant.

Second, the Board finds that where a governmental body is entitled to an exemption from local zoning for a particular function, and it leases part of the premises involved therein to a private individual or corporation, the private lessee is likewise entitled to an exemption...If the function be governmental, then the immunity may apply. If the function is proprietary, then the immunity may not apply. People v. Witherspoon, 52 Misc.2d 320, 321 (Dist. Ct. Suffolk County 1966). In this matter, the Board finds that the applicant's use of the site is a private function. Thus, the state exemption to which they claim to be entitled does not apply.

The evidence presented by the applicant itself was that Coastal was conducting "sorting" at the site. Coastal admitted that "they're bringing in construction demolition debris and they're taking it off the trucks and putting it into the cars." Coastal also weighs the cars because there is a weight limit. (Minutes of September 9, 2004 at page 40).

The President of New York and Atlantic Railway indicated based on his own observation of the site that "the operation is really good. They actually sort out the metal from - from the "C&D" and they take out anything that would be MSW and do not allow it in the car. I mean they're very good about that." (Minutes of September 9, 2004 hearing at page 40).

Mr. Martin Sternberg, a partner in Coastal Distribution stated regarding the operation of the site that "we do ship out to C&D...C&D comes in and if there are items within the C&D that are not allowed to go and be transported to the State of Ohio which is ruled over by Department of Health in the State of Ohio and they have an agent at the site everyday watching each car as it's off-loading, that item, such as a mattress, is taken out of the load and either put back onto the truck that deposited it or if we didn't see it at that moment, there is a special container on the side in which that material is put into and then brought to an incinerator or class one landfill." (Minutes of September 9, 2004 hearing at page 47-48).

Mr. Sternberg claimed that they were only taking materials that had already been processed at a transfer station where "it's presorted." (Minutes of September 9, 2004 at page 52). He also indicated that "we're [Coastal's] not doing any sorting on site. The material is placed on the floor, we pick it up and put it in the rail cars. What - we're doing that, we're visually looking [f]or materials that we know Ohio will not take which would be things - there are many things, but of course, liquids, 55-gallon drums, sofas, bedding, tires, and the list goes on and on...Any of that material that we see, we extract it." (Minutes of September 9, 2004 at page 53).

Coastal admitted that it charged a fee for the above "sorting" or "extracting" service (Page 53).

And finally, the agreement between the parties sets forth that Coastal may enter into its own agreements with customers whereby Coastal shall be responsible to such Customer for obtaining the disposal of Commodities. In entering into and performing any Disposal Agreements, Coastal shall not make any statement or take any action or fail to take any action that the Railroad is in any way participating in or approving any Disposal Agreement. Any Disposal Agreements shall be entirely independent from the transportation and loading service provided under this agreement." Paragraph 2.01(b) of Transload Facility Operations Agreement. The paragraph clearly sets forth a proprietary use of the site by Coastal -- one that does not involve the railroad in any way, by its own terms -- that Coastal engages in for profit.

Based on the above procedure outlined by the applicant itself, as well as the above cited provision contained within the Transload Facility Operations Agreement, the Board finds that Coastal distribution is not solely utilizing the subject premises for transportation or transit purposes only. It is instead taking materials that are deposited at the site by trucks, pre-sorting it for a fee, and then transferring it onto railcars. The board finds this money-making endeavor by Coastal of presorting construction and demolition material prior to its transport does not constitute transportation or transit purposes within the meaning of §1266 (8) of the Public Authorities Law. The Board therefore finds that the applicant is not exempt from the Town's local zoning ordinances.

CONCLUSION

For all the aforementioned reasons, the Board of Appeals herein upholds the Stop Work Order issued to the applicant on or about 3/25/04.

EXHIBIT G

LEXSEE



Caution

As of: Jun 28, 2007

COASTAL DISTRIBUTION, LLC and THE NEW YORK AND ATLANTIC RAILWAY COMPANY, Plaintiffs, - against - THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, PETER CASSELY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON, and PINELAWN CEMETARY, Defendants.

05-CV-2032(JS)(ETB)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

2006 U.S. Dist. LEXIS 8400

January 31, 2006, Decided

SUBSEQUENT HISTORY: Affirmed in part and modified in part by *Coastal Distrib., LLC v. Town of Babylon*, 2007 U.S. App. LEXIS 3042 (2d Cir. N.Y., Feb. 6, 2007)

PRIOR HISTORY: *Coastal Distrib., LLC v. Town of Babylon*, 2005 U.S. Dist. LEXIS 40795 (E.D.N.Y., July 15, 2005)

COUNSEL: [*1] For Plaintiffs: Coastal Distribution, LLC: James F. Gaughran, Esq., Huntington, New York; John F. McHugh, Esq., New York, New York; Ronald E. Joseph, Esq., Landman Corsi Ballaine & Ford, New York, New York.

For Plaintiffs: The New York & Atlantic Railway Company: Ronald E. Joseph, Esq., Landman Corsi Ballaine & Ford, New York, New York; Ronald A. Lane, Esq., Fletcher & Sippel LLC, Chicago, Illinois.

For Defendants: The Town of Babylon, a municipal corporation, The Town of Babylon Board of Zoning Appeals, Peter Casserly, as Commissioner of Planning and Development of the Town of Babylon, and Pinelawn Cemetery: James Patrick Clark, Esq., Bond Schoeneck & King PLLC, Garden City, New York; Mark A. Cuthbertson, Esq., Huntington, New York.

JUDGES: Joanna Seybert, U.S.D.J.

OPINION BY: Joanna Seybert

OPINION

MEMORANDUM AND ORDER

SEYBERT, District Judge:

Before this Court is Magistrate Judge E. Thomas Boyle's Report and Recommendation regarding the request of Coastal Distribution, LLC ("Coastal") and the New York & Atlantic Railway ("NYA" and together with Coastal, the "Plaintiffs") for a preliminary injunction. The Magistrate recommended that this Court preliminarily enjoin the Town of [*2] Babylon ("Town") from enforcing its Stop Work Order and certain zoning regulations against the Plaintiffs. Pursuant to *FED. R. CIV. P. 72(b)*, the Town and Pinelawn Cemetery ("Pinelawn" and together with the Town, the "Defendants") objected to parts of the Report and Recommendation, and Plaintiffs responded. Pursuant to 28 U.S.C. § 636(b)(1), this Court reviews *de novo* those portions of the Report and Recommendation to which Defendants object. Such *de novo* review does not entirely replace the Magistrate's efforts. For purposes of this review, familiarity with the facts of the case is presumed.

After carefully reviewing Defendants' objections, this Court adopts the Report and Recommendation and grants Plaintiffs' request for a preliminary injunction. First, *Younger* does not apply in this case nor will this Court give preclusive effect to the Babylon's Zoning Board of Appeals' ("ZBA") findings of fact. Second, after reviewing the harm to the public interest, this Court finds that Plaintiffs have met their burden on their request for a preliminary injunction.

DISCUSSION

*I. The Younger Doctrine Does Not [*3] Mandate Abstention Nor Are The ZBA's Findings of Fact Entitled To Preclusive Effect.*

A. No State Proceeding Is Ongoing For Younger.

The *Younger* doctrine of abstention does not require this Court to abstain from exercising jurisdiction over this action. The *Younger* doctrine restrains federal courts from exercising jurisdiction over federal constitutional claims where state proceedings are ongoing. See *Younger v. Harris*, 401 U.S. 37, 43-44, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971). This doctrine is rooted in notions of federalism and the state courts' adequate ability to vindicate federal constitutional rights. See *Cullen v. Fliegner*, 18 F.3d 96, 103 (2d. Cir. 1994) (citations omitted). *Younger* is invoked when state criminal, civil, or administrative proceedings are ongoing. See *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 627, 91 L. Ed. 2d 512, 106 S. Ct. 2718 (1986). The administrative proceedings, however, must be of a judicial nature. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 239, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984).

Aside from an ongoing state proceeding, [*4] *Younger* requires two other conditions. The ongoing state proceeding must implicate an important state interest. Additionally, that state proceeding must give parties an adequate opportunity for judicial review of federal constitutional claims. See *Diamond "D" Constr. Corp. v. McGowan*, 282 F.3d 191, 198 (2d. Cir. 2002) (citations omitted).

In this case, New York law does not expressly state whether the ZBA hearings are judicial or administrative in nature. New York limits, however, ZBA's powers to review only *administrative* officials' decisions. N.Y. TOWN LAW § 267-b(1) (the ZBA will have the power to review those decisions made by an "administrative official charged with the enforcement of such ordinance or local law.") (emphasis added). Pinelawn claims that the ZBA acts in a judicial capacity, but Pinelawn cites to only one case that finds zoning appeals as merely "quasi-judicial." (Pinelawn's Objections to Report and Recommendation at 28.)

The nature of zoning appeals, however, is irrelevant because no zoning appeal is pending. The ZBA rendered a final decision regarding this case on February 10, 2005. See *Coastal Distribution, [*5] LLC*, Application No. 04-267 (Town of Babylon Zoning Board of Appeals, Feb. 10, 2005). At that point, Plaintiffs were free to initiate an Article 78 proceeding in state court, but no state law requires this. See N.Y. VILLAGE LAW § 7-712-c ("Any person . . . aggrieved by any decision of the board of appeals . . . may apply to the supreme court for review by a proceeding under article seventy-eight of the civil practice law and rules.") (emphasis added).

So as to the first *Younger* condition, no state court judicial proceeding was ongoing at the time this action commenced. At best, a quasi-judicial proceeding had terminated two months before Plaintiffs filed their complaint. In light of the fact that no state proceeding is ongoing, this Court will not address the other *Younger* conditions and may exercise jurisdiction over this action.

B. This Court Will Not Give Preclusive Effect To The ZBA's Findings Of Fact.

Defendants also argue that the Magistrate was bound by the ZBA's findings of fact and conclusions of law. This Court disagrees and finds that the Magistrate properly made his findings of fact and conclusions of law. Furthermore, [*6] the ZBA's findings bind neither this Court nor that of the Magistrate.

The Supreme Court held that federal courts must give preclusive effect to agencies that act in a "judicial capacity." *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 799, 106 S. Ct. 3220, 92 L. Ed. 2d 635 (1986). But as already established, the ZBA does not act in a judicial capacity. Moreover, in an Article 78 proceeding, a state court can conduct its own hearing, hear further evidence and testimony, and draw its own findings of fact and conclusions of law. These findings and conclusions become a part of the proceeding upon which a state court can make a decision regarding the ZBA's final determinations. See N.Y. TOWN LAW § 267-c(4) (discussing the power of the court in an Article 78 proceeding). *A fortiori*, a federal court can conduct its own hearing, hear further evidence and testimony, and draw its own findings of fact and conclusions of law while reviewing a case that has been before the ZBA.

II. The Plaintiffs Have Met Their Burden For This Court To Grant A Preliminary Injunction.

For this Court to issue a preliminary injunction against "government action [*7] taken in the public interest pursuant to a statutory or regulatory scheme," the Plaintiffs must show "(i) irreparable harm absent the injunction and (ii) a likelihood of success on the merits."

Freedom Holdings, Inc. v. Spitzer, 408 F.3d 112, 114 (2d Cir. 2005) (citations omitted). Plaintiffs satisfy the irreparable harm requirement when they show that absent a preliminary injunction, Plaintiffs "will suffer 'an injury that is neither remote nor speculative, but actual and imminent,' and one that cannot be remedied 'if a court waits until the end of trial to resolve the harm.'" *Id.* Because irreparable harm is "the single most important prerequisite" before a preliminary injunction will issue, Plaintiffs must show first that the injury is "likely" before showing any other requirements. *Id.*

A. Absent Injunctive Relief, Plaintiffs Will Suffer Irreparable Harm.

Irreparable harm does not exist when money damages can fully compensate a party for its injuries caused by the absence of a preliminary injunction. See *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, [*8] *Federal Practice and Procedure* § 2948.1 (2d ed. 1995). However, when courts cannot establish and measure the injury in terms of money, courts have found irreparable harm. See *Register.com, Inc.*, 356 F.3d at 393. Loss of goodwill and injury to reputation are injuries that are difficult to measure in dollars, and thus, these types of injuries are irreparable harm. See Wright, Miller & Kane, *supra* § 2948.1. Furthermore, loss of business opportunities and relationships with clients who could "produce an indeterminate amount of business over years to come" are also hard to measure in dollars and are properly considered irreparable harm. See *Register.com, Inc.*, 356 F.3d at 393.

Defendants argue that nothing in the record supports a finding of irreparable harm; specifically, the record arguably does not establish any loss of goodwill, reputation, or business opportunities. Plaintiffs refute this. Coastal lost potential clients because of this matter and without an injunction, the Farmingdale facility will likely shut down. Without the ability to provide long-term service, Coastal cannot ask shippers to abandon their relationships with truckers. [*9] Furthermore, Plaintiffs did not construct any new structures for construction and demolition debris ("C&D") materials until after both Defendants had assured them that construction was approved.

The irreparable harm is apparent in this case. NYA is the only railroad that handles rail freight on the Long Island Railroad rails. (Hearing Transcript Before Magistrate Judge Boyle, May 19, 2005 ("Tr.") 25.) NYA's growth is almost entirely dependent on transloading. (Tr. 30.) The Farmingdale facility is NYA's only facility suitable for bulk commodities, and Coastal is the only operator of that transload facility. (Tr. 33-34.) Shutting down

the Farmingdale facility would result in a loss of business opportunities, goodwill, and reputation for NYA.

Plaintiffs' rail services are integral for transporting freight and other materials in and out of Long Island. Coastal's clients need these transload and rail services because once the clients commit to rail transportation, it is hard to re-establish trucking arrangements. (Tr. 183-84.) Coastal has already held off accepting clients because Coastal cannot reassure these potential clients that Coastal will be there long term. *Id.* If the Plaintiffs [*10] cannot offer the public long-term, reliable, and well-needed transload and rail services, the Plaintiffs will lose current and potential clients, goodwill, reputation, and an indeterminate amount of business over years to come - immeasurable in dollar amount. *Id.* These types of injuries constitute irreparable harm in this Circuit and the Court holds accordingly.

B. A Preliminary Injunction Benefits The Public Interest.

Defendants correctly argue that when a preliminary injunction implicates public interests, a court should consider the balance of such interests in deciding if "a plaintiff's irreparable injury and probability of success on the merits warrants injunctive relief." *Brody v. Vill. of Port Chester*, 261 F.3d 288, 290 (2d Cir. 2001). Defendant Pinelawn Cemetery ("Pinelawn") argues that the public interest would be harmed if the Town could not regulate the Plaintiffs while handling substances dangerous to the public, specifically asbestos, lead, and other hazardous materials released into the air. But this Court finds that the public interest of reducing trucking traffic on already-congested highways the true interest of concern.

Even though the [*11] Interstate Commerce Commission Termination Act ("ICCTA") preempts the states from regulating railroads, the states may still exercise "traditional police powers over the development of railroad property." *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005). Such state regulations must "protect public health and safety, [be] settled and defined, . . . obeyed with reasonable certainty, and . . . approved (or rejected) without the exercise of discretion on subjective questions." *Id.* Thus, any "electrical, plumbing and fire codes, direct environmental regulations enacted for the public health and safety" would withstand preemption. Plaintiffs then would not go unregulated in regard to utilities, the environment, and the public's health and safety. *Id.*

Thus, the sole public interest at issue here is the highway and road congestion that would dramatically increase if this Court did not enjoin the Town. If this Court does not enjoin the Town from enforcing the Stop Work Order, Plaintiffs' clients would have to transport its freight and other materials via truck on already-

congested highways. This flies in the face of the very reason New York [*12] State privatized rail freight in the first place. The Governor wanted to decrease the number of trucks on the roads and place that traffic on underutilized rails. (Tr. 28.) Without an injunction, hundreds of trucks will be forced onto the Long Island Expressway and other already-congested highways and roads. (Tr. 73.) Therefore, this Court serves the public interest of minimizing highway congestion due to trucks by preliminarily enjoining the Town from enforcing the Stop Work Order.

C. Plaintiffs Have Shown A Likelihood Of Success On The Merits.

The second prong that Plaintiffs must meet for this Court to issue a preliminary injunction is likelihood of success on the merits. *See Freedom Holdings, Inc.*, 408 F.3d at 114. For purposes of a preliminary injunction, however, this Court need not find with "absolute certainty" that Plaintiffs will succeed on the merits of their claims. *Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1984) ("A movant . . . need not show that success is an absolute certainty. He need only make a showing that the probability of his prevailing is better than fifty percent. There may remain considerable room for doubt.") Thus, [*13] a finding that Plaintiffs have more than a fifty-fifty chance of succeeding on the merits of their claims would warrant a finding of a likelihood of success on the merits.

Plaintiffs argue that the Town cannot regulate Coastal's construction of a shed because ICCTA preempts state law and has exclusive jurisdiction over railroads. Based on the reasoning below, this Court finds that the Plaintiffs provide railroad transportation, NYA is a rail carrier, and Coastal is likely a rail carrier, resulting in ICCTA's exclusive jurisdiction over the Plaintiffs.

1. Coastal's Transload Services Are Transportation Under ICCTA Jurisdiction.

The Second Circuit faced facts and issues similar to those presented in this case. *See Green Mountain*, 404 F.3d at 638. In *Green Mountain*, the Second Circuit found that ICCTA preempted Vermont's environmental land use statute. Vermont attempted to regulate the plaintiff railroad company. The railroad wanted to construct a shed to store bulk salt, bulk cement, and non-bulk goods such as steel pipes. The state notified the railroad that constructing the shed violated the railroad's construction permits.

The Second Circuit cited ICCTA, [*14] which expressly preempted "remedies under Federal or State law" and vested with the "Surface Transportation Board ["STB"], a federal agency, exclusive jurisdiction over

'transportation by rail carriers' and 'the construction . . . of . . . facilities . . . ' for the rail carriers. *Id.* at 639 (citing 49 U.S.C. § 10501(b)). The Second Circuit noted that "the term 'transportation' is *expansively* defined to include a 'warehouse . . . yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail.'" *Id.* at 642 (citing 49 U.S.C. § 10102(9) (emphasis added)). The court went on to state that the statute's "plain language grants the [STB] wide authority over [the railroad's] transloading and storage facilities." *Id.* (citations omitted).

Based on this expansive reading of ICCTA and the STB's wide reach, the Second Circuit held that Vermont could not regulate the railroad's building of a storage shed through state permit or pre-clearance requirements. The "proposed transloading and storage facilities are integral to the railroad's [*15] operation and are easily encompassed within the [STB's] exclusive jurisdiction over 'rail transportation.'" *Id.* at 644-45.

Constructing facilities designed for transloading and storage of materials to be shipped by rail falls within the exclusive jurisdiction of the STB. Plaintiffs' proposed storage shed for C&D materials to be shipped by rail is exactly the type of activity the Second Circuit has held falls within ICCTA and STB jurisdiction. The construction of the storage shed is integral to Plaintiffs' shipment of C&D materials by rail. Thus, ICCTA preempts state and town law, and the Town cannot prohibit Plaintiffs from constructing its storage shed.

Defendant Pinelawn attempts to distinguish *Green Mountain* from the case at hand. In *Green Mountain*, Vermont attempted to regulate the railroad that owned the transload facility; in this case, the Town attempts to regulate Coastal, an entity which contracted with the railroad, NYA, to operate the transload facility in Farmingdale. But in defining transportation, Congress did not draw a distinction between a railroad and a party it contracts with. *See* 49 U.S.C. § 10102(9)

"Transportation" [*16] includes --

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

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventila-

tion, storage, handling, and interchange of passengers and property

Id. (emphasis added).

Thus, by its plain language, Coastal's transloading facility falls within the definition of transportation. Transportation includes any yard, property, or facility, and services related to the movement of property by rail - no matter whether the railroad owns and operates the facility or contracts with a third party to operate that facility.

Furthermore, if the Court was to accept Defendants' argument, preemption of state regulations would occur only when the railroads are the sole owners and operators of a transload facility. Inconsistency would result. Railroad-owned and operated transload facilities would be regulated under ICCTA. But transload facilities operated [*17] by third parties contracting with a railroad would be subject to Town regulations even though all those transload facilities provided the same exact services. To avoid this absurd result, all transload facilities related to the movement of passengers and property by rail - whether controlled by a railroad or not - are transportation.

The Third Circuit case of *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3d Cir. 2004) does not control this case. The *Hi Tech* court found that Hi Tech, a lessor of a facility, was transporting materials "to" a rail carrier, and Hi Tech's operations did not involve transportation "by" rail carrier. *Id.* at 308. Accordingly, ICCTA and the STB did not preempt state law, and Hi Tech was subject to New Jersey's Municipal Solid Waste Laws. *See id.* at 309.

Some facts in this case differ materially from *Hi Tech*. First, the New York State Department of Environmental Conservation ("NYDEC") - New York's equivalent to the state agency involved in the *Hi Tech* case - visited the facility Coastal operates. NYDEC, which has more experience in assessing the type of facility that is being [*18] operated than any court of federal jurisdiction has, found that Coastal transloads materials on behalf of NYA, that the Farmingdale facility is a transload facility, and that NYDEC is preempted from exercising jurisdiction over such facility. (Rutigliano Decl. Ex. I.) The state agency in *Hi Tech* found the exact opposite to be true. The New Jersey State Department of Environmental Protection ("NJDEP") found that Hi Tech was operating a municipal solid waste facility subject to state laws.

This Court notes that Defendants attempt to downplay the importance of NYDEC's findings that Coastal is operating a transload facility. But in the *Hi Tech* case,

upon which the Defendants heavily rely, the Third Circuit discussed at length the NJDEP's findings and New Jersey's interest in regulating municipal solid waste facilities. *See id.* at 299-301, 309 ("New Jersey's interest in regulating its solid waste disposal facilities is as real as it is critical."). The Third Circuit went on to find that New Jersey has a "well-recognized compelling state interest" in regulating "solid waste facilities in a densely populated state that has suffered the scourge of unregulated solid [*19] waste facilities for decades." *Id.* at 309 (agreeing with the findings of the district court). No parallel state interest lies in this case because the NYDEC found that Coastal operates a transload facility under ICCTA jurisdiction. As the Third Circuit paid great heed to NJDEP's findings, so too does this Court heed the findings of NYDEC.

Another distinction between *Hi Tech* and this case is the relationship between the railroad and the entity operating the facility. In this case, NYA and Coastal jointly agree and argue that they have an agency relationship. In *Hi Tech*, neither the railroad nor Hi Tech argued that they had an agency or employment relationship.

The *Hi Tech* court found that the agreement between Hi Tech and the railroad "essentially eliminated [the railroad's] involvement in, and responsibility for, the operation of Hi Tech's facility." *Hi Tech*, 382 F.3d at 308. The Coastal-NYA operations agreement at issue in this case does not essentially eliminate the railroad's involvement in and responsibility for the operation of the Farmingdale facility. In fact, the Coastal-NYA operations agreement states that the "RAILROAD shall [*20] control the Facility's operations" and have the right to review and audit Coastal's records and inspect Coastal's facility. (NYA Ex. 8 P1.02) The Coastal-NYA operations agreement further provides that (1) NYA must approve all of Coastal's "commodities, movements, and equipment," (2) NYA must pre-approve any of Coastal's written marketing materials, and (3) written marketing materials must prominently indicate NYA's name or logo. (NYA Ex. 8 P1.04.) Coastal also must pass a portion of its loading fees to NYA and increase levels of traffic. (NYA Ex. 8 PP3.02, 5.01.)

Thus, the operations agreement does not essentially eliminate NYA's involvement and responsibility for the Farmingdale facility. The agreement does quite the opposite and involves NYA on many levels. *Hi Tech* is thus distinguished from the case at hand and is not dispositive.

Defendants argue that an agency relationship does not exist between Coastal and NYA. But this Court finds an agency relationship unnecessary to find ICCTA jurisdiction. First, by its plain language, ICCTA allows railroads to contract with other entities to supervise the fa-

cilities and yards related to the movement of property by rail. ICCTA does [*21] not expressly require such contractual relationship to be one of agency. See 49 U.S.C. § 10102(9)(A). Second, the NYDEP found the Farmingdale facility to be a transloading facility subject to ICCTA jurisdiction. (Rutigliano Decl. Ex. I.) Third, Second Circuit case law has held that ICCTA has exclusive jurisdiction over transload and storage facilities like the Farmingdale facility. See *Green Mountain*, 404 F.3d at 644. Fourth, this Court finds that NYA's involvement at the Farmingdale facility is enough to bring the facility within the exclusive jurisdiction of ICCTA, regardless of Coastal's agreement to actually operate the facility.

2. Coastal Is Likely A Rail Carrier Under ICCTA Jurisdiction.

The other element required for ICCTA jurisdiction is that the transportation be provided by "rail carrier." 49 U.S.C. § 10501(a)(1)(A) ("... The Board has jurisdiction over transportation by rail carrier . . ."). Defendant Pine-lawn argues that the term "rail carrier" does not include third parties who contracted with railroads to operate transload facilities. But the Defendants do not refute this Circuit's precedent [*22] nor Supreme Court precedent nor that of the STB. The Second Circuit did not address specifically whether a contractor operating transload facilities falls under ICCTA jurisdiction; the Second Circuit, however, did hold that transload and storage facilities themselves are transportation and do fall under ICCTA jurisdiction. See *Green Mountain*, 404 F.3d at 642.

Furthermore, the Supreme Court addressed whether the definition of "rail carrier" includes contracted third parties who provide transfer services for railroads. See *City of Chicago v. Atchison, Topeka, & Santa Fe Ry. Co.*, 357 U.S. 77, 87-89, 78 S. Ct. 1063, 2 L. Ed. 2d 1174 (1958). The Supreme Court interpreted ICCTA's predecessor, the Interstate Commerce Act, to have jurisdiction over a third-party private bus corporation that contracted with the railroads to provide transfer services for passengers between train terminals. This Supreme Court precedent supports Plaintiffs' proposition that ICCTA has jurisdiction over third parties who contract with railroads and provide integral services to those railroads.

The Act provides that motor vehicle transportation between terminals, *whether* [*23] *performed by a railroad or by an agent or a contractor of its choosing, shall be regarded as railroad transportation* and shall be subject to the same comprehensive scheme of regulation which applies to such transportation. The various provisions set forth above manifest a con-

gressional policy to provide for the smooth, continuous and efficient flow of railroad traffic from State to State subject to federal regulation. In our view it would be inconsistent with this policy if local authorities retained the power to decide whether the railroads or their agents could engage in the interterminal transfer of interstate passengers. We believe the Act authorizes the railroads to engage in this transfer operation themselves or to select such agents as they see fit for that purposes without leave from local authorities. . . . Because of close time schedules, the great volume of traffic and its irregular ebb and flow, the railroads obviously need a cooperative and dependable transfer operator with suitable equipment who is willing to work in close harmony with them. . . . *The City has no power to decide whether [the contracted third party] can operate a motor vehicle service between terminals* [*24] *for the railroads because this service is an integral part of interstate railroad transportation authorized and subject to regulation under the Interstate Commerce Act.*

Id. (emphasis added).

Lastly but perhaps most telling are certain STB decisions that determine rail carrier status of parties who contract with railroads. See *Ass'n of P&C Dock Longshoremen v. Pittsburgh & Conneaut Dock Co.*, 8 I.C.C. 2d 280 (1992); *H&M Int'l Transp., Inc.*, Petition for Declaratory Order, STB Finance No. 34277, 2003 STB LEXIS 722 (Nov. 12, 2003). STB's predecessor, the Interstate Commerce Commission ("ICC"), determined that a dock facility that contracted with a railroad and provided loading operations for coal and iron ore was a rail carrier. In *Ass'n of P&C Dock Longshoremen*, the ICC reviewed Commission and court precedent for the criteria needed for an entity to be considered a rail carrier.

The ICC found the following considerations to be relevant: (1) "actual performance of rail service," (2) "the service being performed is part of the total rail service contracted for by a member of the public," (3) "the entity is performing as part of a system of interstate [*25] rail transportation by virtue of common ownership between itself and a railroad or by contractual relationship with a railroad, and hence such entity is deemed to be holding itself out to the public," and (4) "remuneration for the services performed is received in some manner, such as a

fixed charge from a railroad or by a percent of the profits from a railroad." *Id.* at 290.

After reviewing these considerations, the ICC laid out a two-part test for whether an entity is a rail carrier. First, does the entity conduct rail operations? Second, does the entity "hold out that service to the public?" *Id.* at 291. In applying this two-part test, the ICC found that the dock satisfied both tests. In answering the first question, the ICC found that "loading and unloading, performed under contract to a rail carrier, is railroad transportation service. . . . It is within the broad scope of services--receipt, handling, storage, transfer, and interchange--related to transporting property that, when performed over track with rail equipment, clearly comprises railroad transportation under § 10102." *Id.* at 291.

As to the second question, the ICC looked [*26] to whether the entity, whose rail carrier status was at issue, allowed the public to use the facilities or if it only served the railroad. The test is whether "the questioned service is part of the total rail common carrier service that is publicly offered . . . whether through common ownership or contract." The ICC found that the railroad publicly offered the dock's rail-lake vessel loading and unloading services as part of its complete common carrier rail transportation service. The ICC also found that the dock's service was not restricted to certain classes of railroad traffic or specific railroad shippers. The dock services were available to all that engage the railroad. *See* 294-95.

Ultimately, the ICC held that the dock was a rail carrier. The dock "conducted rail operations -- it operates a dock that uses rail equipment and track to receive, interchange, transfer, store, and handle property that is being transported -- and makes that service publicly available to all who employ the [railroad]. . . ." *Id.* at 295.

Applying the ICC's two-part test to the facts of this case, this Court finds that Coastal is likely a rail carrier and is under the exclusive [*27] jurisdiction of ICCTA. The first question of the test -- whether Coastal's services are part of rail operations -- is answered in the affirmative. Coastal operates a transload facility; Coastal loads and unloads materials performed under contract with a rail carrier. Coastal receives the freight and other materials from trucks, it handles the freight, it stores the freight until Coastal loads the materials onto the train cars. *Tr.* at 33, 228. Clearly, Coastal's services are properly considered "transportation" under 49 U.S.C. § 10102 and accordingly are a part of rail operations.

The Court also believes the second question should be answered in the affirmative -- as to whether Coastal holds its services out to the public as part of the total rail carrier services provided at the Farmingdale facility. The record reveals that both Coastal and NYA work together at the Farmingdale facility. (*Tr.* 176-77.) Coastal is in

charge of marketing and customer relations. (*Tr.* 99, NYA Ex. 8 P1.04.) NYA sets the rules governing how loading is performed and whether the loaded cars comport with LIRR and federal safety standards. (*Tr.* 62.)

Coastal's transloading operations [*28] are integral to NYA's railroad transportation services. Coastal does not serve just NYA; Coastal serves several members of the public and intends to increase its services to the public via agreement with NYA. (*Tr.* 183-84.) Furthermore, NYA receives remuneration for every car Coastal loads. (*Tr.* 68.)

While the likelihood is high that Coastal is a rail carrier for purposes of ICCTA, the Court recognizes that certain facts support Defendants' position that Coastal is not a rail carrier. For instance, NYA acknowledges that it is responsible for cars only when they are coupled to the railroad's locomotive. (*Tr.* 119.) And certainly, Coastal may find it in its best interest to apply to the STB for licensing or an exemption from licensing. But as stated earlier, this Court need not find with "absolute certainty" that Coastal is a rail carrier under ICCTA. *Wali*, 754 F.2d at 1025. All this Court needs to find is that the Plaintiffs have more than a "fifty percent" chance of success on the merits of their claims. *Id.* Given that this Court finds Coastal provides transportation as defined under ICCTA and several facts support Coastal's rail carrier status, this Court finds [*29] the Plaintiffs have met their burden of probable success on the merits and injunctive relief is warranted.

As for Defendants' argument that Coastal conducts more than transloading operations at the Farmingdale facility, this Court rejects that argument because Defendants have pointed to nothing in the record that supports their position. Defendants' last and final objection is that the Magistrate should not have *sua sponte* raised the equitable estoppel considerations in favor of Plaintiffs. This Court finds it unnecessary to address this final objection in light of the fact that Plaintiffs have met their burden for a preliminary injunction.

CONCLUSION

In accordance with the foregoing, the Court adopts Magistrate Judge E. Thomas Boyle's Report and Recommendation. The Court preliminarily enjoins the Town from enforcing its Stop Work Order against Plaintiffs until resolution of this matter.

SO ORDERED.

Joanna Seybert, U.S.D.J.

Dated: Central Islip, New York

January 31, 2006

EXHIBIT H

LEXSEE 216 FED. APPX. 97

A

Analysis

As of: Jun 28, 2007

COASTAL DISTRIBUTION, LLC, THE NEW YORK AND ATLANTIC RAILWAY COMPANY, Plaintiffs-Appellees, -v.- THE TOWN OF BABYLON, a Municipal Corporation, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, PETER CASSERLY, as Commissioner of Planning and Development of the Town of Babylon, and PINELAWN CEMETERY, Defendants-Appellants.

06-0981-CV, 06-0989-CV

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

216 Fed. Appx. 97; 2007 U.S. App. LEXIS 3042

February 6, 2007, Decided

NOTICE: [*1] RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

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

Coastal Distrib., LLC v. Town of Babylon, 2006 U.S. Dist. LEXIS 8400 (E.D.N.Y., Jan. 31, 2006)

COUNSEL: FOR DEFENDANTS-APPELLANTS: JAMES P. CLARK, Bond, Schoeneck & King, PLLC, Garden City, NY, for Defendant-Appellant the Town of Babylon. FRAN M. JACOBS, Duane Morris LLP, New York, NY, for Defendant-Appellant Pinelawn Cemetery.

FOR PLAINTIFFS-APPELLEES: RONALD A. LANE, Fletcher & Sippel LLC, Chicago, IL, for Plaintiff-Appellee the New York and Atlantic Railway Company. JOHN F. McHUGH, New York, NY, for Plaintiff-Appellee Coastal Distribution, LLC.

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

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

OPINION

SUMMARY ORDER

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

Defendants-appellants the [*2] Town of Babylon (the "Town") and Pinelawn Cemetery ("Pinelawn") appeal from the January 31, 2006 order of the United States District Court for the Eastern District of New York (Seybert, J.) granting a preliminary injunction to plaintiffs-appellees Coastal Distribution, LLC ("Coastal") and the New York and Atlantic Railway Company ("NYA"), enjoining the Town from enforcing a stop work order that prohibited Coastal from continuing construction on a shed it operated on property owned by Pinelawn but leased to the Long Island Railroad ("LIRR") and NYA. See *Coastal Distrib., LLC v. Town of Babylon, 05-CV-2032, 2006 U.S. Dist. LEXIS 8400, 2006 WL 270252 (E.D.N.Y. Jan. 31, 2006).*

We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review. In a nutshell, Coastal operates a transloading facility at NYA's Farmingdale Yard in Babylon, New

York. Coastal loads bulk cargo from trucks onto railcars, and NYA transports the railcars from Coastal to their destinations. A variety of bulk cargo is transloaded at the facility; but the Town and Pinelawn allege that most if not all is construction and demolition debris ("C&D debris").

At the outset [*3] of this dispute, Coastal was building a large shed that the Town alleges is intended to facilitate the sorting and preparation of C&D debris. When it was very near completion, the town issued a stop work order on the construction. Coastal appealed to the Town Zoning Board of Appeals (the "ZBA"), arguing that because the Coastal facility was integral to NYA's railroad services, the enforcement of local zoning regulations was preempted by the exclusive jurisdiction of the federal Surface Transportation Board (the "STB"). See 49 U.S.C. § 10501(a)-(b). The ZBA ruled that Coastal's activities were not transportation by rail subject to the STB's jurisdiction.

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

The grant of a preliminary injunction is reviewed for abuse of discretion. *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 167-70 (2d Cir. 2001). A district court abuses its discretion where it makes an error of law or a clear error of fact. *Forest City Daly Hous., Inc. v. Town of N. Hempstead*, 175 F.3d 144, 149 (2d Cir. 1999). [*4]

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

The district court did not abuse its discretion by granting the preliminary injunction, but it is necessary to modify the injunction to clarify that the parties are permitted to immediately seek review before the STB, which is the tribunal best equipped to decide the issues of federal transportation policy implicated here.

As to the likelihood of irreparable harm, the district court's findings were not clearly erroneous. "[I]rreparable harm may be found where damages are difficult to establish and measure," *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004), [*5] such as where (as here) a party will otherwise lose customer relationships that account for an indeterminate amount of business

over years, see *id.*; *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 69 (2d Cir. 1999). It was not clearly erroneous for the district court to find that Coastal's relationships with its customers could be permanently harmed by Coastal's inability to assure customers that its business will be ongoing.

It was also not clear error to find a likelihood of success on the merits. Coastal and NYA claim that the Interstate Commerce Commission Termination Act (the "Termination Act") preempts the Town's attempts to regulate Coastal's activity in NYA's rail yard, because the STB is vested with exclusive jurisdiction over "transportation by rail carrier," which includes the construction of rail facilities. See 49 U.S.C. § 10501(a)-(b); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 642-43 (2d Cir. 2005). In *Green Mountain*, we held that notwithstanding the Termination Act's preemption provisions, state and local authorities retain police powers to enforce regulations that "protect public health and [*6] safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions." 404 F.3d at 643. By the same token, however, state and local authorities cannot subject the construction of railroad facilities to pre-permitting processes where there are no clear construction standards and where the permit depends on the discretion of a local agency. *Id.* *Green Mountain*, much like this case, involved the construction of transloading facilities on railroad property, which we decided were within the STB's exclusive jurisdiction because they were "integral to the railroad's operation." *Id.* at 644; see also *City of Chicago v. Atchison, Topeka & Santa Fe R.R. Co.*, 357 U.S. 77, 87-89, 78 S. Ct. 1063, 2 L. Ed. 2d 1174 (1958) (pre-ICCTA case holding that bus service between train terminals operated by a third party on a rail carrier's behalf was an "integral part" of interstate rail transportation).

As the Town argues, *Green Mountain* does not entirely resolve this case because it is Coastal, and not NYA, that conducts the day-to-day [*7] operations at the transloading facility. One STB decision reflects the agency's view that where C&D debris transloading is conducted by a third party on rail carrier property, rather than by the rail carrier itself, the transloading operations are only "by rail carrier" (and within STB's jurisdiction) under Section 10501(a) if the rail carrier holds out its own services through the third party as an agent or exerts control over the third party's operations. See *Hi Tech Trans, LLC--Petition for Declaratory Order--Newark, NJ*, STB Finance Docket No. 34192, 2003 STB LEXIS 475, 2003 WL 21952136, at *3-5 (S.T.B. Aug. 14, 2003); see also *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 308 (3d Cir. 2004) (holding that there was no

preemption because no agency relationship existed and the transloading agreement "essentially eliminates [the railroad's] involvement in, and responsibility for, the operation of Hi Tech's facility.").

The Town urges that the *Hi Tech* cases should control the result here. However, the district court found that NYA exerted sufficient control over Coastal's operations to put them within the STB's exclusive jurisdiction. This was not clear error. [*8] While no NYA employees participated in Coastal's operations, the parties' agreement (1) gave NYA supervisory control over Coastal's transloading operations and the right to inspect or audit them; (2) required that NYA's logo was to appear on all of Coastal's marketing materials for the facility and that NYA was to pre-approve all such materials; and (3) said that, although the duties under all transportation documentation would be between NYA and the end customer, Coastal could execute the documents as agent for NYA. See *Coastal*, 2006 U.S. Dist. LEXIS 8400, 2006 WL 270252, at *7. Magistrate Boyle, whose report the district court adopted, explicitly found an agency relationship between Coastal and NYA based on the terms of their agreement. (The agreement in *Hi Tech* disclaimed any agency relationship, see *id.*; *Hi Tech*, 2003 STB LEXIS 475, 2003 WL 21952136, at *2; *Hi Tech*, 382 F.3d at 308.) The Town contends that the agreement does not reflect the reality of how the business is conducted, citing the preceding lease agreement, which granted Coastal a great deal more independence. But the agreement and testimony concerning it suffice to support a finding of likelihood of success [*9] at the preliminary injunction stage.

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

The district court properly held that abstention under *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), was inappropriate. *Younger* and its progeny dictate that federal courts should decline to exercise jurisdiction where "(1) there is an ongoing state proceeding; (2) an important state interest is implicated in that proceeding; and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review" of federal claims. *Diamond D Constr. Corp. v. McGowan*, 282 F.3d 191, 198 (2d Cir. 2002). [*10]

Younger abstention applies to ongoing state court proceedings, and to state administrative proceedings as well. See *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 627, 106 S. Ct. 2718, 91 L. Ed. 2d 512 (1986). The Town, citing *Diamond D*, urges that a state proceeding is ongoing whenever a party to a completed municipal administrative proceeding could have brought—but failed to bring—a state mandamus action to challenge the outcome. *Diamond D* does not support the Town's position, because in that case state administrative proceedings were still ongoing when the plaintiff brought a Section 1983 action and sought to preliminarily enjoin the state proceedings. 282 F.3d at 196. The parties conceded the general applicability of *Younger*, *id.* at 199, and we held that the "extraordinary circumstances" exception to *Younger* was inapplicable in part because the plaintiff had an adequate state remedy in the form of a mandamus proceeding in state court through which the plaintiff could have raised federal constitutional claims, *id.* at 201-02. There are no ongoing state proceedings here: the ZBA issued its [*11] final decision before the federal action was brought. *Diamond D* gives no support to the proposition that the availability of an Article 78 action after the completion of state administrative proceedings renders them ongoing perpetually.

The appellants also argue that the ZBA's factual determinations were entitled to issue-preclusive effect. The "full faith and credit" provisions of 28 U.S.C. § 1738 apply only to state courts and not state administrative agencies. But under federal common law principles of issue-preclusion, the determination of a state administrative agency acting in a judicial capacity is generally entitled to the same issue-preclusive effect in federal court that it would be afforded in state court, provided the parties have had an adequate opportunity to litigate the issue. See *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 799, 106 S. Ct. 3220, 92 L. Ed. 2d 635 (1986). New York courts apply issue-preclusive effect to the quasi-judicial findings of state administrative agencies, as well as municipal zoning boards, see *Town of Wallkill v. Lachmann*, 27 A.D.3d 724, 813 N.Y.S.2d 157, 158 (N.Y. App. Div. 2d Dep't 2006), [*12] but ordinarily do so only in actions brought beyond the period of limitation for an Article 78 challenge to the agency's decision. See, e.g., *Allied Chem. v. Niagara Mohawk Power Corp.*, 72 N.Y.2d 271, 528 N.E.2d 153, 157, 532 N.Y.S.2d 230 (N.Y. 1988) (affirming application of issue preclusion but noting that the lower court properly declined to convert proceeding into an Article 78 proceeding because four month review period had elapsed before the action was initiated). Here, if the appellees had brought suit in an Article 78 state court proceeding—which would have been timely as of the date of the federal complaint—rather than an action in federal court, the state court would not have given the ZBA findings issue-preclusive effect: it would have re-

viewed them using a deferential standard of review after hearing any additional evidence it deemed necessary. See *Doyle v. Amster*, 79 N.Y.2d 592, 594 N.E.2d 911, 913, 584 N.Y.S.2d 417 (N.Y. 1992) ("[C]ourts may not interfere with [municipal zoning] decisions enjoying a rational basis, supported by substantial evidence in the record."); *N.Y. Town Law* § 267-c(4) ("If . . . it shall appear to the court [reviewing a zoning board determination] [*13] that testimony is necessary . . . , it may take evidence . . . , which shall constitute a part of the proceedings upon which the determination of the court shall be made."). *Elliott* does not hold that state law supplies the standard of review when a municipal administrative decision is timely challenged on federal preemption grounds in the federal forum. The very basis for federal jurisdiction here was the appellees' assertion that the Town and its ZBA were preempted by federal law from taking any action to regulate Coastal's activities; and that issue was never reviewed by any court, state or federal. For these reasons, the district court did not err by refusing to grant the ZBA's unreviewed findings preclusive effect.

Nevertheless, we conclude that the preliminary injunction must be modified. At oral argument, counsel for the Town represented that the Town and Pinelawn had refrained from petitioning the STB to define its jurisdic-

tion (or lack thereof) over Coastal's operations because the preliminary injunction prohibited the Town from doing so. We doubt that the district court intended that inhibition. In any event, we modify the preliminary injunction to allow the parties to [*14] petition the STB for a declaratory judgment on the scope of its jurisdiction. "As the agency authorized by Congress to administer the Termination Act, the [STB] is uniquely qualified to determine whether state law should be preempted by the Termination Act." *Green Mountain*, 404 F.3d at 642 (citation and internal quotation marks omitted). Given the existing guidance from this Court and the STB, the district court did not abuse its discretion by issuing a preliminary injunction, but it is wholly appropriate that the parties should seek further guidance from the STB notwithstanding the pendency of litigation in federal court.

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

EXHIBIT I

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35057

REQUEST OF PETITIONERS THE TOWN OF BABYLON AND PINELAWN
CEMETERY FOR THE PRODUCTION OF DOCUMENTS BY NEW YORK
AND ATLANTIC RAILWAY COMPANY AND COASTAL DISTRIBUTION LLC

Pursuant to 49 C.F.R. § 1114.30, the Town of Babylon and Pinelawn Cemetery Corporation (together referred to as "Petitioners") hereby request that New York and Atlantic Railway Company and Coastal Distribution LLC produce and permit Petitioners to inspect and copy the documents described below. The production should be made on or before thirty days following the date of this Request at the offices of Duane Morris LLP, 1540 Broadway, New York, NY 10036.

Definitions

For purposes of this Request, the following definitions shall apply.

1. Communication. The term "communication" means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).
2. Document. The term "document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a), including, without limitation, electronic or computerized data compilations. A draft or non-identical copy is a separate document within the meaning of this term.
3. Identify (with respect to persons). When referring to a person, "to identify" means to give, to the extent known, the person's full name, present or last known address, and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that

person need be listed in response to subsequent discovery requesting the identification of that person.

4. Identify (with respect to documents). When referring to documents, “to identify” means to give, to the extent known, the (a) type of document; (b) general subject matter; (c) date of the document; and (d) author(s), addressee(s) and recipient(s).

5. References to Entities. When an entity is referred to, the request includes the entity and, where applicable, its officers, directors, employees, partners, members, corporate parent, subsidiaries, or affiliates.

6. Person. The term “person” is defined as any natural person or any business, legal or governmental entity or association.

7. Concerning. The term “concerning” means relating to, referring to, describing, evidencing, or constituting.

8. All/Each. The terms “all” and “each” shall be construed as all and each.

9. And/Or. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

10. Number. The use of the singular form of any word includes the plural and vice versa.

11. Coastal. “Coastal” refers to Coastal Distribution LLC and includes its members, officers, employees, and other agents or representatives.

12. Facility. “Facility” refers to the yard and transloading facility, as defined in the Transload Facility Operations Agreement, dated as of August 5, 2004.

13. Lease. "Lease" refers to the Lease Agreements dated March 22, 2002 and July 11, 2002, and any amendments thereto, between New York and Atlantic Railway Company and Coastal with respect to the property identified as the Farmingdale Team Yard.

14. LIRR. "LIRR" refers to the Long Island Railroad and includes its officers, agents, and other representatives.

15. MTA. "MTA" refers to the Metropolitan Transportation Authority and includes its officers, agents, and their representatives.

16. NYAR. "NYAR" refers to New York and Atlantic Railway Company and includes its officers, directors, employees, and other agents or representatives.

17. Operations Agreement. "Operations Agreement" means the Transload Facility Operations Agreement dated as of August 5, 2004 between NYAR and Coastal.

18. Pinelawn. "Pinelawn" means Pinelawn Cemetery Corporation and includes its officers, directors, employees, and other agents or representatives.

19. Structure. "Structure" refers to the three-sided structure built at the Facility.

20. Town. "Town" refers to the Town of Babylon and includes its agents or other representatives.

21. Commodities. "Commodities" refers to any type of material received at the Facility for transport to another location.

Instructions

1. All documents produced by defendants in response to this Request shall be produced as they are maintained in the usual course of business or shall be organized and designated so as to correspond to the Request to which the documents are responsive.

2. Where a claim of privilege is asserted in objecting to any item of this Request, the documents should be produced, except that it is not necessary to produce the portion of the document as to which the privilege is claimed. However, where privilege is claimed, defendants shall set forth a) the date, author, and subject matter of the document; b) the name and title of each person who prepared, received, reviewed, or has or had custody, possession, or control of the document; c) the identity and length of any attachments to the document; and d) the nature of the privilege being claimed or the ground for withholding the document.

3. If any responsive document has been, but no longer is, in the possession, custody or control of the party responding to the Request, the document shall be listed by listing all of the following information: a) the date of the document; b) a description of the subject matter of the document; and c) the name or names and addresses of each person who prepared, received, reviewed or otherwise has or had possession, custody, or control of the document.

4. Unless otherwise indicated, all requests call for the production of documents for the period from January 1, 2002 to and including the date of production.

Documents to Be Produced

1. Documents sufficient to establish how Coastal came to be involved in the Facility.
2. Documents concerning or constituting or reflecting the earliest communication between Coastal and NYAR.
3. All documents concerning the Lease, including drafts thereof.
4. All documents concerning the replacement of the Lease with the Operations Agreement.
5. All drafts of the Operations Agreement.

6. All documents concerning the cost of building the Structure at the Facility, including but not limited to architectural and other professional fees, the cost of construction materials, and construction costs.
7. All documents concerning the payment of the cost of constructing the Structure at the Facility.
8. All documents concerning the cost of maintaining and operating the Facility.
9. All documents concerning communications with the LIRR and/or the MTA about Coastal's actual or proposed use of the Facility.
10. All documents provided to the LIRR and/or the MTA about Coastal's proposed use of the Facility.
11. All documents concerning Coastal's business plan for the Facility.
12. All documents concerning NYAR's business plan for the Facility.
13. Documents sufficient to establish the oversight of the Facility exercised by NYAR.
14. All documents constituting communications with the Town and/or Pinelawn concerning the Facility.
15. All documents concerning air monitoring, dust levels, or any other environmental testing at the Facility.
16. All documents concerning complaints about the Facility, excluding communications from the Town or Pinelawn.
17. All documents concerning Coastal's ownership of railway cars used at or in the operation of the Facility.

18. All documents concerning Coastal's leasing of railroad cars used at or in the operation of the Facility.

19. All logs or other records concerning (a) deliveries to or removed or shipped from the Facility ; (b) the type of commodities delivered to or removed or shipped from the Facility; and (c) the weight of commodities delivered to or removed or shipped from the Facility.

20. All documents constituting or reflecting contracts between Coastal and Coastal's customers for the shipment of commodities to or from the Facility.

21. All documents concerning payments made by or due from Coastal to NYAR in connection with the Facility.

22. All documents concerning payments made by or due from NYAR to Coastal in connection with the Facility.

23. All documents concerning amounts paid to or due Coastal on account of the shipment of commodities to or from the Facility.

24. For the period commencing March 1, 2002, all documents concerning amounts paid to or due NYAR on account of the shipment of commodities to or from the Facility.

25. All documents concerning or evidencing control by NYAR of Coastal's activities at the Facility.

26. All payroll records relating to Coastal employees working at the Facility.

27. All payroll records relating to NYAR employees working at the Facility.

28. All documents concerning Loading Fees, as defined in the Operations Agreement. including but not limited to documents concerning the setting of the amount of the Loading Fee and the collection of the Loading Fee.

29. All documents concerning the Usage Fee, as defined in the Operations Agreement, paid or due NYAR.
30. All documents concerning or evidencing the "monthly accounting of the rail cars and trucks loaded by Coastal," as referred to in paragraph 2.02 of the Operations Agreement.
31. All documents concerning amounts paid to or due NYAR by customers of Coastal for shipments to or from the Facility.
32. All documents concerning Disposal Agreements, as defined in the Operations Agreement, relating to commodities shipped to or from the Property.
33. All documents concerning fees or charges paid to or due Coastal pursuant to Disposal Agreements, as defined in the Operations Agreement.
34. All documents constituting or reflecting or referring to communications between Coastal and NYAR concerning Coastal's conduct of or activities at the Facility.
35. All documents concerning Coastal's marketing of the Facility, as referred to in paragraph 1.04(d) [sic] of the Operations Agreement.
36. All documents constituting or reflecting or referring to brochures or marketing materials, including but not limited to electronic materials and advertisements in trade publications, with respect to the Facility.
37. All documents concerning instructions or rules provided to customers concerning the delivery of commodities to the Facility, including but not limited to instructions or rules concerning the types of materials that can be delivered to the Facility.
38. All documents concerning written procedures for handling commodities received at the Facility, including but not limited to the handling of asbestos-containing materials or other hazardous materials.

39. All documents concerning payments made or due on account of the recovery or recycling of scrap at the Facility.
40. All documents concerning the removal of scrap from the Facility.
41. All documents concerning agreements with landfills with respect to commodities shipped to or from the Facility.
42. All documents concerning or constituting or evidencing the effect of the Facility on truck traffic.
43. All documents concerning signage at the Facility.
44. All documents concerning or constituting communications between NYAR or Coastal on the one hand, and any federal, state, or local agency (including the Surface Transportation Board, but excluding the Zoning Board of Appeals of the Town of Babylon) concerning the Facility.
45. All communications with the Surface Transportation Board concerning Coastal.
46. All documents concerning the February 15, 2005 letter to Joseph Rutigliano from Anthony J. Cava "re: Farmingdale Multi-Model Transload Facility."
47. All documents and communications with landfills with respect to commodities shipped to or from the Facility.
48. All documents concerning the suitability of locations on Long Island for transloading facilities or transfer stations.
49. All documents concerning insurance for the Facility.
50. All documents concerning claims for personal injury or property damage where the injury or damage was alleged to have occurred at the Facility.

51. All documents concerning disputes with customers of Coastal or NYAR arising from or relating to the use or operation of the Facility, including but not limited to claims asserted by customers against Coastal or NYAR.

52. All documents concerning the collection from customers of the Facility of past due bills.

Dated: New York, New York
July 2, 2007

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