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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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Finance Docket No. 36463

THE LOUISVILLE AND JEFFERSON COUNTY RIVERPORT AUTHORITY -
VERIFIED PETITION FOR DECLARATORY ORDER

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Petitioner, The Louisville and Jefferson County Riverport Authority, d/b/a Louisville Riverport Authority ("LRA"), hereby respectfully petitions the Surface Transportation Board ("STB" or "Board") for a declaratory order to eliminate uncertainty pursuant to its authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, finding (1) the New Albany Main Street Properties, LLC, which does business as the Port of Louisville ("Lessee"), has been improperly operating on rail lines in and around this port (that are described in more detail herein) without the required authorization from the STB, (2) the Lessee should cease rail operations immediately on said rail lines, and (3) LRA can seek authority from the STB to have another railroad operate on said rail lines.

THE PARTIES AND PORT FACILITY

Since 2009, the Lessee has been a party to a Port Facility Lease ("Lease") with the LRA. (A copy of the Lease is attached hereto as Exhibit A.) Pursuant to this Lease, LRA leases its public port facility located between Miles 618 and 622 on the Ohio River in Louisville, Kentucky ("Port Facility") to Lessee. The Port Facility consists of approximately 300 acres of land. (These facilities are set forth in a map attached as Exhibit A to the Lease.)

The Port Facility includes the coal dock, the barge fleeting area, the bulk commodity transfer terminal and all real estate owned or leased by LRA, **railroad track/loop and related assets and rights**, the ground storage area, loading and unloading facilities, general cargo dock, **the locomotive**, and the Cat 980 G End Loader and all existing equipment and fixtures. (Lease Section I, A). The term of this Lease runs from August 19, 2016 to August 31, 2021 and can be renewed thereafter.

LRA is a public entity with an appointed citizen board having authority to operate pursuant to KRS §§ 65.510 to 65.650. LRA is a body politic and corporate with the usual corporate attributes, and in its corporate may sue and be sued, contract and be contracted with and do all things to effectively carry out the powers and duties prescribed in these Kentucky statutes. LRA may exercise all powers granted to governmental agencies by KRS 58.010 to 58.140. LRA may exercise all powers, consistent with its powers and duties stated in these statutes, granted by KRS 273.171 to corporations governed by KRS 273.161 to 273.390. It has such powers as may be necessary to promote and develop the Port Facility to attract industrial or commercial operations to the property. It may establish reasonable rates, charges, and fees for the use of the Port Facility and may do so by contract with commercial vendors. It also may acquire any real or personal property necessary for establishing, developing, operating, or expanding the Port Facility. It also operates a Foreign-Trade Zone under 19 U.S.C. § 81.

The railroad infrastructure referenced in the Lease is located on and around the Port Facility property. (Maps of the rail infrastructure including the double-loop track are attached hereto as Exhibit B.) The LRA owns the real property, the rail infrastructure, the overhead gantry crane, the locomotive, and some small pneumatic tire equipment that is included as part of the Lease.

LRA has over 100 companies located on the Port Facility primarily engaged in manufacturing or logistics and distribution, including Kentucky Trailer, Dynacraft, Algood Food, and Coca-Cola Consolidated. As noted, LRA is also a Foreign-Trade Zone with financial incentives for importers and exporters of raw materials, semi-finished and finished goods. LRA has developed over 2,000 acres of land used for industrial and commercial development.

The LRA bulk commodity terminal transfers dry bulk commodities such as coal, grain, fertilizer, and potash, from and to multiple modes of transport, including barge, rail and truck. The facility incorporates a 3.48-mile double-loop track with 120-car unit train capability; dumper vault building with track-mounted rail car indexer for receiving bulk cargo; overhead conveyor system for transferring cargo to barges or to ground storage; variable speed blending system; and a marine facility for loading barges. Two barge fleeting areas each accommodate a 30-barge tow.

The LRA transfer terminal is designed to handle more than four million tons of dry bulk commodities a year working at the rate of 2,000 tons an hour. An entire 120-car train can be off-loaded in an eight-hour shift. The multi-purpose general cargo dock handles loading and unloading of materials such as lumber, steel, and containerized freight, as well as bulk commodities utilizing truck transportation. The general-cargo dock features truck-to-barge and barge-to-truck off-loading capabilities via a 30-ton overhead crane. The crane completes each cycle of transfer from barge to truck and return in less than two minutes. On-site warehousing is available.

Pursuant to the Lease (Section III, A, 1), Lessee must manage and conduct the business of the Port Facility. Most importantly to this proceeding, as noted, Lessee is clearly responsible for the various rail lines on and around the Port Facility under Section I, A of the Lease. (See Exhibit B attached hereto for a map of these railroad tracks subject to the Lease.) LRA has

entered into railroad operating agreements with CSX Transportation (“CSX”), Norfolk Southern Railroad (“NS”), and Paducah and Louisville Railroad (“PAL”) to operate on these rail lines to serve the customers at the Port Facility as noted in Section I, D of the Lease. Lessee is required pursuant to Section III, A, 9 of the Lease to conduct its operations in a way that does not interfere with these rail operations provided by these three railroads. This responsibility set forth in this Lease Section includes maintenance of all of this track and the bridges from the CSX main line to the Norfolk Southern main line and the loop track.

In addition to these rail maintenance duties, Lessee must provide railroad switching services to move goods through the Port Facility and its rail infrastructure. (Lease Section V, A, 7). It also must load and unload cargo to and from storage, barges, trucks, and railroad cars required in the operation of the Port Facility. (Lease Section V, A, 4). Moreover, it must operate the conveyors and other transfer equipment, including the movement of rail cars between the dump site and storage tracks. (Lease Section V, A, 6). The Lease (Section III, A, 9) does permit Lessee to contract with a third-party short line railroad to conduct these required rail duties at the Port Facility, but Lessee has chosen to take on this rail responsibility to operate on these rail tracks since the Lease was in effect.

LRA pays to Lessee all maintenance charges for shipments to the Port Facility received from each of the three railroads that operate on the LRA tracks pursuant to the operating agreements with them. LRA also pays to Lessee 1/3 of all car charges it receives from the three railroads for shipments to industries located in the Port Facility. (Lease Section IV, G).

THE PRESENT DISPUTE BETWEEN LRA AND LESSEE

While the Lease between the LRA and Lessee has been revised at least once since 2009, the terms regarding Lessee’s obligation to “...conduct and manage its business and operations in

a reasonable, prudent and business-like manner, in accordance with customary industry standards, utilizing Lessee's reasonable best efforts, skills and experience and **in compliance with all federal, state and local laws, statutes, ordinances and regulations** including Riverport's Declaration of Restrictions" has remained consistent in both versions of the Lease. (Lease Section III, A, 1 (emphasis added)). In other words, as noted, the Lessee has had the undeniable obligation to conduct rail operations, including maintenance, in and around the Port Facility pursuant to the Lease, which includes active rail lines subject to the authority of the Surface Transportation Board as described in more detail herein.

Moreover, Lessee also has the obligation to operate other transportation/logistics infrastructure owned by the LRA as a compliment to the rail operations, including the dry bulk material marine terminal on the Ohio River featuring a 30-ton, high speed overhead gantry crane. Additional infrastructure that Lessee is responsible for includes roads, buildings and "laydown" areas for bulk customer products located within a double-loop rail track.

Lessee Has Completely Failed to Abide by FRA Safety Regulations and Has Stated It Will Not Do So in the Future.

While the LRA has oversight of its property, the Lessee is required by the Lease to meet its requirements as described above (regarding compliance with federal laws) in operating the Port Facility as a "railroad carrier" subject to the jurisdiction of the Federal Railroad Administration ("FRA"). (See Lease Section III, A, 1)

Until 6 months ago, the LRA did not have any railroad employees on its staff and relied on Lessee to operate its rail operations in accordance with federal law pursuant to the Lease. Upon noticing the general degradation of the overall property and infrastructure, the LRA added a staff member with considerable experience in the rail logistics industry to provide oversight and to assist in developing logistics business for LRA. Under this new staff member, the LRA

designed and shared with the Lessee a Three-Part Plan for working together to create and implement a strategic plan for calculated growth.

Phase I of this plan involves an “evaluation” of the condition of the Port Facility, physically, regulatorily, and administratively, with the intent of determining work that must be done to implement an aggressive business development plan. It was during the first weeks of this Phase that rail conditions and operations were observed that caused the LRA serious concerns regarding the Lessee’s compliance with Occupational Safety and Health Administration and FRA regulations. LRA made numerous inquiries of the Lessee to provide current and historic documentation regarding safety inspections, training, and incident reporting, as required by the FRA, and were met with little to no response that provided any clarity as to compliance with FRA regulations. Similarly, questions and observations regarding operating procedures for the rail operation on LRA’s rail tracks that includes 4 different railroads yielded no clarity or even evidence that such procedures existed. During an inspection of the entire loop track infrastructure, LRA staff found rudimentary infrastructure that had been built without proper clearance from the inner rail curve:



Further investigation revealed that an independent lessee of the LRA, Universal Minerals, had built this crude transload ramp to load railcars with bulk aggregate materials. Upon learning of this rail-loading ramp, LRA staff believed the operation would be noncompliant with FRA's safety regulations. Continued efforts to have the Lessee clarify this concern about compliance with federal safety regulations proved fruitless, leading LRA staff to inquire with another company located at the facility about whether or not the Lessee had ever switched rail cars at their independent facility on the mainline that runs through and outside the Port Facility. ELG Metals confirmed that the Lessee had utilized its employees and locomotive to switch cars in and out of its facility located on the mainline track. In addition, Lessee has moved cars for Russtech to this company's facility located on the mainline and spotted them for CSX. Moreover, LRA is aware that Lessee has served other customers by rail on the mainline. LRA staff requested any procedural documentation regarding how the Lessee managed and participated in operating procedures with the other participating railroads. At this time, LRA learned that there were no formal operating procedures and no written rules for how Lessee was to communicate with the other rail operators in LRA's rail area.

On or around July 6, 2020, a serious rail safety incident was brought to the attention of the LRA staff. The image below shows a severely damaged door on property owned by the LRA and leased to the Lessee. The "Shaker House" building is used by the Lessee to store the locomotive and features rolling doors on both sides with track running through the middle. Inquiries made to the Lessee about the incident revealed that the locomotive was not properly secured by Lessee's employees and "rolled through the door". LRA inquired of the Lessee whether required protocol had been followed in accordance with FRA regulations for an accident

of this nature. Lessee simply responded: “No one hurt, etc. We are looking to get the door fixed. No further action is needed.” (A copy of the email exchange between LRA and Lessee is attached hereto as Exhibit C).



As a consequence of this lackadaisical attitude regarding safety requirements, LRA reached out to the FRA for assistance in getting clarity regarding regulatory jurisdiction. LRA began having discussions with FRA about LRA’s significant safety concerns and provided FRA the following information:

- Copies of Operating Agreements with NS, CSX, and PAL.
- A copy of the Lease between the LRA and the Lessee showing the contractual responsibility for maintenance of and operations on the rail infrastructure.

-Pictures and emails showing secondary switching services being provided using Lessee employees and the leased locomotive.

Communications continued for several weeks and resulted in multiple visits by FRA inspectors. The FRA General Counsel's office was provided information regarding the rail operations in and around the Port Facility. On August 17, 2020, Mr. Kizer of LRA received an electronic letter from Veronica Chittim, FRA Attorney, Office of Safety Law, stating that the FRA had made the determination that operations being conducted by the Lessee were a part of the general railroad system, which means these rail operations are subject to the jurisdiction of the FRA. The complete electronic letter follows:

Mr. Tim W. Kizer

Vice President, Riverport Operations and Strategic Growth

Louisville Riverport Authority

tim.kizer@louisvilleriverport.com

Via Email Only

Good morning:

Mr. Jim Cassatt, Federal Railroad Administration (FRA) District 2 Chief Inspector/Operating Practices Railroad Safety Specialist, informed me that the Louisville Riverport Authority (LRA) was seeking clarification regarding FRA's safety jurisdiction over the rail operations of its contractor, New Albany Main Street Properties, LLC (d/b/a Port of Louisville) (LORJ), in Louisville, Kentucky. Based upon the facts provided by

FRA District 2 personnel, FRA has determined that LORJ is a railroad carrier that operates on the general railroad system of transportation (general system). As a result, LORJ's rail operations at LRA, Louisville, KY, are subject to FRA's safety jurisdiction.

A "railroad carrier" is defined as a person providing railroad transportation. See 49 U.S.C. 20102(3). The term "railroad" is defined broadly to include any form of nonhighway ground transportation that runs on rails or electromagnetic guideways. See 49 U.S.C. 20102(2). The lone exception is for certain rapid transit operations and that exception does not apply in the instant situation. See id. As the delegate of the Secretary of Transportation, FRA exercises jurisdiction over any railroad operating on the general system, which is defined as "the network of standard gage track over which goods may be transported throughout the nation." 49 CFR 1.89; Appendix A to 49 CFR Part 209. FRA has jurisdiction over "every area of railroad safety." 49 U.S.C. 20103.

Although FRA's statutory jurisdiction extends to all railroad carriers, FRA has chosen, as a matter of policy, not to impose its regulations on certain categories of rail operations. As stated in Appendix A to Part 209, FRA's regulations exclude from their reach railroads whose entire operations are confined to an industrial installation that is not part of the general system – plant railroads. Traditional examples of such operations are industrial railroads, which operate at plants that are not part of the general system and that do not operate beyond the plants' boundaries. Such rail operations move only within the confines of the industrial installation, or on immediately adjacent leased track. Moreover, such rail operations are either moving (1) rail cars delivered to the industry so that their contents can be used by that industry, or (2) rail cars containing

commodities or goods being shipped by that industry. See Appendix A to 49 CFR Part 209 and e.g., 49 CFR § 213.3(b).

FRA has previously determined that when an entity operates a locomotive to switch rail cars in service for other entities, rather than for its own purposes or industrial processes, the services become public in nature. Such public services represent the interchange of goods, which characterizes operation on the general system. Indeed, FRA's Policy Statement provides that "operations by the plant railroad indicating it [i]s moving cars on . . . trackage for other than its own purposes (e.g., moving cars to neighboring industries for hire)" brings plant track into the general system. Appendix A to 49 CFR Part 209; see also 49 CFR § 213.3(b). Consequently, FRA maintains that a railroad that serves entities other than itself cannot be considered a plant railroad excepted from FRA's safety jurisdiction. It is operating on the general system and therefore is a general system railroad subject to FRA's jurisdiction. See Appendix A to 49 CFR Part 209.

Based upon the information that was provided, we understand that LORJ moves rail cars for multiple customers on approximately 13 miles of track. These customers include: DHL, Lastique, Lineage Logistics, Misa Metal Processing, Russtech, HTSI, Southern States, ELG Metals, Universal Minerals, and United States Gypsum. Norfolk Southern Railway (NS), CSX Transportation (CSX), and the Paducah and Louisville Railway (PAL) service these customers. NS and CSX service the customers twice a week and operate between 2 and 3 miles with joint operations on LRA property. The PAL services the customers as needed and operate on 7 miles on the LRA property, with

joint operations with LORJ. LORJ has 9 employees and uses the LRA locomotive for these rail operations. LORJ is responsible for maintenance on the LRA property.

Because LORJ moves rail cars for multiple customers, and for other than its own purposes, LORJ cannot be considered a plant railroad excepted from FRA's safety jurisdiction. As LORJ is a railroad carrier performing switching operations of rail cars in commerce, it is subject to FRA's safety laws and regulations.

Please note that if LORJ's rail operations at LRA change in any meaningful manner, FRA's determination may change as well. Finally, please be aware that FRA's determinations regarding jurisdiction are not binding, but merely advisory in nature. These determinations are an attempt to provide guidance.

Sincerely,

Veronica

Veronica Chittim

Attorney, Office of Safety Law

U.S. Department of Transportation

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Several weeks after receiving the determination letter, the FRA returned to LRA's offices to meet regarding next steps for Lessee to become a fully compliant "rail carrier"—two of the Lessee owners and a consultant called into the meeting via Zoom. During the call, the FRA stated that the LRA needed to take certain actions to comply with FRA safety jurisdiction and recommended the following:

- Make necessary filings with the Surface Transportation Board (STB) to receive authorization for the LRA to own a common carrier railroad.
- Make necessary filings with the STB to receive authorization to operate a common carrier railroad.
- Join the American Short Line and Regional Railroad Association (www.aslrra.org) for assistance in establishing a Short Line Railroad.

The Lessee then requested a Zoom call with Maria Bouvette, LRA Executive Director/President, on September 29th, purportedly to discuss next steps regarding the railroad going forward. During that call, Mr. Greg Cantrell of Lessee expressed a desire to negotiate new terms of the Lease whereby the LRA would "...reimburse the [Lessee]" for unidentified future expenses caused by the "Government Imposition" they were experiencing due to the FRA jurisdiction determination. Ms. Bouvette informed the Lessee during the call that the LRA would not be considering any form of reimbursement for his company to become compliant with the FRA and that they were simply caught operating out of compliance.

Despite receiving a copy of this email from the FRA with its clear and irrefutable guidance, Lessee still insisted that it was a "plant railroad", not subject to the regulation of the

FRA. (See attached hereto as Exhibit D October 29, 2020 Lessee letter to LRA).¹ Therefore, it will continue to operate in violation of the FRA regulations which is completely unacceptable to LRA.

Lessee Does Not Have STB Authority to Operate on the LRA Rail Lines.

Based on the FRA's guidance, LRA began to research what authority it would need from the STB to be compliant with the Interstate Commerce Act ("ICA"). Upon doing this research, LRA found it was in full compliance with STB licensing and related requirements pursuant to 49 U.S.C. § 10901 and § 11323.

On October 9, 1987, LRA and CSX filed a petition at the Interstate Commerce Commission ("ICC", predecessor to STB) seeking an exemption under 49 U.S.C. § 10505² from the requirements of 49 U.S.C. § 10901 for the proposed construction and operation of 6.7 miles of rail line into the Port Facility described herein. (See images 1 and 2 in "RP track measured" maps attached hereto as Exhibit E.) At this time, there were seven industries located in the Port Facility. Rail service already was provided from the north by a line jointly owned by the PAL and the NS.

The proposed construction included a 4.5-mile line from a CSX main line east of the Port Facility, a 2.2-mile line within the Port Facility, and construction of barge transfer facilities. This construction provided new rail access to other sections of the LRA facility and enabled CSX to serve the facility directly rather than through switching agreements with other carriers. It also enabled CSX to close its dock located in downtown Louisville. An agreement had been reached

¹ On October 27, 2020, LRA filed a forcible detainer complaint in Kentucky District Court for Jefferson County regarding Lessee's failure to comply with FRA regulations.

² Now codified at 49 U.S.C. § 10502.

between CSX and the City of Louisville for redevelopment of the dock for non-industrial uses. The barge facilities enabled shippers along the Ohio River to be served more efficiently.

This construction and operation of a line of railroad required prior ICC approval under 49 U.S.C. § 10901. However, under 49 U.S.C. § 10505, the ICC could exempt the transaction or service if it found that: (1) regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101a³; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

The ICC found that detailed scrutiny of this transaction under section 10901 was not necessary to carry out the rail transportation policy. The ICC held that no interests of shippers, or the community would be adversely affected by a grant of the exemption. To the contrary, the ICC explained that the exemption would promote the rail transportation policy by fostering increased efficiency and productivity by providing CSX with direct access to the port authority, and by providing CSX, PAL and NS with a direct means of shipping from rail cars onto barge lines. The ICC also stated that the transaction would thus foster sound economic conditions and effective competition, encourage efficient management, and ensure the development of a sound transportation system and promote coordination between rail carriers and other modes, 10101a(4),(5) and (10). The ICC noted that an exemption also reduces regulatory burdens to entry, 10101a(2).

The ICC provided that the proposed transaction was limited in scope and involved construction of a short rail line in a limited geographic area by a public agency. The ICC found that this proposal would allow more efficient and direct service. Furthermore, the ICC asserted that regulation was not necessary to protect shippers from the abuse of market power. The ICC

³ Now codified at 49 U.S.C. § 10101.

said this proposal would increase transportation options for shippers, thus introducing more competitive alternatives, meaning greater protection from abuse of market power.

In addition to this exemption for construction, the LRA and CSX sought an exemption for operation of the involved line. LRA did not plan to operate the line but relied on established carriers to provide service. CSX joined in the petition, and thus sought an exemption for its operations over the constructed line. Accordingly, a grant of this exemption included authority for CSX to operate. **However, the ICC stated that other rail carriers seeking to operate over this line must obtain approval, e.g., by filing a notice under 49 CFR 1150, Subpart D Exempt Transactions (emphasis added).**

Therefore, under 49 U.S.C. § 10505, the ICC exempted the above-described construction and operation from the prior approval requirements of 49 U.S.C. § 10901. *Louisville & Jefferson County Riverport Authority and CSX Transportation, Inc. – Construction and Operation Exemption – in Jefferson City, KY*, FD 31136 (ICC decided December 16, 1987).⁴

Prior to this transaction approved by the ICC, on August 23, 1983, the Illinois Central Gulf Railroad Company (“ICG”), now the PAL, and Southern Railway Company (“SR”), now NS, sought an exemption under 49 U.S.C. § 10505 from the prior approval requirements of 49 U.S.C. § 10901 to construct and operate extended rail lines in Jefferson County, KY. These railroads had entered into an agreement with LRA to construct and operate these tracks to serve the Port Facility. These railroads sought to build connecting track extending from “LG&E” lead track owned by them to connect with tracks already constructed by the LRA, a distance of 720 feet. These railroads also sought authority to operate and maintain tracks of the LRA, a distance

⁴ On October 29, 2020, LRA took necessary steps through Railinc to apply for a “New Roadmark” for the LRA-owned rail. LRA has been approved with the mark of “LRA”.

of 7,948 feet. No railroad at that time served the LRA area. This connecting track extended an already jointly owned industrial track. The ICC exempted this construction and operation transaction from the prior approval requirements of § 10901. *Illinois Central Gulf Railroad Company and Southern Railway Company-- Construction Exemption--Jefferson County, KY*, FD 30273 (ICC served September 19, 1983).

After these two construction transactions, in 1990, the LRA agreed to grant local trackage rights in and around the Port Facility, to SR and PAL as follows: (a) the co-exclusive right of these two railroads to operate over the Lead Track, between valuation stations 59.50 and 96.00 (approximately 3,496 feet); and (b) the nonexclusive right to operate over (1) the Joint Portion Track, between valuation stations 34.96 and 93 (approximately 5,196 feet), (2) the Onsite Line, between valuation stations 86.93 and 61.23 (approximately 5,061 feet), and (3) the Port Rail Trackage. (See images 3 and 4 in Exhibit E.) The ICC exempted these two transactions under 49 U.S.C. 10505 from the prior approval requirements of 49 U.S.C. § 11323. These trackage rights replaced SR's and ICG's rights to operate in the Riverport Complex under the agreement described above in FD 30273. *Southern Railway Company – Trackage Rights Exemption – Louisville and Jefferson County Riverport Authority*, FD 31747 (ICC decided October 31, 1990); *Paducah and Louisville Railway, Inc. – Trackage Rights Exemption – Louisville-Jefferson County Riverport Authority*, FD 31573 (ICC decided March 1, 1990).

In summary, all railroads that operate on or constructed rail track subject to the jurisdiction of the STB have received proper authority to do so in these various exemption proceedings, including LRA, CSX, NS, and PAL, except for one “railroad”, which is the Lessee. Despite operating on the above-described tracks for approximately eleven years, it has never gone to the Board for operating or trackage rights authority pursuant to the ICA. Moreover,

based on its response to LRA regarding the jurisdiction of the FRA to Lessee's rail operations, LRA is certain that Lessee has no intention of obtaining this required authority from the STB, because it somehow considers itself to be a "plant railroad", which it clearly is not because of its service to numerous shippers in and around the Port Facility.

ARGUMENT

A Declaratory Order Is Proper Here.

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321, the STB has discretionary authority to issue a declaratory order to terminate controversy or remove uncertainty. The STB has exercised broad discretion in handling such requests, considering a number of factors, including significance to the industry and ripeness of the controversy. *Delegation of Authority--Declaratory Order Proceedings*, 5 I.C.C.2d 675, 767 (1989).

First, this controversy is ripe. LRA has served a notice of default pursuant to the terms of the Lease and filed a court case in Kentucky District Court of Jefferson County, stating that Lessee has failed to comply with the Lease provision (Lease Section III, A, 1) that requires it to abide by federal law including the regulatory powers of the FRA. As noted, the Lessee responded to this notice of default by saying it does not need to comply with these FRA regulations because it is a "plant railroad". (See Exhibit D.) This unfounded position is what drove LRA to file this Petition. Assumedly, Lessee will take the same position regarding its need to comply with STB rail operating authority statutes and regulations under 49 U.S.C. § 10901 based on this same incorrect legal position that it is a "plant railroad" over which the STB has no jurisdiction. Moreover, it has failed to obtain this STB authorization to operate on the subject rail lines for the last eleven years during which it has been subject to the Lease. The STB, as discussed herein, has exclusive jurisdiction over obtaining authority to operate a rail

line; therefore, LRA felt compelled to bring this action here to ensure the rail operations in and around the Port Facility were in compliance with the STB's statutes and regulations.

Moreover, this matter would have great significance to the rail industry. If entities like the Lessee feel free to ignore the statutory requirements for operating authority by a common carrier railroad, the STB would not have the ability to monitor the rail industry as it has the exclusive jurisdiction to do in this situation. Therefore, it is crucial that these statutory requirements be protected to ensure the rail industry remains financially healthy and safe; otherwise, their significance would be greatly diminished, thereby permitting railroads to operate outside the confines of the law and improperly limiting the STB's jurisdictional powers.

Lessee Must Obtain Authority from the STB to Operate on LRA's Rail Lines.

In 1995, Congress enacted a broad Federal preemption provision, Section 10501(b), that expressly makes the Board's jurisdiction "exclusive" for all transportation by rail carriers, including the facilities and structures that are an integral part of that transportation. 49 U.S.C. § 10102(9); § 10501(b). Section 10501(b) also expressly states that "the remedies provided under this part are exclusive and preempt the remedies provided under Federal and State law." Thus, Section 10501(b) does not permit dual state and Federal regulation of railroads or activities related to rail transportation at railroad facilities. The STB has "exclusive jurisdiction over "transportation by rail carrier," 49 U.S.C. § 10501(a)(1), that is conducted over any "part of the interstate rail network," 49 U.S.C. § 10501(a)(2)(A)." *Rail-Term Corp. – Petition for Declaratory Order*, FD 35582, slip op. at 7 (STB served November 19, 2013).

Accordingly, the Board has exclusive jurisdiction over the construction and operation of rail lines that are part of the interstate rail network, pursuant to 49 U.S.C. § 10501 and § 10901.

King County, WA – Petition for Declaratory Order – Burlington Northern Railroad Company – Stampede Pass Line, et al., FD 33095, *et al.* (STB served September 25, 1996). Section 10901(a) provides that “[a] person may ... (4) in the case of a person other than a rail carrier, ... operate an extended or additional railroad line, **only if the Board issues a certificate authorizing such activity under subsection (c).**” (emphasis added).

Here, Lessee, a noncarrier, has failed to obtain authority to operate on LRA’s rail lines that are clearly part of the interstate rail network. LRA properly obtained authority to construct and operate on these rail lines from the ICC. *Louisville & Jefferson County Riverport Authority and CSX Transportation, Inc. – Construction and Operation Exemption – in Jefferson City, KY*, FD 31136. Moreover, CSX, NS, and PAL have all obtained authority to operate on LRA’s rail lines. *Id.*; *Southern Railway Company – Trackage Rights Exemption – Louisville and Jefferson County Riverport Authority*, FD 31747; *Paducah and Louisville Railway, Inc. – Trackage Rights Exemption – Louisville-Jefferson County Riverport Authority*, FD 31573. In *Louisville & Jefferson County*, the ICC stated that “other rail carriers seeking to operate over this line must obtain approval, e.g., by filing a notice under 49 CFR 1150, Subpart D Exempt Transactions.” (emphasis added).

Despite the exclusive authority of the STB over the rail lines and the unequivocal requirement that § 10901 authority is required to operate on the LRA rail lines, Lessee has not obtained this authority for eleven years. Moreover, Lessee clearly has no intention of obtaining authority in the future as it claims it is a “plant railroad” not subject to the jurisdiction of the FRA and consequently the STB. As a result, based on these cited ICC proceedings regarding these Port Facility rail lines, LRA respectfully asks the STB to declare that its authority is necessary for Lessee to operate on these rail lines and that Lessee must cease and desist from

operating on these lines immediately because it has no authority to operate on them at present. *See CSX Transportation, Inc. – Abandonment in Rocky Mount, Nash County, NC*, AB-55 (Sub-No. 562X), slip op. at 3 (STB served Dec. 30, 1999)(“The Board has long looked at the regulatory status and history of track as an indication of the appropriate regulatory classification of connected or otherwise related track.”) LRA would then obtain proper authority from the STB for a new rail carrier to operate over these rail lines in accordance with these clear and unambiguous statutory requirements.

Assumedly, Lessee Will Claim It Is a Private Railroad That Is Not Subject to STB Jurisdiction, Which Is Clearly Wrong.

The term “rail carrier” is defined as “a person providing common carrier railroad transportation for compensation.” 49 U.S.C. § 10102(5). “The agency’s jurisdiction does not extend to private rail operations (those not operated for hire).” *B. Willis, C.P.A., Inc. – Pet. for Declaratory Order*, FD 34013, slip op. at 2 (STB served Oct. 3, 2001), *pet. to reopen denied*, (July 26, 2002), *aff’d sub nom, B. Willis, C.P.A., Inc. v. STB*, 51 Fed. Appx 321 (D.C. Cir. 2002). In this decision, the STB explained:

In other words, there is a category of rail operations that falls outside the Board's statutory jurisdiction. It consists of private tracks, typically built and maintained by a shipper (or for a shipper at the shipper's expense) and operated by the shipper (or its contractor) to serve only that shipper, moving the shipper's own goods, so that there is no “holding out” to serve other shippers for compensation. Private tracks constitute a narrow, limited category of rail operations. But as long as rail track is constructed and operated in a manner that does not constitute common carriage, rail track can be built and operated in private status not subject to the Board's jurisdiction.

Id.

As discussed by the FRA above under an identical analysis, Lessee cannot possibly be found to be engaged in “private rail operations” as it claims. First, Lessee is not a rail shipper. It has no commodities to ship by rail. Second, Lessee does not only serve one shipper. Lessee serves all the shippers that are located in the Port Facility which is over one hundred shippers. Moreover, Lessee earns compensation for providing rail service to the rail shippers in the Port Facility. In other words, Lessee is clearly a “common carrier railroad” providing “transportation for compensation.” 49 U.S.C. § 10102(5). As such, it cannot provide rail transportation that is clearly part of the rail transportation network, 49 U.S.C. § 10501(a)(2), without authorization from the Board.

Assumedly, Lessee Also Will Argue That the Tracks at Issue Are Excepted Track Pursuant to 49 U.S.C. § 10906, Thereby Not Requiring STB Authorization, Which Is Incorrect.

Ancillary tracks are described in § 10906 as “spur, industrial, team, switching, or side tracks,” though these terms are not defined in the statute. There is no single test for determining whether a particular track segment is a railroad line or is instead ancillary track. Rather, the Board and the courts have adopted a case-by-case, fact-specific approach to make this determination. *See, e.g., Chicago & N.W. Transp. Co.—Aban. Exemption—in McHenry Cty., Ill.*, 3 I.C.C. 2d 366, 367-68 (1987), *rev'd on other grounds sub nom. Ill. Commerce Comm'n v. ICC*, 879 F.2d 917 (D.C. Cir. 1989).

In determining whether a particular track segment is railroad line or ancillary track, the agency and courts look primarily at the use of the track (the “use test”), and at the track's physical characteristics. *N.Y.C. Econ. Dev. Corp—Pet. for Declaratory Order*, FD 34429, slip op. at 6 (STB served July 15, 2004) (citing *Battaglia Distrib. Co. v. Burlington N. R.R.*, FD

32058 (STB served June 27, 1997)). The Board examines whether the tracks are “intended to be used to carry through trains between points of shipment and delivery,” or “are merely incidental to, and not required for, a railroad's service between points of shipment and delivery.” *Nicholson v. ICC*, 711 F.2d 364, 367 (D.C. Cir. 1983) (internal quotation marks omitted).

With respect to the use of the track at issue here, the Board has already found in the earlier cited decisions that this track is railroad mainline and not ancillary track because of the authorization provided in these proceedings. *Louisville & Jefferson County Riverport Authority and CSX Transportation, Inc. – Construction and Operation Exemption – in Jefferson City, KY*, FD 31136; *Southern Railway Company – Trackage Rights Exemption – Louisville and Jefferson County Riverport Authority*, FD 31747; *Paducah and Louisville Railway, Inc. – Trackage Rights Exemption – Louisville-Jefferson County Riverport Authority*, FD 31573; *Illinois Central Gulf Railroad Company and Southern Railway Company-- Construction Exemption--Jefferson County, KY*, FD 30273.

Pursuant to its Lease with LRA as noted, Lessee is required to maintain and operate on all of this authorized trackage to serve the numerous customers of the Port Facility. Moreover, these tracks are used to carry trains between points of shipment and delivery by Lessee. Lessee particularly uses these lines to move cars on the mainline, by serving ELG Metals, Russtech, and other shippers that are located on this track. *See Allied Erecting and Dismantling, Inc., and Allied Industrial Development Corporation – Pet. for Declaratory Order – Rail Easements in Mahoning County, OH*, FD 35316, slip op. at 7-8 (STB served Sept. 17, 2015); *Suffolk & Southern Rail Road LLC – Lease and Operation Exemption – Sills Road Realty, LLC*, FD 35036, slip op. at 4 (STB served November 16, 2007)(where purpose of track is to serve new customers, track is not viewed as ancillary); *Bulkmatic Railroad Corporation – Acquisition and Operation –*

Bulkmatic Transport Company, FD 34145, *et al.*, slip op. at 7 (STB served Nov. 19, 2002)(where evidence establishes (1) the larger purpose and effect of the transaction are to create a new railroad that will provide a competitive alternative; (2) the track of the new railroad will constitute its entire line of railroad; and (3) the new railroad will be interchanging traffic with the national rail system, section 10906 does not prevent exercise of licensing authority); *CSX Transportation, Inc.—Abandonment Exemption – in Pike County, OH*, AB-55 (Sub-No. 622X), slip op. at 2 (STB served May 5, 2003)(because the line is of a significant length, is owned and maintained by the railroad, and historically served more than one shipper, it is not industrial track); *Chicago Rail Link, L.L.C. –Lease and Operation Exemption – Union Pacific Railroad Company*, Finance Docket No. 33323, slip op. at 3 (STB served Dec. 31, 1997)(where intended use was to extend line to serve new customers, track was not “yard” or “switching” track).

Moreover, the physical characteristics of the Port Facility tracks are also consistent with the conclusion that they are mainline tracks. Several specific characteristics have been found relevant in determining whether a track is mainline or ancillary under the physical characteristics test. These characteristics may include: the length of the track, how many shippers will be served, whether it is stub-ended, whether it was built to invade another railroad's territory, whether the shipper is located at the end of the track (indicating that the sole purpose of the track is to reach that shipper's facility rather than a broader market), whether the track was constructed with light-weight rail, whether or not there is regularly scheduled service, the condition of the track, and who owns and maintains the track. *See N.Y.C. Econ. Dev. Corp—Pet. for Declaratory Order*, slip op. at 6-7.

Based on the record at hand, it is clear that the physical characteristics require a finding that this is mainline track: Lessee has used the LRA tracks to serve multiple customers; the

tracks connect to NS and PAL on one end and to CSX on the other end, and thus are not stub-ended; and Lessee is responsible for maintaining the LRA tracks.

In addition, the tracks at issue include 13 miles of rail line, which is not so short as to suggest they are ancillary. Also, the track is not constructed with light-weight rail but is made of standard-gage rail. Furthermore, the numerous shippers are not all located at the end of the track but are located at various points along the track. Finally, this track clearly permitted Lessee to operate in new territory that had not been served previously. Therefore, there can be no argument that this track is ancillary track excepted under 49 U.S.C. § 10906.⁵

CONCLUSION

Based on the foregoing discussion, LRA respectfully asks the Board to declare that Lessee is operating without authority in violation of 49 U.S.C. § 10901 and must cease and desist immediately from conducting any further rail operations on said track. LRA also respectfully asks the Board to declare that LRA can now seek authority for a new common carrier railroad to operate on said tracks in accordance with the STB's statutory requirements.

⁵ Even assuming the track is found to be ancillary somehow, the statutory exception would not apply and STB authorization is still needed, where the track would comprise the entire operations of the Lessee as in this situation. *Effingham R.R. – Pet. for Declaratory Order – Construction at Effingham, IL*, 2 S.T.B. 606 (1997), *aff'd sub nom. United Transp. Union – Ill. Legis. Bd. v. STB*, 183 F.3d 606 (7th Cir. 1999)(carrier would necessarily enter into territory that it does not already serve where track is entire operation). *See Texas Central Business Lines Corporation – Operation Exemption – MidTexas International Center*, FD 33997 (STB served Sept. 12, 2002).

/s/ Daniel Elliott
Daniel Elliott PLLC
2000 Pennsylvania Avenue NW
Suite 7000
Washington, DC 20006
(703) 863-9670

Counsel for LRA

November 18, 2020

CERTIFICATE OF SERVICE

In accordance with 49 C.F.R. § 1104.12, I hereby certify that on November 18, 2020, I served a copy of this Petition for Declaratory Order on counsel, Kenneth A. Bohnert, Conliffe, Sandmann, & Sullivan, 2000 Waterfront Plaza, 325, West Main Street, Louisville, Kentucky 40202, kbohnert@cssattorneys.com, known to represent the New Albany Main Street Properties, LLC, which does business as the Port of Louisville, by the most expedient method including email and express mail.

/s/Daniel R. Elliott

VERIFICATION

I, Tim W. Kizer, Vice President, Operations and Strategic Growth, of The Louisville and Jefferson County Riverport Authority, hereby verify under the penalty of perjury that to the best of my knowledge, the foregoing Verified Petition for Declaratory Order is true and correct. Further, I certify that I am qualified and authorized to make such verification on behalf of The Louisville and Jefferson County Riverport Authority in connection with this proceeding before the Surface Transportation Board.

Executed this 16th day of Nov, 2020



Tim W. Kizer
Vice President, Operations
and Strategic Growth, The
Louisville and Jefferson
County Riverport Authority

EXHIBIT A

MB copy

MODIFIED PORT FACILITY LEASE

THIS PORT FACILITY LEASE AGREEMENT made this 19 day of AUGUST ~~March~~, 2016 by and between (i) **THE LOUISVILLE AND JEFFERSON COUNTY RIVERPORT AUTHORITY**, a corporate body politic, with an address of 6900 Riverport Drive, Louisville, Kentucky (hereinafter referred to as "Riverport"), and (ii) **LOUISVILLE**, with an address of 101 S. Fifth Street, Suite 3650, Louisville, Kentucky 40202 (hereinafter referred to as "LESSEE").

WITNESSETH:

WHEREAS, Riverport has developed a public port facility as part of Riverport's Industrial Complex located between Miles 618 and 622 on the main stem of the Ohio River in the Cannelton Pool consisting of a coal terminal and general cargo dock (the "Port Facility") and consisting of approximately 300 acres more or less, and

WHEREAS, Riverport has agreed to lease the Port Facility to LESSEE in accordance with the terms and conditions set forth herein, and

WHEREAS, Riverport has bid the lease of the Port Facility pursuant to a Request for Proposal on 3/6/16 and following the bidding process LESSEE was the successful bidder.

NOW, THEREFORE, in consideration of the mutual promises and conditions hereafter set forth, the parties, intending to be legally bound, covenant and agree as follows:

SECTION I
DEFINITIONS

A. **PORT FACILITY.** The term Port Facility as used in this Agreement shall mean the facilities illustrated on the map attached as Exhibit A and further described on Exhibit B. Such Port Facility shall include the Coal Dock Facility, the Coal Terminal and all real estate (whether owned or leased by Riverport), riparian rights, railroad track/loop and related assets and rights, the coal storage area, loading and unloading facilities, general cargo dock, the locomotive, the Cat 980 G End Loader and all existing equipment and fixtures including but not limited to all existing related assets.

B. **PORT FACILITY AREA.** The term Port Facility Area as used in this Agreement shall mean that area on both sides of the levee shown on the map attached as Exhibit A.

C. **LEASE YEAR.** Each twelve month period during the Term of the Lease (as defined below).

D. **RAILROAD AGREEMENTS** The term "Railroad Agreements" shall mean each of those Operating Agreements between Riverport and: 1. CSX Transportation; 2. Norfolk Southern Railroad; and 3. Paducah and Louisville Railroad, copies of which have been provided to Lessee and are hereby incorporated herein by reference.

E. **CAPITAL IMPROVEMENT.** The term "Capital Improvement" shall mean any expenditure for upgrades or additions to the Port Facility which extends the useful life of the Port Facility for more than one year and costing more than \$5,000 or constitute fixtures to the real estate where the useful life can be

determined by reference to the Internal Revenue Code. The design, plans and construction of Capital Improvements must be approved by Riverport prior to the initiation of any action for improvements or additions by LESSEE, which approval shall not be unreasonably or untimely withheld, and must comply with all applicable zoning laws and regulations (including the binding elements imposed by the Louisville Metro Planning and Design Services and Riverport's Declaration of Restrictions.) LESSEE acknowledges that it has received copies of the binding elements and Declaration of Restrictions. When required, the approval of the U.S. Army Corps of Engineers, the Louisville Metro Planning and Design Services and/or other local, State or Federal agencies also shall be obtained before any action is taken for construction of improvements and/or additional facilities to be constructed at the Port Facility Area.

SECTION II

TERM OF THE AGREEMENT

A. **Initial term.** This Agreement shall continue from the date of execution of the Agreement until August 31, 2016. *21 Dec John*

B. **Renewal Terms** At the option of LESSEE, and by three months' written notice to Riverport, this Agreement may be extended for three additional five (5) year terms and a final term of four years and five months (each a "Renewal Term") unless this Agreement is otherwise earlier terminated pursuant to the terms contained herein, and further provided that LESSEE is not in default hereunder after the expiration of any applicable cure period.

C. Letter of Credit to Secure LESSEE's Obligations. In addition to its obligations hereunder and in order to secure its obligations to Riverport, LESSEE agrees that it will provide a Stand-by Letter of Credit to the Riverport in the amount of \$350,000.00. Such Stand-by Letter of Credit shall be issued from a financial institution acceptable to Riverport in its sole discretion and shall be payable upon the occurrence of any default under Section VIII (A) or the failure by LESSEE to pay any sums due hereunder within the timeframes specified in this Agreement..

SECTION III **REPRESENTATIONS, COVENANTS, AND CONDITIONS**

A. LESSEE Covenants. LESSEE represents covenants and agrees that during the term of this Agreement:

1. Management of the Port Facility. LESSEE will conduct and manage its business and operations in a reasonable, prudent and business-like manner, in accordance with customary industry standards, utilizing LESSEE's reasonable best efforts, skill and experience and in compliance with all federal, state and local laws, statutes, ordinances and regulations including Riverport's Declaration of Restrictions. In addition to the above, LESSEE agrees to work with any previous operator of the Port Facility to insure an orderly transfer of operations. Subject to the approval of Riverport, which approval shall not be unreasonably or untimely withheld, LESSEE shall have the right to subcontract any of the services to be provided upon the Port Facility Area. Under no circumstances shall Riverport be liable for any actions or inactions which result from such subcontracts.

2. Qualification to Transact Business. LESSEE is qualified to do business in the Commonwealth of Kentucky, is in good standing, and has full power and authority to enter into this Agreement.

3. Continued Public Use. The Port Facility and Port Facility Area were constructed in whole or in part with public funds and as such, will be operated as public facilities in accordance with the requirements of any applicable Federal, state and local law.

4. Reporting Requirements. LESSEE will furnish to Riverport a complete written report and analysis, containing the information listed in the attached Exhibit D, of the operations of the Port Facility each calendar quarter showing customers served and tons handled or service rendered. Each quarterly report shall be due within thirty (30) days of the end of each calendar quarter. LESSEE will also furnish on a timely basis such other information on port operations as Riverport may reasonably request. In addition, Lessee shall provide an annual report of operations containing the information listed in the attached Exhibit D at the Port Facility within ninety (90) days of each Lease Year end during the term of this Lease.

5. Non-competition. LESSEE covenants not to compete with Riverport by managing loading or unloading operations with, any other public or private port facility within 25 river miles of the Port Facility, Mile 618 on the Ohio River, nor for any operation or entity located at the Clark Maritime Center in Clark County, Indiana, except with prior written approval of Riverport. LESSEE further covenants not to use, or at its initiative, direct product through, any such public or private port facility, unless it can be demonstrated that to use, or move such product through

Riverport rather than through such other public or private port would not be commercially feasible.

6. Compliance with Laws. During the performance of its obligations hereunder, LESSEE shall provide equal employment opportunities for all qualified persons and shall not discriminate against any employee or applicant because of race, color, sex, age, national origin, or handicapping conditions and otherwise comply with all applicable federal, state and local laws affecting LESSEE, the Port Facility or any of the operations contemplated hereunder.

7. Industry Practices. Except as otherwise provided herein, LESSEE covenants to pay in accordance with the general practices of the industry all expenses and costs incurred by it in discharging its responsibilities hereunder and in operating and maintaining in good operating condition and appearance the Port Facility, including, but not limited to, wages and salaries and attendant taxes and insurance, broker's fees of any type, security personnel, security systems, utilities, supplies, equipment, insurance, costs of bonds, and rentals excepting, however, those expenses and costs which LESSEE is disputing in good faith. Riverport will not be liable or responsible for the direct payment to employees, suppliers, contractors or subcontractors of LESSEE of any costs or expenses (including demurrage or any similar charges) associated with, or arising out of, the operation of the Port Facility. LESSEE agrees to indemnify and hold the Riverport harmless from any variance, violation or alleged violation of the above-referenced obligations.

8. LESSEE Qualifications. LESSEE represents and warrants that it is qualified and experienced in the development, marketing, management,

maintenance and operation in accordance with the standards of this industry of facilities comparable to the Port Facility.

9. Railroad Agreements. LESSEE has been provided copies of the Railroad Agreements and covenants and agrees to conduct its operations in a manner consistent with, and so as not to violate or place Riverport in default under any of the Railroad Agreements. In the event that LESSEE wishes to enter into any agreements to contract with a Short Line Railroad to provide switching or any other rail or rail-related services to the Port Facility and to the industries within the Jefferson Riverport International, LESSEE shall provide notice to Riverport. Riverport shall have the right to approve such agreements, which approval shall not be unreasonably nor untimely withheld but in no event shall such agreements be or be considered to be an obligation of the Riverport. Notwithstanding the foregoing, Riverport may withhold approval of any such agreement if such agreement would in the sole discretion of Riverport increase the cost of rail shipments to the industries at or served by the Jefferson Riverport International. LESSEE will be responsible for all maintenance of the Lead track and bridges from the CSX main line to the Norfolk Southern main line and the loop track as required under the Railroad Agreements. Riverport will be responsible for maintaining the lead tracks highlighted in yellow, as shown on the drawing attached hereto as Exhibit C, which serve industries located at the Jefferson Riverport International.

10. No Hazardous Cargo. LESSEE agrees that it will not load or ship either into or out of the Port Facility any hazardous waste, hazardous materials or garbage or other consumer waste unless or until they have received the express, prior written consent of the Riverport.

B. Riverport Covenants. Riverport represents covenants and agrees that during the term of this Agreement:

1. Riverport is qualified to do business in the Commonwealth of Kentucky, is in good standing, and has the legal power, authority and right to execute and enter into this Agreement with LESSEE.

2. Riverport agrees that it will not interfere with the daily operations of the Port Facility provided that this Lease is not in default.

3. Riverport is lawfully in ownership or possession of the Port Facility and Port Facility Area, including all equipment and personal property, and has the full right, power and authority to grant to LESSEE a covenant of quiet use and enjoyment.

4. Riverport is not currently in material default of any contract; lease, permit or agreement assigned hereunder or incorporated herein which could affect LESSEE's operation of the Port Facility or Port Facility Area.

5. Riverport specifically makes no representation with regard to the condition of the Equipment listed on Exhibit B.

6. To the extent necessary for the performance of the work, Riverport shall assist LESSEE in obtaining access to electricity, water, and sanitary sewer, at Lessee's expense.

7. Except for the wetlands located on or adjacent to the Property, Riverport represents and covenants that it is not aware of any environmental liability, damage or condition present or existing at the Port Facility or Port Facility Area, which would materially impact LESSEE's ability to perform under this Agreement. To the extent that any environmental issues exist at the present time, they are not and shall

not become the responsibility of LESSEE. To the extent that environmental issues arise after the date hereof which are not pre-existing, then LESSEE shall be responsible for such environmental liability, damage or condition.

SECTION IV **PROMOTION AND DEVELOPMENT OF PORT FACILITY**

Throughout the term of this Agreement, LESSEE shall utilize its reasonable best efforts to establish and maintain an effective marketing, promotional advertising and sales campaign to promote and develop the usage of the Port Facility. In addition, LESSEE shall partner with the Riverport and/or the Louisville/Metro Government to continue development opportunities at the Port Facility.

SECTION V **SERVICE PROVIDED; MAINTENANCE** **AND REPAIR RESPONSIBILITIES**

A. Service Provided. In addition to promoting and developing the Port Facility as called for above during the term of this Agreement, LESSEE shall provide management and, terminal operating and cargo solicitation services at the Port Facility incidental to the operation of the Port Facility and Port Facility Area which shall include, but shall not be limited to, the following:

1. General supervision required for the provision of all services required for the operation of the Port Facility.
2. Except for the locomotive used to move or position rail cars, and the Cat 980 G End Loader furnished by Riverport, LESSEE will provide, either

on an owned or rented basis, all portable equipment required in the operation of the Port Facility for provision of services.

3. Provision for all cargo (including dry and liquid bulk and breakbulk) handling services for the Port Facility and provision of the personnel, equipment (except that specified as being provided by Riverport) and supplies in connection therewith.

4. Loading and unloading cargo to and from storage, barges, trucks and railroad cars required in the operation of the Port Facility with personnel, equipment and supplies supplied by LESSEE.

5. Fleeting and movement of barges between docks and fleeting areas.

6. Operation of conveyors and other transfer equipment, including movement of rail cars between dump site and storage tracks.

7. Provide railroad switching services to move goods through the Port Facility as required by good operation and in accordance with agreements between Riverport and the railroads serving the Port area.

8. Preparation and implementation of plans for fire control, hazardous material spill control and other similar emergency control and alert plans

9. Provide security for the Port Facility and for equipment and cargoes while in the Port area as required by applicable contracts or in accordance with prevailing industry practice.

B. . Maintenance and Repair. Except as otherwise agreed herein, LESSEE shall perform all required maintenance at the Port Facility and Port Facility Area. LESSEE shall at all times keep the Port Facility in a good state of maintenance and repair, and make all such repairs to the Port Facility as may be or become necessary to maintain the same in good repair and working order. All repairs shall be made in a good workmanlike manner, and shall use materials at least equal in equality to the damaged materials when new. With respect to the maintenance and repair of the Port Facility and Port Facility Area, LESSEE shall be responsible for establishing and implementing a written preventive maintenance program and a scheduled maintenance program. LESSEE will maintain records to document its compliance with such program.

SECTION VI

RENT

A. Rent Due Date. LESSEE shall pay to Riverport the amount specified below on a quarterly basis beginning four months after the execution of this Agreement.

B. Rent Amount. For each ton transferred through the Port Facility, LESSEE shall pay to the Riverport \$.25 per net ton (2,000 pounds) for the first 2 million net tons in any one year. The Rent Amount shall continue at \$.25 per net ton on all amounts above 2 million net tons in any one year until \$1,370,000 has been paid (the "Shortfall Amount") with \$.15 of the \$.25 being credited to the Shortfall Amount per ton. For example, if in a given year 4,000,000 tons were loaded through the Port, the total Rent Amount would be \$1,000,000, of which \$300,000 would be credited to the Shortfall Amount. In the event the Rent Amount in any given year is less than \$500,000, the difference between the Rent Amount

and \$500,000 shall be added to the Shortfall Amount. Once the Shortfall Amount has been paid in full, the Rent Amount will be reduced to \$.25 per ton for cargo transferred up to 2,000,000 tons per year and \$.10 per ton for all cargo transferred in excess of 2,000,000 tons for all years in which there is no Shortfall Amount remaining unpaid.

C. Minimum Annual Rent Payment. Notwithstanding the foregoing, the minimum Annual Rent Amount due under this Lease shall be the following:

09-01-15 – 08/31/16:	\$ 130,000
09-01-16 and after:	\$ 200,000

D. Adjustments to Rent. On April 1, 2017, the Rent Amount and Minimum Annual Rent Amount shall be adjusted to reflect the percentage change in the Producer's Price Index for all goods ("PPI") (the "Initial Adjustment") for the period September 1, 2008 and August 31, 2013. Thereafter on each September 1, the Rent Amount and the Minimum Annual Rent Amount shall be adjusted in accordance with the PPI (each, an "Annual Adjustment"). In no event shall the amount of any Annual Adjustment be greater than 5% from the then-prior Rent Amount or Minimum Rent Amount.

E. Timing and Place of Payments. Payments of Rent shall be made in quarterly installments within 30 days of the end of each calendar quarter. In the event that the total periodic payments of Rent for any Lease Year do not equal the Minimum Lease Payment, LESSEE shall remit payment of any shortfall of Rent within ninety (90) days of the end of each Lease Year.

F. Triple Net Lease. This is a triple net lease. LESSEE shall be responsible for the payment of any and all utilities, taxes and any other expenses

required to operate or applicable to the Port Facility or the Port Facility Area after the effective date hereof.

G. Maintenance Charges. RIVERPORT shall pay to LESSEE all Maintenance Charges paid by each railroad for shipments to the Coal Terminal to RIVERPORT under the Railroad Agreements. RIVERPORT shall pay to LESSEE 1/3 of all car charges paid to RIVERPORT under the Railroad Agreements for shipments to industries located within the Jefferson Riverport International. Such charges shall be remitted by RIVERPORT to LESSEE within thirty (30) days of receipt.

SECTION VII

LIABILITY

A. LESSEE May Not Bind Riverport. Notwithstanding anything to the contrary herein contained, neither LESSEE nor its agents shall incur, directly or indirectly, any liabilities or make any commitments, financial or otherwise, which purport to bind Riverport or any of its subsidiaries or affiliates unless such action is approved in each instance by Riverport in writing.

B. Riverport May Not Bind LESSEE. Notwithstanding anything to the contrary herein contained, neither Riverport nor its agents shall incur, directly or indirectly, any liabilities or make any commitments, financial or otherwise, which purport to bind LESSEE or any of its subsidiaries or affiliates unless such action is approved in each instance by LESSEE in writing.

SECTION VIII
DEFAULTS; TERMINATION OF AGREEMENT

A. **Termination by Riverport.** Riverport shall have the right to terminate this Agreement, if LESSEE (i) shall become in default under any material mortgage, deed of trust or lease covering the Port Facility Area to which it is a party, and such default is not cured within the grace period, if any, provided therein; or (ii) shall make a general assignment for the benefit of its creditors; or (iii) shall be adjudicated a bankrupt; or (vi) shall file a petition for voluntary bankruptcy; or (v) shall fail to make a payment due to Riverport pursuant to Section VI and such nonpayment shall continue after ten (10) days written notice from Riverport to LESSEE; or (vi) defaults in the performance or observance of any duty, covenant or condition to be performed or observed by it or otherwise agreed to hereunder and such default is not cured within twenty (20) days after written notice from Riverport to LESSEE

B. **Termination by LESSEE** LESSEE shall have the right to terminate this Agreement in the event Riverport defaults in the performance or observance of any duty, covenant or condition to be performed or observed by it hereunder, and such default materially adversely affects LESSEE. In such event LESSEE may terminate this Agreement after thirty (30) days written notice to Riverport if such default is not cured within the said thirty day period.

C. **Vacating of Premises.** Upon the expiration or other termination of this Agreement for any cause, LESSEE will immediately vacate the Port Facility and Port Facility Area and discontinue all use of Port Facility's trade names, trademarks, signs and forms of advertising and other indicia of operations on or within the Port Facility Area and shall remove the same from these areas. If

LESSEE shall fail or omit to make or cause to be made, such changes on or within the Port Facility or elsewhere, within thirty (30) business days after written notice by Riverport to LESSEE, then Riverport shall have the right to enter upon the Port Facility, the Port Facility Area or other place or related business without being deemed guilty of trespass or any other tort, and to make or cause to be made such changes at the expense of LESSEE which expense LESSEE agrees to pay on demand.

D. Removal of Personal Property. Upon the expiration or other termination of this Agreement, LESSEE shall be entitled to remove from the Port Facility (i) any movable vessels, property or equipment owned by LESSEE or leased by LESSEE from a party other than Riverport, and (ii) such other property and equipment which Riverport and LESSEE have agreed can be so removed pursuant to a separate agreement to be entered into between Riverport and LESSEE at the time such property or equipment is placed on or at the Port Facility or Port Facility Area.

E. Accounting for Capital Improvements. In the event that this Agreement terminates, except for a termination by Riverport for cause as defined above, or expires and LESSEE has made Capital Improvements which have not been fully depreciated then the Riverport and LESSEE agree to work together to ensure that LESSEE is fairly compensated for the lesser of the fair market value or the undepreciated portion of said Capital Improvements and the parties shall enter into an appraisal process which would fairly compensate LESSEE for the lesser of the fair market value or the undepreciated value of the Capital Improvements then remaining.

In the event the parties are not able to agree upon an appraisal process within twenty (20) days, each party shall select an appraiser within ten (10) days. The appraisers so selected shall then select a third appraiser within ten (10) business days. The three appraisers so selected shall meet, review all Capital Improvements made by LESSEE for which LESSEE requests accounting, and shall determine the appropriate accounting to be made between the parties. The appraisal process shall be final and binding on the parties and not subject to further review or appeal.

Notwithstanding the foregoing, in the event that any Capital Improvements are made by LESSEE at or benefitting the Port Facility but which have not been approved by the Riverport as required herein in and Paragraph IV above, then such unapproved Capital Improvements shall not be compensable by Riverport as set forth above. In addition, if LESSEE does not renew the lease at the end of any lease term, then Riverport shall not be obligated to compensate LESSEE for the amount of any Capital Improvements.

F. **No Rights Affected.** Expiration or Termination of this Agreement shall not affect rights or obligations of the respective parties accruing prior to the date of any such expiration or termination.

SECTION IX **ASSIGNMENT OF CONTRACTS; PERMITS**

A. **Contracts.** Riverport shall assign and LESSEE shall assume all existing contracts and agreements for services to be provided by and to the Port Facility or the Port Facility Area and listed in the attached Exhibit E. Riverport will

work to ensure the timely and expeditious assignment and transfer of all such agreements to LESSEE.

B. **Permits.** Riverport agrees to arrange for LESSEE to operate under any Permits required (the "Sub-Assignment") and in use for the operation of the Port Facility or Port Facility Area issued by any local, state or federal department, agency, bureau or authority having jurisdiction over the Port Facility or Port Facility Area and the operations at the Port Facility. LESSEE shall maintain any and all such permits and any such Sub-Assignment shall automatically terminate upon the expiration or termination, for whatever reason, of this Lease.

SECTION X

DEVELOPMENT OF PORT FACILITY AREA; RIGHT OF FIRST REFUSAL

A. **Establishment of Private Terminal Facilities.** Riverport reserves the right to lease land and/or contract with any private firm(s) (the "Private Operator") for the establishment of separate, private terminal facilities within the Port Facility Area to serve and to be used by such private firm(s) if the private facilities will not interfere or compete with the Port Facility as it then exists or is planned to exist and if the facilities operated by LESSEE or proposed by LESSEE do not reasonably satisfy the needs of such private firm(s). Riverport will not permit the establishment of a private terminal (other than one performing services materially different from those services customarily preformed by stevedores or terminal companies such as the services enumerated hereinabove) until it has supplied LESSEE with a written statement describing the needs of such private firm(s) and LESSEE has had forty-five (45) days from receipt of such statement in which to respond in writing setting forth its proposal for meeting such needs.

Riverport will evaluate LESSEE's proposal and, if facilities available from LESSEE or proposed by LESSEE reasonably meet the needs of such private firm(s), then Riverport will not permit a separate private terminal. Riverport will make available to LESSEE on the same terms and conditions, the same financing arrangements, if any, as it proposes to make available to the private firm(s). In the event that the Private Operator wants to develop a portion of the Port Facility Area and LESSEE is unwilling or unable to implement a development plan, then Riverport shall have the right to work with said party to implement such development plan, provided however that any new facility shall not unreasonably interfere with LESSEE's operations as set forth in this Lease.

B. **Right of First Refusal.** In the event that Riverport decides to sell the Port Facility Area or has received a bona fide offer to purchase the Port Facility Area, then LESSEE shall have a right of first refusal to purchase the Port Facility Area at either the listed price in the event of a listing or the offered price, terms and conditions of any bona fide offer. Additionally, in the event Riverport decides to lease any of the property listed in Exhibit E to a party other than the then current lessee, LESSEE shall have the right of first refusal to lease such property at the offered lease price, terms and conditions. In the event Riverport decides to lease any property listed in Exhibit E, LESSEE shall be provided with thirty (30) days notice of any proposed lease price, terms and conditions and shall accept or decline such proposed lease within said time period.

C. **Reduction in Rent.** In the event that a portion of the Port Facility Area is sold to a third party, the parties agree to review and negotiate appropriate

changes in rent to the extent that the reduction in land available to LESSEE negatively impacts LESSEE's revenue capacity.

SECTION XI
NOTICES

A. **Requirements.** Any notice required to be given pursuant to the terms of this Agreement shall be made in writing and either personally delivered or shall be transmitted by facsimile or certified mail, return receipt requested. The above specified form of notice shall be the sole method of compliance with the notice requirements of this Agreement. The effective date of any notice required pursuant to this Agreement shall be the date of receipt except as otherwise provided herein.

B. **Place of Notice.** Any notice required to be given pursuant to this Agreement shall be transmitted to respective parties at the following addresses or such other places that the parties from time to time designate in writing,

If Lessee:	Mr. Joe Tegart Port of Louisville 101 South Fifth Street Suite 3650 Louisville, Kentucky 40202
------------	--

If to Riverport:	President Louisville and Jefferson County Riverport Authority 6900 Riverport Drive Louisville, Kentucky 40258
------------------	---

SECTION XII
INSURANCE (UNDER REVIEW BY INSURANCE EXPERTS; SUBJECT TO
ADDITIONAL COMMENTS)

A. **Insurance Requirements.** LESSEE agrees to carry, maintain and continue in force at its sole expense during the term of this Agreement insurance in companies acceptable to Riverport providing coverage against risks customarily insured against by others who provide services similar to those provided by LESSEE under this agreement. Such insurance coverage shall include the following:

1. **Workers' Compensation.** Workers Compensation insurance in amounts required by the laws of the Commonwealth of Kentucky, and Longshoremen's Liability insurance as required in accordance with applicable law;

2. **General Liability.** General Liability and Automobile Liability insurance (including coverage on owned and non-owned vehicles) against claims for personal injury, death, or property damage arising out of LESSEE's performance under this Agreement, each with a combined single limit of not less than \$1,000,000 per occurrence;

3. **Marine, Wharfingers and Stevedore's Insurance.** Protection and indemnity (Marine Liability) insurance, Wharfingers Liability, coverage of not less than \$1,000,000 per occurrence. Additionally, LESSEE shall provide or require its contractor to provide Jones Act coverage as required by law; and

4. Requirements of the Railroad Agreements. The insurance required by the Railroad Agreements

5. Excess Liability. Excess Liability coverage will be provided in an amount sufficient to provide at least \$6,000,000 in insurance for claims arising from any single occurrence under any of the coverage's described in Paragraphs A2, A3, and A4 of this Section.

B. Personal Property Insurance. LESSEE will be responsible for purchasing and maintaining property damage insurance for its assets at the PortFacility and any additions thereto. Similarly, Riverport will be responsible for purchasing and maintaining property damage insurance for its assets at the Port Facility.

C. Riverport as Additional Insured. Riverport shall be named as an additional insured or loss payee as its interest may appear (as appropriate) on all of the policies of insurance stipulated in Paragraph A (excepting Paragraph A1) of this Section. Certificates of all insurance coverage required by Paragraph A of this Section shall be given to Riverport and shall include statements by the carriers that cancellation of coverage cannot occur without thirty (30) days prior written notice to Riverport.

SECTION XIII
GOVERNING LAW

This Agreement shall be constructed and interpreted pursuant to the applicable law of the Commonwealth of Kentucky and the Maritime laws of the United States where applicable.

SECTION XIV
GENERAL

A. **Complete Agreement of the Parties.** This Agreement between Riverport and LESSEE sets forth all the promises, conditions and understandings between the parties. Except as herein otherwise provide, no subsequent alteration, amendment, charge, change or addition to this Agreement shall be effective unless reduced to writing and executed by the parties.

B. **No Joint Venture.** The parties are not and shall not be considered as joint ventures or partners. Neither of the parties shall have the power to bind or obligate the other party.

C. **No Waiver.** Waiver by either party of any particular default by the other party shall not affect or impair a party's rights in respect of any subsequent default of the same or a different kind; nor shall any delay or omission by either party to exercise any right arising from any default affect or impair a party's rights as to the same or any future default.

D. **Force Majeure.** No failure or omission on the part of either Riverport or LESSEE to carry out any of the terms or conditions of this Agreement shall give rise to any claim against such party if such failure or omission arises from labor disputes, fire, floods, droughts, unusual delay in transportation, governmental action, adverse weather conditions, acts of God, acts of war, civil strife, or terrorism

or any other cause or causes beyond the reasonable control of such party. The settling of strikes or lockouts shall be entirely within the discretion of the affected party and such party shall not be required to settle strikes or lockouts by acceding to the demands of the opposing party when such course is inadvisable in the discretion of such party. The party desiring delay or excuse from performance due to conditions outlined in this clause shall give written notice to the other as promptly as may be practical under the circumstances. The party delayed by force majeure shall use reasonable diligence to correct the cause or delay. Any relief granted under the terms of this paragraph shall not extend beyond the time that is reasonably required to rectify the cause of the delay or non-performance.

E. **Governmental Impositions; Changes in Law.** If any tax or other governmental charge of any type or designation except net income taxes or their equivalent (including franchise taxes), upon any of the equipment, facilities, or services to be provided by LESSEE under this Agreement, or upon the use by LESSEE of, or for the construction, maintenance, or operation of, the Port Facility or Port Facility Area over which or through which services are to be performed, is imposed, becomes effective, or is increased at any time after the effective date of this Agreement, or if LESSEEs' operating costs are increased due to any federal, state or local, law, rule or regulation enacted after the effective date of this Agreement (hereinafter called a "Governmental Imposition"), and such Governmental Imposition makes it commercially unreasonable or impractical for LESSEE to continue to provide services hereunder, the parties agree to meet within ten (10) business days after notice by LESSEE to Riverport to negotiate appropriate changes to this Agreement. If the parties fail to reach agreement within thirty (30) days, LESSEE

shall have the right, subject in any event to the provisions of Section VIII herein, exercisable within the next thirty (30) days, to terminate this Agreement.

F. **Indemnification.** With respect to acts or omissions relating to this Agreement, Riverport shall indemnify, defend, and hold harmless LESSEE and any affiliate of LESSEE, their officers, directors, agents and employees, from and against any and all claims, demands, suits, causes of action, liabilities, damages, losses and expenses of any nature whatsoever incurred by or brought against LESSEE or an affiliated entity, or their officers, directors, agents and employees, caused by the fault or negligence of Riverport, its directors, officers, employees or agents (other than LESSEE, an affiliated corporation and their directors, officers, agents or employees), or caused jointly by the default or negligence of Riverport or its officers, directors, agents, or employees and the fault or negligence of a party other than LESSEE, any affiliated corporation, or their officers, directors, agents and employees.

With respect to acts or omissions relating to this Agreement, LESSEE shall indemnify, defend, and hold harmless Riverport, any affiliated entity, its officers, directors, agents and employees, from and against any and all claims, demands, suits, causes of action, liabilities, damages, losses and expenses of any nature whatsoever incurred by or brought against Riverport or an affiliated entity, or its directors, officers, employees or agents, or caused by the fault or negligence of LESSEE or any affiliated corporation or (other than Riverport, an affiliated entity or their directors, officers, agents and employees) their directors, officers, agents or employees and the fault or negligence of a party other than Riverport or its officers, directors, agents or employees or caused jointly by the default or negligence of LESSEE, an affiliated entity or its officers, directors,

agents, or employees and the fault of negligence of a party other than Riverport, an affiliated entity, or their officers, directors, agents and employees.

G. **Consequential Damages.** In no event shall the parties hereto be liable to the other for any indirect, incidental or consequential damages of such party for any loss, damage or failure of performance hereunder except to the extent caused by the other party's grossly negligent or willful acts or omissions.

H. **Right to Audit.** Riverport and its representatives shall have the right to inspect, audit, or examine LESSEE's books and records relating to its operation of the Port Facility, together with any other financial information referenced in Section VI, but excluding any customer agreements or other confidential contracts, at any reasonable time during normal business hours. Additionally, Riverport shall only have the right to inspect the books and records of LESSEE upon reasonable advance notice and no more often than one time per calendar quarter.

I. **Right to Inspect.** Riverport shall have the right to enter upon the Port and Port Facility Area as well as any premises where LESSEE operates pursuant to this Agreement for any purpose whatsoever, but specifically to determine that said operation and management are being conducted in accordance with requirements of the Agreement and in accordance with all applicable laws. Notwithstanding the foregoing, Riverport shall not interfere with LESSEE's operations, except where such operations are erroneous or are dangerous to persons or property. Furthermore, all Riverport personnel shall at all times comply with all safety and health rules, regulations and requirements while in, on or around the Port Facility and Port Facility Area.

J. **Time is of the Essence.** Any actions, consents, or approvals required of the parties by this Agreement shall not be unreasonably withheld. With regard to the obligations of the parties hereto, TIME SHALL BE OF THE ESSENCE.

K. **No Third-Party Beneficiaries.** Except with regard to the Railroad Agreements referenced in Section 1, Paragraph D, the provisions of this Agreement shall not create or be deemed to create any rights in or obligations to any person, firm, or corporation other than the parties hereto.

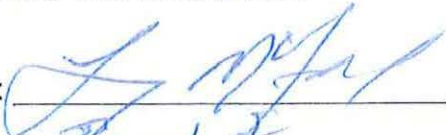
L. **Binding Effect.** Except as expressly set forth herein, this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

M. **Headings.** The headings inserted throughout this Agreement are for convenience of reference and shall not affect the construction or interpretation of this Agreement.

N. **No Assignment.** LESSEE, with prior written notice to Riverport, may assign this Agreement to a wholly owned subsidiary of LESSEE; provided, however, such an assignment shall not in any way relieve or release LESSEE from any of its duties, obligations or responsibilities under this Agreement and LESSEE shall remain fully and primarily liable and responsible to Riverport for the full and complete performance of this Agreement. LESSEE shall not be entitled to assign this agreement to any other party or entity without the express written approval of the Riverport.

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

LOUISVILLE AND JEFFERSON COUNTY
RIVERPORT AUTHORITY

By: 
Title: President

NEW ALBANY MAIN STREET PROPERTIES, LLC
D/B/A PORT OF LOUISVILLE

By: 
Title: member co-owner

EXHIBIT A

MAP OF PORT FACILITY AND PORT FACILITY AREA

EXHIBIT B

RIVERPORT OWNED PORT EQUIPMENT
AS OF JULY 1, 2012

1. General Cargo Dock

1. Marine structures - 2 cells, 5 dolphins
2. Bridge crane runway - supports for bridge crane
3. 15-Ton Hawco hydraulic bucket
4. 15-Ton Mack hydraulic bucket
5. 30-Ton bridge crane
6. Hopper
7. Two winches
8. 6-tine, 6 yard hydraulic grapple

4 miles to
I-264



Jefferson
Riverport



UTAH RIVER

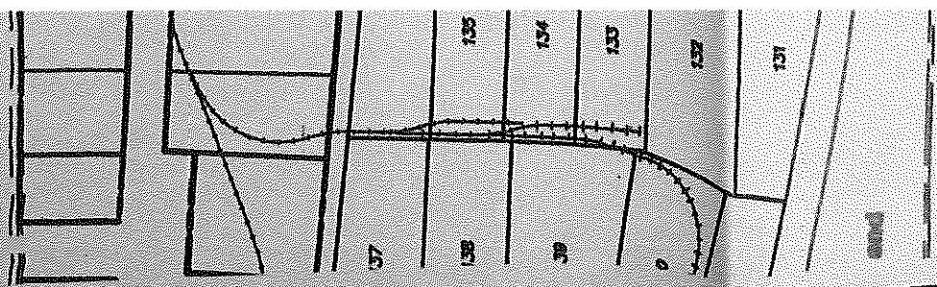


Exhibit A

EXHIBIT B

RIVERPORT OWNED PORT EQUIPMENT

A. General Cargo Dock

1. Marine structures - 2 cells, 5 dolphins
2. Bridge crane runway - supports for bridge crane
3. 15-Ton Howco Bucket and 15-Ton Mack Bucket
4. 30-Ton bridge crane
5. Hopper
6. Two winches
7. 6-tine, 6 yard hydraulic grapple

B. Bulk Commodity Terminal

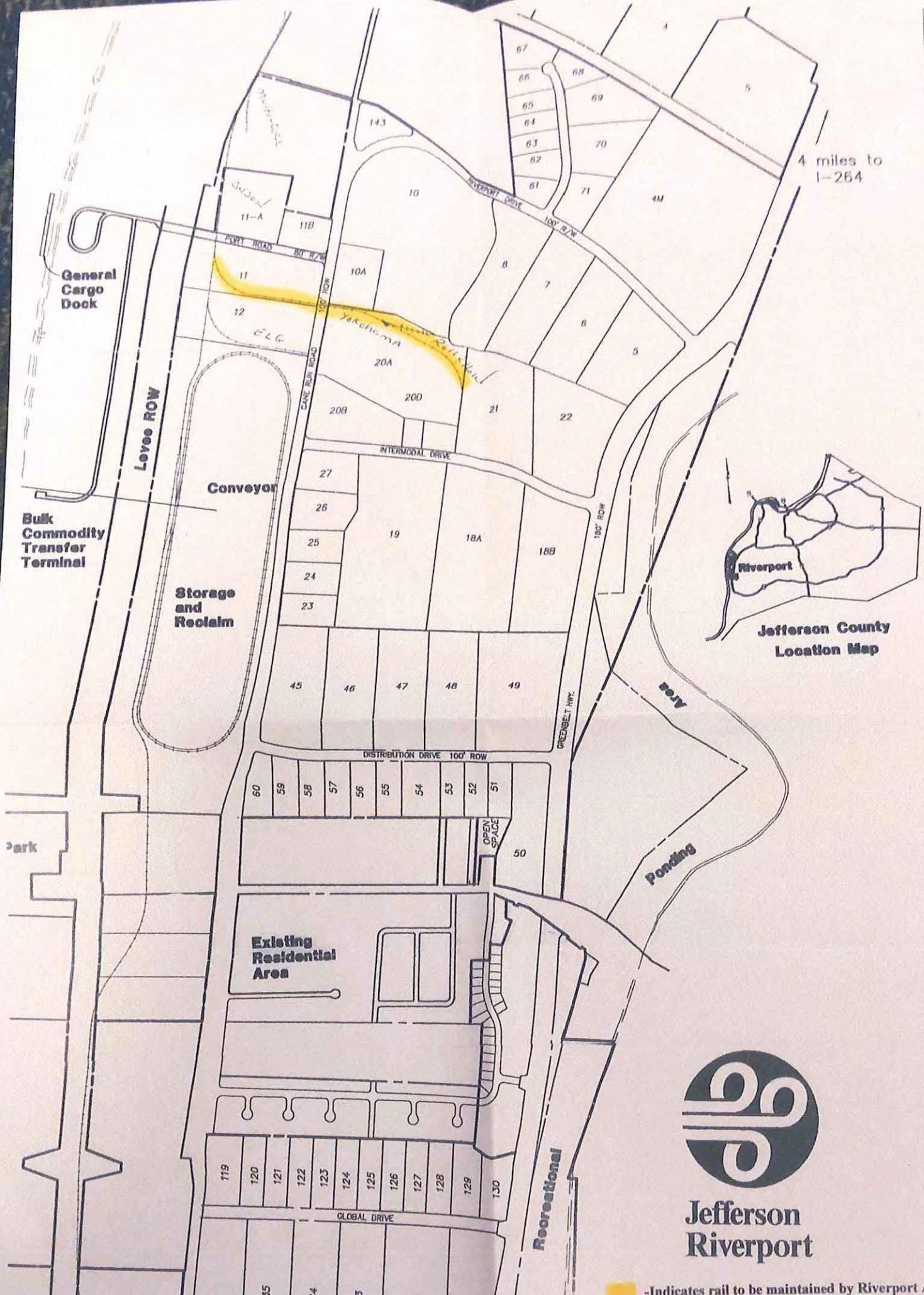
1. Dumper vault and tunnel
2. Conveyor system from pit to end of conveyor, including steel structural support and control tower including a variable height control on final section of conveyor, and a rotating telescopic loading chute.
3. Marine structures, 10 cells, 1 dolphin
4. Automatic coal sampling system with two primary sampling stations, a sample building and associated other equipment
5. Two car shakers and two hoists
6. Two barge winches

C. Ground Storage and Reclaim Facility

1. Variable-speed reversible conveyor belt interfacing with the conveyor system described in B.2 above
2. Traveling dual-wing stacker crane, including control room, with capability of off-loading coal from either or both wings at 2000 tons per hour
3. Two reclaim hoppers, designed to accept coal from front-end loaders and transfer to reclaim conveyor at 1000 tph for each hopper

D. Railroad and Associated Equipment

1. Double loop track, approximately 23,000 linear feet, designed to accommodate two 120 car trains, with appropriate crossovers and connections to south Lead Track (CSX) and North Lead Track (NS and PAL)
2. Car indexer
3. Cat 980 G End Loader



**Jefferson
Riverport**

-Indicates rail to be maintained by Riverport Authority

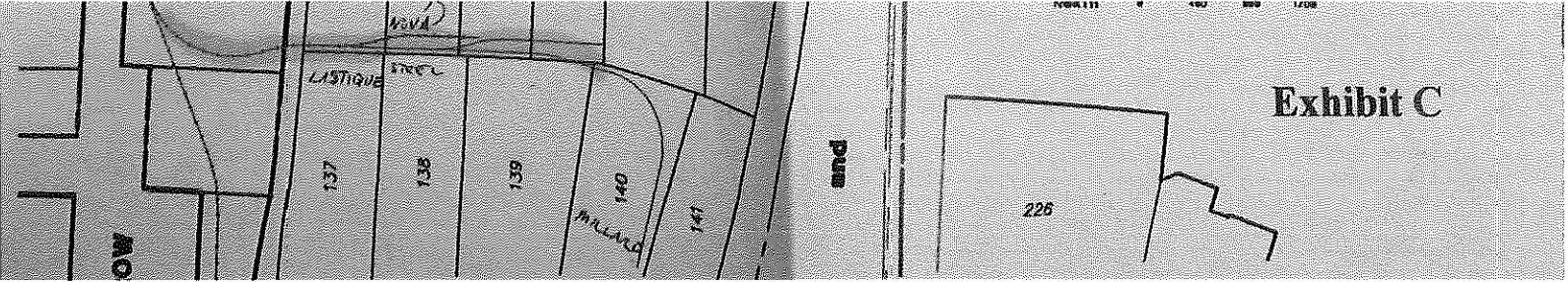
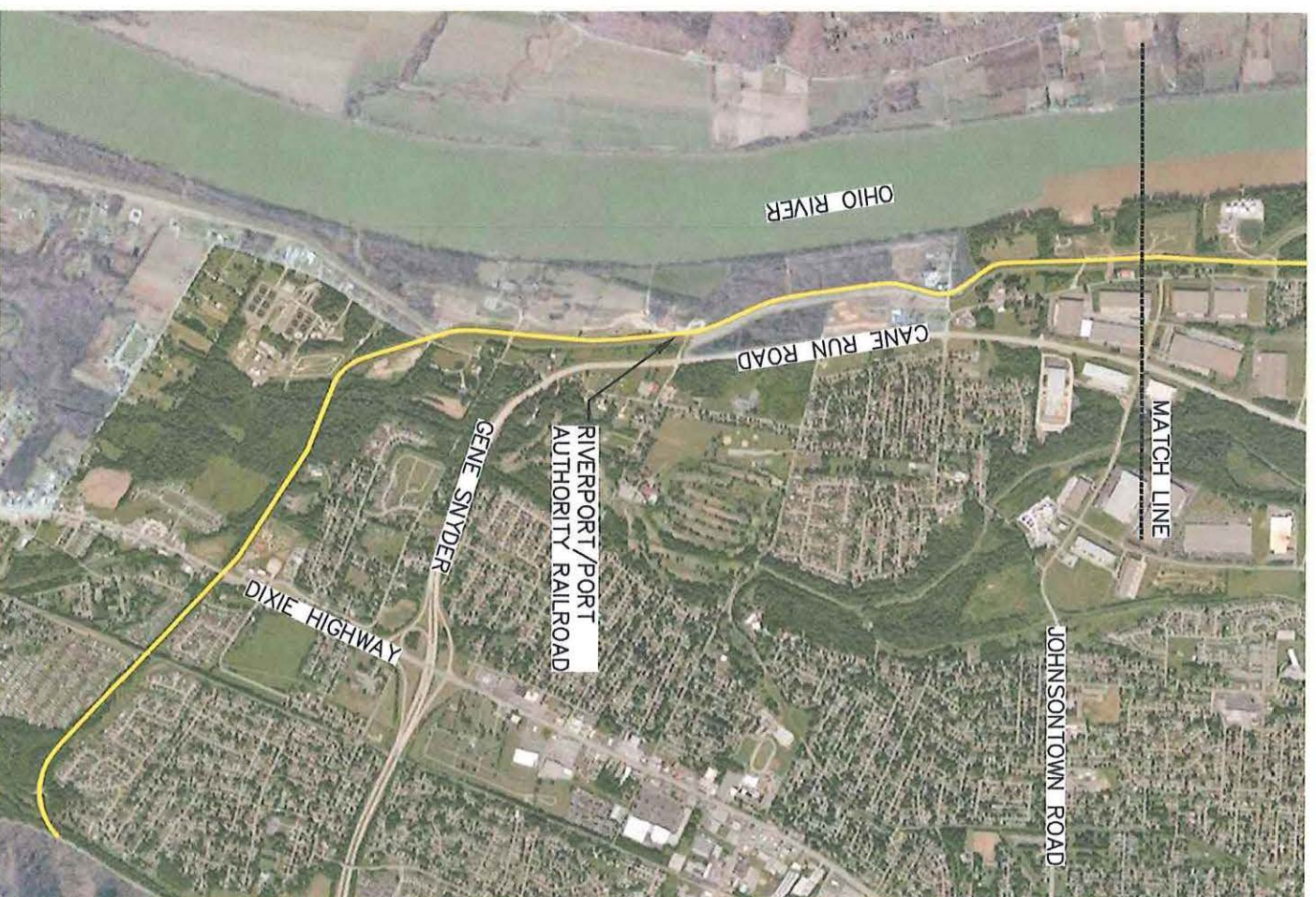


EXHIBIT B



Existing Riverport Rail Infrastructure

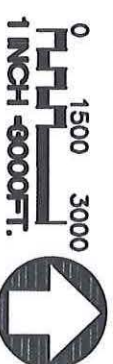


EXHIBIT C

From: Greg Cantrell <gcantrell@portoflouisville.com>
Date: Monday, July 6, 2020 at 10:22 AM
To: Tim Kizer <tim.kizer@louisvilleriverport.com>
Cc: Joseph Tegart <jtegart@portoflouisville.com>, Ron Siler <prsiler@gmail.com>, Lisa Fleming <llfleminglaw14@gmail.com>
Subject: Re: Property Damage/Potential locomotive involvement

Tim,

The locomotive bumped the roll up door. No one hurt, etc. We are looking to get the door fixed. No further action is needed.

Thanks for all your concern though.

Greg Cantrell

Port of Louisville

On Mon, Jul 6, 2020 at 11:14 AM Tim Kizer <tim.kizer@louisvilleriverport.com> wrote:

Greg

One of our team members has brought to my attention that they witnessed over the weekend what appears to be substantial damage done to one of the doors on the shaker house. While I have not been able to go see for myself, by description it sounds like the locomotive may have been involved in causing this damage. I implore you to provide me the following information immediately:

- Was anyone injured? If so, have they or are they being treated for their injuries?

- Was the locomotive involved in this damage? If so....

- Did witnesses prepare statements regarding the occurrence?

- Were those involved, especially the engineer, drug tested immediately following?

- Was the engineer certified to run the locomotive?

- Was the FRA and/or OSHA notified?

- Has your Team created a training program to ensure this does not happen again?

- Has the locomotive been fully inspected to ensure no faulty functions caused the accident or will cause further accidents?

-Did you notify your insurance provider that a claim would be filed on this damage or do you intend to pay for repairs out of pocket?

-Has the facility been blocked off so as to not cause personal injury to anyone due to the damage?

It is imperative that you provide me clear and detailed answers to these questions. Should I not receive them by COB today I will be forced to request an outside inspection (at your cost). No answer will imply that the locomotive was involved which may require that we impound the locomotive until a further investigation is done to ensure it is safe to operate and your operators are able to legally operate the equipment.

Thank you in advance for the detail regarding this matter.

twk

Tim W. Kizer

VP, Riverport Operations and Strategic Growth

[Louisville Riverport Authority](#)

EXHIBIT D

LAW OFFICES
CONLIFFE, SANDMANN & SULLIVAN

CHARLES J. SANDMANN (1936-1992)
KARL N. VICTOR, JR. (1933-2014)
I.G. SPENCER (1931-2016)
F. CHRIS GORMAN
RICHARD M. SULLIVAN
JACK R. UNDERWOOD, JR.
E. BRUCE NEIKIRK
JAMES A. BABBITZ
KENNETH A. BOHNERT
JAMES T. MITCHELL
EDWARD F. BUSCH
MAUREEN P. TAYLOR
EDWARD L. LASLEY
SCOTT A. JOHNSON ++
JEFFREY N. MAHONEY
BRADLEY R. PALMER
MICHAEL E. MAIER

PROFESSIONAL LIMITED LIABILITY COMPANY

2000 WATERFRONT PLAZA
325 WEST MAIN STREET
LOUISVILLE, KENTUCKY 40202
PHONE (502) 587-7711
FAX (502) 587-7756
www.cssattorneys.com

SUBURBAN OFFICE

1215 Herr Lane Suite 210
Louisville, Kentucky 40222
(502) 896-2966 Phone
(502) 896-0396 Fax

++ Also Admitted in Ohio



October 29, 2020

Via Email and Regular Mail

Donald L. Cox, Esq.
Lynch Cox Gilman & Goodman, PSC
500 West Jefferson Street, Suite 2100
Louisville, Kentucky 40202

Re: **Modified Port Facility Lease with**
Louisville & Jefferson County River Port Authority

Dear Don:

I am writing on behalf of New Albany Main Street Properties, LLC d/b/a Port of Louisville with respect to several ongoing issues.

First, in your letter of September 25, 2020, you suggested that the Port of Louisville is not qualified to do business in Kentucky. That is not accurate. A copy of the current Annual Report filed August 10, 2020 is attached.

In that same letter you contend that the Port of Louisville is not meeting its rail obligations as set forth under the Lease. That too, is inaccurate. The Lease requires the Port of Louisville to act consistent with therein defined Railroad Agreements – the status of which Railroad Agreements having been discussed in our letter to you dated September 11, 2020. Notwithstanding the questioned status of the Railroad Agreements, the Port of Louisville has met their requirements. Your contention was apparently based on your misinterpretation of the Lease and on an email from Veronica Chittim of the FRA to Mr. Tim Kizer dated August 17, 2020 which does not formally impose any regulations or requirements, and which predated a meeting with FRA officials who confirmed that the issues addressed in that email would need to be addressed in a formal administrative process (which could take months, if not years, to complete) and are still under FRA consideration. The email itself says that it was “not binding, but rather advisory in nature.”

First, contrary to what your letter asserts, the Lease does not require the Port of Louisville

Donald L. Cox, Esq.
October 29, 2020
Page 2

to provide "switching services" to Riverport industries nor to contract with a short line railroad to do so. Nor does the Port of Louisville operate a short line railroad. It has never been obligated to do any of this under the Lease. The Port of Louisville has met its rail repair obligations and all such repairs have been made consistent with CSX inspections. For these reasons, the assumptions underlying the referenced "advisory" email are inaccurate. Port of Louisville only performs switching within its captive boundaries. Plainly, what Port of Louisville operates on the loop track is a "plant railroad excepted from FRA's safety jurisdiction." In this respect, the Port of Louisville is operating consistent with current standards and requirements, as it always has – and is not in breach of any Lease obligations in such regard. Thus, there are no Lease performance breaches to be "corrected" as your letter suggests. Further, as we have advised in our letter to you dated September 11, 2020, if enhanced FRA maintenance and/or operational requirements are formally imposed, then the Port of Louisville is entitled to an adjustment in the Lease terms to account for that. In fact, we are seeking a judicial declaration on this issue as is shown in our tendered Second Amended Counterclaim. Our September 11, 2020 letter further noted breaches by the Riverport, which were not thereafter cured.

Following up on our letter to you dated September 10, 2020, the materials needed to repair the shaker house door have been received and are ready to be installed this week (or as weather permits). The materials were ordered weeks ago as reported in our letter, however, supply chain disruptions were experienced and thus they were just recently received. Our September 10, 2020 letter reported that, because of supply chain issues, delivery of the ordered materials could take approximately six weeks – which turned out to be the case.

Lastly, as a result of a recent FRA inspection of the locomotive, some minor repairs were required which did not require it to be shut down pending the repairs. These are being undertaken by the Port of Louisville and are expected to be completed in short order.

As noted throughout these proceedings, the Port of Louisville denies that it is in breach of the letter or spirit of the subject Lease. All rights, claims, and defenses continue to be fully reserved.

Sincerely,



Kenneth A. Bohnert
kbohnert@cssattorneys.com

encl.

cc: Mr. Joe Tegart
Mr. Greg Cantrell
Mr. P. R. Siler
Lisa Fleming, Esq.
F. Chris Gorman, Esq.
Edward Busch, Esq.

Commonwealth of Kentucky
Michael G. Adams, Secretary of State

LARP
0704347
Michael G. Adams
KY Secretary of State
Received and Filed
8/10/2020 3:13:40 PM
Fee receipt: \$15.00

Michael G. Adams
Secretary of State
P. O. Box 1150
Frankfort, KY 40602-1150
(502) 564-3490
<http://www.sos.ky.gov>

**Annual Report
Online Filing**

ARP

Company: NEW ALBANY MAIN STREET PROPERTIES, LLC
Company ID: 0704347
State of origin: Indiana
Formation date: 5/2/2008 12:00:00 AM
Date filed: 8/10/2020 3:13:40 PM
Fee: \$15.00

Principal Office

3282 KEPLEY RD.
GEORGETOWN, IN 47122

Registered Agent Name/Address

JOSEPH P. TEGART
8252 PORT ROAD
LOUISVILLE, KY 40258

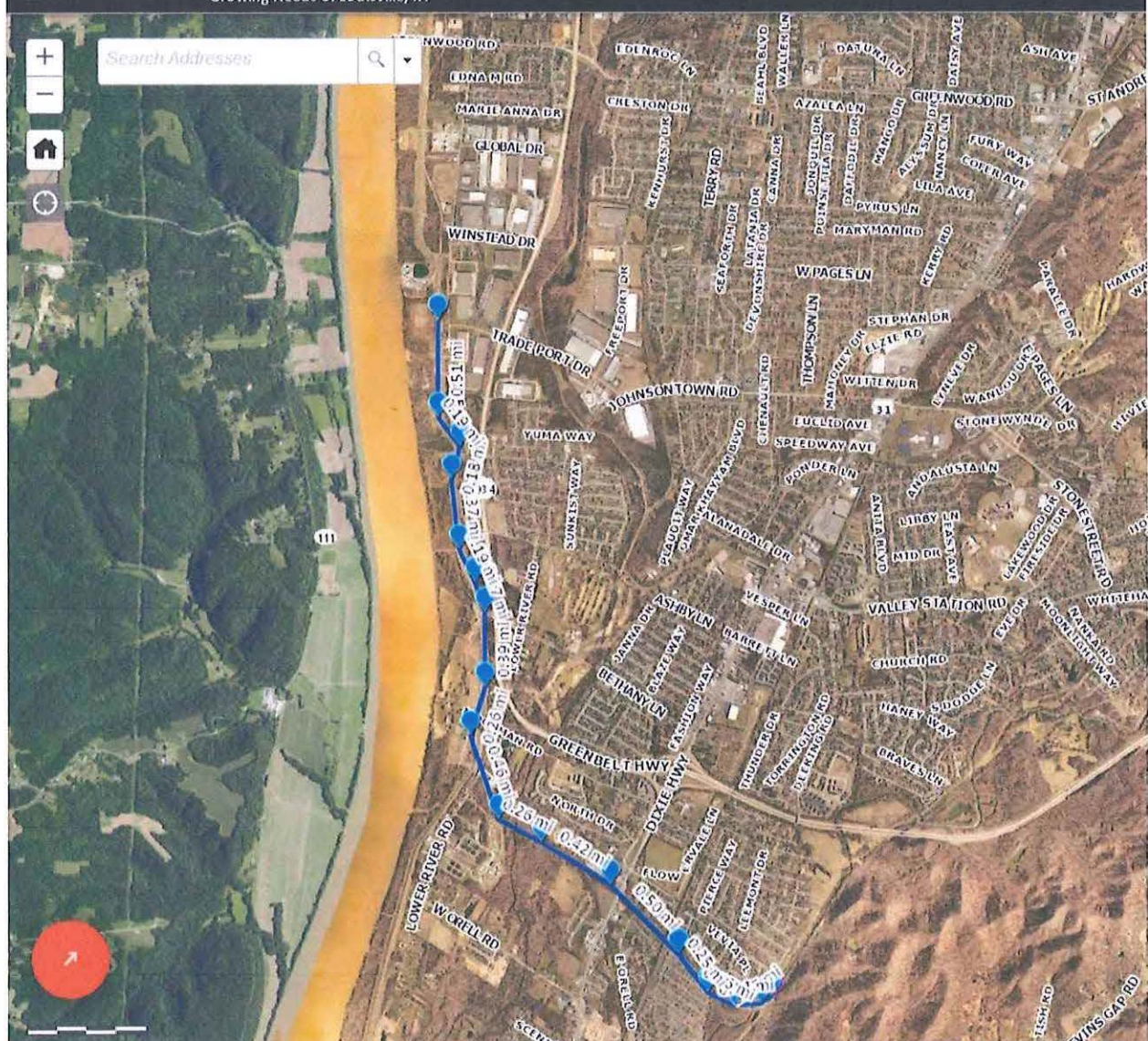
Members/Managers

Member	Gregory P. Cantrell	3282 Kepley Road, Georgetown, IN 47122
Member	P. Ron Siler	2806 Rhone Drive, Palm Beach Gardens, Florida 33410
Member	Simpco Financial, LLC	3282 Kepley Road, Georgetown, IN 47122
Member	Tegart Transportation Co., LLC	608 Highland Avenue, New Albany, Indiana 47150

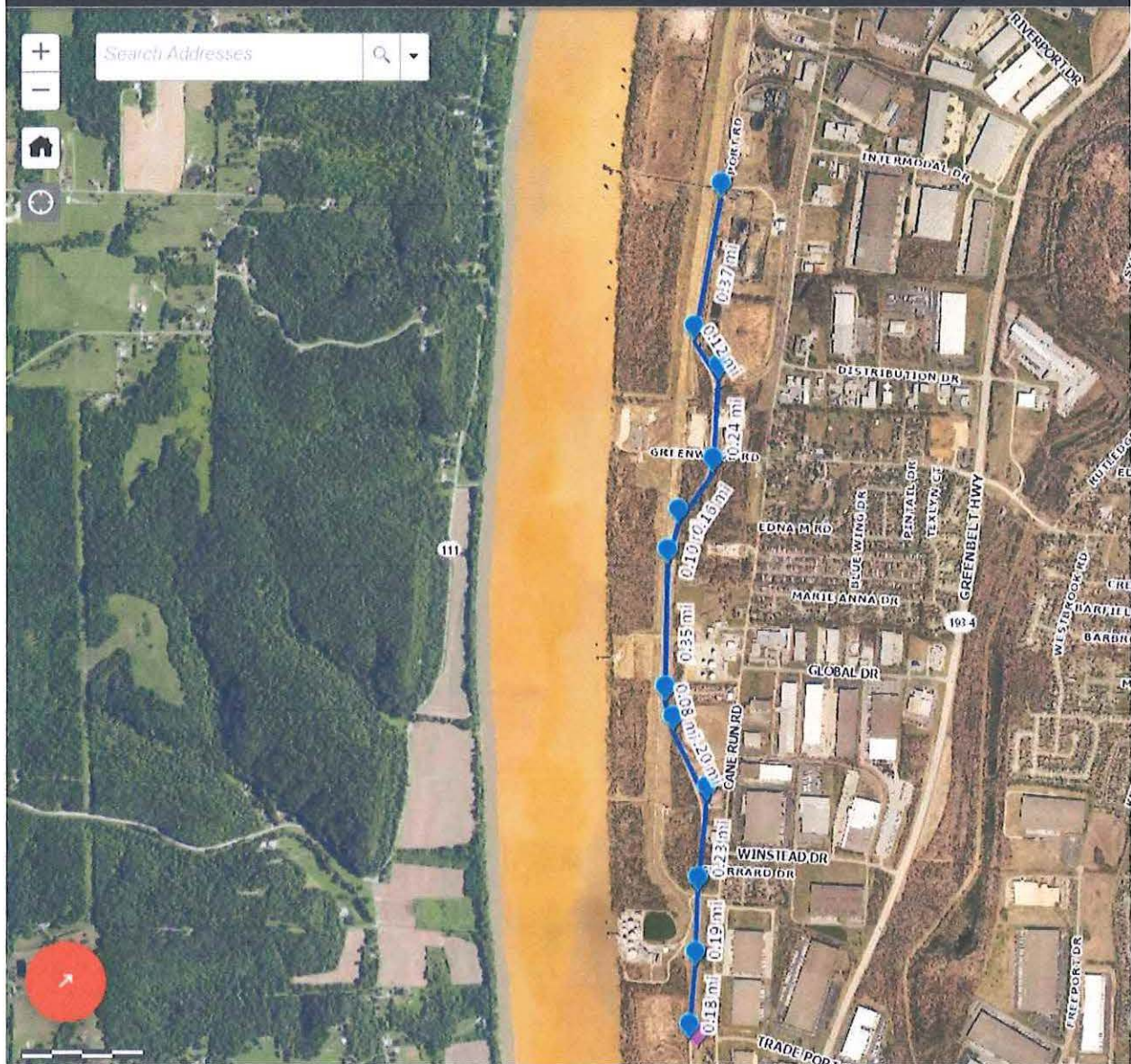
Signatures

Signature	Gregory P Cantrell
Title	Member

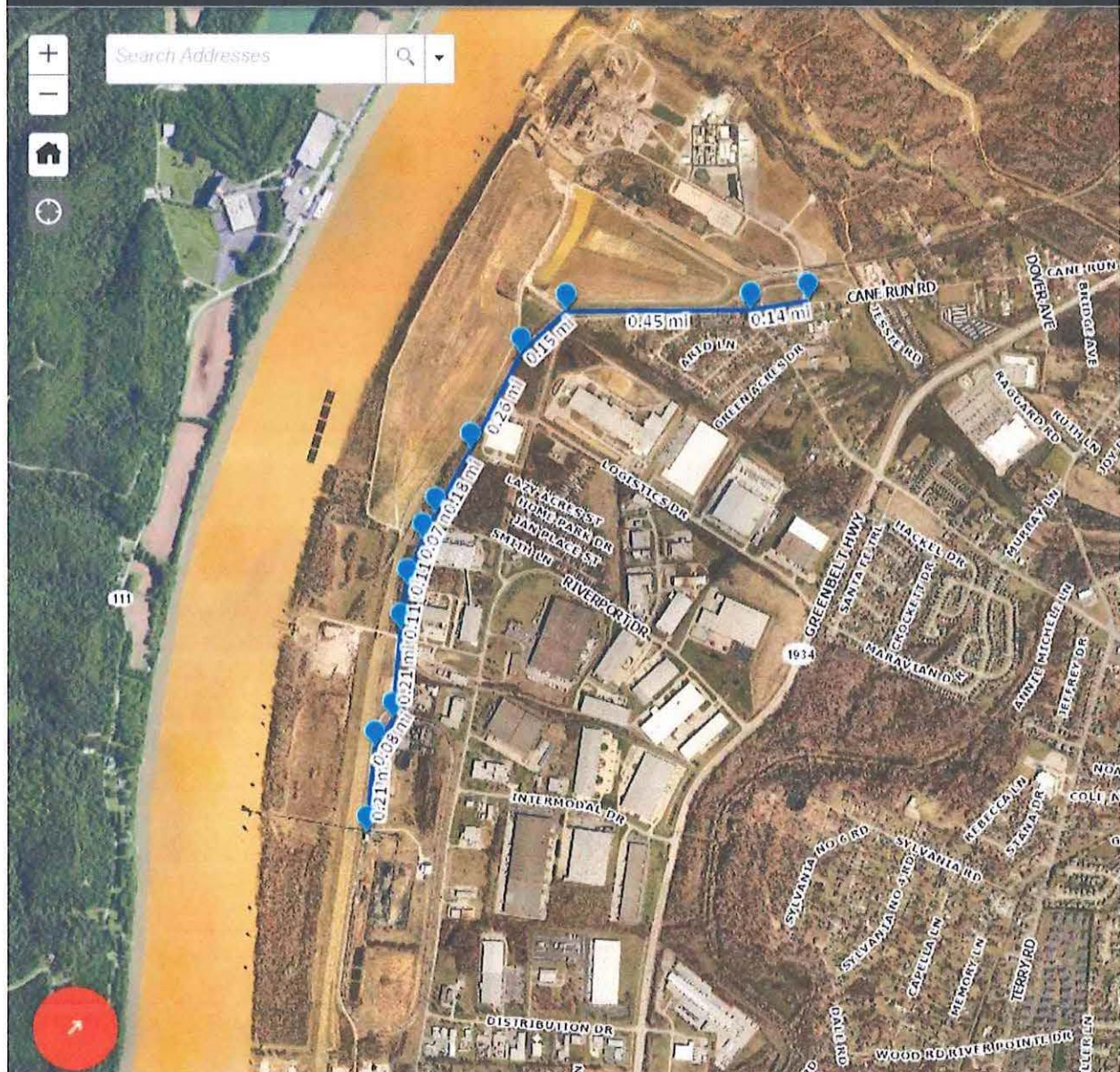
EXHIBIT E



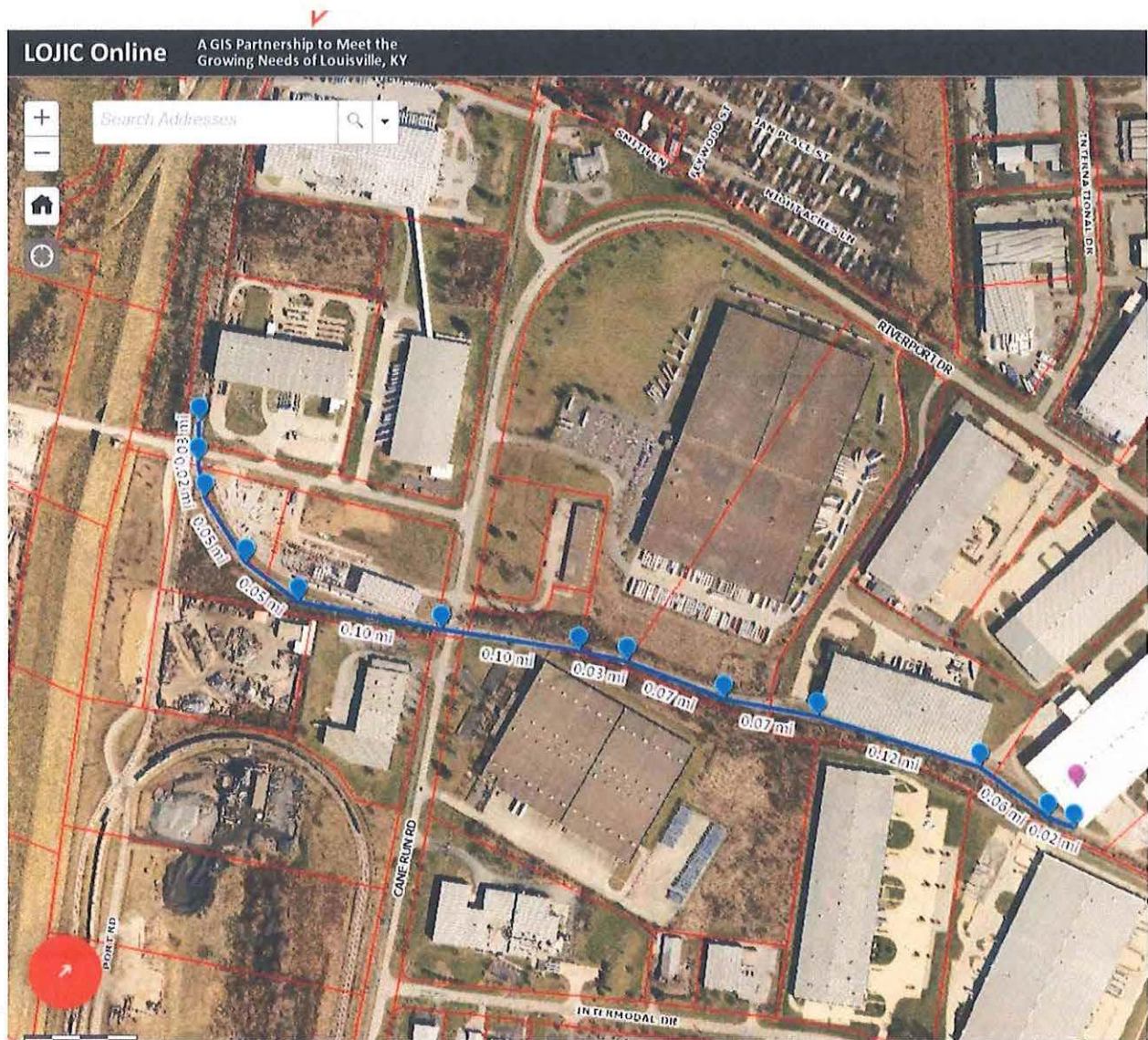
4.5 miles shown from CSX to south end of industrial park.



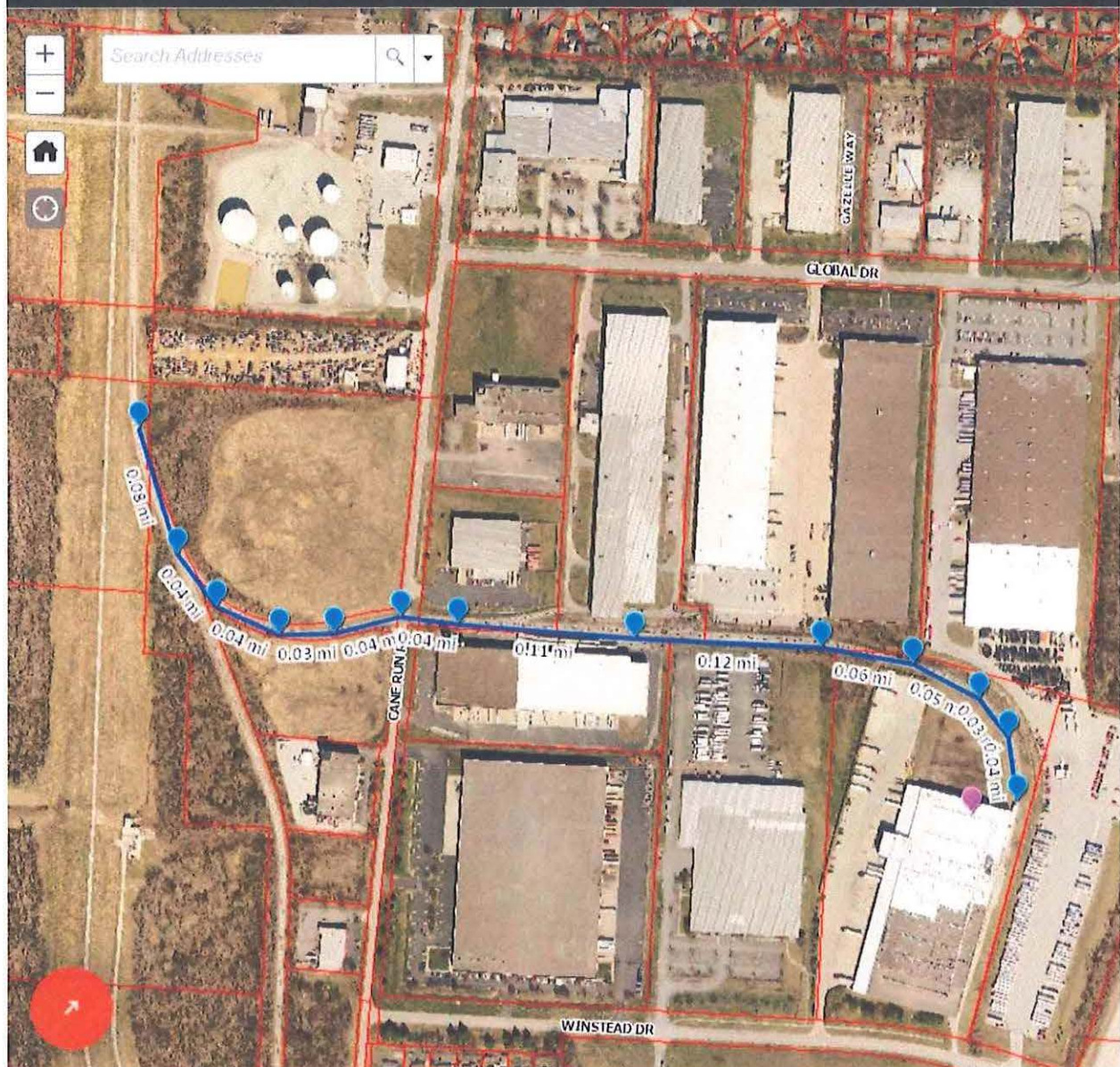
2.2 miles shown from south end of industrial park to center of port area.



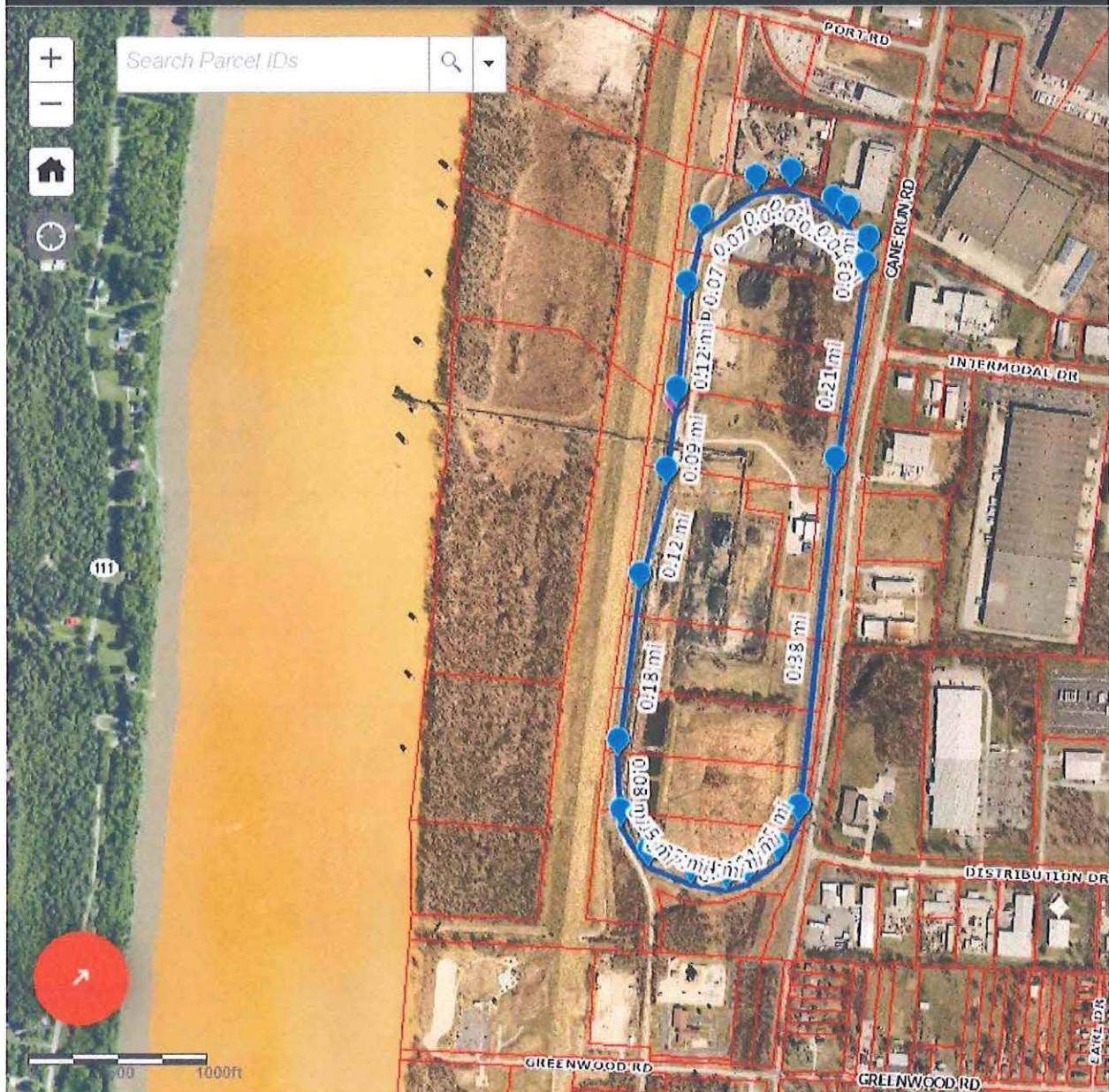
1.97 miles shown from center of port area to NS connection at north end of industrial park.



0.71 miles shown for lead serving DHL, HTI



0.68 miles shown for lead serving Lastique, Misa Metal Processing, Lineage Logistics



1.74 miles shown for one loop. Total, combined double loop track length is 3.48 miles.