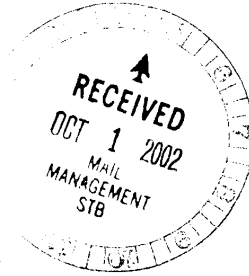


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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34258

NORTH CAROLINA STATE PORTS AUTHORITY
-- ACQUISITION EXEMPTION --
NORTH CAROLINA PORTS RAILWAY COMMISSION



MOTION TO DISMISS
VERIFIED NOTICE OF EXEMPTION
FROM 49 U.S.C § 10901

EXPEDITED ACTION REQUESTED

I.
INTRODUCTION

The North Carolina State Ports Authority (SPA), a non-carrier state agency, has filed this day a Verified Notice of Exemption from 49 U.S.C. § 10901 to acquire rail lines and other rail assets from the North Carolina Ports Railway Commission (PRC). SPA hereby moves the Board to dismiss this Verified Notice of Exemption on the ground that the Board lacks jurisdiction and that SPA, a non-carrier, will not become a carrier by virtue of the transaction.

The acquisition is pursuant to a state statute enacted by the North Carolina legislature on September 20, 2002 requiring the abolition of PRC and the transfer of its assets to SPA subject to certain conditions. A copy of that statute is attached hereto as Exhibit A.

The statute specifically prohibits SPA from becoming a common carrier and from operating the lines to be acquired. Accordingly, PRC will grant exclusive easements to two Class III carriers, the Wilmington Terminal Railroad, LP ("WTR") and Carolina Rail Service, LLC. ("CRS"), who will assume the full common carrier obligation with respect to the subject lines. SPA will then enter into operating agreements with those same carriers to conduct rail

operations over the lines.¹ SPA itself will not acquire the right or obligation to conduct any rail operations on the subject lines and will not hold itself out as a provider of common carrier service.

Given the fact that SPA will not acquire the common carrier obligation and will not conduct any rail operations over the lines being acquired, SPA believes that this transaction is not subject to the Board's jurisdiction under the doctrine articulated in *State of Maine, Department of Transportation -- Acquisition and Operation Exemption -- Maine Central Railroad Company*, 8 I.C.C. 835 (1991) (hereinafter "*State of Maine*") and subsequent cases. However, in *State of Maine*, the ICC recommended that "any similar transactions should likewise be submitted to us in advance *** for a jurisdictional determination." ICC at § 37. SPA is accordingly filing this Motion to Dismiss its Notice of Exemption in order to obtain a jurisdictional determination. In addition, the North Carolina legislation prescribing the transaction conditions it on the receipt, within 45 days of the legislation's effective date, of an opinion by the State Attorney General regarding the status of SPA as a non-carrier. Because the requested STB Action would assist the Attorney General in rendering that opinion, SPA respectfully requests expedited action, by no later than November 1, 2002.

II. STATEMENT OF FACTS

SPA is an agency of the State of North Carolina that was established to, among other things, operate, develop and promote North Carolina's harbors and seaports. General Statutes of North Carolina Chapter 143B, Part 10 (N.C. Gen. Stat. §§143B-452 et seq.). PRC, also a state

¹ Simultaneous with the filing of this Verified Notice of Exemption, WTR is filing a Verified Notice of Exemption in Finance Docket 34257 to acquire an easement over and to operate the Wilmington Lines and CRS is filing a Verified Notice of Exemption in Finance Docket 34256 to acquire an easement over and to operate the Morehead Lines.

agency, was established to own and operate rail assets at the ports that are owned and operated by SPA. General Statutes of North Carolina Chapter 143B, Part 11 (N.C. Gen. Stat. §§ 143B-469 – 143B-469.3). In 1980, the ICC granted PRC a certificate and operating authority to conduct common carrier service. *North Carolina Ports Railway Commission – Acquisition and Operation in New Hanover and Carteret Counties, NC*, Docket No. 29423 (ICC served December 29, 1980).

PRC initially provided common carrier switching and weighing service pursuant to this authority, but subsequently contracted rail operations out to third parties. *See North Carolina Ports Railway Commission — Petition for Declaratory Order of Prospective Abandonment Exemption*, Finance Docket No. 31248 (ICC decided Sept. 21, 1988). In 1986, PRC ceased all operating common carrier service and entered into contracts with CRS and WTR to provide the rail service at the ports.

In 1988, based on the fact that it no longer operated a railroad, PRC filed a petition with the Interstate Commerce Commission (ICC) seeking a declaratory order that it was no longer a common carrier subject to the ICC's jurisdiction or, in the alternative, an exemption for prospective abandonment. The ICC denied the petition but, on its own motion, exempted PRC from ICC/STB jurisdiction on the ground that it does not operate a railroad. That exemption was expressly made subject to a "residual common carrier obligation." *Id.*

In 1993, PRC purchased certain CSXT lines in Wilmington, NC and leased them to WTR to operate. In its decision approving the transactions, the ICC affirmed that PRC retains a "residual common carrier obligation." *North Carolina Ports Railway Commission – Purchase and Operation Exemption – CSX Transportation Inc., Line in North Carolina*, Finance Docket No. 32345 (ICC decided Nov. 5, 1993). PRC retained title to the rail lines. In 1995, PRC filed a

petition for an exemption to acquire control of BMRI. *North Carolina Ports Railway Commission – Acquisition of Control Exemption – Beaufort & Morehead Railway, Inc.*, Finance Docket No. 32735 (I.C.C. served December 22, 1995). In 1999, PRC filed a Notice of Exemption to “acquire the railroad franchise and business of BMRI and assume operations over .87 miles of track.” *North Carolina Ports Railway Commission d/b/a Beaufort & Morehead Railway – Acquisition and Operation Exemption – Beaufort & Morehead Railway, Inc.*, Finance Docket No. 33826 (STB served December 2, 1999). However, in January 2002, BMRI filed a Notice of Exemption to acquire by lease from PRC and operate that same .87 miles of track, and PRC ceased operating on the line. *See Beaufort & Morehead Railway, Inc.–Acquisition and Operation Exemption–North Carolina Ports Railway Commission d/b/a Beaufort & Morehead Railway*, Finance Docket No. 34151 (STB served Jan. 18, 2002).

PRC currently owns certain right-of-way, trackage, and other assets of railroad lines at the Port of Wilmington, North Carolina (the “Wilmington Lines”) and at the Port of Morehead City, North Carolina (the “Morehead Lines”). While PRC conducts no rail operations, it is subject to a residual common carrier obligation as discussed above. PRC’s wholly owned subsidiary, BMRI, currently operates on the Morehead Lines.² CRS also operates on that portion of those lines which are within the SPA’s Morehead City Port Terminal. PRC’s Wilmington Lines continue to be operated by WTR. Maps of the Wilmington Lines and the Morehead Lines are attached to the respective Verified Notices of Exemption as Exhibit A.

² Those lines extend from the connection with the Norfolk Southern Railway Company (Atlantic & East Carolina Railway) at milepost 0.0 in Morehead City to milepost 0.87 at Gallants Channel near Morehead City, a distance of .87 miles in Carteret County, NC, serving the intermediate stations of Marsh Island, Radio Island and Beaufort Team Track, together with all of PRC’s yard and interchange tracks.

On September 20, 2002 the North Carolina legislature passed SB 1115 (the "Act") which, *inter alia*, requires the abolition of the PRC and transfer of all its assets to SPA subject to certain conditions, including an opinion issued by the State Attorney General regarding SPA's status as a noncarrier. Pursuant to the Act, SPA will acquire all of PRC's assets, including the rights, title, ownership interests, and leasehold interests of PRC and its subsidiary in the right-of-way, trackage, and other physical assets of the Wilmington Lines and the Morehead Lines. The Act also expressly prohibits SPA from operating on the railroad or from becoming a common carrier subject to Board jurisdiction. See SB 1115 attached hereto as Exhibit A. Thus, simultaneous with the transfer of PRC's assets to SPA, PRC will transfer the common carrier obligation over the Wilmington Lines and the Morehead Lines to WTR and CRS respectively, and convey to those carriers permanent easements to conduct railroad operations over, and maintenance on those lines. Drafts of the proposed rail easements to be conveyed by PRC to WTR and CRS are attached hereto as Exhibits B and C respectively. SPA will also enter into operating agreements with WTR and CRS to conduct the rail operations on the lines. Drafts of the proposed operating agreements are attached hereto as Exhibits D and E respectively. WTR and CRS have filed Notices of Exemption to acquire the easements and operate on the lines. SPA will not acquire the right or obligation to conduct any rail operations on the lines and will not hold itself out as a provider of common carrier service.

The Act requires that the transfer be consummated within 60 days of the effective day of the Act subject to receipt of an opinion from the Attorney General as described above within 45 days of that effective date. Accordingly, SPA expects to consummate the transactions described above by November 20, 2002.

III. ARGUMENT

The “two primary issues” in evaluating this motion are “whether [the Board] must exercise jurisdiction over the proposed transfer of the rail [assets] from [the rail carrier] to the State (noncarrier), and whether the State will become a regulated common carrier.” *See State of Texas (Acting by and Through the Texas DOT) -- Acquisition Exemption -- West Texas & Lubbock Railroad Company, Inc.*, Docket No. 33889, slip op. at 3 (STB served March 6, 2002) (hereinafter *State of Texas*). Generally, acquisition of a rail line by a noncarrier is subject to prior approval by the Board under 49 U.S.C. §10901 if the acquiring entity becomes a carrier by virtue of the acquisition, *id.*, and this is so even where the acquiring noncarrier is a state entity. *Id.*, citing *Common Carrier Status of States, State Agencies*, 363 I.C.C. 132, 133 (1980), *aff’d sub nom. Simmons v. ICC*, 697 F.2d 326 (D.C. Cir. 1982).

However, a transfer of rail assets alone is not necessarily subject to Board jurisdiction. In the last decade, the ICC/STB has repeatedly found that it lacks statutory jurisdiction over transfers of physical rail assets to state entities in transactions in which the common carrier obligation is either retained by the operating carrier, or transferred to a third party. *State of Maine*, 8 I.C.C. 835. *See also State of Wisconsin, DOT -- Petition for Declaratory Order*, Docket No. 341810 (STB served August 1, 2002); *State of Georgia, DOT -- Acquisition Exemption -- South Carolina Central Railroad, Inc.*, Docket No. 34057 (STB served April 30, 2002); *State of Vermont -- Acquisition Exemption -- Certain Assets of Boston and Maine Corporation*, Docket No. 33830 (STB decided June 1, 2000) (hereinafter “*State of Vermont*”); *State of Georgia, DOT -- Acquisition Exemption -- Line of Central of Georgia Railroad Co.*, Docket No. 33690 (STB served June 23, 1999); *South Orient Railroad Co., Ltd. Acquisition and*

Operation Exemption – Line of the Atchison, Topeka and Santa Fe Railway Co., Docket No. 31971, 1992 WL 210237 (ICC decided September 2, 1992).

“The fundamental test for determining whether a party is a common carrier is whether there has been a holding out to the public as a common carrier.” *State of Texas*, slip op. at 3. Where the state entities do not hold themselves out as common carriers and have not acquired a common carrier obligation, they do not become carriers by virtue of a rail asset acquisition modeled on *State of Maine*. See, e.g. *id.* at 3-4.

In *State of Maine*, the Maine Department of Transportation filed a notice of exemption to acquire the physical assets and underlying real property of a rail line from Maine Central Railroad Company ("MEC"). MEC retained a permanent easement for continued common carrier freight operations and the right to maintain, operate, and renew the rail line. The ICC dismissed the notice of exemption for lack of jurisdiction. The ICC explained that it had jurisdiction over the acquisition of a rail line only where the common carrier rights and obligations were being transferred, in whole or in part. Because MEC retained the common carrier obligation and there was no impairment of MEC's ability to fulfill its continuing common carrier obligation, the ICC concluded that the transaction was non-jurisdictional. *State of Maine* at 836-7. An important factor in the Board's decision was the fact that Board authority would be required for MEC to discontinue service on the line. *Id.*

In *State of Maine*, the seller of the rail lines retained a permanent rail freight easement and continued to operate over the rail lines. However, the STB has found it also lacks jurisdiction over three-party transactions, where the seller transfers the underlying rail lines to the state entity but transfers the permanent rail freight easement to a third party carrier, since “the result is not materially different.” *State of Vermont*, slip op. at 3; see also *South Orient*, slip op.

at 3; *State of Georgia*, slip op. at 2. Typically, in such transactions the state entity then enters into an operating agreement with the carrier holding the easement. *Id.*

The proposed transaction is consistent with *State of Maine* and its progeny and, therefore, not subject to STB jurisdiction. SPA, a non-carrier state agency, is acquiring the rail assets of PRC, but is not acquiring the common carrier obligation. In fact, SPA is statutorily barred from providing common carrier rail service, lacks the capability to provide such service, and will not hold itself out as providing such service. Under the proposed transaction, the common carrier obligation will be transferred directly from PRC to two Class III carriers, WTR and CRS, together with exclusive rail easements that will enable those carriers to operate unimpaired on, and to maintain, the subject lines. SPA will simultaneously enter into operating agreements with WTR and CRS. Following the transfer of the common carrier obligation and easements, STB authority would be required in order for either WTR or CRS to discontinue service on the subject lines.

An essential element of the *State of Maine* type transaction is that the operating carrier must have a rail easement that enables it to meet unimpaired its common carrier obligations on the acquired lines. Here the easements to be granted by PRC to WTR and CRS grant each of those carriers “the exclusive right to conduct railroad operations on the Premises, including the right to operate with its trains, locomotives, rail cars and rail equipment with its own crews over its Premises.” See drafts of Operations Easements, attached hereto as Exhibits B and C. at para. 1.2. The easements expressly confer to WTR and CRS “any and all rights and obligations of PRC under federal laws to conduct common carrier rail service,” *id.* at para. 1.3., and include “a right of entry over the Premises for WTR or CRS employees, machinery, or equipment needed to perform maintenance or inspections, to clear derailments or wrecks, or otherwise conduct rail

service.” (*Id.* at para. 1.4.) Thus the Easements plainly enable WTR and CSR to meet unimpaired their common carrier obligations on the lines.

Similarly, the Operating Agreements between SPA and WTR and between SPA and CRS grant each of those carriers “the exclusive right to operate its trains, locomotives, cars and equipment with its own crews” over the line. See drafts of Rail Operating Agreement, attached hereto as Exhibits D and E, at Section 2(a). The Operating Agreements expressly confer on each carrier “exclusive control and management of its rail operations” on the line *id.* at Section 2(b), and requires each carrier to “assume the full common carrier obligation with respect to the line. *Id.* at Section 2(d). SPA’s right to inspect the facilities is subject to the requirement that its “exercise of such rights shall not conflict with [the carrier’s] operations.” Finally, each Agreement explicitly grants WTR and CRS “exclusive control over the terms and conditions upon which it provides railroad transportation services to its customers, to the same extent as if [it] owned said facilities outright.” *Id.* at Section 10(c).

The only rights retained by SPA with respect to the line are (1) the right to select a different operator at the termination of the five-year Operating Agreement (or in the event of a default by WTR or CRS) and to require the carrier to assign its easement and its contracts affecting use of the line to its successor, and to cease operating on the Lines “subject to the receipt of required regulatory approvals” (*Id.* at Sections 5(b) and 16); and (2) the requirement that the carriers obtain SPA’s consent to the grant of any rights to a third party that affect the physical assets (such as the creation of a lien or the grant of an easement or a right to operate over the lines) (*Id.* at Section 3).

The Board and its predecessor have repeatedly recognized that the retention of limited rights such as these are entirely consistent with the conclusion that the state agency does not

acquire common carrier status and the transaction is not subject to Board jurisdiction. For example, in *State of Vermont*, the easement granted the Class III carrier was for an initial period of only six months, subject to extension, and Vermont retained the right to transfer the easement to another carrier in the event of substantial failure by the Class III carrier in performing its common carrier obligations. The carrier was required to cooperate in any such transfer. In addition, the carrier was precluded from granting access to the line to other persons. See *State of Vermont*, slip op. at p. 3. In concluding that it did not have jurisdiction over the transaction, the STB reasoned that, among other things, the Class III carrier would still be able to operate the line under the easement without interference, and discontinuance of service by either the Class III carrier or its successor would require STB abandonment authority.

Similarly, in *South Orient*, the seller, The Atchison, Topeka & Santa Fe Railway, transferred a certain right of way and other fixed assets to a state entity and granted a third party carrier an exclusive permanent easement over the line. The state entity, in turn, leased the rail assets to the third-party carrier. The ICC found that transaction not to be subject to its jurisdiction, even though the state agency preserved its ability to compel a release of the "permanent" easement in the event the lease agreement with the carrier was terminated for default, reasoning that the state agency "has no right to interfere with South Orient's operations as long as the railroad continues to provide service and to carry out its other obligations." *Id.* at p. 3. It further noted that if the state agency were to exercise its rights to "oust South Orient from control of the line," it "would require authority from [the STB] to do so." *Id.*

The limited rights retained here by SPA are fully consistent with *State of Vermont* and *South Orient*. The proposed provisions of the Operating Agreements relating to termination of the Agreements and transfer of the easements to a successor generally track the operating

agreement approved by the Board in *State of Vermont*.³ The default provisions are much like those approved in *South Orient*.⁴ Similarly, the provisions requiring SPA consent to the creation of liens or the grant of easements or the right to operate over the line are comparable to the provisions in *State of Vermont* that prevented the carrier from “grant[ing] access to or assign[ing] its interest” in the line “without Vermont’s approval.” *State of Vermont*, slip op. at 3.

The bottom line is that, as in *State of Vermont* and the other cases cited herein, the two carriers “will be able to operate” their respective lines “without interference or interruption, as long as they provide rail services and carry out their other obligations,” and “abandonment authority must be obtained from the Board” before either of them may stop service. *State of Vermont*, slip op. at 3-4. In these circumstances, SPA plainly will not become a common carrier, and the transaction thus is not subject to the jurisdiction of the Board.

³ The principal difference between *State of Vermont* and this case is that the *State of Vermont* operating agreement provided for an initial term of only six months, while the proposed operating agreements in this proceeding provide for an initial term of five years. Operating Agreements, Section. 5, attached hereto as Exhibits D and E.

⁴ In the event of default, SPA is required to give the carrier written notice of default and, in the case of a failure to provide satisfactory service, the reason therefor. The carrier then has a grace period of 30 days to cure the default. If it does not do so, SPA has the right to terminate the Agreement on 30 days’ notice. Operating Agreements, Section 16(b), attached hereto as Exhibits D and E. Thus SPA cannot summarily oust WTR or CRS without giving the carrier an opportunity to cure a default.

CONCLUSION

Wherefore, for the reasons stated above, the North Carolina State Ports Authority respectfully requests that the Board dismiss its Notice of Exemption filed this 30th day of September, 2002.

Respectfully submitted,

NORTH CAROLINA STATE PORTS
AUTHORITY

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EXHIBIT A

**EXCERPT OF
SENATE BILL 1115
RATIFIED BILL**

**AN ACT TO MODIFY THE CURRENT OPERATIONS APPROPRIATIONS ACT
OF 2001 AND TO MAKE OTHER CHANGES IN THE BUDGET OPERATION OF
THE STATE.**

The General Assembly of North Carolina enacts:

REPEAL PORTS RAILWAY COMMISSION/TRANSFER TO STATE PORTS AUTHORITY

SECTION 6.6.(a) Part 11 of Article 10 of Chapter 143B of the General Statutes, G.S. 143B-469 through G.S. 143B-469.3, is repealed.

SECTION 6.6.(b) G.S. 120-123(25) is repealed.

SECTION 6.6.(c) G.S. 143B-454(a)(4) reads as rewritten:

"(4) Be authorized and empowered to acquire, construct, maintain, equip and operate any wharves, docks, piers, quays, elevators, compresses, refrigeration storage plants, warehouses and other structures, and any and all facilities needful for the convenient use of the same in the aid of commerce, including the dredging of approaches thereto, and the construction of beltline roads and highways and bridges and causeways thereon, and other bridges and causeways necessary or useful in connection therewith, and shipyards, shipping facilities, and transportation facilities incident thereto and useful or convenient for the use thereof, (strikethrough: excluding terminal railroads;) and to acquire, construct, and maintain, but not operate, such rail facilities as may be

necessary or useful in connection with the operation of the State Ports, provided that nothing in this subdivision shall be construed as requiring or allowing the North Carolina State Ports Authority to become a carrier by rail subject to the federal laws regulating those carriers;"

SECTION 6.6.(d) Within 30 days of the date this section becomes law, the North Carolina Ports Railway Commission shall provide the North Carolina State Ports Authority with a complete list of its assets and liabilities. All of the assets, real and personal, tangible and intangible, and all of the liabilities, including contractual obligations, of the North Carolina Ports Railway Commission are transferred to the North Carolina State Ports Authority. If and to the extent that such transfers require the execution of any documents or instruments of transfer by the North Carolina Ports Railway Commission, those documents may be executed by the current officers and members of the Commission and shall be executed within 60 days of the date this section becomes law.

SECTION 6.6.(e) As part of a plan to reorganize and consolidate rail operations at the State Ports, the North Carolina State Ports Authority may sell or transfer the Beaufort and Morehead Railway, Inc., or any part thereof or interest therein, to a terminal switching or short line railroad company, or to the North Carolina Railroad Company, on such terms and conditions as the parties may agree to.

SECTION 6.6.(f) The Attorney General within 45 days of this section becoming law shall render an opinion as to whether or not subsections (a) through (e) of this section will subject the State Ports Authority to status as a common carrier subject to the Railway Labor Act. Subsections (a) through (e) of this section become effective only if an opinion is issued that it does not subject the State Ports Authority to status as a common carrier subject to the Railway

Labor Act, and in such case subsections (a) through (e) of this section become effective upon the issuance of the opinion. In lieu of subsections (a) through (e) of this section, if the North Carolina State Ports Authority finds that the transfer of any stock owned by the North Carolina Ports Railway Commission to the North Carolina State Ports Authority will accomplish the same end as the transfer of assets of the North Carolina Ports Railway Commission, it may order such transfer if the Attorney General issues an opinion it does not subject the State Ports Authority to status as a common carrier subject to the Railway Labor Act, and in such case the transfer becomes effective 60 days after it is ordered.

EXHIBIT B

**PERMANENT AND EXCLUSIVE RAILROAD
OPERATIONS EASEMENT**

THIS PERMANENT RAILROAD OPERATIONS EASEMENT ("Easement") granted as of October 1, 2002, by the NORTH CAROLINA PORTS RAILWAY COMMISSION ("PRC"), to WILMINGTON TERMINAL RAILROAD, LP, a North Carolina corporation ("WTR").

WHEREAS, by operation of law, (2002 SB 1115*) the NORTH CAROLINA STATE PORTS AUTHORITY ("SPA") will become the owner of all assets of PRC, including the railroad facilities which were previously owned or leased by PRC and the Lease Agreement pursuant to which WTR operated the terminal and switching railroad operations at the Wilmington North Carolina State Ports Authority Port Terminal (the "Premises"). Said facilities are hereafter referred to as the "Facilities".

WHEREAS, PRC has agreed to convey this Easement to WTR in order to transfer to WTR the full common carrier obligation with respect to the Premises and Facilities and to enable WTR to provide common carrier rail services on the Premises and Facilities.

NOW THEREFORE, in consideration of the premises, reservations, covenants and undertakings contained herein, PRC hereby grants the following easement to WTR:

1. GRANT OF EASEMENT

1.1 Subject to the terms and conditions hereof, PRC hereby grants to WTR a rail easement for the purpose of providing common carrier rail service to all customers on the Premises described in Exhibit A, and shown on the track map which is attached hereto as Exhibit B.

1.2 This Easement is for common carrier rail services on the Premises. This Easement shall grant WTR the exclusive right to conduct railroad operations on the Premises, including the right to operate with its trains, locomotives, rail cars and rail equipment with its own crews over the Premises for the purposes set forth in this Easement;

1.3 The conveyance of this Easement by PRC to WTR includes any and all rights and obligations of SPA under federal law to conduct common carrier rail services. By accepting this Easement, WTR hereby undertakes to assume the full common carrier obligation with respect to the Premises and Facilities and to provide any and all such common carrier rail services, subject to any and all laws governing or regulating the provision of such services, for so long as this Easement shall remain in effect.

1.4 This Easement granted by PRC includes a right of entry over the Premises for any and all WTR employees, agents or representatives, machinery, vehicles or equipment which WTR reasonably may deem necessary or convenient for the purposes of inspecting Facilities, clearing any derailments or wrecks of WTR trains on Facilities, performing maintenance or otherwise conducting WTR rail service over the Facilities in accordance with this Easement.

1.5 This Easement is subject to the terms, conditions and limitations of the separate Operating Agreement between WTR and SPA dated as of November 1, 2002. Pursuant to that Operating Agreement, WTR shall not have the right to grant access to the Premises or to the Facilities to third parties without NCSPA's consent, which consent may be withheld by NCSPA in its sole discretion.

1.6 WTR shall not have the right to assign its interests in this Easement except as provided in the Operating Agreement between WTR and SPA dated November 1, 2002.

2. TERM AND TERMINATION

This Easement shall terminate and be extinguished and all property rights granted to WTR hereunder shall vest in the owner of the Premises upon the termination, pursuant to an order of the Surface Transportation Board ("STB"), of common carrier rail service on the Facilities or any part thereof; provided, however, that a termination of this Easement pursuant to such an order shall apply only to those sections of the Facilities subject to such STB order. The termination provisions of this Section 2 shall not apply to a termination of rail service by WTR done as part of a transfer of its common carrier rights and obligations to a permitted successor or assign.

3. INDEMNIFICATION

WTR hereby agrees to release, indemnify and hold harmless PRC, its officers, agents and employees, from and against any and all claims, suits, actions, causes of action, demands, losses, costs, damages and expenses whatsoever, occasioned by any claims, suits, actions, administrative or judicial proceedings ever asserted, threatened or instituted by WTR, any third party or governmental agency under any theory of law seeking to hold PRC liable for any acts or omissions of any party after conveyance of the Easement and arising from or related to this Easement.

IN WITNESS WHEREOF, the parties hereto have caused this PERMANENT
RAILROAD OPERATIONS EASEMENT to be duly executed as of the date first above written.

WILMINGTON TERMINAL RAILROAD, LP

(SEAL)

By: _____

ATTEST: _____
Secretary

NORTH CAROLINA STATE PORTS AUTHORITY

(SEAL)

By: _____
Erik Stromberg, Executive Director

ATTEST: _____
Assistant Secretary

APPROVED AS TO FORM:

Dennis P. Myers, Assistant Atty. General

* SB 1115 contains a provision which makes the transfer of PRC's assets and liabilities to NCSPA contingent upon there being issued an opinion by the North Carolina Attorney General that such transfer will not subject NCSPA to the provisions of the Railway Labor Act. If that opinion is not issued within the time provided, then SB 1115 will not become law. Should that occur, and should SB 1115 not become law, then this PERMANENT RAILROAD OPERATIONS EASEMENT shall be null and void.

Exhibit A
Part I

The Front Street Spur, extending from the east line of Third Street at CSX Rail Valuation Station 91+37.3 and extending generally in a northerly direction a distance of 0.66 miles, more or less, to CSX Rail Valuation Station 56+39, in Wilmington, New Hanover County, North Carolina. This line was conveyed to the North Carolina Ports Railway Commission by deed recorded in Book 1726, Page 74, New Hanover County Registry in a transaction approved by the Interstate Commerce Commission by decision dated November 5, 1993, Finance Docket No. 32345 and Finance Docket No. 32345 (Sub-No. 1).

Part II

The New River Spur, extending from the CSX Rail Valuation Station 0+00, also being Rail Valuation Station 86+20 on the Front Street Spur at the west line of Second Street and extending generally in a southerly direction a distance of 3.5 miles, more or less, to CSX Rail Valuation Station 185+00, in Wilmington, New Hanover County, North Carolina. This line was conveyed to the North Carolina Ports Railway Commission by deed recorded in Book 1726, Page 74, New Hanover County Registry in a transaction approved by the Interstate Commerce Commission by decision dated November 5, 1993, Finance Docket No. 32345 and Finance Docket No. 32345 (Sub-No. 1).

Part III

This line extends from the north entrance to the Port of Wilmington at Transit Road, vicinity its intersection with Burnett Blvd., to the south entrance to said Port, at River Road vicinity its intersection with Shipyard Blvd., through and including the classification yards and includes all of the railroad tracks on said Port, whether denominated as spurs, side tracks, industrial tracks, or otherwise, (but excluding crane rails) all in Wilmington, New Hanover County, North Carolina.

Part IV

It is the intent of the parties that the trackage described in Parts I, II and III, above include all of the railroad tracks owned by SPA in Wilmington, New Hanover County, North Carolina. If, and to the extent, the above descriptions should inadvertently have omitted some of such trackage, or of any trackage as to which SPA should have the right to operate on or over, then such trackage is also hereby included.

EXHIBIT C

**PERMANENT AND EXCLUSIVE RAILROAD
OPERATIONS EASEMENT**

THIS PERMANENT RAILROAD OPERATIONS EASEMENT ("Easement") granted as of October 1, 2002, by the NORTH CAROLINA PORTS RAILWAY COMMISSION ("PRC"), to CAROLINA RAIL SERVICE, INC, a North Carolina corporation ("CRS").

WHEREAS, by operation of law, (2002 SB 1115*) the NORTH CAROLINA STATE PORTS AUTHORITY ("SPA") will become the owner of all assets of PRC, including the railroad facilities which were previously owned or leased by PRC and the Lease Agreement pursuant to which CRS operated the terminal and switching railroad operations at the Morehead City and Radio Island North Carolina State Ports Authority Port Terminal (the "Premises"). Said facilities are hereafter referred to as the "MCRI".

WHEREAS, PRC has agreed to convey this Easement to CRS in order to transfer to CRS the full common carrier obligation with respect to the Premises and MCRI and to enable CRS to provide common carrier rail services on the Premises and MCRI, including those services previously furnished by the Beaufort & Morehead Railway, Inc. as described in STB Finance Docket No. 34151.

NOW THEREFORE, in consideration of the premises, reservations, covenants and undertakings contained herein, PRC hereby grants the following easement to CRS:

1. GRANT OF EASEMENT

1.1 Subject to the terms and conditions hereof, PRC hereby grants to CRS a rail easement for the purpose of providing common carrier rail service to all customers on the Premises described in Exhibit A, and shown on the track map which is attached hereto as Exhibit B.

1.2 This Easement is for common carrier rail services on the Premises. This Easement shall grant CRS the exclusive right to conduct railroad operations on the Premises, including the right to operate with its trains, locomotives, rail cars and rail equipment with its own crews over the Premises for the purposes set forth in this Easement;

1.3 The conveyance of this Easement by PRC to CRS includes any and all rights and obligations of SPA under federal law to conduct common carrier rail services. By accepting this Easement, CRS hereby undertakes to assume the full common carrier obligation with respect to the Premises and MCRI and to provide any and all such common carrier rail services, subject to any and all laws governing or regulating the provision of such services, for so long as this Easement shall remain in effect.

1.4 This Easement granted by PRC includes a right of entry over the Premises for any and all CRS employees, agents or representatives, machinery, vehicles or equipment which CRS reasonably may deem necessary or convenient for the purposes of inspecting MCRI, clearing any derailments or wrecks of CRS trains on MCRI, performing maintenance or otherwise conducting CRS rail service over MCRI in accordance with this Easement.

1.5 This Easement is subject to the terms, conditions and limitations of the separate Operating Agreement between CRS and SPA dated as of November 1, 2002. Pursuant to that Operating Agreement, CRS shall not have the right to grant access to the Premises or to MCRI to

third parties without NCSPA's consent, which consent may be withheld by NCSPA in its sole discretion.

1.6 CRS shall not have the right to assign its interests in this Easement except as provided in the Operating Agreement between CRS and SPA dated November 1, 2002.

2. TERM AND TERMINATION

This Easement shall terminate and be extinguished and all property rights granted to CRS hereunder shall vest in the owner of the Premises upon the termination, pursuant to an order of the Surface Transportation Board ("STB"), of common carrier rail service on MCRI or any part thereof; provided, however, that a termination of this Easement pursuant to such an order shall apply only to those sections of MCRI subject to such STB order. The termination provisions of this Section 2 shall not apply to a termination of rail service by CRS done as part of a transfer of its common carrier rights and obligations to a permitted successor or assign.

3. INDEMNIFICATION

CRS hereby agrees to release, indemnify and hold harmless PRC, its officers, agents and employees, from and against any and all claims, suits, actions, causes of action, demands, losses, costs, damages and expenses whatsoever, occasioned by any claims, suits, actions, administrative or judicial proceedings ever asserted, threatened or instituted by CRS, any third party or governmental agency under any theory of law seeking to hold PRC liable for any acts or omissions of any party after conveyance of the Easement and arising from or related to this Easement.

IN WITNESS WHEREOF, the parties hereto have caused this PERMANENT
RAILROAD OPERATIONS EASEMENT to be duly executed as of the date first above written.

CAROLINA RAIL SERVICES, INC.

(SEAL)

By: _____
Harold C. Stowe, President

ATTEST: _____
Secretary

NORTH CAROLINA STATE PORTS AUTHORITY

(SEAL)

By: _____
Erik Stromberg, Executive Director

ATTEST: _____
Assistant Secretary

APPROVED AS TO FORM:

Dennis P. Myers, Assistant Atty. General

* SB 1115 contains a provision which makes the transfer of PRC's assets and liabilities to NCSPA contingent upon there being issued an opinion by the North Carolina Attorney General that such transfer will not subject NCSPA to the provisions of the Railway Labor Act. If that opinion is not issued within the time provided, then SB 1115 will not become law. Should that occur, and should SB 1115 not become law, then this PERMANENT RAILROAD OPERATIONS EASEMENT shall be null and void.

Exhibit A
Part I

This line extends from the connection with the Norfolk Southern Railway Company / North Carolina Railroad Company at Milepost 0.0 in Morehead City 28557 to Milepost 0.87 at Gallants Channel on Radio Island, Morehead City 28557, a distance of 0.87 miles, and includes the spur track and consolidation tracks leading from said line, generally along Inlet Drive, to the industrial tracks on the property leased from the North Carolina State Ports Authority to PCS Phosphate Company, Inc. Also includes the spur tracks leading to the PCS Phosphate Company, Inc. rail car dump and the "Fishmeal" spur on the area commonly known as Marsh Island, all in Carteret County, North Carolina.

Part II

This line extends from the connection with the Norfolk Southern Railway Company / North Carolina Railroad Company at Milepost 0.0 in Morehead City 28557, through and including the classification yard parallel to Highway 70 onto the Morehead City Port, and thus includes all of the railroad tracks on said Port, whether denominated as spurs, side tracks, industrial tracks, or otherwise, all in Carteret County, North Carolina.

Part III

It is the intent of the parties that the trackage described in Parts I and II, above include all of the railroad tracks owned by NCSPA in Carteret County, North Carolina. If, and to the extent, the above descriptions should inadvertently have omitted some of such trackage, or of any trackage as to which NCSPA should have the right to operate on or over, then such trackage is also hereby included.

**NORTH CAROLINA
NEW HANOVER COUNTY**

**EXHIBIT D
RAIL OPERATING AGREEMENT**

THIS AGREEMENT, entered into as of the 1st day of November 2002 by and between WILMINGTON TERMINAL RAILROAD, L.P., a North Carolina Limited Partnership authorized to do business as a common carrier by railroad in the State of North Carolina, ("WTR") and the NORTH CAROLINA STATE PORTS AUTHORITY, an agency of the State of North Carolina ("SPA").

WITNESSETH:

WHEREAS, WTR has heretofore operated the switching and terminal railroads at the Port of Wilmington pursuant to a Lease Agreement with the North Carolina Ports Railway Commission ("PRC").

WHEREAS, by operation of law, (2002 SB 1115*) SPA has become the owner of all assets of the NORTH CAROLINA PORTS RAILWAY COMMISSION (PRC), including the railroad facilities which were previously owned or leased by PRC, the Lease Agreement pursuant to which WTR operated the terminal and switching railroad at the Wilmington Port Terminal and the tracks on which WTR operated as described in ICC Finance Docket No. 32345, ICC Finance Docket No. 32345 (Sub-No. 1) and ICC Finance Docket No. 30910. All of the aforementioned trackage is hereafter referred to as the WTR Line and is described on Exhibit A and shown on the track map attached hereto as Exhibit B.

WHEREAS, the parties hereto desire to enter into an Operating Agreement to grant WTR a license to operate on the WTR Line and to govern WTR's usage of the railroad facilities hereinafter described for switching and otherwise handling and storing rail cars and generally to accomplish any required rail transportation service.

NOW THEREFORE, the parties hereto, intending to be legally bound agree as follows:

SECTION 1. DEFINITIONS

Except as otherwise specifically provided, the following capitalized terms shall have the meanings specified below whenever used in this Agreement:

“Agreement” shall mean this Operating Agreement.

“Commencement Date” shall mean the first day of the month next following the month in which SPA has notified WTR that any requisite regulatory approvals for the implementation of this Agreement and the Easement have been obtained.

“Designated Operator” shall mean the successor operator who is nominated by SPA to perform all railroad operations on the tracks which are the subject of this Agreement at the termination hereof.

“Easement” shall mean the permanent railroad operating easement conveyed by NCPRC to WTR, a copy of which is attached as Exhibit C to this Agreement.

“Equipment” shall mean the personal property listed in Exhibit D, which is assumed to have the values stated in said Exhibit for the purpose of its purchase by WTR.

“Gross Revenues” shall mean the total revenues received by WTR from its customers during any month for the provision of rail transportation services, less any refunds, allowances, or credits made or allowed such customers.

“Interest” shall mean interest calculated at the rate which is allowed by the federal court for the Eastern District of North Carolina during the time any interest may accrue.

“Party” or “Parties” shall mean the signatories to this Agreement, unless otherwise specified.

"Term Month" shall mean any calendar month while this Agreement and the Easement are in effect.

"Term Year" shall mean any twelve month period, beginning with the Commencement Date, while this Agreement and the Easement are in effect.

SECTION 2. PERMITTED USE OF THE WTR LINE RAILROAD FACILITIES.

(a) Subject to the terms and conditions herein provided, WTR shall have the exclusive right to operate its trains, locomotives, cars and equipment with its own crews over the WTR Line for the purpose of conducting railroad operations thereon for the term of this Agreement.

(b) WTR shall have exclusive control and management of its rail operations on the WTR Line.

(c) WTR shall be entitled to all revenues derived from its provision of rail service on the WTR Line, except to the extent a portion of such revenues is pledged to SPA pursuant to this Agreement.

(d) WTR shall assume the full common carrier obligation with respect to the WTR Line.

SECTION 3. RESTRICTIONS ON USE OF THE WTR LINE

WTR shall not, without prior written consent of SPA, which is not to be unreasonably withheld:

(a) permit any other person, entity or railroad to conduct operations on the the WTR Line;

(b) grant any easement, lease, license or right of occupancy in, on, under, through, above, across or along the WTR Line, or any portion thereof, to any third party;

(c) cause or knowingly suffer the creation of any encumbrance or lien on the WTR Line or any portion thereof.

SECTION 4. ASSIGNMENT OF CONTRACTS

(a) SPA shall assign to WTR its rights in any easements, crossing agreements and other agreements ("Contracts") affecting the use, occupancy or possession of all or any portion of the WTR Line, to the extent such rights are necessary for WTR to conduct rail operations on the WTR Line. WTR shall be responsible for any and all liabilities under such Contracts and shall be entitled to any and all benefits under such Contracts, to the extent such liabilities and benefits are applicable to its rail operations on the WTR Line.

(b) Upon expiration or termination of this Agreement, WTR shall immediately relinquish its rights under such Contracts and shall not be liable for any obligations or eligible for any benefits arising from such Contracts which accrue after the date of termination or expiration.

SECTION 5. TERM AND TERMINATION

(a) This Agreement shall become effective on the date written above (the "Effective Date"). This Agreement shall continue in full force and effect for a period of five (5) years from the Commencement Date unless terminated before the expiration of such period by SPA for default as set forth herein, or by mutual agreement. The term of the Agreement may be extended beyond the initial five year period as provided for in Section 16.

(b) WTR covenants and agrees to perform its common carrier railroad obligations over the WTR Line for the entire term of this Agreement, including any extensions which may

be agreed upon by the parties. Upon the expiration or termination of the Agreement, WTR covenants and agrees to transfer and convey its Easement to an operator to be designated by SPA (hereafter, the "Designated Operator"). WTR also covenants and agrees that, upon expiration or termination of this Agreement, and upon the receipt of required regulatory approvals of the transfer of the Easement, WTR shall cease its rail operations on the WTR Line, vacate its occupancy of any portion of the WTR Line and remove any of its property from the WTR Line. WTR also covenants and agrees to cooperate in any regulatory filings which may be necessary to effectuate the transfer and conveyance of its Easement to SPA's Designated Operator. WTR shall also transfer, assign and/or convey any contractual rights necessary to perform its common carrier obligation to provide rail service over the WTR Line to SPA's Designated Operator upon expiration or termination of this Agreement.

(c) The rights, benefits, duties and obligations running from or to either party under this Agreement shall in all events expire (except liabilities incurred prior to termination) upon the expiration or termination of this Agreement.

(d) Expiration or termination of this Agreement shall not relieve or release either party hereto from any obligation assumed or from any liability which may have arisen or been incurred by either party under the terms of this Agreement prior to termination hereof.

SECTION 6. TAXES AND UTILITIES

(a) SPA shall be responsible for the payment of all taxes which may be assessed, levied, charged, confirmed or imposed by any governmental authority on the WTR Line.

(b) WTR shall be solely responsible for all costs, expenses, charges, obligations and liabilities, of any nature and kind, relating to or arising from WTR's use, occupancy, interest in,

maintenance of or operations on the WTR Line during the term of this Agreement, except as specifically otherwise provided herein.

SECTION 7. MAINTENANCE OF THE WTR LINE

WTR shall maintain and make running repairs to the WTR Line with its own supervision and labor, or may enter into one or more contracts for the performance of such repairs, at the discretion of WTR. WTR shall keep and maintain the WTR Line up to standards necessary for movement of 286,000 pound capacity cars on the WTR Line at a speed of 10 mph. All maintenance shall be for the account of WTR, and SPA will have no responsibility for such maintenance. For the purpose of this Agreement, maintenance will be assumed to include (without limitation) checking and correcting rail gauge, adding ballast and maintaining vertical and horizontal rail alignment, replacing and/or setting spikes, cleaning and lubricating switches, restoring switch and frog points, replacing cross ties as needed, removing debris and controlling vegetation and erosion in rights of way, and maintaining signals, lights, crossings and signage.

SECTION 8. ADDITIONS, RETIREMENTS AND ALTERATIONS

If any changes in, additions and betterments to or retirements from the WTR Line are required by any law, rule, regulation or ordinance promulgated by any governmental body having jurisdiction over the WTR Line, or if the operations of SPA or its tenants should require any such additions, betterments or retirements, at SPA's request to do so, WTR shall construct the additional or altered facilities and SPA shall pay to WTR the cost thereof. SPA shall reimburse WTR for such additions, and alterations as follows:

- (a) The parties will agree in advance as to the reasonable cost of the alterations required, and SPA will pay WTR ¼ the cost thereof when the project is 25% complete as

certified by WTR, $\frac{1}{4}$ when the project is 50% complete, $\frac{1}{4}$ when the project is 75% complete and the final $\frac{1}{4}$ of the cost when the project is 100% complete; or, at SPA's option,

(b) WTR will cause the project to be constructed and SPA will reimburse it on the basis of cost plus 5%. If this method of reimbursement is chosen, SPA will require reasonable proof of WTR's cost, and will make reimbursements as verified invoices are submitted, less 5%, which will be retained until the project is complete.

SECTION 9. MANAGEMENT AND OPERATIONS

(a) WTR shall comply with the provisions of the Federal Locomotive Inspection Act and the Federal Safety Appliance Act, as amended, and any other federal and state and local laws, regulations and rules respecting the operation, condition, inspection and safety of its trains, locomotives, cars and equipment while such trains, locomotives, cars and equipment are being operated over the WTR Line. WTR shall indemnify, protect, defend, and save harmless SPA and its executives, agents and employees from and against all fines, penalties and liabilities imposed upon WTR or its parent corporation, subsidiaries and affiliates, or their respective directors, officers, agents and employees under such laws, rules and regulations by any public authority or court having jurisdiction over the WTR Line, when attributable solely to the failure of WTR to comply with its obligations in this regard.

(b) WTR's trains shall not include locomotives, cars or equipment which exceed the width, height, weight or other restrictions or capacities of the WTR Line.

(c) Initially, said rail transportation services shall be performed by WTR in accordance with any existing tariffs and contracts with shippers and with other carriers, which WTR hereby agrees to assume. Subject to any limitations set forth in such contracts or as may be prescribed by the Surface Transportation Bond, WTR thereafter may modify or cancel any

such tariffs or agreements in such lawful manner as WTR deems appropriate. WTR shall have exclusive control over the terms and conditions upon which it provides railroad transportation services to its customers, to the same extent as if WTR owned said Facilities outright.

SECTION 10. RIGHT OF ENTRY AND LICENSE – ENTRY UPON PROPERTY OF SPA.

SPA reserves the right at all times to enter upon the Facilities for the purpose of inspecting same; provided, however SPA's exercise of such right shall not conflict with WTR's operations under this Agreement.

SECTION 11. OWNERSHIP OF THE FACILITIES

Notwithstanding WTR's exclusive possession, use and control of the Facilities under this Agreement, SPA shall at all times remain the owner of all its right, title and interest in the Facilities. Nothing herein shall be construed as the conveyance of an interest in real or personal property except as set out in Section 13 hereof. WTR shall not take any action inconsistent with the foregoing, and in particular shall not represent to third parties that its interest in the Facilities exceeds that granted to it under this Agreement and the Easement.

SECTION 12. CONDITION OF TRACKAGE AND FACILITIES

(a) It shall be the duty of WTR to inspect the Facilities and satisfy itself as to the condition thereof before causing any engine, train or car to be driven thereupon. The operation of any engine, train, or car upon the Facilities by WTR, its officers, employees, agents, servants or subcontractors shall constitute an acknowledgement by WTR that the condition of the Facilities is such that engines, trains and cars may be safely operated thereupon.

(b) From and after the Commencement Date and until the termination of this Agreement, WTR shall be responsible for maintaining the Facilities in no less than the condition they were when WTR took possession of same on the Commencement Date, and for returning the Facilities to the NCPRC in at least that condition when this Agreement terminates. If SPA should determine that required maintenance is not being performed by WTR as is required by this Agreement, and, after notice to WTR specifying the deficiency and the same not having been corrected by WTR within 30 days of such notice, SPA may contract with one or more qualified contractors to perform such required maintenance and WTR will be liable for the cost thereof, and will pay the same within 15 days its receipt of a verified invoice.

SECTION 13. EQUIPMENT

On the Commencement Date (or as soon as possible thereafter), SPA shall, in addition to tendering possession of the Facilities to WTR, tender possession to WTR of the items of equipment identified in Exhibit D to this Agreement, at the locations therein indicated. Said equipment has been mutually agreed to have the values shown on Exhibit D. SPA will execute such documents (in addition to this Agreement) as may be required to transfer ownership of said equipment to WTR. WTR will pay SPA the total amount shown on Exhibit D in twelve (12) equal payments, due and payable on the first day of each month beginning on the Commencement Date. It is acknowledged that Exhibit D is not now complete, and it may be modified up to the Commencement Date. Any such modifications will bear the initials of representatives of the parties who are authorized to agree to the same. The equipment is sold to WTR as is, where is, with no warranty of any kind, including fitness for use for its normal purpose. Any repairs to or replacement of said equipment will be the sole responsibility of WTR.

SECTION 14. PAYMENT

WTR will pay SPA a percentage of all gross revenues generated by it during each Term Year by WTR's provision of rail transportation services pursuant to this Agreement and the Easement as follows:

\$0 - \$1,000,000 -----	5%
\$1,000,000 - \$1,500,000 -----	20%
Over \$1,500,000 -----	40%

Such payments shall be made by WTR to SPA on or before the 30th day of each month based on the gross revenues of the previous month. WTR will prepare and submit to SPA, with each payment, a monthly statement reflecting the gross revenues generated by it during the previous month. Provided it gives reasonable notice to WTR, SPA will have full access to the books and records of WTR in order to audit the same.

SECTION 15. LIABILITY

(a) WTR shall be solely responsible for (i) any loss and/or liability for loss of, damage to, or destruction of the property of SPA, its employees, agents, contractors or invitees, (ii) any loss and/or liability for loss of, damage to or destruction of the property of any other person, entity, agency, firm, partnership or corporation whatsoever to the extent caused by the negligence of WTR, (iii) any liability for injury to or death of any person whomsoever, in each case relating to, resulting from or arising out of WTR's use, maintenance of or operations on the WTR Line. It is agreed and understood that WTR shall not be responsible for any landowner liability not involving WTR's use, maintenance of or operations on the WTR Line, as SPA shall be and remain the owner of the real estate underlying the WTR Line, as well as the WTR Line.

(b) WTR hereby releases SPA, its executives, agents, and employees from, and agrees forever to protect, indemnify, defend, and hold harmless SPA, its officers, directors, agents, and employees from and against any and all claims, actions, costs, damages, losses, and expenses in any manner caused by, arising out of, or connected with WTR's use, maintenance of or operations on the WTR Line.

SECTION 16. RENEGOTIATIONS; DEFAULT AND TERMINATION

(a) Renegotiation. Either party to this Agreement may, by notice to the other party given at least one hundred eighty (180) days prior to the fifth anniversary of the Commencement Date or one hundred eighty (180) days prior to the tenth or any succeeding fifth anniversary of the Commencement Date, demand renegotiation of the terms of this Agreement. Such notice shall specify the changes desired. The parties shall promptly negotiate in good faith with one another with respect to such changes. If the parties are unable to agree with respect thereto within ninety (90) days following such notice, then the party demanding renegotiation may elect to terminate this Agreement, by so notifying the other party. Provided that: the decision of either party to renew this Agreement (or not to do so) shall be in such party's sole discretion and neither party shall have the right to challenge that decision. The notifying party shall be responsible for obtaining any necessary regulatory approvals for the abandonment and/or discontinuance of common carrier operations over the WTR Line by WTR, but the other party shall cooperate with the notifying party in this effort. Such a termination shall be effective as soon as necessary regulatory approvals have been obtained or as soon thereafter as possible.

If this Agreement is terminated pursuant to this subsection, SPA will require any successor rail carrier operating over the WTR Line to take applications from, interview, and employ acceptable employees of WTR, provided that such successor carrier shall determine in its sole discretion the acceptability for employment of these employees.

(b) Default. Either party may terminate this Agreement upon thirty (30) days' notice if the other party is in default of a material obligation or covenant under this lease agreement, and remains in default thereof for thirty (30) days following notice and demand by the non-defaulting party that the default be cured. In the event of such termination, the parties shall cooperate in obtaining any necessary regulatory approvals for WTR's abandonment and/or discontinuance of common carrier railroad operations over the WTR Line Facilities and the transfer of such operations to a Designated Operator. The party in default shall bear all costs resulting from termination of the Agreement, including the costs of obtaining regulatory approvals for which the parties or either of them may be responsible.

(c) In the event WTR ceases performance or without justification fails to provide service commensurate with the reasonable needs of its customers, then SPA shall give WTR written notice of such non-performance or failure, and in the case of a failure to provide satisfactory performance, the reason therefore, and WTR shall be allowed thirty (30) days thereafter to begin performance or render it satisfactory. Should performance by WTR remain unsatisfactory without justification after said thirty (30) day period, SPA shall be entitled without diminution of any and all other legal remedies available to it, to terminate this Agreement for reasons of such default, subject to any necessary regulatory approvals.

(d) In the event WTR files, or has filed against it, any petition or action for relief under any creditor's law (including bankruptcy, reorganization, or similar actions), either in state or federal court, or becomes insolvent, or makes any transfer in fraud of creditors, or has a receiver appointed for its assets, or makes an assignment for the benefit of creditors, this Agreement shall terminate immediately, subject to any necessary regulatory approvals, and such termination shall be treated as a termination for default.

SECTION 17. INSURANCE

WTR shall purchase and maintain such insurance as will protect it from the claims described below which may arise out of or result from the performance of rail transportation services hereunder by WTR, or by any subcontractor or by anyone directly or indirectly employed by WTR, or by anyone for whose acts it may be liable:

- (a) Claims under Federal Employers Liability Act (FELA), disability benefit laws and any other employee benefit acts or laws applicable to WTR in the performance of its services;
- (b) Claims for damages because of bodily injury, occupational sickness or disease, or death of its employees;
- (c) Claims for damages because of bodily injury or death of any person other than its employees;
- (d) Claims for damages insured by usual personal injury liability coverage which are sustained by any person as a result of an offense directly related to the employment of such person by WTR;

(e) Claims for damages because of injury to or destruction of tangible property of SPA or any third party, including loss of use resulting therefrom due to the negligence of any employee of WTR;

(f) Comprehensive Railroad Liability Insurance (including coverage for railroad operations and loss of use) shall be maintained in the combined limit of at least two million dollars (\$2,000,000.00). Such coverage shall also include (a) liability for damage to or destruction of property of others in WTR's care, custody or control, including that of SPA and (b) Broad Form Contractual Liability Coverage providing insurance as to the liability of WTR to SPA. Comprehensive Automobile Liability (including owned, nonowned and hired or rented vehicles) policies shall be maintained at combined single limit of five hundred thousand dollars (\$500,000.00) for bodily injury and property damage. FELA, and occupational disease insurance in statutory limits will be carried to comply with the laws of the State of North Carolina and other federal or state laws applicable to the employment of any of WTR's employees. Employer's liability insurance will be carried with a minimum limit of one hundred thousand dollars (\$100,000.00).

All of the insurance specified in this section shall be obtained from an insurance carrier or carriers authorized to do business in the State of North Carolina and satisfactory to SPA. The certificates of insurance required to be maintained by WTR shall be filed with SPA prior to commencing any services hereunder. Such policies shall provide that such insurance is not subject to change or cancellation until after thirty (30) days' written notice has been given to SPA. SPA shall be listed as additional named insured under such policies. WTR shall maintain any other insurance required by federal or state law. WTR's full compliance with the provisions

of this section shall be a condition precedent to its provision of rail transportation services under this Agreement.

SECTION 18. LABOR WARRANTY

Unless otherwise agreed, WTR shall continue to furnish services to its customers during any pending dispute between the parties regarding their respective rights and obligations hereunder. WTR also warrants that it will exercise reasonable diligence to furnish services hereunder during any labor dispute, strike or work stoppage with or by its employees and that WTR will take all action, including court action, reasonably necessary to prevent or terminate such service disruptions.

SECTION 19. ARBITRATION

Any irreconcilable dispute arising among between the parties with respect to this Agreement shall be submitted for binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association. The decision of the arbitrator shall be final and conclusive upon the parties hereto. Each party shall pay the compensation, costs, fees and expenses of its own witnesses, experts and counsel. The compensations, costs and expense of the arbitrator, if any, shall be borne equally by the parties hereto. The arbitrator shall not have the power to award consequential or punitive damages or to determine violations of criminal laws. Pending the award of the arbitrator, there shall be no interruption in the transaction of business under this Agreement, and all payments in respect thereto shall be made in the same manner as prior to the arising of the dispute until the matter in dispute shall have been fully determined by arbitration, and thereupon such payment or restitution shall be made as required by the decision or award of the arbitrator.

SECTION 20. INSPECTION OF RECORDS

Each party to this Agreement shall have the right to inspect the books and records of the other party insofar as necessary to verify that the other party is properly carrying out its obligations under this Agreement. Such inspection shall be on reasonable notice and at reasonable times and locations; and each party may impose reasonable conditions on such inspection to protect confidential business information from needless disclosure, so long as such conditions do not prevent the inspecting party from obtaining the necessary information and verification. Each party shall retain all books and records that might be subject to inspection hereunder for at least three (3) years following the end of the month to which they relate.

SECTION 21. EMPLOYMENT

(a) WTR shall furnish and be responsible for all its personnel needs in order to fulfill its duties and responsibilities under this Agreement. All personnel so employed in providing services, including the entire work force up to and including all members of management, or other persons in general charge of the Facilities, shall be employed by WTR, and shall be and remain at all times the employees of WTR, and not the employees of SPA. WTR shall locate, recruit, select, hire and train all of its necessary personnel and shall supervise, direct and control such personnel.

(b) WTR will pay, and be solely responsible for, all wages, fringe benefits, employee benefits, unemployment, worker's compensation (including Railroad Retirement), Social Security and other charges, taxes, levies, or premiums regarding any such employees.

(c) All such personnel employed by WTR shall be solely WTR's employees, subject to WTR's exclusive direction and control, and SPA shall not have any right to exercise direction of, control over, employ or be responsible for, any such personnel.

SECTION 22. SUCCESSORS AND ASSIGNS

This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto; provided, however, WTR shall not transfer or assign this Agreement, or any of its rights, interests or obligations hereunder, or its Easement or any of its rights, interests or obligations thereunder, to any person, firm, or corporation without obtaining the prior consent of SPA, which consent may be withheld by SPA in its reasonable discretion. WTR covenants and agrees, however, to transfer and assign its Easement and any of its rights, interests or obligations thereunder to SPA's Designated Operator upon expiration or termination of this Agreement.

SECTION 23. NOTICES

Any notice required or permitted to be given by any one party to any other party under this Agreement shall be given to all parties to the Agreement and shall be deemed given on the date received by certified mail, or by such other means as shall provide equivalent proof of service, and shall be addressed as follows:

If to WTR:	2605 Thomas Drive Panama City Beach, FL 32408 Attn: K. Earl Durden
If to SPA:	2202 Burnett Blvd Wilmington, NC 28401 Attn: Jeff L. Strader

Any party may provide changes in the above addresses to the other parties by personal service or U.S. mail:

SECTION 24. GENERAL PROVISIONS

(a) This Agreement and each and every provision hereof is for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right of any third party to recover by way of damages or otherwise against any of the parties hereto.

(b) This Agreement contains the entire understanding of the parties hereto and supersedes any and all oral understandings among the parties.

(c) No term or provision of this Agreement may be changed, waived, discharged or terminated except by an instrument in writing and signed by all parties to this Agreement.

(d) All words, terms and phrases used in this Agreement shall be construed in accordance with the generally applicable definition or meaning of such words, terms and phrases in the railroad industry.

(e) All section headings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

(f) This Agreement is the result of mutual negotiations of the parties hereto, neither of whom shall be considered the drafter for purposes of contract construction.

(g) This Agreement shall be governed by and construed in accordance with the laws of the State of North Carolina.

SECTION 25. REGULATORY APPROVAL

The parties acknowledge that this Agreement requires or may require Surface Transportation Board ("STB") approval and shall cooperate in obtaining such approval in a timely fashion. The parties also acknowledge that transfer and assignment of WTR's Easement to SPA's Designated Operator may require STB approval. The parties shall cooperate, to the extent necessary, to obtain such approval in a timely fashion.

SECTION 26. CANCELLATION OF LEASE

The Lease Agreement dated as of September 15, 1986 is hereby cancelled, the same being superceded by this Agreement and the Easement. In addition, any agreement or obligation of the parties arising as the result of the assumption of operations on the New River Spur or the Front Street Spur, as described in Finance Docket No. 32345 and Finance Docket No. 32345 (Sub-No. 1), is hereby cancelled, the same being superceded by this Agreement and the Easement.

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

WITNESS: WILMINGTON TERMINAL RAILROAD, LP

By: _____
General Partner

WITNESS: NORTH CAROLINA STATE PORTS AUTHORITY

By: _____
Executive Director

APPROVED AS TO FORM:

Dennis P. Myers, Assistant Atty. General

* SB 1115 contains a provision which makes the transfer of PRC's assets and liabilities to SPA contingent upon there being issued an opinion by the North Carolina Attorney General that such transfer will not subject SPA to the provisions of the Railway Labor Act. If that opinion is not issued within the time provided, then SB 1115 will not become law. Should that occur, and should SB 1115 not become law, then this RAIL OPERATING AGREEMENT shall be null and void.

Exhibit A

Part I

The Front Street Spur, extending from the east line of Third Street at CSX Rail Valuation Station 91+37.3 and extending generally in a northerly direction a distance of 0.66 miles, more or less, to CSX Rail Valuation Station 56+39, in Wilmington, New Hanover County, North Carolina. This line was conveyed to the North Carolina Ports Railway Commission by deed recorded in Book 1726, Page 74, New Hanover County Registry in a transaction approved by the Interstate Commerce Commission by decision dated November 5, 1993, Finance Docket No. 32345 and Finance Docket No. 32345 (Sub-No. 1).

Part II

The New River Spur, extending from the CSX Rail Valuation Station 0+00, also being Rail Valuation Station 86+20 on the Front Street Spur at the west line of Second Street and extending generally in a southerly direction a distance of 3.5 miles, more or less, to CSX Rail Valuation Station 185+00, in Wilmington, New Hanover County, North Carolina. This line was conveyed to the North Carolina Ports Railway Commission by deed recorded in Book 1726, Page 74, New Hanover County Registry in a transaction approved by the Interstate Commerce Commission by decision dated November 5, 1993, Finance Docket No. 32345 and Finance Docket No. 32345 (Sub-No. 1).

Part III

This line extends from the north entrance to the Port of Wilmington at Transit Road, vicinity its intersection with Burnett Blvd., to the south entrance to said Port, at River Road vicinity its intersection with Shipyard Blvd., through and including the classification yards and includes all of the railroad tracks on said Port, whether denominated as spurs, side tracks, industrial tracks, or otherwise, (but excluding crane rails) all in Wilmington, New Hanover County, North Carolina.

Part IV

It is the intent of the parties that the trackage described in Parts I, II and III, above include all of the railroad tracks owned by SPA in Wilmington, New Hanover County, North Carolina. If, and to the extent, the above descriptions should inadvertently have omitted some of such trackage, or of any trackage as to which SPA should have the right to operate on or over, then such trackage is also hereby included.

EXHIBIT E

**NORTH CAROLINA
CARTERET COUNTY**

RAIL OPERATING AGREEMENT

THIS AGREEMENT, entered into as of the 1st day of October 2002 by and between CAROLINA RAIL SERVICE, LLC, a North Carolina Limited Liability Corporation ("CRS") authorized to do business as a common carrier by railroad in the State of North Carolina, ("CRS") and the NORTH CAROLINA STATE PORTS AUTHORITY, an agency of the State of North Carolina ("SPA").

WITNESSETH:

WHEREAS, CRS has heretofore operated the switching and terminal railroads at the Port of Morehead City pursuant to a Lease Agreement with the North Carolina Ports Railway Commission ("PRC").

WHEREAS, by operation of law, (2002 SB 1115*) SPA has become the owner of all assets of the PRC, including the railroad facilities which were previously owned or leased by PRC, the Lease Agreement pursuant to which CRS operated the terminal and switching railroad operations at the Morehead City State Port Terminal and the tracks on which the Beaufort & Morehead Railway, Inc. operated as described in STB Finance Docket No. 34151. All of the aforementioned trackage is hereafter referred to as the Morehead City Radio Island Line, or "MCRI" and is described on Exhibit A and shown on the track map attached hereto as Exhibit B.

WHEREAS, the parties hereto desire to enter into an Operating Agreement to grant CRS a license to operate on MCRI, and to govern CRS's usage of the railroad facilities hereinafter described for switching and otherwise handling and storing rail cars and generally to accomplish any required rail freight transportation service.

NOW THEREFORE, the parties hereto, intending to be legally bound agree as follows:

SECTION 1. DEFINITIONS

Except as otherwise specifically provided, the following capitalized terms shall have the meanings specified below whenever used in this Agreement:

“Agreement” shall mean this Operating Agreement.

“Commencement Date” shall mean the first day of the month next following the month in which SPA has notified CRS that any requisite regulatory approvals for the implementation of this Agreement and the Easement have been obtained.

“Designated Operator” shall mean the successor operator who is nominated by SPA to perform all railroad operations on the tracks which are the subject of this Agreement at the termination hereof.

“Easement” shall mean the permanent railroad operating easement conveyed by SPA to CRS, a copy of which is attached as Exhibit C to this Agreement.

“Equipment” shall mean the personal property listed in Exhibit D, which is assumed to have the values stated in said Exhibit for the purpose of its purchase by CRS.

“Facilities” shall mean the trackage and other rail assets of MCRI.

“Gross Revenues” shall mean the total revenues received by CRS from its customers during any month for the provision of rail transportation services, less any refunds, allowances, or credits made or allowed such customers.

“Interest” shall mean interest calculated at the rate which is allowed by the federal court for the Eastern District of North Carolina during the time any interest may accrue.

“Party” or “Parties” shall mean the signatories to this Agreement, unless otherwise specified.

“Term Month” shall mean any calendar month while this Agreement and the Easement are in effect.

“Term Year” shall mean any twelve month period, beginning with the Commencement Date, while this Agreement and the Easement are in effect.

SECTION 2. PERMITTED USE OF THE MOREHEAD CITY/RADIO ISLAND (MCRI) TERMINAL RAILROAD FACILITIES.

(a) Subject to the terms and conditions herein provided, CRS shall have the exclusive right to operate its trains, locomotives, cars and equipment with its own crews over MCRI for the purpose of conducting railroad operations thereon for the term of this Agreement.

(b) CRS shall have exclusive control and management of its rail operations on MCRI.

(c) CRS shall be entitled to all revenues derived from its provision of rail service on MCRI, except to the extent a portion of such revenues is pledged to SPA pursuant to this Agreement.

(d) CRS shall assume the full common carrier obligation with respect to MCRI.

SECTION 3. RESTRICTIONS ON USE OF MCRI

CRS shall not, without prior written consent of SPA, which consent may be withheld by SPA in its sole discretion:

(a) permit any other person, entity or railroad to conduct any freight or passenger operations on MCRI;

(b) grant any easement, lease, license or right of occupancy in, on, under, through, above, across or along MCRI, or any portion thereof, to any third party;

(c) cause or knowingly suffer the creation of any encumbrance or lien on MCRI or any portion thereof.

SECTION 4. ASSIGNMENT OF CONTRACTS

(a) SPA shall assign to CRS its rights in any easements, crossing agreements and other agreements ("Contracts") affecting the use, occupancy or possession of all or any portion of MCRI, to the extent such rights are necessary for CRS to conduct rail operations on MCRI. CRS shall be responsible for any and all liabilities under such Contracts and shall be entitled to any and all benefits under such Contracts, to the extent such liabilities and benefits are applicable to its rail operations on MCRI.

(b) Upon expiration or termination of this Agreement, CRS shall immediately relinquish its rights under such Contracts and shall not be liable for any obligations or eligible for any benefits arising from such Contracts which accrue after the date of termination or expiration.

SECTION 5. TERM AND TERMINATION

(a) This Agreement shall become effective on the date written above (the "Effective Date"). This Agreement shall continue in full force and effect for a period of five (5) years from the Commencement Date unless terminated before the expiration of such period by SPA for default as set forth herein, or by mutual agreement. The term of the Agreement may be extended beyond the initial five year period as provided for in Section 16.

(b) CRS covenants and agrees to perform its common carrier freight railroad obligations over MCRI for the entire term of this Agreement, including any extensions which may be agreed upon by the parties. Upon the expiration or termination of the Agreement, CRS covenants and agrees to transfer and convey its Easement to an operator to be designated by SPA

(hereafter, the "Designated Operator"). CRS also covenants and agrees that, upon expiration or termination of this Agreement, and upon the receipt of required regulatory approvals of the transfer of the Easement, CRS shall cease its rail operations on MCRI, vacate its occupancy of any portion of MCRI and remove any of its property from MCRI. CRS also covenants and agrees to cooperate in any regulatory filings which may be necessary to effectuate the transfer and conveyance of its Easement to SPA's Designated Operator. CRS shall also transfer, assign and/or convey any contractual rights necessary to perform its common carrier obligation to provide rail transportation service over MCRI to SPA's Designated Operator upon expiration or termination of this Agreement.

(c) The rights, benefits, duties and obligations running from or to either party under this Agreement shall in all events expire (except liabilities incurred prior to termination) upon the expiration or termination of this Agreement.

(d) Prior to the Commencement Date, CRS shall furnish SPA a Performance Bond in the amount of One Hundred Thousand Dollars, conditional upon CRS's true and faithful performance of all undertakings, covenants, terms, conditions and provisions of this Agreement. The performance bond shall guarantee payment to SPA in the amount of the bond (which is stipulated to be a reasonable determination of liquidated damages) in the event this Agreement should be terminated by SPA because of CRS's default of its obligations.

(e) Expiration or termination of this Agreement shall not relieve or release either party hereto from any obligation assumed or from any liability which may have arisen or been incurred by either party under the terms of this Agreement prior to termination hereof.

(c) That portion of the rail line extending south from the main Radio Island spur to the PCS leased facilities, including the ladder tracks in the vicinity of Inlet Drive, is acknowledged to be in a condition of poor maintenance and repair. Before CRS is required to assume maintenance responsibility for that trackage, it will be repaired, at SPA expense, so as to bring it into condition to handle 286,000 lb cars at 10 mph. Such repairs will be accomplished according to the procedure set out in Section 8 below.

(d) Prior to the Commencement Date, the parties will have agreed upon certain current maintenance requirements which will be accomplished at SPA expense, according to the procedure set out in Section 8 below. Such requirements will be set out in a separate document, not made a part of this Agreement, and will be accomplished on a schedule agreeable to the parties.

SECTION 8. ADDITIONS, RETIREMENTS AND ALTERATIONS

If any changes in, additions and betterments to or retirements from MCRI are required by any law, rule, regulation or ordinance promulgated by any governmental body having jurisdiction over MCRI, or if the operations of SPA or its tenants should require any such additions, betterments or retirements, CRS shall construct the additional or altered facilities and SPA shall pay to CRS the cost thereof. SPA shall reimburse CRS for such additions, and alterations as follows:

a. The parties will agree in advance as to the reasonable cost of the alterations required, and SPA will pay CRS $\frac{1}{4}$ the cost thereof when the project is 25% complete as certified by CRS, $\frac{1}{4}$ when the project is 50% complete, $\frac{1}{4}$ when the project is 75% complete and the final $\frac{1}{4}$ of the cost when the project is 100% complete; or, at SPA's option,

b. CRS will cause the project to be constructed and SPA will reimburse it on the basis of cost plus 5%. If this method of reimbursement is chosen, SPA will require reasonable proof of CRS's cost, and will make reimbursements as verified invoices are submitted, less 5%, which will be retained until the project is complete.

SECTION 9. MANAGEMENT AND OPERATIONS

(a) CRS shall comply with the provisions of the Federal Locomotive Inspection Act and the Federal Safety Appliance Act, as amended, and any other federal and state and local laws, regulations and rules respecting the operation, condition, inspection and safety of its trains, locomotives, cars and equipment while such trains, locomotives, cars and equipment are being operated over MCRI. CRS shall indemnify, protect, defend, and save harmless SPA and its executives, agents and employees from and against all fines, penalties and liabilities imposed upon CRS or its parent corporation, subsidiaries and affiliates, or their respective directors, officers, agents and employees under such laws, rules and regulations by any public authority or court having jurisdiction over MCRI, when attributable solely to the failure of CRS to comply with its obligations in this regard.

(b) CRS's trains shall not include locomotives, cars or equipment which exceed the width, height, weight or other restrictions or capacities of MCRI.

(c) Initially, said rail transportation services shall be performed by CRS in accordance with any existing tariffs and contracts with shippers and with other carriers, which CRS hereby agrees to assume. Subject to any limitations set forth in such contracts or as may be prescribed by the Surface Transportation Bond, CRS thereafter may modify or cancel any such tariffs or agreements in such lawful manner as CRS deems appropriate. CRS shall have

exclusive control over the terms and conditions upon which it provides railroad transportation services to its customers, to the same extent as if CRS owned said Facilities outright.

10. RIGHT OF ENTRY AND LICENSE – ENTRY UPON PROPERTY OF SPA.

(a) SPA hereby assigns to CRS its rights and obligations under the following agreements: (1) that certain Assignment from the Atlantic and East Carolina Railway Company to the North Carolina Ports Railway Commission (NCPRC) dated September 17, 1981, effective July 1, 1981; and (2) that certain Interchange Agreement between the Atlantic and East Carolina Railway Company, the NCPRC and Alla-Ohio Valley Coals, Inc., dated April 3, 1981; and CRS hereby assumes responsibility for fulfilling SPA's obligations, if any, under said Agreements.

(b) SPA reserves the right at all times to enter upon the Facilities for the purpose of inspecting same; provided, however SPA's exercise of such right shall not conflict with CRS's operations under this Agreement.

SECTION 11. OWNERSHIP OF THE FACILITIES

Notwithstanding CRS's exclusive possession, use and control of the Facilities under this Agreement, SPA shall at all times remain the owner of all its right, title and interest in the Facilities. Nothing herein shall be construed as the conveyance of an interest in real or personal property except as set out in Section 13 hereof. CRS shall not take any action inconsistent with the foregoing, and in particular shall not represent to third parties that its interest in the Facilities exceeds that granted to it under this Agreement and the Easement.

SECTION 12. CONDITION OF TRACKAGE AND FACILITIES

(a) It shall be the duty of CRS to inspect the Facilities and satisfy itself as to the condition thereof before causing any engine, train or car to be driven thereupon. The operation of any engine, train, or car upon the Facilities by CRS, its officers, employees, agents, servants or subcontractors shall constitute an acknowledgement by CRS that the condition of the Facilities is such that engines, trains and cars may be safely operated thereupon.

(b) From and after the Commencement Date and until the termination of this Agreement, CRS shall be responsible for maintaining the Facilities in no less than the condition they were when CRS took possession of same on the Commencement Date, and for returning the Facilities to the NCPRC in at least that condition when this Agreement terminates. If SPA should determine that required maintenance is not being performed by CRS as is required by this Agreement, and, after notice to CRS specifying the deficiency and the same not having been corrected by CRS within 30 days of such notice, SPA may contract with one or more qualified contractors to perform such required maintenance and CRS will be liable for the cost thereof, and will pay the same within 15 days its receipt of a verified invoice.

SECTION 13. EQUIPMENT

On the Commencement Date (or as soon as possible thereafter), SPA shall, in addition to tendering possession of the Facilities to CRS, tender possession to CRS of the items of equipment identified in Exhibit D to this Agreement, at the locations therein indicated. Said equipment has been mutually agreed to have the values shown on Exhibit D. SPA will execute such documents (in addition to this Agreement) as may be required to transfer ownership of said equipment to CRS. CRS will pay SPA the total amount shown on Exhibit D in twelve

(12) equal payments, due and payable on the first day of each month beginning on the Commencement Date. The equipment is sold to CRS as is, where is, with no warranty of any kind, including fitness for use for its normal purpose. Any repairs to or replacement of said equipment will be the sole responsibility of CRS. It is acknowledged that Exhibit D is not now complete, and it may be modified up to the Commencement Date. Any such modifications will bear the initials of representatives of the parties who are authorized to agree to the same.

SECTION 14. PAYMENT

CRS will pay SPA a percentage of all gross revenues generated by it during each Term Year by CRS's provision of rail transportation services pursuant to this Agreement and the Easement as follows:

\$0 - \$1,000,000 -----	26%
\$1,000,000 - \$1,500,000 -----	30%
Over \$1,500,000 -----	40%

Such payments shall be made by CRS to SPA on or before the 30th day of each month based on the gross revenues of the previous month. CRS will prepare and submit to SPA, with each payment, a monthly statement reflecting the gross revenues generated by it during the previous month. SPA will at all times have access to the books and records of CRS in order to audit the same.

SECTION 15. LIABILITY

(a) CRS shall be solely responsible for (i) any loss and/or liability for loss of, damage to, or destruction of the property of SPA, its employees, agents, contractors or invitees to the extent caused by the negligence of CRS, (ii) any loss and/or liability for loss of, damage to or

destruction of the property of any other person, entity, agency, firm, partnership or corporation whatsoever to the extent caused by the negligence of CRS, (iii) any liability for injury to or death of any person whomsoever in each case relating to, resulting from or arising out of CRS's use, maintenance of or operations on MCRI. It is agreed and understood that CRS shall not be responsible for any landowner liability not involving CRS's use, maintenance of or operations on MCRI, as SPA shall be and remain the owner of the real estate underlying MCRI, as well as MCRI.

(b) CRS hereby releases SPA, its executives, agents, and employees from, and agrees forever to protect, indemnify, defend, and hold harmless SPA, its officers, directors, agents, and employees from and against any and all claims, actions, costs, damages, losses, and expenses in any manner caused by, arising out of, or connected with CRS's use, maintenance of or operations on MCRI.

SECTION 16. RENEGOTIATIONS; DEFAULT AND TERMINATION

(a) Renegotiation. Either party to this Agreement may, by notice to the other party given at least one hundred eighty (180) days prior to the fifth anniversary of the Commencement Date or one hundred eighty (180) days prior to the tenth or any succeeding fifth anniversary of the Commencement Date, demand renegotiation of the terms of this Agreement. Such notice shall specify the changes desired. The parties shall promptly negotiate in good faith with one another with respect to such changes. If the parties are unable to agree with respect thereto within ninety (90) days following such notice, then the party demanding renegotiation may elect to terminate this Agreement, by so notifying the other party. Provided that: the decision of either party to renew this Agreement (or not to do so) shall be in such party's sole discretion and neither party shall have the right to challenge that decision. The notifying party shall be responsible for

obtaining any necessary regulatory approvals for the abandonment and/or discontinuance of common carrier operations over the Facilities by CRS, but the other party shall cooperate with the notifying party in this effort. Such a termination shall be effective as soon as necessary regulatory approvals have been obtained or as soon thereafter as possible.

If this Agreement is terminated pursuant to this subsection, SPA will require any successor rail carrier operating over MCRI Facilities to take applications from, interview, and employ acceptable employees of CRS, provided that such successor carrier shall determine in its sole discretion the acceptability for employment of these employees.

(b) Default. Either party may terminate this Agreement upon thirty (30) days' notice if the other party is in default of a material obligation or covenant under this lease agreement, and remains in default thereof for thirty (30) days following notice and demand by the non-defaulting party that the default be cured. In the event of such termination, the parties shall cooperate in obtaining any necessary regulatory approvals for CRS's abandonment and/or discontinuance of common carrier railroad operations over MCRI Facilities and the transfer of such operations to a Designated Operator. The party in default shall bear all costs resulting from termination of the Agreement, including the costs of obtaining regulatory approvals for which the parties or either of them may be responsible.

(c) In the event CRS ceases performance or without justification fails to provide service commensurate with the reasonable needs of its customers, then SPA shall give CRS written notice of such non-performance or failure, and in the case of a failure to provide satisfactory performance, the reason therefore, and CRS shall be allowed thirty (30) days thereafter to begin performance or render it satisfactory. Should performance by CRS remain unsatisfactory without justification after said thirty (30) day period, SPA shall be entitled without

diminution of any and all other legal remedies available to it, to terminate this Agreement for reasons of such default, subject to any necessary regulatory approvals.

(d) In the event CRS files, or has filed against it, any petition or action for relief under any creditor's law (including bankruptcy, reorganization, or similar actions), either in state or federal court, or becomes insolvent, or makes any transfer in fraud of creditors, or has a receiver appointed for its assets, or makes an assignment for the benefit of creditors, this Agreement shall terminate immediately, subject to any necessary regulatory approvals.

(e) In the event this Agreement is terminated as provided in subsection (d) of this Section, such termination shall be treated as a termination for default, and CRS shall be liable for the payment to SPA specified in subsection (d) of Section 5, depending upon the date of termination.

SECTION 17. INSURANCE

CRS shall purchase and maintain such insurance as will protect it from the claims described below which may arise out of or result from the performance of rail transportation services hereunder by CRS, or by any subcontractor or by anyone directly or indirectly employed by CRS, or by anyone for whose acts it may be liable:

(a) Claims under Federal Employers Liability Act (FELA), disability benefit laws and any other employee benefit acts or laws applicable to CRS in the performance of its services;

(b) Claims for damages because of bodily injury, occupational sickness or disease, or death of its employees;

(c) Claims for damages because of bodily injury or death of any person other than its employees;

(d) Claims for damages insured by usual personal injury liability coverage which are sustained by any person as a result of an offense directly related to the employment of such person by CRS;

(e) Claims for damages because of injury to or destruction of tangible property of SPA or any third party, including loss of use resulting therefrom due to the negligence of any employee of CRS;

(f) Comprehensive Railroad Liability Insurance (including coverage for railroad operations and loss of use) shall be maintained in the combined limit of at least two million dollars (\$2,000,000.00). Such coverage shall also include (a) liability for damage to or destruction of property of others in CRS's care, custody or control, including that of SPA and (b) Broad Form Contractual Liability Coverage providing insurance as to the liability of CRS to SPA. Comprehensive Automobile Liability (including owned, nonowned and hired or rented vehicles) policies shall be maintained at combined single limit of five hundred thousand dollars (\$500,000.00) for bodily injury and property damage. FELA, and occupational disease insurance in statutory limits will be carried to comply with the laws of the State of North Carolina and other federal or state laws applicable to the employment of any of CRS's employees. Employer's liability insurance will be carried with a minimum limit of one hundred thousand dollars (\$100,000.00).

All of the insurance specified in this section shall be obtained from an insurance carrier or carriers authorized to do business in the State of North Carolina and satisfactory to SPA. The certificates of insurance required to be maintained by CRS shall be filed with SPA prior to commencing any services hereunder. Such policies shall provide that such insurance is not subject to change or cancellation until after thirty (30) days' written notice has been given to

SPA. SPA shall be listed as additional named insured under such policies. CRS shall maintain any other insurance required by federal or state law. CRS's full compliance with the provisions of this section shall be a condition precedent to its provision of rail transportation services under this Agreement.

SECTION 18. LABOR WARRANTY

Unless otherwise agreed, CRS shall continue to furnish services to its customers during any pending dispute between the parties regarding their respective rights and obligations hereunder. CRS also warrants that it will exercise reasonable diligence to furnish services hereunder during any labor dispute, strike or work stoppage with or by its employees and that CRS will take all action, including court action, reasonably necessary to prevent or terminate such service disruptions.

SECTION 19. ARBITRATION

Any irreconcilable dispute arising among between the parties with respect to this Agreement shall be submitted for binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association. The decision of the arbitrator shall be final and conclusive upon the parties hereto. Each party shall pay the compensation, costs, fees and expenses of its own witnesses, experts and counsel. The compensations, costs and expense of the arbitrator, if any, shall be borne equally by the parties hereto. The arbitrator shall not have the power to award consequential or punitive damages or to determine violations of criminal laws. Pending the award of the arbitrator, there shall be no interruption in the transaction of business under this Agreement, and all payments in respect thereto shall be made in the same manner as prior to the arising of the dispute until the matter in dispute shall have been fully

determined by arbitration, and thereupon such payment or restitution shall be made as required by the decision or award of the arbitrator.

SECTION 20. INSPECTION OF RECORDS

Each party to this Agreement shall have the right to inspect the books and records of the other party insofar as necessary to verify that the other party is properly carrying out its obligations under this Agreement. Such inspection shall be on reasonable notice and at reasonable times and locations; and each party may impose reasonable conditions on such inspection to protect confidential business information from needless disclosure, so long as such conditions do not prevent the inspecting party from obtaining the necessary information and verification. Each party shall retain all books and records that might be subject to inspection hereunder for at least three (3) years following the end of the month to which they relate.

SECTION 21. EMPLOYMENT

(a) CRS shall furnish and be responsible for all its personnel needs in order to fulfill its duties and responsibilities under this Agreement. All personnel so employed in providing services, including the entire work force up to and including all members of management, or other persons in general charge of the Facilities, shall be employed by CRS, and shall be and remain at all times the employees of CRS, and not the employees of SPA. CRS shall locate, recruit, select, hire and train all of its necessary personnel and shall supervise, direct and control such personnel.

(b) CRS will pay, and be solely responsible for, all wages, fringe benefits, employee benefits, unemployment, worker's compensation (including Railroad Retirement), Social Security and other charges, taxes, levies, or premiums regarding any such employees.

(c) Notwithstanding any other provision of this Agreement, all such personnel employed by CRS shall be solely CRS's employees, subject to CRS's exclusive direction and control, and SPA shall not have any right to exercise direction of, control over, employ or be responsible for, any such personnel.

SECTION 22. SUCCESSORS AND ASSIGNS

This Agreement shall insure to the benefit of and be binding upon the successors and assigns of the parties hereto; provided, however, CRS shall not transfer or assign this Agreement, or any of its rights, interests or obligations hereunder, or its Easement or any of its rights, interests or obligations thereunder, to any person, firm, or corporation without obtaining the prior consent of SPA, which consent may be withheld by SPA in its reasonable discretion. CRS covenants and agrees, however, to transfer and assign its Easement and any of its rights, interests or obligations thereunder to SPA's Designated Operator upon expiration or termination of this Agreement.

SECTION 23. NOTICES

Any notice required or permitted to be given by any one party to any other party under this Agreement shall be given to all parties to the Agreement and shall be deemed given on the date received by certified mail, or by such other means as shall provide equivalent proof of service, and shall be addressed as follows:

If to CRS: 100 Terminal Road
State Port
Morehead City, NC 28557
Attn: Paul Meyer

If to SPA: 2202 Burnett Blvd
Wilmington, NC 28401
Attn: Jeff L. Strader

Any party may provide changes in the above addresses to the other parties by personal service or U.S. mail.

SECTION 24. GENERAL PROVISIONS

(a) This Agreement and each and every provision hereof is for the exclusive benefit of the parties hereto and not for the benefit of any third party. Nothing herein contained shall be taken as creating or increasing any right of any third party to recover by way of damages or otherwise against any of the parties hereto.

(b) This Agreement contains the entire understanding of the parties hereto and supersedes any and all oral understandings among the parties.

(c) No term or provision of this Agreement may be changed, waived, discharged or terminated except by an instrument in writing and signed by all parties to this Agreement.

(d) All words, terms and phrases used in this Agreement shall be construed in accordance with the generally applicable definition or meaning of such words, terms and phrases in the railroad industry.

(e) All section headings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.

(f) This Agreement is the result of mutual negotiations of the parties hereto, neither of whom shall be considered the drafter for purposes of contract construction.

(g) This Agreement shall be governed by and construed in accordance with the laws of the State of North Carolina.

SECTION 25. REGULATORY APPROVAL

The parties acknowledge that this Agreement requires or may require Surface Transportation Board ("STB") approval and shall cooperate in obtaining such approval in a timely fashion. The parties also acknowledge that transfer and assignment of CRS's Easement to SPA's Designated Operator may require STB approval. The parties shall cooperate, to the extent necessary, to obtain such approval in a timely fashion.

SECTION 26. CANCELLATION OF LEASE

The Lease Agreement dated as of September 15, 1986 is hereby cancelled, the same being superceded by this Agreement and the Easement.

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

WITNESS: CAROLINA RAIL SERVICE, LLC

By: _____
President

WITNESS: NORTH CAROLINA STATE PORTS AUTHORITY

By: _____
Executive Director

APPROVED AS TO FORM:

Dennis P. Myers, Assistant Atty. General

* SB 1115 contains a provision which makes the transfer of PRC's assets and liabilities to SPA contingent upon there being issued an opinion by the North Carolina Attorney General that such transfer will not subject SPA to the provisions of the Railway Labor Act. If that opinion is not issued within the time provided, then SB 1115 will not become law. Should that occur, and should SB 1115 not become law, then this RAIL OPERATING AGREEMENT shall be null and void.

CERTIFICATE OF SERVICE

I hereby certify that I have on this 1st day of October, 2002, served copies of this Verified Notice of Exemption AND Motion to Dismiss by regular mail, postage pre-paid, on the following parties:

Apex Oil
P.O. Box 3127
Wilmington, NC 28406
Attn: John Joyner,
Terminal Manager

Boke Trading
810 Sunnyvale Drive
Wilmington, NC 28412
Attn: Robert Alston

Cape Fear Bonded
P.O. Box 292
Wilmington, NC 28402
Attn: William Stanfield

Cape Fear Bulk
2217 Jump'in Run
Wilmington, NC 28403
Attn: Eric Higgins

Carolina Rail Service
100 Terminal Road
State Port
Morehead City, NC 28557

CSX Transportation
P.O. Box 44057
Jacksonville, FL 32231
Attn: Director - Operations

Colonial Terminals, Inc.
Cape Fear Terminal
1002 South Front Street
Wilmington, NC 28401
Attn: Ronald G. Hart,
Terminal Manager

Flint Hills Resources
P.O. Box 3958
Wilmington, NC 28406
Attn: Cliff Ruark,
Terminal Manager

International Longshoreman's
Association, AFL-CIO
c/o Gleason & Mathews, P.C.
26 Broadway, 17th Floor
New York, NY 10004-1864

Nooter/Eriksen
1509 Ocello Drive
Fenton, MO 63026
Attn: Leo Deterding,
Mgr. of Transportation

Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510-2191
Attn: Dr. Robert Martinez,
VP Ports & Development

North Carolina Department of
Transportation
1501 Mail Service Center
Raleigh, NC 27699-1501
Attn: David King,
Deputy Secretary, Transit

North Carolina Ports Railway
Commission
Attn: William Kincheloe, Chairman
516 Paul Street
PO Box 671
Rocky Mount, NC 27802

PCS Phosphate
PO Box 48
Aurora, NC 27806
Attn: Keith Thornton, General Manager

Rescar Companies
3333 River Road
Wilmington, NC 28412
Attn: Rex Greer

S&R Packing and Crating
P.O. Box 2551
Wilmington, NC 28402
Attn: Steve Thompson

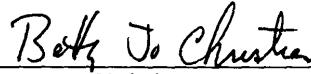
South Wilmington Terminal Exxon
P.O. Box 1350
Wilmington, NC 28402
Attn: Mike Mayhugh,
Terminal Manager

Touchstone Shipping and Logistics, Inc.
17350 S.H. 249, Suite 320
Houston, TX 77064
Attn: Lynn Stewart

U.S. Army Military Ocean Terminal
6280 Sunny Point Road
Southport, NC 28461
Attn: Brenda Hewett

Vopak Terminal Wilmington, Inc.
P.O. Box 896
Wilmington, NC 28402
Attn: Al Smeilus,
Terminal Manager

Wilmington Terminal Railroad
1717 Woodbine Street
Wilmington, NC 28401
Attn: Billy Tucker


Betty Jo Christian *KPD*