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By E-Filing

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**Re: Docket No. FD 36463, The Louisville and Jefferson County Riverport
Authority – Petition for Declaratory Order**

Dear Ms. Brown:

Accompanying this letter for filing in the referenced docket is the Reply to Petition for Declaratory Order filed on behalf of New Albany Main Street Properties, LLC d/b/a Port of Louisville.

Please do not hesitate to call me if you have any questions.

Sincerely,

Thomas W. Wilcox
Attorney for New Albany Main Street
Properties
d/b/a Port of Louisville

Enclosure



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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36463

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

REPLY TO PETITION FOR DECLARATORY ORDER

Pursuant to the regulations of the Surface Transportation Board (“Board” or “STB”) and the order issued in this proceeding on December 3, 2020, New Albany Main Street Properties, LLC, d/b/a Port of Louisville (“Port of Louisville”) hereby replies in opposition to the Petition for Declaratory Order (“Petition”) filed in this proceeding by the Louisville and Jefferson County Riverport Authority (“LRA”) on November 18, 2020. In its Petition, LRA asks the Board to declare “(1) the Port of Louisville “has been improperly operating on rail lines in and around this port . . . without the required authorization from the STB, (2) the [Port of Louisville] 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.”

For all the reasons set forth hereinbelow, the Petition is utterly without merit and must be denied. As detailed below, the Petition is merely the latest installment of a multi-faceted, meritless, and highly unsuccessful effort by LRA to wrongfully remove the Port of Louisville as the lessee and operator of a 300-acre Port Facility (defined below) located within the overall 2000+ -acre

Riverport Complex owned by LRA because new management of LRA installed in 2019 does not like the terms of the parties' current Lease, which is attached to the Petition. Having failed repeatedly in an arbitration proceeding (and in the Kentucky state court action which ordered the arbitration and confirmed its result) to accomplish this goal, LRA now seeks to use the Board to interfere with the legitimate contract rights of the Port of Louisville by falsely asserting that it is in breach of the Lease because it has not obtained authority from the STB to operate as a rail common carrier over Port Facility tracks and unspecified tracks "around" the Port Facility. LRA asserts this claim despite the fact that (1) neither LRA nor the Port of Louisville's predecessor ever possessed operating authority over any rail tracks in the Riverport Complex since it began operations more than 35 years ago; (2) LRA has never before raised this question in the 10 years the Port of Louisville has managed the Port Facility and indeed previously discouraged the Port of Louisville from seeking common carrier operating authority; and (3) LRA's allegations that the Port of Louisville has conducted railroad operations on any tracks in the Riverport Complex other than the two loop tracks located within the Port Facility are vague, and aside from being unsupported by any evidence, are simply not true.

As demonstrated in this Reply, which is supported by the verified statement of Mr. Joseph P. Tegart, President and one of the co-owners of the Port of Louisville ("Tegart V.S.") the rail operations of the Port of Louisville, which are only a small part of its overall duties as the manager of the Port Facility, are that of a contract switcher that has always confined its switch operations to the loop tracks within the Port Facility, which are industry tracks originally constructed by LRA without any authority from the Interstate Commerce Commission ("ICC"). The Port of Louisville is in no way a rail carrier providing common carrier service as that term is defined in 49 U.S.C. §10101(5).

I. FACTUAL BACKGROUND

A. The Port of Louisville

The Port of Louisville was formed in 2006 by Mr. Tegart and another individual, with a third owner joining in 2010, with decades of experience in the barge and terminal, and coal industries.¹ The company was the only bidder to respond to a request for proposal issued by LRA in April 2008 for an entity to take over management of the Port Facility after it had fallen into disrepair and become commercially unviable, primarily because of the nationwide reduction in coal transportation by rail and a lack of regular maintenance.² The Port Facility includes a barge-served bulk commodity transfer terminal and general cargo dock along the Ohio River, railroad tracks that include approximately four miles of double loop tracks plus a short piece of connecting track, a coal storage area, loading and unloading facilities, and a general cargo dock.³ These facilities accept barges for loading and unloading of cargo to/from rail and truck for various customers, most of whom are not located in the Riverport Complex or the Port Facility.⁴

The loop tracks and the bulk terminal facility and dock are separated by a levee.⁵ All of these facilities were originally designed to handle large volumes of coal delivered by unit trains for transfer to barges.⁶ When first constructed, there were no businesses directly connected to the loop tracks or located within the Port Facility acreage.⁷ Over time, and with the lack of use of the

¹ Tegart V.S. at 2.

² *Id.*

³ *Id.* at 3.

⁴ *Id.* at 3-4.

⁵ *Id.* at 3.

⁶ *Id.*

⁷ *Id.* at 4.

loop tracks for their original purpose, three businesses have constructed facilities that are either located within the 300-acre Port Facility property or immediately adjacent to it.⁸

Having been awarded the business by LRA, the Port of Louisville executed its first Port Facility Lease with LRA in 2009 (“2009 Lease”).⁹ The 2009 Lease was renewed with no material operating changes in 2012, and then again in 2016, with the Port of Louisville being the only bidder each time.¹⁰ For more than ten years the Port of Louisville has been fully engaged in reviving the Port Facility and making it a success. Its owners have personally invested around \$1 to \$1.5 million in capital for track repair and operations and continue to put all the company’s income back into company operations.¹¹ None of the owners has ever taken a salary or any distribution or reimbursement for out-of-pocket travel and other expenses, with all income from operations being reinvested in the company.¹²

As Mr. Tegart explains, the Port of Louisville was formed by marine terminal operators to operate the entire Port Facility, not to be a railroad.¹³ The rail-related operations of the Port of Louisville are just one component of its activities and obligations pursuant to its Lease with LRA.¹⁴ The Port of Louisville’s other responsibilities include many tasks involving barge and dock

⁸ *Id.* Among the many factual errors in the Petition is the erroneous statement at page 23 that “Lessee serves all shippers that are located in the Port Facility *which is over one hundred shippers.*” (emphasis supplied). While there are more than 120 tenants in the entire Riverport Complex, there are only three tenants physically located in or adjacent to the Port Facility. Moreover, it is a gross overstatement that all 120 tenants of the Riverport Complex are rail shippers.

⁹ Tegart V.S. at 7.

¹⁰ *Id.*

¹¹ *Id.* at 2.

¹² *Id.*

¹³ *Id.* at 6.

¹⁴ *Id.*

operations and maintenance, and managing a full-service commodities transfer operation for the movement of various cargos from river barge to rail and truck, and from rail and truck to river barge.¹⁵ Indeed, in the absence of coal customers or a large rail tenant or customer the Port of Louisville has focused its efforts on developing new river cargoes.¹⁶ This business has consisted of 90% inbound barge deliveries which are loaded primarily into trucks, and 10% outbound cargoes which also primarily arrive by truck.¹⁷ The Port of Louisville has constantly prospected and marketed for large bulk commodity customers who could use the “shaker house” complex and transfer conveyor, which have been out of operation since the inception the 2009 Lease and would require a \$5-6 million investment to renew for operation.¹⁸ However, no such customer has emerged, so the transloading operations are conducted using portable conveyors and other handling equipment that is less efficient.¹⁹

B. History of the Riverport Complex and the Port Facility

The Petition tellingly glosses over the history and development of the Riverport Complex and the Port Facility, which is of critical importance when considering the contentions and relief sought by LRA. The Riverport Complex was developed by LRA in the mid-1980s and currently houses more than 120 companies in the Industrial Service, Logistics and Distribution, Manufacturing, Retail, and other industries who use various modes of transportation, including truck, barge, and railroad.²⁰ There are approximately 13 miles of rail track in the entire Riverport

¹⁵ *Id.*

¹⁶ *Id.* at 7.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 8.

²⁰ *Id.* at 2-3.

Complex.²¹ The tenants of the Riverport Complex have both purchased and leased tracts of land in the Riverport Complex to operate their companies.²² They have also constructed their own rail tracks and spurs and/or leased tracks constructed by LRA.²³ LRA itself functions mostly as an industrial complex real estate management entity.²⁴ It has only four employees and does not conduct any actual industrial activities or operations in the Riverport Complex.²⁵

On information and belief, the original railroad tracks in the Riverport Complex and the Port Facility were constructed by LRA in the mid-1980s.²⁶ There is no indication that LRA sought authorization from the ICC for such construction and the Petition does not claim this is the case. These tracks included the Port Facility tracks, and in particular, the two loop tracks.²⁷ The original tracks constructed by LRA were later supplemented by lines of railroad connecting the systems of CSX Transportation (“CSX”), the Southern Railway (soon to become Norfolk Southern Railway)(“NS”) and the Paducah & Louisville Railroad (“P&L”) to the existing Riverport Complex tracks, which enabled its tenants to receive rail service.²⁸ These connecting tracks initially consisted of certain lines of railroad jointly constructed by the predecessors to P&L and NS.²⁹ Notably, LRA did not seek or obtain authority from the ICC to conduct common carrier operations over these new rail lines. LRA granted all three railroads contract rights to conduct

²¹ *Id.* at 3.

²² *Id.* at 2.

²³ *Id.* at 3.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 4.

²⁷ *Id.*

²⁸ *Id.*

²⁹ FD 30273, *Illinois Central Gulf Railroad Company and Southern Railway Company – Construction Exemption – Jefferson County, KY* (ICC served September 19, 1983).

common carrier operations over the existing Riverport Complex tracks that had been constructed by LRA,³⁰ for which operating authority was sought by NS and P&L and approved by the ICC.³¹

The newly added tracks eventually included 6.7 miles of tracks LRA constructed jointly with CSX, comprised of 4.5 miles of lead track outside Riverport Complex and 2.2 miles inside it.³² These tracks were and are now used exclusively by CSX to serve its customers in the Port Facility and to connect to the loop tracks.³³ The Port of Louisville has never conducted any switch operations on this track, so the extensive discussion in the Petition about this track is puzzling, and ultimately irrelevant. Nevertheless, it is noteworthy that, as with the NS/P&L tracks discussed above, while LRA sought and received authority from the ICC to jointly construct the new CSX rail line, only CSX sought or received the authority to conduct common carrier operations over it.³⁴

The Petition cites no instances where LRA asked for and received authority to conduct any common carrier operations over any of the rail tracks in the Riverport Complex, and the Port of Louisville could locate no such instances. It is well established that a non-carrier entity who

³⁰ Copies of all three Rail Agreements are included as Exhibit A to this Reply (“Reply Exhibit A).

³¹ Tegart V.S. at 4; Petition at 18. Because the three Railroad Agreements are nearly identical, CSX was also granted rights to operate over all Riverport Complex tracks. However, there is no evidence that CSX also sought operating authority from the ICC, which possibly could have been because it is satisfied with operating over only the 6.7 miles of track for which it received construction and operating authority.

³² Finance Docket No. 31136, *Louisville & Jefferson County Riverport Authority and CSX Transportation, Inc. – Construction and Operation Exemption – in Jefferson County, KY* (ICC served December 16, 1987) (“CSX Construction”).

³³ Tegart V.S. at 9.

³⁴ See *CSX Construction* at 2. “[LRA] does not plan to operate the line, but will rely on established carriers to provide service. CSX joined in the petition, and thus has sought exemption for its operations over the constructed line. Accordingly, a grant of this exemption includes authority for CSX to operate.”

receives authority to construct a railroad line does not automatically receive operating authority, which must be separately requested.³⁵ Consequently, to the extent the Petition seeks to leave the impression that LRA also received operating authority and could thus expect the Port of Louisville or its predecessor to seek authority to be the designated operator, it is simply inaccurate. Thus, the assertion that “all railroads that operate on or [sic] constructed rail track subject to the jurisdiction of the STB have received proper authority to do so in these various exemption proceedings, *including LRA . . .*, except for one ‘railroad’ which is Lessee,”³⁶ is flatly wrong. This is another significant factual error. Moreover, given LRA’s primary legal argument that the Port of Louisville should have sought operating authority from the Board either on its own behalf or as the designated operator of Port Facility tracks on behalf of LRA, that error is rather telling.

C. The Railroad Agreements

LRA’s decision not to ask for operating authority over the jurisdictional rail lines associated with the Riverport Complex was entirely consistent with the Operating Agreements it contemporaneously entered into with NS, CSX and P&L to serve tenants in the Riverport Complex.³⁷ These agreements are referred to as the “Railroad Agreements” in each of the leases

³⁵ FD No. 32630, *Omaha Public Power District—Construction Exemption—In Otoe County, NE* (served May 2, 1995) (“OPPD did not include operating authority within the scope of exemption. Therefore, before commencing operations on the line, operating authority must be approved or exempted by this Commission.”); FD No. 33862, *Public Service Co. of Colorado—Construction Exemption—Pueblo County, CO* (served August 23, 2000) (“In its construction exemption petition, PSCo did not include a request for authorization to operate. Before commencing operations on the line, it must seek and obtain operating authority from the Board under 49 U.S.C. 10901 or 49 U.S.C. 10502.”); FD No. 34836, *Arizona Eastern Railway, Inc.—Construction Exemption—In Graham County, AZ* (served on June 15, 2009) (“While we are granting AZER an exemption from 49 U.S.C. 10901 to construct the proposed line of railroad, we are not granting AZER, nor has AZER sought, the authority to operate this line.”).

³⁶ Petition at 18.

³⁷ Tegart V.S. at 4.

the Port of Louisville has entered into with LRA for the Port Facility since 2009.³⁸ They are significant because each lease has contained a provision that “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.”³⁹ According to LRA, the Railroad Agreements are still in effect and are administered on a “month to month” basis by LRA and the railroads.⁴⁰

In pertinent part, the Railroad Agreements granted each of the railroads the non-exclusive right to use the “Rail Lines” in the Riverport Complex to serve its tenants.⁴¹ In exchange for such usage, the railroads each agreed to pay LRA (1) a “Maintenance Charge” that was calculated pursuant to an agreed upon formula and (2) a “Car Charge” established by the agreement based on

³⁸ *Id.*

³⁹ 2009 Lease at Section III(A)(9), 2012 Lease at Section III(A)(9); 2016 Lease at Section III(A)(9).

⁴⁰ See also Petition at 5, asserting that LRA “has entered into railroad operating agreements with [CSX, NS, and P&L] to operate these lines and serve the customers at the Port Facility” In the 2009 Lease and each lease that has been renewed, LRA represented and warranted that the three Operating Agreements furnished to the Port of Louisville were in effect and valid, despite that by their terms, the agreements had expired in 2003 (CSX), 2000 (Norfolk Southern) and 2003 (P&L), respectively. The Port of Louisville was not supplied subsequent versions of the contracts or amendments and has relied upon LRA to inform the Port of Louisville of any updates or material amendments since this would affect the Lease terms. Nevertheless, confirmation that the agreements have remained in effect has been supplied in part by LRA remitting to the Port of Louisville certain “Maintenance Charge” and “Car Charge” payments the railroads make to LRA pursuant to their agreements. See 2016 Lease at Section VI(G). Contrary to the assertion made in the Petition that “LRA pays to Lessee all maintenance charges . . . and 1/3 of all car charges it receives from the three railroads,” Petition at 5, LRA has not consistently and timely made either payment, particularly since 2019 when LRA launched its campaign to concoct reasons to terminate the 2016 Lease. More recently, LRA’s counsel informed the Port of Louisville that the Railroad Agreements are in effect on a month-to-month basis, after a Vice President of LRA asserted that they had all expired. Tegart V.S. at 5. Letter from LRA counsel to counsel for Port of Louisville, dated October 2, 2020, attached as Reply Exhibit B.

⁴¹ Reply Exhibit A, Section 2.

the number of cars each railroad moved over the Rail Lines.⁴² Under Section 4 of the agreement, each railroad agreed “to provide Riverport and Users located within or operating from the Riverport Complex with service consistent with [each railroad’s] common carrier or contract obligations, including the provision of service upon reasonable request therefor”⁴³ Thus, LRA was considered as a shipper customer rather than another railroad involved in the linehaul movement of rail cars. On information and belief, LRA issued no rail waybills, did not charge the tenants of the Riverport Complex for rail transportation, was not subject to the Railway Labor Act or the various Railway Retirement and Unemployment Compensation statutes, did not have interchange agreements with the railroads, did not participate in the line haul revenues through divisions or junction line settlements, or otherwise manifest any of the indicia of a common carrier railroad.

Pursuant to Section 6 of the Agreement entitled Switching Services, all shipments made by the three railroads in common carrier service are deemed to be “fully and completely delivered as soon as the car containing such shipment shall have been placed in the location *designated by the Riverport Authority to receive it*, and detached from the engine or train by which it was moved”⁴⁴ And Section 6 then states that “Riverport shall perform switching services on the Port Rail Trackage for rail cars.”⁴⁵ Under the Railroad Agreements, “Port Rail Trackage” is defined as “[a] system of rail trackage owned by Riverport *as part of the bulk commodity transfer facilities within the port area at the Riverport Complex, including a double loop track and one or more connections*

⁴² *Id.* at Sections 3(a) and 3(b).

⁴³ *Id.* at Section 4(a) (emphasis supplied).

⁴⁴ *Id.* at Section 6(a) (emphasis supplied).

⁴⁵ *Id.* at Section 6(b).

to the Onsite Rail Line and Lead Track.”⁴⁶ Thus, under the Rail Agreements, the switching operations of LRA, and now the Port of Louisville as its contractor, are expressly confined to the loop tracks and connections to certain industrial tracks,⁴⁷ but not on the jurisdictional rail lines owned or operated by the three railroads serving the facility.⁴⁸ The Rail Agreements therefore expressly establish a clear line of demarcation between the common carrier service provided to the Riverport Complex by the railroads and the private, non-jurisdictional contract switching operations within the Port Facility that were originally the responsibility of LRA.

If it is not satisfied with the service of the three serving railroads, under Section 6 LRA can, upon 60 days’ written notice, operate its own or leased locomotives on the Rail Lines to move cars over the Rail Lines in coordination with the railroad and in compliance with its requirements, including liability and indemnification terms.⁴⁹ The Port of Louisville is not aware that the LRA ever availed itself of this right or sought authority from the ICC or the Board in order to provide that service. And, of course, under that same section, LRA reserved the right to designate another entity “for example a contract operator of the port transloading facility” to fulfill LRA’s rights and obligations, subject to the approval and other terms of the delivering railroad.⁵⁰ LRA availed itself of that right by first entering into an agreement with Cooper/T. Smith to operate the Port Facility

⁴⁶ *Id.* at Section 1(e) (emphasis added).

⁴⁷ See *Id.* at Sections 1(b) and 1(c), defining “Onsite Rail Line” and “Lead Track” to be tracks previously constructed by LRA.

⁴⁸ *Id.*

⁴⁹ *Id.* at Section 6(c)

⁵⁰ *Id.* at Section 6(c)(4).

from 1987⁵¹ to 2007, and then entering into the successive lease agreements with the Port of Louisville, both with the approval of the railroads.⁵²

While there are several provisions in the Railroad Agreements expressly referring to the railroad's provision of common carrier service in the Riverport Complex, including making the railroad responsible "for obtaining all necessary government approvals" for entering into the agreement and performing thereunder,⁵³ there are no provisions that state or imply that LRA would similarly provide services as a common carrier railroad over any tracks subject to the jurisdiction of the ICC (and now the STB). Instead, the agreements reflected a clear understanding that LRA's (and its contractor's) activities would be limited to non-carrier contract switching operations confined to a subset of the Port Facility tracks, namely the two loop tracks.

The Port Facility was owned and operated in the foregoing manner by LRA through its operator Cooper/T. Smith for the next 20 years.⁵⁴ During that time, the Port Facility bulk transfer facilities and conveyor fell into disrepair and the loop tracks deteriorated substantially and the overall Port Facility became economically unviable.⁵⁵

D. The Lease and the Port of Louisville's Rail Operations

Pursuant to the terms of its leases commencing in 2009 the Port of Louisville has been tasked with a wide range of services and operations in addition to rail switching services on the loop track for the purpose of marketing and developing the Port Facility as a marine terminal and

⁵¹ The starting year of the contract is on information and belief.

⁵² Tegart V.S. at 6-7.

⁵³ Reply Exhibit A at Section 11.

⁵⁴ Tegart V.S. at 6.

⁵⁵ *Id.* at 7.

bringing it back to economic viability.⁵⁶ Starting in 2009 after spending approximately \$300,000 to rehabilitate the loop tracks and related facilities⁵⁷, the Port of Louisville conducted its operations on the Port Facility loop tracks in the same manner as LRA and Cooper/T. Smith had previously, while improving and increasing services to Port Facility customers.⁵⁸ LRA and the Port of Louisville renewed the 2009 Lease in substantially the same form in 2012, and then again in 2016 after another open bidding process.⁵⁹ Each lease carried forward the operating provisions of the 2009 Lease that incorporated the three Railroad Agreements and required Port of Louisville to act in accordance with their terms.⁶⁰ Further, each renewal was validation that the Port of Louisville's performance under the terms of the preceding lease was in conformance with its terms – including its handling of rail operations. LRA is estopped to now contend otherwise.

At pages 9 to 12 of his Verified Statement, Mr. Tegart explains in detail the rail operations of the Port of the Louisville pursuant to the Lease, which since 2009 have been confined to the loop tracks of the Port Facility, except on rare occasions where the Port of Louisville assisted the two companies whose facilities are adjacent to the Port Facility boundaries by either moving cars around for one as a courtesy and for no compensation, and by temporarily storing the cars of the other on the loop track for a daily charge after they were place there by CSX.⁶¹ Mr. Tegart strongly refutes the vague, unsupported and inaccurate allegations in the Petition that the Port of Louisville is required by the Lease terms to provide any switching services to any tenants of the Riverport

⁵⁶ *Id.* at 5-8.

⁵⁷ *Id.* at 7.

⁵⁸ *Id.* at 6-8.

⁵⁹ *Id.* at 7.

⁶⁰ *Id.* at 4.

⁶¹ *Id.* at 8.

Complex outside the Port Facility, and that the Port of Louisville has conducted rail operations for compensation on Riverport Complex tracks other than the Port Facility loop tracks.⁶²

As stated previously, the Lease does require the Port of Louisville to maintain certain tracks in the Riverport Complex outside the Port Facility, and the Port of Louisville has occasionally used the locomotive it leases from LRA to ferry personnel and tools to locations needing repair.⁶³ However, it has never used the locomotive to conduct switching operations or other rail services for any tenant of the Riverport Complex.⁶⁴

The term of the current Lease extends to August 31, 2021, with the Port of Louisville having the option to renew and extend the Lease for two additional five-year terms⁶⁵ “and a final term of four years and five months” unless the Lease is otherwise terminated pursuant to its terms or the Port of Louisville is in default.⁶⁶ As explained in more detail in the next subsection of this Reply, sometime in 2019 the new management of LRA apparently decided that they no longer wanted to abide by the terms of the Lease and launched an extremely aggressive and thus far unsuccessful effort in the courts (and before an arbitrator) to try to terminate the Lease by concocting various reasons why the Port of Louisville is allegedly in default of the Lease. Although the efforts of LRA have been unsuccessful the record in the arbitration proceeding and court cases makes it clear that the LRA has been improperly interfering with the business of the

⁶² *Id.* at 5-6, 8-9.

⁶³ *Id.* at 11.

⁶⁴ *Id.*

⁶⁵ This reflects the construction of the Lease by the Arbitrator appointed in a civil action brought by LRA against the Port of Louisville as shown on p. 2 of the Reasoned Opinion attached as Reply Exhibit C, discussed *supra*.

⁶⁶ Petition Exhibit A, Lease at Section II(B).

Port of Louisville and conspiring with a third party it wishes to install as a new operator in place of the Port of Louisville.

E. The LRA's Multi-Pronged Effort to Terminate the Lease it No Longer Wants to Honor by Disparaging the Port of Louisville and Conspiring with a Third Party to Take its Place

The Petition contains no cogent explanation as to why LRA, after more than 35 years of neither possessing nor requiring its contractor managers of the Port Facility to obtain operating authority from the ICC or the Board to conduct switching operations on Port Facility tracks, now claims such authority was required all along. Instead, LRA asserts that this contractual duty on the part of the Port of Louisville to seek operating authority from the Board is somehow found in boilerplate language in the Lease referring very generally to compliance with “federal, state, and local laws, statutes and regulations.”⁶⁷ As mentioned previously, this weak attempt must be placed in the context of LRA's multi-pronged, bad faith effort begun in 2019 to remove the Port of Louisville because LRA no longer desires to honor the terms of the Lease.

This overall effort is summarized in the Reasoned Opinion issued on March 20, 2020 by an arbitrator appointed in a civil action brought by LRA against the Port of Louisville.⁶⁸ Specifically, the arbitrator's decision recounts how LRA conspired in bad faith with WATCO Companies (“WATCO”) to evict the Port of Louisville and replace it with WATCO by first, concocting a laundry list of alleged “breaches” of the lease (which list was developed by a consultant whose fees and expenses were paid by WATCO) and then, seeking to terminate the Lease in a series of court actions against Port of Louisville starting in 2019 alleging material

⁶⁷ Petition at 6, quoting section III(A)(1). of the Lease.

⁶⁸ Reply Exhibit C.

breaches of the Lease.⁶⁹ Notably for purposes of the Petition, prior to October 27, 2020 neither the consultant's report financed by WATCO nor any of the parties' correspondence or court actions brought by LRA alleged that the Port of Louisville had breached the Lease terms by not seeking operating authority from the Board. The arbitrator's decision points out that LRA began issuing notices of default to the Port of Louisville in May of 2019, but that LRA had previously entered into a Memorandum of Understanding with WATCO in February 2019 stating that LRA desired to enter into an agreement with WATCO to replace the Port of Louisville.⁷⁰ The arbitrator found this behavior to be "credible evidence of a breach of the duty of good faith and fair dealing that [LRA] owes [Port of Louisville] under the lease" and "evidence of [LRA's] noncompliance with the spirit if not the letter of public bidding requirements."⁷¹ Moreover, and significantly for purposes of the underlying court case and the Petition, the arbitrator also found that the Port of Louisville had committed no material breaches of the Lease.⁷² A "Phase II" of the arbitration has been commenced to address claims for money damages asserted by the Port of Louisville against LRA, and is in the discovery phase. The arbitrator's decision was later confirmed over LRA's objection by the state court with jurisdiction over the underlying action. LRA has appealed these decisions to the Kentucky Court of Appeals.⁷³

Despite the arbitrator's ruling that Port of Louisville had not committed any material breach of the Lease and the court's affirmance of his conclusions, LRA filed yet another "forcible

⁶⁹ See Reply Exhibit C.

⁷⁰ *Id.* at 4

⁷¹ *Id.* at 4-5.

⁷² *Id.* at 5-9. "Phase II" of the arbitration will address the Port of Louisville's claims for monetary damages. Discovery is underway; however, no date has yet been set for disclosures or a hearing.

⁷³ The confirming decision and notice of appeal are attached hereto as Reply Exhibit D.

detainer” action on October 27, 2020, which the Petition references in passing without any reference to LRA’s prior lawsuit or the arbitrator’s opinion.⁷⁴ On November 22, 2020, the Port of Louisville moved to dismiss this latest action because that action seeks to relitigate already decided issues.⁷⁵ The Port of Louisville has also requested that the court stay any further consideration of the October 27, 2020 action pending the Board’s resolution of the issues presented by LRA’s Petition.⁷⁶ LRA has yet to reply to the Motion to Dismiss, and no action is expected on the motion until February 10, 2021.

In summary, the Petition is obviously part of the scheme hatched by LRA and WATCO to try to terminate the Lease by concocting various baseless “breaches” of the Lease by the Port of Louisville and/or subjecting the Port to material operational interferences and financial duress. Having failed so far to convince any state court or arbitration panel that the Port of Louisville has materially breached the Lease in any way, LRA has now turned to the Board to attempt to accomplish what the courts have refused to do by advancing the baseless allegation that the Port of Louisville is in breach of the Lease because it requires authority to operate as a common carrier pursuant to 49 U.S.C. §10901.

⁷⁴ Petition at 15, note 1.

⁷⁵ See Reply Exhibit E, Memorandum in Support of Defendant’s Motion to Dismiss or, in the Alternative, to Stay Proceedings and/or Refer Claims to Arbitration (“Motion to Dismiss”). This motion provides additional details of the inappropriate conspiracy between LRA and WATCO, the baseless allegations being made by LRA, and LRA’s unsuccessful court actions to execute its scheme to evict the Port of Louisville.

⁷⁶ Reply Exhibit E, Motion to Dismiss at 12-13.

II. ARGUMENT

A. The Port of Louisville Has Not Been Improperly Operating on any Rail Lines without Required Board Authorization

1. LRA's Allegations that the Port of Louisville has Conducted Rail Operations on any Railroad Lines outside of the Port Facility are Unsupported by Any Evidence and are Wrong

As outlined above, the Riverport Complex is comprised of two sections for purposes of this Petition: (1) the 2000+-acre overall Riverport Complex, which houses more than 120 tenants and 13 miles of railroad tracks, and (2) the 300-acre Port Facility that the Port of Louisville has leased and manages. The Riverport Complex outside of the Port Facility is comprised of a mix of industrial rail tracks that are not subject to the Board's jurisdiction, and tracks for which the three serving railroads sought construction and operating authority that they use to directly serve their customers in the Riverport Complex and to connect to the Port Facility loop tracks.

The Petition contains several vague, unsubstantiated, and inaccurate claims that the Port of Louisville has conducted operations on tracks other than the Port Facility loop tracks. In conjunction with these allegations, the Petition states, also without any support whatsoever, that "the Lessee has had the undeniable obligation to conduct rail operations, including maintenance, in *and around* the Port Facility pursuant to the Lease."⁷⁷ No provision in the Lease supports this statement and LRA cites to none. This erroneous statement is then compounded by LRA inferring that the tracks "around" the Port Facility "include active rail lines subject to the authority of the Surface Transportation Board,"⁷⁸ thereby incorrectly alleging that the Lease obligates the Port of

⁷⁷ Petition at 6 (emphasis supplied).

⁷⁸ *Id.*

Louisville to operate on active rail lines subject to the Board's authority outside of the Port Facility.⁷⁹ This is flatly wrong, and the Lease does no such thing.

Moreover, the Port of Louisville has not in fact conducted any rail switching operations on tracks outside of the Port Facility.⁸⁰ As stated in the verified statement of Mr. Tegart, the Port of Louisville has, except for extremely rare occasions, confined the totality of its operations to the Port Facility loop tracks since it took over management of the Port Facility in 2009.⁸¹ Mr. Tegart specifically denies that the Port of Louisville has ever switched cars or performed any rail services for any rail shipper in the Riverport Complex not on or immediately adjacent to the loop tracks.⁸² This includes ELG Metals and RussTech, contrary to the allegations at page 8 of the Petition.⁸³ These anecdotal assertions by LRA are not supported by any documentation or evidence. Likewise, the Petition's allegation that "LRA is aware that Lessee has served other customers by rail on the mainline," is unsupported and inaccurate and should be disregarded.⁸⁴

The other assertion that the Port of Louisville has conducted rail operations outside of the Port Facility is presented indirectly and again without any evidentiary support.⁸⁵ Specifically, as explained in more detail below, LRA, without any consultation or prior notice to the Port of Louisville, supplied the Federal Railroad Administration ("FRA") with erroneous information that

⁷⁹ See Petition at 24, which erroneously states "[p]ursuant its Lease with LRA as noted, Lessee is required to maintain *and operate* on *all* of [the lines of railroad constructed by CSX, NS, and P&L] to serve the numerous customers of the Port Facility." (emphasis supplied). .

⁸⁰ Tegart V.S. at 8-10.

⁸¹ *Id.* at 8-9.

⁸² *Id.* at 10.

⁸³ *Id.* at 8-9.

⁸⁴ Petition at 8.

⁸⁵ *Id.* at 12.

the Port of Louisville “move[d] rail cars for multiple customers on approximately 13 miles of track.”⁸⁶ More specifically, LRA falsely informed the FRA that the Port of Louisville provided regular “moves” for no fewer than 10 tenants and/or customers of the Riverport Complex.⁸⁷ As discussed below, the Port of Louisville has vigorously objected to LRA’s unilateral action and its false representations to the FRA.

In summary, the Petitions allegations that the Port of Louisville has conducted railroad operations on lines of railroad located outside of the Port Facility are categorically false.

2. The Port of Louisville Does Not Require STB Authorization to Operate Tracks in the Port Facility

a. The History of the Riverport Complex Proves Neither LRA Nor the Serving Railroads Contemplated LRA or its Contractors Would Need or Require Operating Authority under §10901 to Conduct Switching on the Port Facility Loop Tracks

As recounted above, the Petition contains a number of omissions, misstatements and critical errors about the Port Facility tracks and their relationship to the other tracks in the Riverport Complex. First, the Petition omits the fact that the two loop tracks on which the Port of Louisville’s rail operations are almost exclusively conducted were constructed by LRA without seeking construction and operating authority from the ICC. There is also no indication or assertion that LRA constructed these tracks in the early 1980s with the intention of holding out to provide service as a common carrier or for any purpose other than that they would be industrial tracks used in conjunction with the planned coal-to-barge transloading operations.⁸⁸ Indeed, LRA has never

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ It is well-established that the determination of whether a particular track segment is a “railroad line” requiring authorization pursuant to §10901(a) or is a track exempt from STB jurisdiction turns on the intended use of the segment. *Nicholson v. ICC*, 711 F.2d 364 (D.C. Circuit 1983).

possessed or requested authority to operate as a common carrier over *any* tracks in the Riverport Complex, contrary to its representation in the Petition that it has operating authority over the jurisdictional lines of rail in the Riverport Complex.

Moreover, the fact that LRA granted CSX, NS, and the P&L operating rights over the Port Facility tracks in the Railroad Agreements, and NS & P&L received authority from the ICC to conduct operations over all Riverport Complex “Rail Lines” via trackage rights, does not mean that either LRA or the Port of Louisville requires common carrier authority. A mere grant of operating authority by the owner over its private track does not automatically convert the track into a common carrier line of railroad.⁸⁹ None of the railroads have ever sought to conduct any operations over the Port Facility loop tracks, and so the loop tracks’ status as private industry tracks has remained unchanged since their initial construction.

Third, it is again worth mentioning that prior to leasing the Port Facility to the Port of Louisville in 2009, LRA engaged the services of another contractor, Cooper/T. Smith, for approximately 20 years without either LRA or Cooper/T. Smith seeking any authority from the ICC or the STB to conduct rail operations as a common carrier over the Port Facility tracks, or any other Riverport Complex tracks for that matter.

⁸⁹ See FD No. 31405, *Arkansas Central Railway Co., Inc.—Operation Exemption—Line of Herzog Stone Products, Inc.* (ICC served April 7, 1995), where trackage rights authority was granted over a private track but the carrier never conducted any service, so the track remained private (“Our authorizations for new operations, trackage rights, and abandonments are permissive in nature. Parties obtaining such authority from the Commission are not required to institute operations, enter into trackage rights agreements or to abandon lines. Consummation of any of these actions is at the discretion of the parties and is a question of fact, not law.”). *See also*, FD No. 32248, *Hanson Natural Resources Co.—Non-Common Carrier Status—Petition for Declaratory Order* (ICC served December 5, 1994) (track remains a private spur until a carrier holds out to provide common carrier service over it.).

Accordingly, it is clear from the history and operations of the Riverport Complex and the Port Facility that the Port Facility tracks were not constructed as rail lines subject to the jurisdiction of the ICC and there was no intent for any operations over them by LRA's contractors to be common carrier operations requiring Board authorization under §10901.

b. The Lease and Railroad Agreements Confirm Operations in the Port Facility are Not Common Carrier Operations Subject to the Board's Jurisdiction

The Lease and Railroad Agreements clearly establish that switching operations in the Port Facility are not common carrier operations by a rail carrier subject to the Board's jurisdiction. Rather, these documents establish a clear line of demarcation between the common carrier operations of the three-line haul railroads in the Riverport Complex and the contract switching operations of the Port of Louisville in the Port Facility. As recounted above, subject to obligations to maintain certain tracks in the Riverport Complex, the obligations of the Port of Louisville under the Lease are limited to the management and operation of the Port Facility only.⁹⁰ Under the Lease, the Port of Louisville is required to provide "switching services to move through the Port Facility as required by good operation and in accordance with the agreements between Riverport and the railroads serving the Port area."⁹¹ Despite LRA's flatly wrong assertions in the Petition, there are no provisions in the Lease that require or obligate the Port of Louisville to provide any rail switching services, let alone common carrier switching services, to any other section of the Riverport Complex other than the Port Facility and the loop tracks.⁹²

⁹⁰ Tegart V.S. at 6-8.

⁹¹ Petitioner Exhibit A, Lease at Section V(A)(7).

⁹² The only provision that would allow such services is Section III(A)(9), which states that if the Port of Louisville "wishes to enter into any agreements to contract with a Short Line Railroad to provide switching or any other rail-related services to the Port Facility and to the industries within

The Lease explicitly states that the switching services provided by the Port of Louisville in the Port Facility must be in accordance with the Railroad Agreements, and in such a manner “so as not to violate or place Riverport in default under any of the Railroad Agreements.”⁹³ As recounted above, the Railroad Agreements explicitly state that the railroads’ common carrier service ends when the cars they deliver are placed in the location designated by LRA to receive it, and they are detached from the train.⁹⁴ Under this arrangement, LRA and its contract operators are not part of the overall linehaul movement by the railroads. The Railroad Agreements also state that LRA or its contractor shall perform switching services on the Port Rail Trackage, the definition of which coincides with the definition of the Port Facility in the Lease.⁹⁵ The Port of Louisville, as LRA’s “contract operator of the port transloading facility,” has conducted switching operations in the Port Facility in accordance with the Lease and its predecessors since 2009, and in conformance with the Rail Agreements.⁹⁶ These agreements clearly contemplate LRA and its contractors performing switching services as a private switching contractor, and not as a rail carrier that is part of the line haul railroad’s overall movement of any commodity. Nothing in the Lease expressly or impliedly required or requires the Port of Louisville to change that arrangement by seeking operating authority from the STB over any of the Port Facility tracks.⁹⁷ As such, for LRA or the Port of Louisville to seek to become a rail common carrier subject to the jurisdiction of the STB would be contrary to the Lease terms and the Railroad Agreements. Indeed, Mr. Tegart

the [Riverport Complex]” it must have the prior approval of LRA. The Port of Louisville has not desired to enter into such agreements and it has therefore not asked LRA for permission to do so.

⁹³ Petitioner Exhibit A, Lease at Section III(A)(9).

⁹⁴ Reply Exhibit A, Section 6(a).

⁹⁵ Reply Exhibit A, Section 6(b).

⁹⁶ Reply Exhibit A, Section 6(c)(4); Tegart V.S. at 10.

⁹⁷ *See generally* Petitioner Exhibit A.

explains how in prior years the Port of Louisville broached the subject of becoming a short line railroad for purposes of operating the Port Facility, and the LRA President in place prior to 2019 strongly rejected the idea for numerous reasons.⁹⁸

B. The Port of Louisville is Not a Rail Carrier Holding out to Providing Common Carrier Transportation for Compensation

Notwithstanding LRA's contentions, the Port of Louisville is not a rail carrier under 49 U.S.C. §10102(5) under any circumstances. First, LRA's allegation that the Port of Louisville has an obligation pursuant to the Lease to provide common carrier switch operations to Riverport Complex tenants beyond the Port Facility is demonstrably false. And LRA's allegations that the Port of Louisville has actually provided such services, or held out to provide them, are utterly without any evidentiary support and strongly refuted by Mr. Tegart.⁹⁹ Further, Mr. Tegart has explained that any rail "operations" the Port of Louisville has conducted on the tracks beyond the loop tracks with the single locomotive it leases from LRA have never been for any compensation, which is a requirement for finding an entity to be a "rail carrier."¹⁰⁰

Second, the structure of the Riverport Complex and Port Facility, their history, and the relevant agreements demonstrate that the Port Facility loop tracks are not, and never have been, railroad lines subject to the ICC's or the Board's jurisdiction. Nor have the contract switch operations of LRA and its contractors ever been considered "common carrier railroad transportation for compensation."¹⁰¹ Rather, they have consisted of picking up and dropping off cars delivered to the loop tracks by linehaul railroads and unhooked from their locomotives, and

⁹⁸ Tegart V.S. at 12.

⁹⁹ Tegart V.S. at 8-11.

¹⁰⁰ *Id.* at 11.

¹⁰¹ Petition at 22; 49 U.S. Code § 10102.

they are taken by the Port of Louisville to be loaded (from barges) or unloaded (to barges or trucks) and/or switched as needed.¹⁰² Similarly, when the railcars are to be returned to those railroads the Port of Louisville places them in position on the loop track to be picked up by the applicable railroad.¹⁰³ It does not physically exchange railcars with any of the railroads.¹⁰⁴ It receives no direct payments from any railroad and has no knowledge of the railroad's rates and other arrangements with its customers.¹⁰⁵ On rare occasions, the Port of Louisville has moved cars for one of the industries whose facilities are adjacent to the loop tracks and stored cars for the other, but in these instances such actions are out of courtesy and either not for any compensation and/or (in the case of temporary storage) paid through individually negotiated arrangements.¹⁰⁶

Rather than establishing one charge for its services in the Port Facility to assess generally to potential customers, the Port of Louisville has direct contracts with customers of the Port Facility (most of which are not located within the Riverport Complex) for loading or unloading a railcar that is placed on the loop tracks.¹⁰⁷ The Port of Louisville does not charge a separate fee for switching cars on and off the loop track, but rather individually negotiates these fees on a case-by-case basis.¹⁰⁸ The Port of Louisville also does not receive any payments from other tenants of the Riverport Complex for the rail component of its overall operations of the Port Facility.¹⁰⁹ In summary, there is simply no factual or legal support for LRA's allegation that the Port of Louisville

¹⁰² Tegart V.S. at 10.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 11.

¹⁰⁶ *Id.* at 8-9.

¹⁰⁷ *Id.* at 11.

¹⁰⁸ *Id.* at 12.

¹⁰⁹ *Id.*

is a rail carrier under §10102(5) that requires operating authority under §10901 to fulfill its obligations under its Lease with LRA.

C. LRA’s Attempt to Conflate FRA Jurisdiction over Rail Safety with the STB’s Exclusive Jurisdiction over Railroad Transportation is Misplaced

The Petition includes an extensive discussion of interactions between LRA and the FRA in the summer and fall of 2020 regarding the extent to which the FRA has jurisdiction over the Port Facility tracks for purposes of compliance with FRA track safety and other regulations.¹¹⁰ The point of this part of the Petition is not readily apparent. Whether the FRA has jurisdiction over a particular segment of railroad track to enforce its safety regulations is completely irrelevant to the main question posed by the Petition, namely, whether the Port of Louisville’s use of the Port Facility track pursuant to its Lease requires it to obtain authority from the Board. It is indisputable that this question is *exclusively* within the province of the Board under 49 U.S.C. §10501. It appears that the main reason this information is included in the Petition is to tell the Board that LRA sought and obtained – unbeknownst to the Port of Louisville - an *ex parte*, non-binding, advisory opinion from a staff attorney at the FRA that the tracks in the Port Facility are subject to the FRA’s safety jurisdiction. Based in large part on the inaccurate information provided to it by LRA, the informal opinion considered the Port of Louisville to be a “rail carrier performing switching operations in commerce.”¹¹¹

Separate and apart from the fact that the FRA representative’s opinion was expressly non-binding, advisory, and had no force of law, it was based on false information provided by LRA.

¹¹⁰ Petition at 6-14.

¹¹¹ A second reason appears to be to make the even more irrelevant and baseless argument that the Port of Louisville is in breach of the Lease because LRA asserts the Port of Louisville will not comply with FRA regulations in the future. How this assertion, even if it had any basis, pertains in any way to the jurisdictional question presented by the Petition is not explained. Petition at 15.

Specifically, as discussed above, the Port of Louisville operates only on the loop tracks within the Port Facility. It does *not*, as LRA apparently informed FRA, “move rail cars for multiple customers on approximately 13 miles of track,” and it does *not* provide rail freight services to “DHL, Lastique, Lineage Logistics, Misa Metal Processing, Russtech, HTSI, Southern States, ELG Minerals, Universal Minerals, and United States Gypsum.”¹¹² This information provided to FRA by LRA, which obviously factored into the erroneous guidance, was untrue and the Port of Louisville raised a strong objection to it upon being told of the FRA’s informal guidance by LRA.¹¹³

Moreover, in addition to being irrelevant to the question presented by the Petition, the determination of whether an entity providing rail switching services is a “plant railroad” is limited to a determination of whether the FRA has jurisdiction over the tracks at issue. That is not a question in this case, especially since the Port of Louisville does not question the legitimacy of the FRA’s safety jurisdiction over tracks that are part of the general system of railroads. The FRA clearly has broad jurisdiction over rail tracks in port facilities, and the Port of Louisville does not dispute it. While the Port of Louisville maintains that, based on the *actual* facts and circumstances present in this situation, there are legitimate questions about whether all of the Port Facility tracks are subject to the FRA’s safety jurisdiction, it is by no means refusing to comply with any FRA directives or determinations that it does have jurisdiction over any Port Facility tracks. The Port of Louisville has merely taken the position that if such a determination is made then it is prepared

¹¹² *Id.* at 12, quoting the FRA opinion email.

¹¹³ Tegart V.S. at 9. *See also*, letter from counsel for Port of Louisville to counsel for LRA dated October 29, 2020, attached as Exhibit D to the Petition.

to meet with the LRA to discuss the issue and negotiate appropriate changes to the Lease to account for the increased costs that will be incurred.¹¹⁴

D. There is No Basis for Issuing an Order Requiring the Port of Louisville to Cease Operations on the Line

As the Port of Louisville is not conducting rail operations as a common carrier railroad over any Riverport Complex tracks, and except for very rare instances it has confined all of its operations to the two loop tracks in the Port Facility pursuant to the Lease, it neither was nor is required to obtain STB approval to conduct its limited contract switching service. Thus, there is no basis for LRA's second request in its Petition that the Board declare the Port of Louisville "should cease operations immediately upon such lines,"¹¹⁵ (which it later modifies to a declaration that the Port of Louisville "*must* cease and desist from operating on these lines immediately)."¹¹⁶ LRA does not offer one shred of authority supporting its draconian demand.

Even if the STB was to conclude that the Port of Louisville should have sought and received authority from the STB to conduct its extremely infrequent and uncompensated services beyond the loop tracks and/or its operations on the loop tracks, a cease and desist order would be exceedingly harsh and unnecessary in these circumstances. Other than the continuing baseless and bad faith allegations of LRA, there is no evidence whatsoever that the Port of Louisville has done anything wrong or failed to provide any service to any customer of the Port Facility. To the contrary, LRA's sole example of its trumpeted concerns about safety essentially boils down to a single instance of a damaged warehouse door on the out-of-service shaker house structure used

¹¹⁴ See, Reply Exhibit F, Letter dated September 11, 2020 from counsel for the Port of Louisville to LRA, at 2.

¹¹⁵ Petition at 2.

¹¹⁶ *Id.* at 21-22 (emphasis added).

only for equipment storage¹¹⁷ and which was promptly replaced by the Port of Louisville with a new door. There have been no Occupational Safety and Health Administration (“OSHA”) reportable accidents or incidents during the entirety of the Port of Louisville’s lease and operation of the Port Facility. The Port of Louisville maintains that one minor property damage incident of this nature in 11 years of operation constitutes an excellent safety record. Moreover, as rail safety issues are the exclusive province of the FRA, the Board has no reason to issue cease and desist orders pertaining to such matters.

In addition, any failure of the Port of Louisville to seek operating authority has clearly been inadvertent, and without any intention of circumventing any laws. Neither LRA nor its previous contract operator ever sought such authority over any Riverport Complex or Port Facility tracks in more than 35 years. In reliance upon this past position the Port of Louisville has in good faith conducted its limited switch operations in the same manner pursuant to its Lease and the Railroad Agreements for nearly 11 years.¹¹⁸ In the event the Board concludes that common carrier authority is necessary here, the Port of Louisville can quickly submit a Notice of Exemption or other appropriate pleading seeking common carrier authority to cure any perceived shortcoming.¹¹⁹ It has not done so because it believes, for all the reasons set forth in this Reply, and LRA also believed at least until 2019, that no such authority is necessary.

¹¹⁷ Exhibit C to the Petition.

¹¹⁸ Tegart V.S. at 8.

¹¹⁹ STB Finance Docket No. 34481, *Horsehead Corp. – Petition for Acquisition and Operation Exemption – Chestnut Ridge Railway Co.* (served March 12, 2004).

E. Declaring that LRA May Replace the Port of Louisville with a “Railroad” Under These Circumstances Would be Highly Irregular and Prejudicial

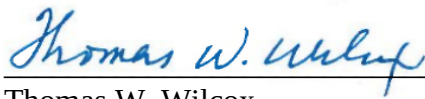
The final request of LRA for the Board to declare LRA “can seek authority from the STB to have another railroad operate on said lines” should be rejected out of hand for several reasons. To even entertain this request, the Board must conclude that (1) the Port of Louisville is a “railroad,” which it is surely not; (2) the Port Facility tracks are all lines of railroad subject to the Board’s jurisdiction, which they are surely not; and (3) the term “said lines” is clearly defined in the Petition, which it surely is not. For example, LRA doesn’t need a declaratory order from the Board to “have another railroad” operate over the tracks in the Riverport Complex that do not include the Port Facility tracks. It could simply enter into another operating or trackage rights agreement as it has already done with CSX, NS, and P&L. However, to the extent that LRA is asking the Board to authorize replacement of the Port of Louisville with a “railroad” then it is impermissibly asking the Board to interject itself into a private contract dispute over an ongoing lease which is pending before state and federal courts and an arbitrator in several ongoing actions. This would be highly prejudicial to the contractual rights of Port of Louisville, who has already been found to not be in material breach of any of the Lease provisions.¹²⁰ Moreover, the seriously flawed logic and rationale of this aspect of the Petition is exposed by the fact that LRA is in effect asking the Board to authorize an action that would result in LRA breaching the Lease and the Railroad Agreements, which as stated above explicitly establish that switching operations in the Port Facility are to be conducted by LRA or “a contract operator of the port transloading facility” not a railroad subject to the Board’s jurisdiction.

¹²⁰ FD No. 34867, *Gen. Ry. Corp.—Exemption for Acquis. of R.R. Line—in Osceola & Dickinson Ctys., Iowa*, slip op. at 4 (served June 15, 2007); FD No. 33905, *Lackawanna Cty. R.R. Auth.—Acquis. Exemption—F&L Realty, et al.*, slip op. at 6 (served Oct. 22, 2001).

III. CONCLUSION

For all the reasons stated in this Reply, the Board should summarily deny the Petition for Declaratory Order filed by LRA and terminate this proceeding.

Respectfully submitted,



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January 6, 2021

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Docket No. FD 36463

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

VERIFIED STATEMENT OF JOSEPH P. TEGART

My name is Joseph P. Tegart. I am one of three co-owners of New Albany Main Street Properties, LLC, which does business as the Port of Louisville. My official title is President. I have been a co-owner of the Port of Louisville since 2006. I have been in the port and terminal industry for more than 40 years. A copy of my resume is attached to this statement. I have worked for American Commercial Barge Lines and its subsidiary American Commercial Terminals (“ACBL”) in various capacities in sales and operations. I was sales manager for ACBL’s 12 river terminals that handled a diverse range of products including coal, grain, steel, and bulk product. At Zeigler Coal Company, I was the Transportation Manager overseeing the movement of 40 million tons of coal a year to both domestic and international customers. I also worked for Cooper/T. Smith and Associated Terminals in coal and stevedoring sales, including a sales and management role at the Port Facility when Cooper/T. Smith was the lessee of the facility.

I have worked in and around the 2000+-acre Riverport Complex owned by the Louisville and Jefferson Riverport Authority (“LRA”) since its initial construction and development in the early 1980s. When I worked for Cooper/T. Smith from 1996 to 2000 when that company was operating the Port Facility, they leased the 300-acre parcel within the Riverport Complex located

along the Ohio River that consists primarily of a barge bulk commodity loading and unloading dock, approximately four miles of railroad loop tracks and related equipment. I left Cooper/T. Smith in 2000 to work for Associated Terminals. In 2006, my partners and I formed the Port of Louisville. We were the only bidder that responded to an April 2008 request for proposal from LRA for entities to take over management of the Port Facility, which by that time had deteriorated and become commercially unviable, primarily because of the significant reduction in coal transportation by rail and the lack of regular maintenance of buildings, equipment, and rail lines.

For more than ten years pursuant to the lease that has been renewed and amended several times but whose terms are still is substantially the same, we have been fully engaged in making the Port Facility a success. We have personally invested \$1 to \$1.5 million in capital in redeveloping the Port Facility and continue to put all the Company's income back into company operations. With all income from operations being reinvested into the company, none of the owners of the Port of Louisville has ever taken a salary or any distribution or reimbursement for out-of-pocket travel and other expenses.

I have been asked to submit this verified statement describing the Riverport Complex, the Port Facility, and the rail operations component of our overall management and operation of the Port Facility. I am also correcting several significant misstatements found in the Petition for Declaratory order filed by LRA in this proceeding.

A. The Riverport Complex

The Riverport Complex is a 2000+-acre site owned and developed by LRA which houses more than 120 businesses who use various modes of transportation, including truck, barge, and railroad. Those businesses have both purchased and leased tracts in the Riverport Complex to operate their companies. According to the LRA's website, the Riverport Complex contains

approximately 13 miles of railroad tracks. Businesses that need rail service have also constructed their own rail tracks and spurs and/or leased tracks constructed by LRA. LRA itself functions mostly as an industrial complex real estate management entity. It has only four employees and does not conduct any actual industrial activities or operations in the Riverport Complex. Accordingly, LRA does not have actual “customers” per se. Rather, it has owners and tenants. The owners and tenants of the Riverport Complex are in the Industrial Service, Logistics and Distribution, Manufacturing, Retail, and other industries.¹

B. The Port Facility

The Port Facility is a 300-acre subset of the Riverport Complex. It consists of a barge-served bulk commodity transfer terminal and general cargo dock along the Ohio River, approximately four miles of a double loop track and related assets and rights, and a coal storage area which has been out of the coal service business for more than 15 years. It also consists of a conveyor and related loading and unloading facilities, all of which were originally designed to handle large volumes of coal delivered by unit trains for transfer to barge and delivery to utility and industrial customers. Those facilities are in a poor, unusable condition except for storage of other equipment, would require five to six million dollars of investment to rehabilitate, and have no current, long-term customer interest. The Port of Louisville has no contractual obligation to rehabilitate the equipment but continually prospects for potential customers who would make rehabilitation economically viable.

The bulk commodity transfer terminal and the general cargo dock are separated from the loop tracks by a levee.² These facilities accept barges for loading and unloading of cargo to/from

¹ <https://www.louisvilleriverportauthority.com/>

² The Lease refers to these two sections making up the Port Facility as the Port Facility Area. See Lease at Section 1.B and Exhibit A.

rail and truck for various customers, most of whom are not located in the Riverport Complex or the Port Facility. In addition to the loop tracks, the Port Facility property contains a length of rail that runs through the Port Facility property to connect the loop tracks to the mainlines of the Norfolk Southern Railway (“NS”) and Paducah & Louisville Railway (“P&L”) that enter the Riverport Complex from the north, and to the mainline of CSX Transportation, Inc., which enters the Riverport Complex from the south. I understand that the bulk terminal, barge dock, loop tracks and track connecting to the main line railroads were all constructed by LRA in the early 1980s with the rest of the Riverport Complex. Over time, in the absence of the Port Facility being used for its original purpose as a bulk coal rail-to-barge transfer facility, three non-coal industries have located their facilities either within the Port Facility boundaries or adjoining its boundaries.

On information and belief, starting in 1983, LRA began working with the Southern Railway (predecessor to NS), CSX, and the Illinois Central (predecessor to the P&L) to construct rail lines that connected their main lines to the existing tracks within the Riverport Complex so tenants could receive interstate rail service. These railroads were granted access to the Riverport Complex as a whole through nearly identical Operating Agreements they entered into with LRA, and the railroads dealt directly with their customers in the Riverport Complex when setting terms and conditions for rail service. All three of the Port of Louisville’s leases with LRA to manage the Port Facility have expressly stated that our operations must be consistent with these “Railroad Agreements,” copies of which were first provided to us by LRA when we signed the 2009 Lease. In the 2009 Lease, and each renewed version, LRA represented and warranted that the three agreements were in effect and valid, despite that by their terms, the agreements they furnished us had expired in July 2003 (CSX), 2000 (NS) and 2003 (P&L), respectively. We have not been

supplied any subsequent versions of the contracts or amendments and have relied upon LRA to inform us of any updates or material amendments since this would affect the Lease terms.

Confirmation that the Railroad Agreements have remained in effect has been supplied in part by LRA remitting to the Port of Louisville, pursuant to Section VI.G of our lease, certain “Maintenance Charge” and “Car Charge” payments the railroads make to LRA. Contrary to the assertion made in the Petition that “LRA pays to Lessee all maintenance charges . . . and 1/3 of all car charges it receives from the three railroads,” Petition at 5, LRA has not consistently and timely made either payment, particularly since 2019 when LRA launched its campaign to concoct reasons to terminate the 2016 Lease. More recently, counsel for LRA informed the Port of Louisville that the Railroad Agreements are in effect on a month-to-month basis, after a Vice President of LRA asserted that they had all expired 11 years ago.

Under the Railroad Agreements, each of the railroad carriers expressly characterized their service over most of the Riverport Complex as common carrier service. However, the rail operations and obligations of LRA – and us as its contractor - under the Rail Agreements are not characterized in that manner. Rather, the Railroad Agreements *specifically* state that the railroads’ common carrier service ends when they deliver the cars to points designated by LRA and unhook them. Pursuant to Section 6 of the Agreement entitled Switching Services, all shipments made by the three railroads in common carrier service are deemed to be “fully and completely delivered as soon as the car containing such shipment shall have been placed in the location designated by the Riverport Authority to receive it, and detached from the engine or train by which it was moved . . . ,” which in our case is the loop tracks. Once the railroad’s common carrier service is completed and the cars unhooked, LRA’s limited role under the Railroad Agreements is to perform switching services on “the Port Rail Trackage,” which is defined in the Railroad Agreements as “[a] system

of rail trackage owned by Riverport as part of the bulk commodity transfer facilities within the port area at the Riverport Complex, including a double loop track and one or more connections to the Onsite Rail Line and Lead Track.” This definition coincides with the definition of the Port Facility in the Lease. Thus, under the Rail Agreements, the switching services of first, the Port of Louisville’s predecessor Cooper/T. Smith and then the Port of Louisville since 2009 as LRA’s current contract operator of the Port Facility, are confined to the Port Facility loop track once the cars or trains are delivered to the loop track and unhooked from the railroad’s locomotives.

C. The Port of Louisville’s Operation of the Port Facility

Rail car switching on the loop track is just part of our role as manager of the Port Facility. The Port of Louisville was formed by marine terminal operators to operate the entire Port Facility, not to be a railroad. Our other responsibilities include maintaining of the US Army Corps of Engineers permitted river fleet for barges; maintaining the riverfront dock and crane loading/unloading operation and equipment; sales, operation and management of a full-service commodities transfer operation for the movement of various cargos from river barge to rail and truck and from rail and truck to river barge. These include, but are not limited to, scrap metals, bauxite, finished steel slabs and coils, cement, coal, sand, coke, limestone, millscale, clay, fertilizers, feldspar, wire rod, and gypsum.

As for the rail component of our overall management, when the Port Facility terminal and loop tracks were first opened for operation by LRA in 1987 the Port Facility was operated by Cooper/T. Smith, who filled that role until 2007. Our understanding is that starting in the early 1990's LRA received a subsidy from CSX of one million dollars a year for 10 years due to the railroad’s interest in developing the Port Facility. When the subsidy money dried up, the LRA found that it did not generate enough revenue from its rail business to support maintenance of the

track running through the Port Facility or the two loop tracks. LRA struggled along, letting the tracks in the Port Facility deteriorate.

In 2008 LRA issued a public request for proposal for entities to lease the Port Facility for a qualified entity to take over operating the Port Facility, including a locomotive owned by LRA and used by Cooper/T. Smith to perform the limited switching on the loop tracks called for by the Railroad Agreements. We were the only and successful bidder and in September 2009 executed our first Port Facility Lease (“2009 Lease”) whereby we undertook all of the duties previously provided by LRA and Cooper/ T. Smith. The 2009 Lease was renewed in substantially its same form in 2012, and again in 2016 after the public bidding processes; in each of the bid processes resulting in a Port Facility Lease, the Port of Louisville was the only bidder and was awarded the new lease based largely on its satisfactory operational performance under the preceding lease(s).

When the Port of Louisville took over management of the Port Facility, the railroad tracks were in such bad condition that they were barely operable. The two loop tracks were in such bad condition that they could not be utilized for seven years. The company spent approximately \$20,000 of its own money the first two months to rehabilitate the track, and over \$300,000 in total to put the loop tracks back into service. In addition, in the absence of coal customers or a large rail tenant or customer we have focused our efforts on developing new river cargoes to and from the Port Facility. This business has consisted of 90% inbound cargoes which are loaded primarily into trucks, and 10% outbound cargoes which also primarily arrive by truck. More recently, we have received some commodities by railcar which are then transloaded into barges. We started with nothing in 2009 and have grown the tonnage every year. We have constantly prospected and marketed for large bulk commodity customers who could use the “shaker house” complex and transfer conveyor, which have been out of operation since well before the inception of our Lease.

However, no such customer has emerged, so our transloading operations are conducted using portable conveyors and other handling equipment that is less efficient. Most of our customers are entities who do not have facilities in either the Riverport Complex or the Port Facility. Rather, they ship bulk commodities by either rail or truck to be transferred into barges, or by barge to be transferred and loaded into railcars or trucks. We believe the outlook for new, diverse cargoes and customers is very bright.

The rail service aspect of the Port of Louisville's management and operation of the Port Facility has not changed in any material way from how it occurred prior to 2009 and since the opening of the Port Facility. Most importantly for purposes of LRA's Petition, it is absolutely and unequivocally false for LRA or any other party to state that the Port of Louisville conducts any switching operations or any other rail service to any tenant of the Riverport Complex on any of the tracks of the Riverport Complex other than the loop tracks. All of our rail switching operations are confined to the two loop tracks.

Specifically, we have never "utilized [our] employees and locomotives to switch cars in and out of" ELG Metals' facility on "the mainline," as LRA's Petition inaccurately states at page 8. ELG Metals' facility is on property that adjoins the Port Facility boundaries that is connected to the track constructed by LRA that runs through the Port Facility. On very rare occasions when ELG Metals has had operational difficulties on their site they have asked us to move their railcars around on their premises, which we have done for no charge as a courtesy to a customer. To reach the ELG facility our leased locomotive traverses a few hundred feet on the LRA track. I estimate this has happened less than 10 times in over 11 years.

Similarly, we have never "moved cars for RussTech to [its] facility located on the mainline and spotted them for CSX." *Id.* RussTech's facility is also adjacent to the Port Facility boundaries

and connected to the LRA track. We have occasionally stored their rail cars on the loop track for a daily storage fee. However, in all cases the cars were moved on and off the loop track by CSX. We have never moved cars to or from RussTech's facility. Finally, Universal Minerals has a facility leased directly from with a short track that is connected to the loop track. Occasionally, one of the three railroads railroad will place a rail car on the loop track for Universal Minerals. In such cases we have moved the car to their siding connected to the loop track, but we do not charge Universal for doing so.

Recently, LRA apparently told the Federal Railroad Administration ("FRA"), without consulting Port of Louisville and without our prior knowledge, that the Port of Louisville regularly moves multiple railcars for the companies above at least seven other Riverport Complex tenants over the approximately 13 miles of tracks that are in the entire Riverport Complex. LRA's provision of this false information to FRA came to light in an email from the FRA to LRA dated August 17, 2020, which LRA eventually shared with us in September. This information provided to the FRA is demonstrably incorrect and we have vigorously objected to LRA for making these representations.

Contrary to the allegations made by LRA in the Petition, and subject to the very limited exceptions discussed above, our operations are, and have always been, as follows: CSX comes into the Riverport Complex from the South Monday thru Friday during the day. It exclusively uses the 6.7-mile track that it and LRA jointly constructed in 1987, 2.2 miles of which are located in the Riverport Complex. This track connects to the LRA track in the Port Facility. P&L and NS come into the Riverport Complex from the North at night Monday thru Friday. All of the Riverport Complex tenants and owners located outside of the Port Facility receive their daily railcars from CSX, NS and/or P&L without any knowledge of, involvement with or interference from the Port

of Louisville; these tenants are not Port Facility customers. Consistent with the Railroad Agreements, the Port of Louisville's rail operations are confined solely to the two loop tracks except on very rare occasions when we have had to temporarily move cars onto the tracks adjacent to the loop tracks.

When any of the railroads require our service to switch cars in and out of the Port Facility, as required by the Rail Agreements they place their empty or loaded rail cars directly on the loop tracks at the point it connects to their tracks and unhook them. This is typically accomplished by the railroad backing the train onto the loop tracks and unhooking the cars, as opposed to the railroad locomotive coming on to the loop track. Consequently, the Port of Louisville is conceptually the same as a rail customer, as opposed to being part of the overall line haul movement. The Port of Louisville then picks up the cars with the LRA locomotive that is included in the Port Facility assets we have leased from LRA and we take the railcars to be loaded (from barges) or unloaded (to barges or trucks). Similarly, when the railcars are to be returned to those railroads, we place them in position on the loop track to be picked up by the applicable railroad. We do not physically exchange railcars with any of the railroads. They drop the railcars and unhook them before we ever touch them. Over the past year the railroads have placed railcars in units from 1 railcar up to 90 railcar unit trains, all of which we process for cargo transfers to and from barges at our river dock by moving them on the loop track. We do not hold out to provide any switching for other industries or entities located at the Riverport Complex outside of our leased Port Facility. This is how the LRA and its first contract operator conducted rail operations in the Port Facility from the beginning, and the Port of Louisville did not change these operations when we took over operation of these facilities in 2009.

Under our Lease with LRA, we are required to maintain some of the tracks located beyond the Port Facility and into the Riverport Complex. Under the current system, CSX and NS inspect the Riverport Complex tracks on behalf of the three railroads, and if they find a problem, they call us and we have it repaired immediately by our rail contractor, Associated Rail. I believe in the 11 years we have maintained the tracks required by our Lease these tracks have only been closed because of a maintenance issue once for three days. Notwithstanding its overblown rhetoric, LRA's attempt to characterize the Port of Louisville operations as unsafe is categorically false. Our contractor also performs routine maintenance such as tie replacement, switch work, track weed spraying, clearing debris³, and tree trimming along the tracks. These people perform their work on the entire length of the tracks in the Riverport Complex. On occasion we have had to utilize the leased LRA switching locomotive to ferry tools and personnel to track locations in the Riverport Complex that are distant from the Port Facility. In all cases the Port of Louisville coordinates with the three rail carriers to ensure that they are not operating on the tracks while this work is being performed. But we are not moving rail cars for the shippers when these "ferry" operations are conducted.

The Port of Louisville does not receive any direct payments from any of the railroads, and we assume they directly determine and assess the rates and charges for common carrier service paid by their customers located in the Riverport Complex and their customers who deliver cars to the Port Facility from outside the Riverport Complex. We have direct contracts with customers of the Port Facility for physically loading or unloading a railcar that is located on the loop tracks on which we operate. As stated previously, most of these customers are located outside the Riverport

³ There is a creek running under the CSX mainline track that overflows regularly after storms and leaves lots of debris on the tracks that must be cleared off quickly. This sometimes requires the use of the locomotive to rapidly move tools and personnel to the location.

Complex grounds. These charges are individually negotiated and paid on a case-by-case basis. However, we do not charge a separate fee for switching their cars on and off the loop track as the line haul railroads place the cars on the loop tracks pursuant to their arrangements with their customers. We also do not receive any payments from other tenants of the Riverport Complex for performing our maintenance responsibilities under the Lease. It is our understanding that the railroads make direct payments to LRA in conjunction with their operating access and common carrier service to Riverport Complex owners and tenants. This understanding derives from Section 3 of the three Railroad Agreements. Pursuant to this provision the railroads pay a “Maintenance Charge” and a “Car Charge” to LRA. Section VI.G of our Lease in turn obligates LRA to pay us all the “Maintenance Charges,” and one third of the “Car Charges.”

Over the years the Port of Louisville has considered operating the tracks in the Port Facility as a Class III short line railroad and seeking appropriate authority from the Board to do so. We have been approached by companies such as R.J. Corman and Respondek Railroad about taking this step. However, the former president of LRA, Mr. Larry McFall, who retired in 2016, was strongly opposed to a Class III short line operating in the Port Facility. I recall his view was that having three railroads serving his potential customers in the Riverport Complex and serving the Port Facility was a strong selling point for economic development of the Riverport Complex as a whole. His fear was that the creation of a Class III shortline in the Port Facility would result in higher rail rates for Port Facility customers that would retard economic development. In my opinion selling real estate was more important to Mr. McFall than developing and operating a short line railroad within the Riverport Complex. Also, becoming a short line railroad would be contrary to the Railroad Agreements, which create a clear line of demarcation between the common carrier

service provided by the railroads and the contract switching operations provided by LRA and its contract operators of the Port Trackage. So, we let the matter drop.

VERIFICATION

I, Joseph P. Tegart, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to sponsor this testimony.

Executed: January 5, 2021

Joseph P. Tegart
Title January 5, 2021

Joseph P. Tegart

Louisville, KY
502.744. 9048-Cell
tegartJP@gmail.com

Educational Background

Indiana University, BS
Master's Work, Webster University
Computer Education courses, Belleville Area College

Work Experience

Port of Louisville
Partner

Louisville, KY
2010 - Present

Vice President Sales and Marketing
Ohio River Trading Company
Mammoth Marine

Louisville, KY

January 2007-2008

Responsibilities:
Business Start up, Transportation and Logistics operation, sales and innovation

President
Kraken Barge Line LLC

New Albany, IN/Louisville, KY
April 2005-Present

Responsibilities:
Business Start up, General operation, sales and innovation

President
Tegart Transportation

New Albany, IN/Louisville, KY
May 2004-Present

Responsibilities: Markert Transportation Consultation:

- **North American Stainless**
- **Nugent Sand Company**

- Coal Network Company
- American Innovation Company
- Phoenix Coal Company

Southern Regional Sales Manager And Manager Coal Sales American Commercial Barge Lines
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**Jeffersonville, Indiana
April 2002-May 2004**

Responsibilities:

Barge Transportation Sales and Marketing

Gulf Coast Region

Prodcuts included: Steel, Coal, Aggregates, and imported Raw Materials

President of Terminal Marketing and Operations Coal Equity Inc.

**Cincinati, Ohio
April 2002- Jan. 2001**

Responsibilities:

Marketing for Terminal Facilities:

- Marketing and Sales for terminals in Kenova, West VA and Rockport IN.

Entrepreneurial Growth:

- Creation and implementation of growth strategies for terminals.

Transportation and Logistics:

- Provide logistics for steel, bulk and other raw material's movement throughout the United States by utilization of a combination of rail, barge and truck modalities.

Operation of Terminals:

- Orchestration of daily operational and transportation process.
- Supervision of personnel and maintence of faciility.

2

Vice President of Marketing Associated Terminals, L.L.C.
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Louisville, KY

**New Orleans, LA
1999-2001**

Responsibilities:

Marketing for Terminal Facilities:

- Marketing and Sales for Mid Stream operations in the Gulf/ Lower Mississippi River.

Entrepreneurial Growth:

- Location and Operation of United States growth opportunities that interface with base operations in the Gulf.

Transportation and Logistics:

- Design and facilitate product transportation systems utilizing rail, truck and barge transportation.

Vice President Sales and Operations Cooper/ T. Smith

**Louisville, Kentucky
New Orleans, LA
June 1999-1996**

Responsibilities:

Orchestration of two Terminal Operations, Ghent, Kentucky and Jefferson County River Port, Louisville, Kentucky.

- Built Ghent Terminal from 50,000 tons to 400,000 ton operation.
- Supervised 35 direct reports.
- Sold bulk material, Coal, Coke , Scrap, Steel, Fertilizer.
- Increased Coal production by 800,000 tons in three year period.
- Designed and implemented intermodal transportation packages, movement of coal and coke from barge to rail and rail to barge.

3

Manager of Transportation Zeigler Coal Company

**Fairview Hts. , Illinois
1996-1990**

Responsibilities:

Transportation/Logistics of all coal

3

- Supervised transportation of 40 million tons of Coal on Annual basis (700 million dollars value).
- Negotiated transportation contracts with all major barge, railroads, trucking, shipping companies, terminal companies and ocean vessels.
- Designed and implemented logistics configuration for optimal routes from mine to end-user
- Coordinated transportation operations for distribution and quality service.

Director of Terminal Sales Manager of Terminal Sales Director of Sales American Commercial Barge Lines
--

Jeffersonville, Indiana
1990-1976

Responsibilities:

Sales and Marketing for ACBL Terminals, United States

- Completed Terminal marketing and sales for seven terminals located throughout the United States.
- Sold barge freight for domestic and export coal sales.
- Managed operations of various coal and steel terminals for ACBL and subsidiaries.

Past/Present Professional Organizational Involvement

Vice Chairman
National Coal Association
Transportation Committee

Board of Directors
National Waterways Association

Board of Director
Treasurer
St. Louis Coal Club

President
Board of Directors
Lexington Coal Exchange

Membership:
Knoxville Coal Club
North Carolina Coal Association

LANGUAGE SKILLS

High School Spanish, Travel experiences in Mexico, Canada, Italy, Turkey, Spain, Austria, England
Scotland, and France.

TRAINING AND PROFESSIONAL DEVELOPMENT ACTIVITIES

Selected and completed ACBL Leadership Academy

CAREER INTERESTS

Logistics, Sales, Marketing and Transportation
Creative Problem Solving
New Markets

NAME: Joseph P. Tegar

EMPLOYMENT INFORMATION:

Current Title: Southern Regional Sales Manager
Date Employed by ACL: 1975-1990; April 2002-Present
Chronology of Employment:

Date	Employer	Title/Position
Sept. 2003-Present	ACL	Southern Regional Sales Manager
April 2002-Sept. 2003	ACL	Manager Coal Sales
April 2001-April 2002	Coal Network Incorporated Mason , OH	Vice President Sales and Operation
Sept. 1999-Sept. 2000	Associated Terminals, Inc. Baton Rouge, LA	Vice President of Brokerage, Coal and Bulk Commodities
June 1996-Sept. 1999	Cooper T. Smith Stevedoring New Orleans, LA	Vice President for Sales and Marketing Terminals
Nov. 1990-June 1996	Zeigler Coal Company	Manager of Transportation
1975-1990	ACBL Jeffersonville, IN	Variety of positions in Marketing and Operations

EDUCATIONAL SUMMARY

Indiana University	BS Degree	
Webster University	Master's Degree Work	
Belleville College	Computer Courseware	

LANGUAGE SKILLS

High School Spanish, Travel experiences in Mexico, Canada, Italy, Turkey, Spain, Austria, England Scotland, and France.

TRAINING AND PROFESSIONAL DEVELOPMENT ACTIVITIES

Selected and completed ACBL Leadership Academy

CAREER INTERESTS

Logistics, Sales, Marketing and Transportation

Problem Solving

New Markets

BUSINESS AND PROFESSIONAL AFFILIATIONS

Knoxville Coal Club

Lexington Coal Exchange

Past President of Lexington Coal Exchange

Past Vice Chairman National Mining Association

Past Treasure and Director of St. Louis Coal Club

Past member of North Carolina Coal Association

LICENSE AND CERTIFICATIONS

NA

REPLY EXHIBIT A

OPERATING AGREEMENT

THIS OPERATING AGREEMENT, made and entered into as of this ^{10th} day of ~~March~~ ^{July}, 2000, by and between LOUISVILLE AND JEFFERSON COUNTY RIVERPORT AUTHORITY (hereafter "Riverport"); and CSX TRANSPORTATION INC. (hereafter "CSX").

W I T N E S S E T H:

WHEREAS, CSX and Riverport are parties to an Agreement Relating to CSXT Use of Riverport Authority Rail Lines dated February 1, 1990, which Agreement also consists of various Addenda and Exhibits thereto (collectively, the "Agreement"), which is a comprehensive instrument defining the rights, duties and obligations of the parties respecting CSX freight railroad service to the Riverport Complex and port transloading facility;

WHEREAS, the term of that Agreement which was to have expired on January 31, 2000, has been extended by the parties by a letter agreement of January 31, 2000, pending completion of this Operating Agreement; and

WHEREAS, the Parties' desire to enter into this Operating Agreement to define the mutual rights, duties and obligations respecting CSX rail freight operations to the Riverport Complex, in accordance with the terms and conditions of this Operating Agreement;

NOW THEREFORE, the Parties agree as follows:

1. DEFINITIONS.

(a) Offsite Rail Line. A line of railroad owned by Riverport approximately 4.1 miles long, connecting at its southern end to CSX Transportation, Inc.'s existing line of railroad between Louisville, Kentucky, and Henderson, Kentucky, near Mile Post HR-15, known as CSX's LE & STL Subdivision, extending northwardly to the south property line of the Riverport and highlighted in purple on Exhibit A.

(b) Onsite Rail Line. A line of railroad owned by Riverport connecting at its southern end to the Riverport Offsite Rail Line, extending northwardly on the Riverport Complex, and highlighted in blue on Exhibit A.

(c) Lead Track. Trackage beginning at the LG&E Lead Track at approximately Station 7+59.50, and ending at point or points of connection with the Port Rail Trackage, as hereinafter defined, which trackage, together with a working track, which is approximately 1,500 track feet in length, and all underlying right-of-way, trestle, bridge, grade crossings, grade crossing protection, sublast, grading, drainage, and all other appurtenances thereto.

(d) Joint Portion. That portion of the Lead Track between Station 34+96.00, plus or minus and the point or points of connection with the Port Rail Trackage.

(e) Port Rail Trackage. A system of rail trackage owned by Riverport as part of the bulk commodity transfer facilities within the port area at the Riverport Complex, including a double loop track and one or more connections to the Onsite Rail Line and Lead Track.

(f) Industrial Lead Track. One or more extensions to the Offsite Rail Line, the Onsite Rail Line, the Lead Track or the Port Rail Trackage, owned by the Riverport and built to serve industrial users.

(g) Rail Lines. The Offsite Rail Line, the Onsite Rail Line, the Joint Portion, the Industrial Lead Track and the Port Rail Trackage.

(h) User. Any industry or other facility which is located at the Riverport Complex which ships or receives freight over the Rail Lines.

2. RIGHT TO USE RAIL LINES.

The Riverport hereby grants to CSX the non-exclusive right with the Paducah and Louisville Railway, Inc. ("Paducah") and Norfolk Southern Railway Corporation ("Southern") to use the Rail Lines for providing rail service to the Riverport Authority's port and industrial complex ("Riverport Complex") and to users of rail service located within or operating from the Riverport Complex, and for the handling of inbound and outbound rail shipments. CSX accepts the use of the Rail Lines in accordance with the terms, conditions, covenants and agreements set forth herein.

CSX acknowledges that concurrently with its use of the Rail Lines and Southern's and Paducah's use of the Rail Lines, the Riverport is free to use the

Rail Lines and grant other railroads and other parties servicing the Riverport complex the right to use such rail facilities. CSX's rail freight operations and service within the Riverport Complex shall be in accordance with a mutually acceptable operating plan (the "Operating Plan"). Riverport and CSX recognize and agree that representatives of the parties shall meet to develop such mutually acceptable Operating Plan within sixty (60) days of the Effective Date of this Operating Agreement. The Operating Plan, once developed by the parties, shall be attached as an appendix to this Operating Agreement.

The parties recognize and expect that any such Operating Plan would include, among other operating issues, the following: communications within the Riverport Complex, and the coordination of movements on the Rail Lines, among the freight railroad providers serving the facility; mutually acceptable operating times or windows to preserve access to the facility and its tenants; switching services. Riverport agrees that the operating arrangements and conditions which exist as of the Effective Date shall continue until the parties complete the mutually agreeable Operating Plan contemplated hereunder.

This Operating Agreement, and the contemplated Operating Plan, supercedes and replaces in its entirety the Agreement of February 1, 1990 and all addenda and exhibits thereto, which Agreement, as extended by the Letter Agreement of January 31, 2000, shall terminate upon the execution of this Operating Agreement. The parties recognize and agree that the rights, duties and obligations of the Parties respecting CSX's rail freight operations at the Riverport Complex shall be as provided herein, and shall be consistent with the

Operating Plan contemplated hereunder, and that this Operating Agreement and forthcoming Operating Plan represents the full and complete agreement of the Parties regarding such service.

3. CHARGES FOR USE OF RAIL LINES.

(a) In exchange for CSX's use of the Rail Lines for moving freight that is destined for the port transloading facility, CSX shall pay to Riverport a charge for maintenance of the Rail Lines (which, for purposes of this Article 3(a) only, Rail Lines shall not be deemed to include the Lead Track and Joint Portion) the amount provided for on Exhibit B attached hereto (2000 basis) (the "Maintenance Charge"). The Maintenance Charge shall be adjusted effective each anniversary date of this Agreement in accordance with Exhibit C attached hereto and made a part hereof; additionally, it is to be adjusted for the additional length added to the Rail Lines by each extension thereto. It is understood and agreed that the basis of computing the Maintenance Charge set forth in Exhibit B is intended to result in a fair and equitable payment to the Riverport for the costs incurred by the Riverport in maintaining and operating the Rail Line. Accordingly, it is further agreed that either party may request renegotiation of the basis of computing the Maintenance Charge not more frequently than once every three years (beginning three years after the effective date of this Agreement), if the requesting party believes that the then existing basis of compensation is no longer providing for the fair and equitable payment of costs. In the event the parties are unable to agree upon a new basis of compensation, then either

party may demand that the new basis be established by arbitration pursuant to paragraph 13 of this Agreement. The new basis of compensation, determined by agreement or by arbitration, shall apply from and after the date renegotiation was permitted under this paragraph, or from and after the date renegotiation was requested, whichever is later and until again later reviewed.

(b) In exchange for CSX's use of the Rail Lines for moving freight that is not destined for the port transloading facility, CSX shall pay to Riverport a car user charge of \$23.42 (2000 basis) for each and every such carload of freight moved over the Rail Lines (the "Car Charge"), which Car Charge shall be the only payment CSX shall be obligated to pay Riverport hereunder for use of the Rail Lines under this Subsection. The Car Charge to CSX shall not be greater than the charge to any other railroad or customer for the same or substantially similar freight moved to or from the Riverport Complex by such other railroad during a comparable period of time.

(c) The payment of charges provided for hereunder shall be made on a calendar quarterly basis in arrears and not later than sixty (60) days after the last day of each quarter.

(d) CSX shall maintain a record of the number of cars and tons of material which are moved over the Rail Lines and extensions thereto. With each quarterly payment to the Riverport, CSX shall provide Riverport with a copy of such record. Riverport shall be entitled to inspect the books and other information of CSX to verify the accuracy of CSX record upon reasonable notice at a reasonable time and place.

(e) The Car Charge shall be adjusted effective each anniversary date of this Agreement, in accordance with Exhibit C. If the index set forth on Exhibit C ceases to be published, an appropriate substitute for determining the percentage increase shall be negotiated by the parties hereto.

4. CONSTRUCTION, MAINTENANCE AND OPERATION OF RAIL LINES.

(a) CSX shall utilize the Rail Lines to afford Riverport and the private entities that now or in the future shall be located within or operating from the Riverport Complex the facility to receive and ship carload freight by railroad, in accordance with lawfully published tariffs, contracts or quotes of the affected railroads. CSX agrees to provide Riverport and Users located within or operating from the Riverport Complex with service consistent with CSX common carrier or contract obligations, including the provision of service upon reasonable request therefor, in cooperation with the other rail carriers serving the Riverport Complex.

(b) Except as may be mutually agreed to in writing by the parties, rail cars shall not be loaded on or unloaded directly from the Onsite Rail Line, the Offsite Rail Line or Lead Track. Loading and unloading shall be performed on such spur tracks as may be constructed to diverge from the Onsite Rail Line or Lead Track in accordance with Paragraph 4(c), below.

(c) Riverport, CSX, and Users, to the extent provided in any agreement with Riverport, shall have the right to construct additional spur tracks diverging from the Rail Lines to serve Users requiring railroad service in

the Riverport Complex, provided that the design and construction of each such track is approved by Riverport and the railroad(s) providing such service, and such railroad's operation (if any) over such spur track is covered by a prior written agreement between the railroad, the owner of said spur track, and/or the User requiring such service. The parties hereto will not unreasonably withhold agreement on such design, construction, or operation.

(d) The parties recognize that CSX may wish or be required by law to use the Rail Lines to provide rail service to shippers or receivers located outside the Riverport Complex. If and when such use is so required or desired, the terms and conditions applicable thereto, as between Riverport and CSX, shall be subject to negotiation, and arbitration pursuant to paragraph 13 hereof if required; and solely for purposes of disputes to which this Subsection applies, the provision in paragraph 13 permitting either party to object to arbitration, shall be inapplicable. The terms and conditions for such use, determined as aforesaid, shall be covered by separate agreement between said parties, or by appropriate amendment to this Agreement.

(e) The Riverport shall, at its own cost and expense, (but subject to payment by CSX of the Maintenance and Car Charges described in paragraphs 3(a) and 3(b) herein) keep up, maintain, repair and renew the Rail Lines, and all replacements thereof, and additions and betterments thereto, if any, so that the same and every part thereof shall be in good repair, working order and condition for the rail freight service and usage contemplated hereunder.

(f) Riverport in its sole discretion may make extensions to the

Rail Lines. The terms and conditions governing the use of such extensions shall be covered by separate agreement between Riverport and the parties desiring use of such extensions. Railroads desiring to participate and use such extensions shall be granted the right of access thereto on equal terms. CSX or Riverport may, at its sole-expense, install turnouts in the Offsite Rail Line and, in the case of Riverport, permit other parties to connect tracks to said turnouts for the purpose of rail service, provided that the design and construction of each such track is approved by Riverport and the railroads providing such service. The parties hereto will not unreasonably withhold agreement on such design, construction, or operation. Each carload of freight picked up or delivered by CSX on such connecting tracks shall be included in the computation of the charges payable to the Riverport under this Operating Agreement.

5. CLEARANCE REQUIREMENTS.

(a) Riverport agrees to observe and be bound by the following clearance requirements with respect to the Rail Lines: an overhead space of 23 feet measured perpendicularly from the top of the rail (except that overhead clearance where wire lines extend over the Rail Lines shall be such as may be prescribed by the National Electric Safety Code, but never less than 27 feet) and a space ²⁵~~20~~ feet in width, measured twelve and one-half (12 1/2) feet on each side from the center line of the Rail Lines; provided, however, that all side clearance for the Rail Lines must be increased one and one-half (1-1/2) inches for every degree of curvature therein. Such space shall be kept clear of any

obstruction whatsoever including but not limited to all structural facilities or property of Riverport which are or may be placed or erected above or parallel to the Rail Lines. Riverport shall not cause to be placed in such space any obstruction, and shall cooperate fully with Railroads to prevent third parties from violating such clearance requirements with respect to the Rail Lines.

(b) Notwithstanding anything contained in this Agreement and irrespective of the sole, joint or concurring negligence of CSX, Riverport shall assume sole responsibility for and shall indemnify and save harmless and defend CSX from and against all claims, actions, or legal proceedings arising from the failure of Riverport to comply with any clearance requirement set forth in this Agreement. In this connection, it is specifically understood that knowledge on the part of CSX of a violation of any such clearance requirements, whether such knowledge is actual or implied, shall not constitute a waiver and shall not relieve Riverport of its obligation to indemnify CSX for losses and claims resulting from any such violations.

(c) Riverport agrees that as a condition of any sale or lease of land within the Riverport Complex, it shall require that its vendee or lessee agree to be bound by standard clearances with respect to the Rail Lines, as set forth in Paragraph 5(a) above, and Riverport further agrees that said covenant shall run with the land and shall be enforceable directly by CSX.

(d) It is understood and agreed that Riverport shall neither install nor voluntarily permit the installation of any grade crossings, wire lines, pipelines, or any other structures on, over, or across the Rail Lines

until authorized representatives of CSX shall have approved the plans and specifications thereof and until the party requesting the said installation has executed an agreement in substantially the form set forth in Exhibit D, Exhibit E, or Exhibit F hereto, as may be appropriate, covering such installation; provided, however that the sole valid basis for CSX's withholding of such approval shall be its reasonable belief that the proposed grade crossing, wire line, pipeline, or other structure would create new public safety risks or otherwise interfere with rail operations; and provided further, that CSX shall not be entitled to any rental or other compensation for any such installation (except for reimbursement of expenses occasioned by the installation and reasonable fees for preparation of the applicable agreement), the right to such compensation being reserved exclusively to Riverport.

6. SWITCHING SERVICES.

(a) It is mutually agreed by the parties hereto that all carload shipments consigned to Riverport Authority for delivery and/or transloading shall be deemed to have been fully and completely delivered as soon as the car containing such shipment shall have been placed in the location designated by the Riverport Authority to receive it, and detached from the engine or train by which it was moved, and CSX shall thereupon be fully and completely relieved of any liability as common carrier or as bail or otherwise, for loss of or injury to such car and its contents occurring after such delivery, and that CSX shall not be liable as common carrier, nor as bail, nor otherwise, for any property loaded into any car until said car is attached or coupled to the engine or train by

which it is to be moved from said tracks toward its destination, and that until said car is so attached or coupled up, the said car and its contents shall be deemed and held to be in the possession of Riverport Authority so far as liability therefor is concerned.

(b) Riverport shall perform switching services on the Port Rail Trackage for rail cars, including those of unit trains containing material to be moved through the port transloading facilities.

(c) Additionally, Riverport shall have the right upon sixty (60) days written notice to CSX to operate its owned or leased locomotives on the Rail Lines and extensions thereto and to move cars (regardless of ownership) over the Rail Lines and extensions thereto using said locomotives, in connection with service to the Riverport Complex, subject to the following conditions:

1) Riverport will coordinate pickup and delivery of cars with CSX's designated representative and, at all times, will carry out its switching operations in a prompt, safe and efficient manner, complete said operations with the least practicable delay in accordance with the mutually acceptable Operating Plan, and thereafter return the cars (loaded or empty, as the case may be) coupled with air hoses connected and doors closed, to CSX in the same condition as the same were in when received by Riverport, ordinary wear and tear excepted, such condition to be determined by inspection by CSX in accordance with the Interchange Rules of the Association of American Railroads.

2) Riverport will be responsible for any accident, injury or damage involving any equipment or locomotive handled by Riverport and in connection with the rail to barge transfer facility while such equipment is in

the custody or under the control of Riverport, it being specifically understood and agreed that the responsibility of Riverport for said equipment shall commence at the time of delivery by CSX to Riverport of any such equipment, and shall continue without interruption, until such equipment shall be returned in good order, as aforesaid, to CSX .

3) Riverport will defend, indemnify, and save harmless CSX from and against any and all claims, demands, suits, judgments or sums of money to any person, corporation, firm or individual accruing for loss of life, injury or damage to person or property resulting from the switching operation of the Riverport.

4) Riverport may, if it so chooses, designate another entity (for example, a contract operator of the port transloading facility) to exercise Riverport's right under this paragraph 6; provided, however, that before any such designee commences operation over the Rail Lines, (i) Riverport shall give CSX at least sixty (60) days advance notice of such designation, including the identity of the designee, (ii) said designee shall expressly assume each and every obligation of Riverport under this paragraph 6, but Riverport shall remain primarily responsible to CSX, and (iii) said designee shall satisfy the prerequisites to Riverport's operation over the Rail Lines and shall be able to provide safe services and be financially sound. CSX may object to such a designation, within thirty (30) days after notice thereof from Riverport, if and only if CSX has reasonable grounds for believing that the specified designee will not operate over the Rail Lines in a safe, economical, responsible manner and

such designee is not financially sound. Finally, in the event Riverport, or another entity under direction of Riverport, undertakes to perform the switching services contemplated hereunder, the parties agree to meet and confer relative to the procedures by which Riverport or such other entity will exchange cars and communicate with CSX, and by which Riverport or such other entity will be compensated for the services it provides.

5) Riverport will maintain the insurance required in Paragraph 7 of this Agreement.

7. INSURANCE.

Riverport will, at its expense, for the further protection of CSX, take out, and at all times thereafter during the life of this Agreement, maintain in full force and effect, a policy or policies of comprehensive general liability insurance including contractual liability insurance specifically covering the liabilities to which Riverport is or may be subjected by the terms of paragraphs 5, 6 or 10 of this Agreement, underwriting for the benefit of Riverport the risk of loss of life, personal injury or property loss or damage including lading damage and losses from breach of carrier obligations to third parties resulting from Riverport's operations over the Rail Lines; said insurance policy or policies shall name CSX as an Additional Insured, and shall be in an amount of at least Five Million Dollars (\$5,000,000.00) for each occurrence, and in any event, not less than the amount of such coverage that Riverport may agree to maintain in an agreement with any other rail carrier serving the Riverport Complex during the

term of this Agreement. Neither compliance with this requirement nor CSX's approval of the terms and conditions of any insurance policy shall in any way limit or modify the obligations of Riverport to CSX.

8. TERM.

(a) The term of this Agreement shall run from the date of this Agreement (the "Effective Date") and shall continue in effect for a term of three (3) years.

(b) In the event of default hereunder by CSX or Riverport, with respect to any of the terms and provisions hereof, and the continuation of such default for more than sixty (60) days after written notice from the non-defaulting party of the existence of such default, the non-default party or parties may elect to cancel this Agreement by giving thirty (30) days notice in writing of such cancellation to the defaulting party or parties. Such right of cancellation shall be in addition to any other remedies which any party may have under applicable law.

(c) Upon any cancellation of this Agreement under the terms hereof, all rights of the parties hereunder shall absolutely cease, except that no cancellation of this Agreement shall affect the liabilities or obligations of the parties (whether of indemnification or otherwise) which may have accrued prior to such cancellation. CSX shall surrender use of the Rail Lines to Riverport upon or prior to the effective date of such cancellation. Title to any improvements or betterments to the Rail Lines made while this Agreement is in effect shall vest in Riverport.

(d) If all or any part of the Rail Lines shall be taken or appropriated by any public or quasi-public authority under the threat of or through the power of eminent domain, either party hereto shall have the right, at its option, to terminate this Agreement if such taking or appropriation shall be considered by such party to be of such an extent or nature as to substantially handicap, impede or impair the intended use of the Rail Lines ; provided, however, CSX shall not have the right to terminate if Riverport is able to provide alternative access, reasonably acceptable to CSX, or replace the track taken without material interruption of the CSX's usage. If a part of the Rail Lines shall be so taken or appropriated and neither party hereto shall elect to terminate this Agreement, the charge for the use thereafter to be paid shall be equitably reduced.

(e) In the event the Rail Lines shall become unfit for use due to floods, earthquake, Act of God, or force majeure, and the Riverport is unable to restore the Rail Lines to fit condition within a reasonable time under the circumstances, either party hereto may elect to terminate this Agreement on thirty (30) days notice.

(f) In the event CSX is divested of use of the Rail Lines, whether as the result of cancellation of this Agreement, or eminent domain proceedings, or otherwise, CSX shall not be entitled to any compensation for the loss of use, except that:

(i) If said loss results from the cancellation of this Agreement, Riverport shall pay to CSX the net original cost to CSX, less

depreciation, of any additions and betterments to the Rail Lines made by CSX with the consent of Riverport or pursuant to governmental order during the effectiveness of this Agreement; provided, however, that Riverport will be required to pay for such additions, betterments, and track and other materials only if CSX ask for permission to remove the same from the Rail Lines at their expense (including restoration of any affected portion of such Rail Lines to a condition equivalent to its condition immediately prior to the installation of such additions or betterments), within thirty (30) days after the effective date of the cancellation of this Agreement (such notice must describe in detail just what additions, betterments, and track and other materials CSX wishes to remove), and the Riverport refuses to permit them to do so; and

(ii) If the Rail Lines or any part thereof are taken by eminent domain, CSX may participate in any award of compensation with respect thereto, to the extent that their investment in such additions, betterments, or track or other materials, as described in clause (i) above, have added to the value of the property taken by eminent domain.

9. DEFECT IN TITLE.

It is understood and agreed that if CSX is prevented from operating over any part of the Rail Lines due to a defect in Riverport's property rights therein, CSX shall be excused from providing service under this Agreement, until such time as Riverport cures said defect and CSX is again able to operate said part of the Rail Lines ; but Riverport shall be under no obligation to cure any

such defect. It is further understood and agreed that if such a defect prevents CSX from serving the Riverport Complex at all, and such defect continues for sixty (60) days, either CSX or Riverport may elect to cancel this Agreement under paragraph 8, as though the other party were in default.

10. INDEMNIFICATION.

(a) Riverport agrees to defend, indemnify and hold CSX, its officers, directors, agents, employees, successors and assigns harmless from and against any and all losses, damages, claims, actions, and expenses resulting from death, personal injury, or loss of or damage to property, caused solely by the fault or negligence of Riverport or its officers, directors, agents, employees, successors, or assigns, or caused jointly by the fault or negligence of Riverport or its officers, directors, agents, employees, successors, or assigns, and the fault or negligence of a party other than CSX or its officers, directors, agents, employees, successors, or assigns.

(b) CSX agrees to defend, indemnify and hold Riverport, its officers, directors, agents, employees, successors and assigns harmless from and against any and all losses, damages, claims, actions, and expenses resulting from death, personal injury, or loss of or damage to property, caused solely by the fault or negligence of CSX or its officers, directors, agents, employees, successors, or assigns, or caused by the fault or negligence of CSX or its officers, directors, agents, employees, successors, or assigns, and the fault or negligence of a party other than Riverport or its officers, directors, agents,

employees, successors, or assigns.

(c) Whenever any death, personal injury, or loss or damage to property occurs and arises out of both the fault or negligence of CSX or its officers, directors, agents, employees, successors, or assigns, and the fault or negligence of Riverport or its officers, directors, agents, employees, successors, or assigns, each party shall be responsible for, and indemnify and hold harmless the other from, any and all losses, damages, claims, actions, and expenses resulting from the death or personal injury of its employees or from the loss of or damage to property in its custody or control, or in the custody or control of its employees.

11. APPROVALS.

CSX shall be responsible for obtaining any and all necessary governmental approvals for its entry into this Agreement and for their performance hereunder. CSX agrees to prosecute any necessary applications for such approval as expeditiously as possible. Riverport shall cooperate with CSX in such efforts.

12. SUCCESSORS AND ASSIGNS.

This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties, whether or not expressly assumed by such successors and assigns. No party may assign this Agreement without the written approval of the other parties, which approval shall not be unreasonably withheld.

13. ARBITRATION.

Any controversy or claim between the parties hereto arising out of or relating to this Agreement, or the breach thereof, which cannot be settled by the parties themselves, shall be settled through arbitration by a sole, disinterested arbitrator to be selected jointly by the parties hereto; however, if the parties fail to select such arbitrator within sixty (60) days after demand for arbitration is made by any party hereto, then they shall jointly submit the matter to binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association. Any decision of an Arbitrator selected under this paragraph shall be required to set forth in detail and in writing the reasons for his decision. The Arbitrator must not issue injunctions and any award shall be limited to the actual damages of the aggrieved party. The decision and award of the arbitrator(s) shall be final and conclusive upon the parties hereto, and judgment may be entered thereon in any court having jurisdiction thereof. Each party to the arbitration shall pay the compensation, costs, fees, and expenses of its own witnesses, exhibits, and counsel. The compensation, costs, and expenses of the arbitrator, if any, shall be borne equally by the parties hereto; provided, however, that any party may prior to or within thirty (30) days following receipt of notice by another party that the noticing party intends to submit a controversy or claim to arbitration pursuant to this section, notify the other parties that it objects to arbitration of said controversy or claim. If the objecting party gives notice of its objection to

arbitration as above stated, then this section 13 shall not apply to said controversy or claim.

14. PARTIAL INVALIDITY.

If any provision of this Agreement is held by lawful authority to be invalid, void, or unenforceable, the remaining provisions shall continue in full force without impairment or invalidation.

15. REASONABLENESS STANDARD.

It is hereby expressly understood and agreed by and between the parties hereto that any decision, approval or consent required by either party pursuant to this Agreement shall be made in a reasonable manner and no party shall withhold any decision, approval or consent on an unreasonable basis.

16. NOTICES.

(a) Any notice required to be given pursuant to the terms of this Agreement shall be made in writing and shall be transmitted by facsimile, first class mail or electronic transmission, with confirmation by 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) Any notice required to be given pursuant to this Agreement

shall be transmitted to the respective parties at the following address or at such other places as the parties from time to time designate in writing:

If to CSX: General Manager-Inter Carrier Agreements
 CSX Transportation, Inc
 500 Water Street (J801)
 Jacksonville, Florida 32202

If to Riverport: President
 Louisville and Jefferson County
 Riverport Authority
 6900 Riverport Drive
 Post Office Box 58010
 Louisville, Kentucky 40258

17. COMPLETE AGREEMENT

This Operating Agreement represents the entire understanding of the parties, may not be modified without their written consent, shall be construed (except for matters referring to federal laws or regulations) according to the laws of the Commonwealth of Kentucky and has been executed by the duly authorized representatives of the parties.

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

~~INC. WE~~
CSX TRANSPORTATION CORPORATION

By: [Signature]

Title: an Interim Agreement

LOUISVILLE AND JEFFERSON COUNTY
RIVERPORT AUTHORITY

By: [Signature]

Title: President

sca\maa\c&a\coal contracts\riverport (3-6-00)FINAL

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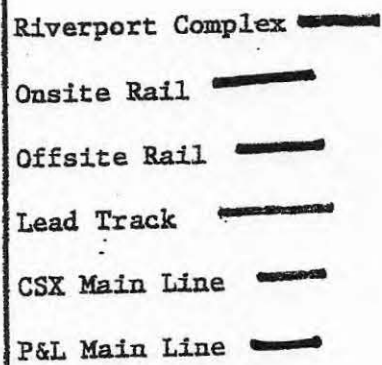


EXHIBIT B

MAINTENANCE CHARGES

$$(\$3,275 + (110 \times \text{MGT}) (1.08 (\text{SPD}-\underline{30})) \times \text{Miles} \\ 10$$

SPD = Speed - 40 MPH

MGT = 2 Million Gross Tons (1 Million Net Tons)

\$3,275 is a fixed cost which, in addition, to track maintenance includes:

Weed spray @ \$180.00/mile/year

Inspections as required by FRA

Rail test @ \$35.00/mile/year

Track geometry @ \$15.00/mile/year

$$(\$3,275) (110 \times 2) \times 1.08 \times 4.1 \text{ miles} = \$15,476$$

$$\begin{array}{rcl} \$15,476 & & = \$0.0155/\text{ton} \\ 1,000,000 \text{ Net Tons} & & \end{array}$$

EXHIBIT C

ANNUAL ADJUSTMENT OF CHARGES

The rates and charges to which this Exhibit pertains shall be adjusted upward or downward based upon the annual changes in the Producer Price Index-- Industrial Commodities Less Fuel and Related Products and Power (Table 8), hereinafter the "Index" as published by the United States Department of Labor, Bureau of Labor Statistics. In determining the amount of the annual adjustment, if any, the Index as first published for the first quarter of the preceding year shall be subtracted from the Index as first published for the first quarter of the current year and the result shall be divided by the Index as first published for the first quarter of the preceding year. The quotient, stated as a decimal, shall then be multiplied by .60 and rounded to the nearest one-hundredth, and if there is no nearest one-hundredth, to the nearest even one-hundredth, and shall be added to 1.00. The resulting figure shall hereafter be called the Annual Change Factor. The Annual Change Factor shall be multiplied by the Effective Rate from the previous year to determine the Effective Rate for the Current Year.

Such new Effective Rate shall be rounded to the nearest one cent, and if there is no nearest one cent, to the nearest even one cent. The base year shall be 1985 and the "first quarter" of each year shall be that calendar quarter ending June 30.

The adjustment mechanism for the rate for throughput at the port is

represented by the following formula:

$$CER = \frac{(CFQI - PFQI \times .60 + 1.00)}{(PFQI)} \times PER$$

where:

CER = CURRENT EFFECTIVE RATE
PER = PREVIOUS EFFECTIVE RATE
CFQI = CURRENT FIRST QUARTER INDEX
PFQI = PREVIOUS FIRST QUARTER INDEX

SOUTHERN TRACKAGE RIGHTS AGREEMENT

THIS SOUTHERN TRACKAGE RIGHTS AGREEMENT, made and entered into as of this 23rd day of July, 1990, by and between LOUISVILLE AND JEFFERSON COUNTY RIVERPORT AUTHORITY (hereafter "Riverport"); and SOUTHERN RAILWAY COMPANY (hereafter "Southern").

W I T N E S S E T H:

A. The Illinois Central Gulf Railroad Company (hereafter "ICG"), Southern Railway Company, and Riverport entered into an Agreement dated July 8, 1983 (hereafter the "Southern/ICG Agreement"), relating to trackage and rail service at the Riverport Complex located along the Ohio River southwest of Louisville, Kentucky.

B. ICG assigned its interest in the Southern/ICG Agreement to the Paducah & Louisville Railway, Inc. (hereafter "Paducah").

C. Riverport has entered into an Agreement with the CSX Corporation (hereafter the "CSX Agreement") relating to trackage to be built leading to and located at the Riverport Complex and rail service and other rights incident thereto.

D. Riverport has entered into a Trackage Rights Agreement with Paducah relating to certain trackage located within the Riverport Complex (hereafter "the Paducah Trackage Rights Agreement").

E. In order to achieve consistency where possible in the Southern/ICG Agreement, the CSX Agreement, the Paducah Trackage Rights Agreement, and to promote safe, efficient and coordinated

rail service to the Riverport Complex, Southern and Riverport now adopt this Southern Trackage Rights Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. DEFINITIONS.

(a) Offsite Rail Line. A line of railroad owned by the Riverport approximately 4.1 miles long, connecting at its southern end to CSX Transportation, Inc.'s existing line of railroad between Louisville, Kentucky, and Henderson, Kentucky, near Mile Post HR-15, known as CSX's LE & STL Subdivision, extending northwardly to the south property line of the Riverport and highlighted in purple on Exhibit A.

(b) Onsite Rail Line. A line of railroad owned by the Riverport connecting at its southern end to the Riverport Offsite Rail Line, extending northwardly on the Riverport Complex, and highlighted in blue on Exhibit A.

(c) Lead Track. Trackage beginning at the LG&E Lead Track at approximately Station 7+59.50, and ending at point or points of connection with the Port Rail Trackage, as hereinafter defined, which trackage, together with a working track, which is approximately 1,500 track feet in length, and all underlying right-of-way, trestle, bridge, grade crossings, grade crossing protection, sublast, grading, drainage, and all other appurtenances thereto.

(d) Joint Portion. That portion of the Lead Track between Station 34+96.00, plus or minus and the point or points of connection with the Port Rail Trackage.

(e) Port Rail Trackage. A system of rail trackage owned by the Riverport as part of the bulk commodity transfer facilities to be built in the port area at the Riverport Complex, including a double loop track and one or more connections to the Onsite Rail Line and Lead Track.

(f) Rail Lines. The Onsite Rail Line, the Joint Portion, and the Port Rail Trackage.

(g) User. Any person who is located at the Riverport Complex who ships or receives freight over the Rail Lines.

2. RIGHT TO USE RAIL LINES.

The Riverport has granted to Paducah upon terms essentially similar to those expressed herein and hereby grants to Southern the coexclusive right with Paducah to use the Lead Track from its beginning at approximately Station 7+59.50 to the northern end of the Joint Portion at approximately Station 34+96.00, and the non-exclusive right to use the Rail Lines for providing rail service to the Riverport Complex and to users of rail service located within or operating from the Riverport Complex ("Users"), and for the handling of inbound and outbound rail shipments; subject, however, to CSX's first and primary right to use trackage and access facilities supporting the bulk commodity transfer facilities constructed at the Riverport Complex pursuant to the terms of the CSX Agreement. Any operations of either Railroad over the Onsite Rail Line are to be

communicated in advance to the appropriate CSX representative, and coordinated with any CSX operations scheduled over the same track during the same time period.

Southern acknowledges that concurrently with its (and Paducah's) use of the Rail Lines, the Riverport is free to use the Rail Lines and grant other railroads and other parties servicing the Riverport Complex the right to use such rail facilities, provided, however, that the operations of Southern shall not be unduly delayed by any such grant of rights.

3. CHARGES FOR USE OF RAIL LINES.

(a) In exchange for Southern's use of the Rail Lines for moving freight that is destined for the port transloading facility, Southern shall pay to Riverport a charge for maintenance of the Lead Track of one half of the amount provided for on Exhibit B attached hereto (1985 basis) ("the Maintenance Charge"). The Maintenance Charge shall be adjusted effective each anniversary date of this Agreement in accordance with Exhibit C attached hereto and made a part hereof; additionally, it is to be adjusted for the additional length added to the Lead Track by each extension thereto. It is understood and agreed that the basis of computing the Maintenance Charge set forth in Exhibit B is intended to result in a fair and equitable payment to the Riverport for the costs incurred by the Riverport in maintaining and operating the Lead Track. Accordingly, it is further agreed that either party may request renegotiation of the basis of computing the Maintenance Charge not more frequently than once every three years (beginning three years after the

effective date of this Southern Trackage Rights Agreement), if the requesting party believes that the then existing basis of compensation is no longer providing for the fair and equitable payment of costs. In the event the parties are unable to agree upon a new basis of compensation, then either party may demand that the new basis be established by arbitration pursuant to paragraph 13 of this Southern Trackage Rights Agreement. The new basis of compensation, determined by agreement or by arbitration, shall apply from and after the date renegotiation was permitted under this paragraph, or from and after the date renegotiation was requested, whichever is later and until again later reviewed.

(b) In exchange for Southern's use of the Rail Lines for moving freight that is not destined for the port transloading facility, Southern shall pay to Riverport a car user charge of \$20.00 (1985 basis) for each and every such carload of freight moved over the Rail Lines (the "Car Charge"). The Car Charge to Southern shall not be greater than the charge to any other railroad or customer for the same or substantially similar freight moved to or from the Riverport Complex by such other railroad during a comparable period of time and Riverport will, upon written request, disclose to Southern any written agreement that may hereafter be made between Riverport and CSX or Riverport and Paducah or their successors and assigns or with any other railroad company.

(c) The payment of charges provided for hereunder shall be made on a calendar quarterly basis in arrears and not later than sixty (60) days after the last day of each quarter.

(d) Southern shall maintain a record of the number of cars and tons of material which are moved over the Rail Lines and extensions thereto. With each quarterly payment to the Riverport, Southern shall provide Riverport with a copy of such record. Riverport shall be entitled to inspect the books and other information of Southern to verify the accuracy of Southern's record upon reasonable notice at a reasonable time and place.

(e) The Car Charge shall be adjusted effective each anniversary date of this Agreement, in accordance with Exhibit C. If the index set forth on Exhibit C ceases to be published, an appropriate substitute for determining the percentage increase shall be negotiated by the parties hereto.

4. CONSTRUCTION, MAINTENANCE AND OPERATION OF RAIL LINES.

(a) Subject to the provisions of paragraph 4(c) regarding Southern approval of design and construction of spur tracks and the coverage by an agreement, Southern shall utilize the Rail Lines to afford Riverport and the private companies that now or in the future shall be located within or operating from the Riverport Complex the facility to receive and ship carload freight by railroad, in accordance with lawfully published tariffs, contracts or quotes of the affected railroads. Southern agrees to provide Riverport and Users located within or operating from the Riverport Complex with service consistent with Southern's common carrier or contract obligations, including the provision of service upon reasonable request therefor, in

cooperation with the other rail carriers serving the Riverport Complex.

(b) Except as may be mutually agreed to in writing by the parties, rail cars shall not be loaded on or unloaded directly from the Onsite Rail Line or Lead Track. Loading and unloading shall be performed on such spur tracks as may be constructed to diverge from the Onsite Rail Line or Lead Track in accordance with Paragraph 4(c), below.

(c) Southern, Riverport, CSX Corporation, Users and Paducah, to the extent provided in any agreement with Riverport, shall have the right to construct additional spur tracks diverging from the Onsite Rail Line or Lead Track to serve Users requiring railroad service in the Riverport Complex, provided that the design and construction of each such track is approved by Riverport and the railroad(s) providing such service, and such railroad's operation (if any) over such spur track is covered by a prior written agreement between the railroad, the Owner of said spur track, and/or the User requiring such service. The parties hereto will not unreasonably withhold agreement on such design, construction, or operation.

(d) The parties recognize that Southern may wish or be required by law to use the Onsite Rail Line, Lead Track or portions thereof to provide rail service to shippers or receivers located outside the Riverport Complex. If and when such use is so required or desired, the terms and conditions applicable thereto, as between Riverport and Southern, shall be subject to negotiation, and arbitration pursuant to paragraph 13 hereof if

required; and solely for purposes of disputes to which this sentence applies, the provision in paragraph 13 permitting either party to object to arbitration, shall be inapplicable. The terms and conditions for such use, determined as aforesaid, shall be covered by separate agreement between said parties, or by appropriate amendment to this Southern Trackage Rights Agreement.

(e) Unless otherwise agreed with Southern, Paducah shall be responsible for controlling all rail operations on the Rail Lines. Paducah and Southern may change the designation of the Railroad controlling operation (hereinafter referred to as the "Dispatching Railroad") from time to time, not more frequently than every three months. No such change may be made effective on less than ten days' advance notice to Riverport.

(f) Whenever one of either Paducah or Southern is picking up and/or delivering cars at the Riverport Complex and cars that are to be picked up by the other of either Paducah or Southern are on the Onsite Rail Line, Lead Track and/or in the way, the railroad picking up and/or delivering cars will move the cars of the other railroad, as may be necessary to complete its own operations, and thereafter replace them to the locations from which they were moved, without additional charge.

(g) The Riverport shall, at its own cost and expense, (but subject to payment by Southern of the Maintenance and Car Charges described in paragraphs 3(a) and 3(b) herein) keep up, maintain, repair and renew the Rail Lines, and all replacements thereof, and additions and betterments thereto, if any, so that

the same and every part thereof shall be in good repair, working order and condition.

(h) Riverport in its sole discretion may make extensions to the Rail Lines. The terms and conditions governing the use of such extensions shall be covered by separate agreement among Riverport and the parties desiring use of such extensions. Railroads desiring to participate and use such extensions shall be granted the right of access thereto on equal terms.

5. CLEARANCE REQUIREMENTS.

(a) Riverport agrees to observe and be bound by the following clearance requirements with respect to the Lead Track: an overhead space of 23 feet measured perpendicularly from the top of the rail (except that overhead clearance where wire lines extend over the Lead Track shall be such as may be prescribed by the National Electric Safety Code, but never less than 27 feet) and a space 20 feet in width, measured 10 feet on each side from the center line of the Lead Track; provided, however, that all side clearance for the Lead Track must be increased one and one-half (1-1/2) inches for every degree of curvature therein. Such space shall be kept clear of any obstruction whatsoever including but not limited to all structural facilities or property of Riverport which are or may be placed or erected above or parallel to the Lead Track. Riverport shall not cause to be placed in such space any obstruction, and shall cooperate fully with Railroads to prevent third parties from violating such clearance requirements with respect to the Lead Track.

(b) Notwithstanding anything contained in this Southern Trackage Rights Agreement and irrespective of the sole, joint or concurring negligence of Southern, Riverport shall assume sole responsibility for and shall indemnify and save harmless and defend Railroads from and against all claims, actions, or legal proceedings arising from the failure of Riverport to comply with any clearance requirement set forth in this Southern Trackage Rights Agreement. In this connection, it is specifically understood that knowledge on the part of Southern of a violation of any such clearance requirements, whether such knowledge is actual or implied, shall not constitute a waiver and shall not relieve Riverport of its obligation to indemnify Railroads for losses and claims resulting from any such violations.

(c) Riverport agrees that as a condition of any sale or lease of land within the Riverport Complex, it shall require that its vendee or lessee agree to be bound by standard clearances with respect to the Lead Track, as set forth in Paragraph 5(a) above, and Riverport further agrees that said covenant shall run with the land and shall be enforceable directly by Southern.

(d) It is understood and agreed that Riverport shall neither install nor voluntarily permit the installation of any grade crossings, wire lines, pipelines, or any other structures on, over, or across the Lead Track until authorized representatives of Southern shall have approved the plans and specifications thereof and until the party requesting the said

installation has executed an agreement in substantially the form set forth in Exhibit D, Exhibit E, or Exhibit F hereto, as may be appropriate, covering such installation; provided, however that the sole valid basis for Southern's withholding of such approval shall be its reasonable belief that the proposed grade crossing, wire line, pipeline, or other structure would interfere with rail operations; and provided further, that Southern shall not be entitled to any rental or other compensation for any such installation (except for reimbursement of expenses occasioned by the installation and reasonable fees for preparation of the applicable agreement), the right to such compensation being reserved exclusively to Riverport.

6. SWITCHING SERVICES.

(a) Riverport shall perform switching services on the Port Rail Trackage for rail cars, including those of unit trains containing material to be moved through the port transloading facilities.

(b) Additionally, Riverport shall have the right upon sixty (60) days' written notice to Southern to operate its owned or leased locomotives on the Onsite Rail Line and Joint Portion and extensions thereto and to move cars (regardless of ownership) over the Onsite Rail Line and Joint Portion and extensions thereto using said locomotives, in connection with service to the Riverport Complex, subject to the following conditions:

(i) Riverport will coordinate pickup and deliveries of cars with Southern's designated representative to

insure pickup and delivery of cars at reasonable and frequent times.

(ii) Riverport will carry out its switching operations over the Onsite Rail Line and Joint Portion and in connection with the rail to barge transfer facility in a prompt, safe and efficient manner, complete said operations with the least practicable delay, and thereafter return the cars (loaded or empty, as the case may be) coupled with air hoses connected and doors closed, to Southern in the same condition as the same were in when received by Riverport, ordinary wear and tear excepted, such condition to be determined by inspection by Southern in accordance with the Interchange Rules of the Association of American Railroads.

(iii) Riverport will be responsible for any accident, injury or damage involving any equipment or locomotive handled by Riverport on the Onsite Rail Line or Joint Portion and in connection with the rail to barge transfer facility while such equipment is in the custody or under the control of Riverport, it being specifically understood and agreed that the responsibility of Riverport for said equipment shall commence at the time of delivery by Southern to Riverport of any such equipment, and shall continue without interruption, until such equipment shall be returned in good order, as aforesaid, to Railroad.

(iv) Riverport will indemnify and save harmless Southern from and against any and all claims, demands, suits, judgments or sums of money to any person, corporation, firm or individual accruing for loss of life, injury or damage to person

or property resulting from the switching operation of the Riverport.

(v) Riverport may, if it so chooses, designate another entity (for example, a contract operator of the port transloading facility) to exercise Riverport's right under this paragraph 6; provided, however, that before any such designee commences operation over the Rail Lines, (i) Riverport shall give Southern at least sixty (60) days advance notice of such designation, including the identity of the designee, (ii) said designee shall expressly assume each and every obligation of Riverport under this paragraph 6, but Riverport shall remain primarily responsible to Southern, and (iii) said designee shall satisfy the prerequisites to Riverport's operation over the Rail Lines and shall be able to provide safe services and be financially sound. Southern may object to such a designation, within thirty (30) days after notice thereof from Riverport, if and only if Railroads have reasonable grounds for believing that the specified designee will not operate over the Rail Lines in a safe, economical, responsible manner and is financially sound.

(vi) For switching performed by Riverport on cars received from or delivered to Southern, a charge per car will be paid by Southern to Riverport (the "Switching Charge") in accordance with a tariff to be established by Riverport from time to time representing a reasonable charge for the locomotive and crew, reflecting the costs involved. Such charge will be in addition to the Car Charge described in paragraph 3. Whenever Southern is required to pay a Switching Charge to Riverport,

Southern may include an additional charge in its tariff, contract or quote charged to its Customer to reflect any additional net cost to Southern.

(vii) Riverport will maintain the insurance required in Paragraph 7 of this Southern Trackage Rights Agreement.

7. INSURANCE.

Riverport will, at its expense, for the further protection of Southern, take out, and at all times thereafter during the life of this Southern Trackage Rights Agreement, maintain in full force and effect, a policy or policies of comprehensive general liability insurance including contractual liability insurance specifically covering the liabilities to which Riverport is or may be subjected by the terms of paragraphs 5, 6 or 10 of this Southern Trackage Rights Agreement, underwriting for the benefit of Riverport the risk of loss of life, personal injury or property loss or damage including lading damage and losses from breach of carrier obligations to third parties resulting from Riverport's operations over the Onsite Rail Line and Joint Portion and in connection with the rail to barge transfer facility; said insurance policy or policies to be in an amount of at least Three Million Dollars (\$3,000,000.00) for each occurrence, and in any event, not less than the amount of such coverage that Riverport may agree to maintain in an agreement with any other rail carrier serving the Riverport Complex during the term of this Agreement. Neither compliance with this requirement nor Southern's approval of the terms and

conditions of any insurance policy shall in any way limit or modify the obligations of Riverport to Southern:

8. TERM.

(a) The term of this Southern Trackage Rights Agreement shall run from the date of this Southern Trackage Rights Agreement and shall continue in effect for a term of ten (10) years.

(b) In the event of default hereunder by Southern or Riverport, with respect to any of the terms and provisions hereof, and the continuation of such default for more than sixty (60) days after written notice from the non-defaulting party of the existence of such default, the non-default party or parties may elect to cancel this Southern Trackage Rights Agreement by giving thirty (30) days notice in writing of such cancellation to the defaulting party or parties. Such right of cancellation shall be in addition to any other remedies which any party may have under applicable law.

(c) Subject to paragraph 8(b) of this Southern Trackage Rights Agreement, neither party to this Southern Trackage Rights Agreement may seek approval for the abandonment or discontinuance of common carrier rail operations by Southern over the Lead Track until five (5) years after this Southern Trackage Rights Agreement becomes effective. After said five year period has expired, either party to this Southern Trackage Rights Agreement may at any time seek approval for the abandonment or discontinuance of common carrier rail operations over the Lead Track (and the other party may oppose such approval

in any lawful manner). If approval for the total abandonment or discontinuance of common carrier operations over the Lead Track to the Riverport Complex is obtained, either party to this Southern Trackage Rights Agreement may, by giving thirty (30) days notice in writing, cancel this Southern Trackage Rights Agreement.

(d) Upon any cancellation of this Southern Trackage Rights Agreement under the terms hereof, all rights of the parties hereunder shall absolutely cease, except that no cancellation of this Southern Trackage Rights Agreement shall affect the liabilities or obligations of the parties (whether of indemnification or otherwise) which may have accrued prior to such cancellation. Southern shall surrender use of the Lead Track to Riverport upon or prior to the effective date of such cancellation. Title to any improvements or betterments to the Rail Lines made while this Southern Trackage Rights Agreement is in effect shall vest in Riverport.

(e) If all or any part of the Rail Lines shall be taken or appropriated by any public or quasi-public authority under the threat of or through the power of eminent domain, either party hereto shall have the right, at its option, to terminate this Southern Trackage Rights Agreement if such taking or appropriation shall be considered by such party to be of such an extent or nature as to substantially handicap, impede or impair the intended use of the Rail Lines; provided, however, Southern shall not have the right to terminate if Riverport is able to provide alternative access, reasonably acceptable to

Southern, or replace the track taken without material interruption of the Railroads' usage. If a part of the Rail Lines shall be so taken or appropriated and neither party hereto shall elect to terminate this Southern Trackage Rights Agreement, the charge for the use thereafter to be paid shall be equitably reduced.

(f) In the event the Rail Lines shall become unfit for use due to floods, earthquake, Act of God, or force majeure, and the Riverport is unable to restore the Rail Lines to fit condition within a reasonable time under the circumstances, this Southern Trackage Rights Agreement shall terminate.

(g) In the event Railroads are divested of use of the Rail Lines, whether as the result of cancellation of this Southern Trackage Rights Agreement, or eminent domain proceedings, or otherwise, Southern shall not be entitled to any compensation for the loss of use, except that:

(i) If said loss results from the cancellation of this Southern Trackage Rights Agreement, Riverport shall pay to Southern the net original cost to Southern, less depreciation, of any additions and betterments to the Rail Lines made by Southern with the consent of Riverport or pursuant to governmental order during the effectiveness of this Southern Trackage Rights Agreement; provided, however, that Riverport will be required to pay for such additions, betterments, and track and other materials only if Southern ask for permission to remove the same from the Rail Lines at their expense (including restoration of any affected portion of such Rail Lines to a condition equivalent

to its condition immediately prior to the installation of such additions or betterments), within thirty (30) days after the effective date of the cancellation of this Southern Trackage Rights Agreement (such notice must describe in detail just what additions, betterments, and track and other materials Southern wishes to remove), and the Riverport refuses to permit them to do so; and

(ii) If the Rail Lines or any part thereof are taken by eminent domain, Southern may participate in any award of compensation with respect thereto, to the extent that their investment in such additions, betterments, or track or other materials, as described in clause (i) above, have added to the value of the property taken by eminent domain.

(h) Unless Southern otherwise so directs, Riverport may pay any amount due Southern under this paragraph by remitting the same to whichever of Paducah or Southern was, at the time this Southern Trackage Rights Agreement terminated, the Dispatching Railroad (for the account of both Southern and Paducah as their interests may appear).

9. DEFECT IN TITLE.

It is understood and agreed that if Southern is prevented from operating over any part of the Lead Track due to a defect in Riverport's property rights therein, Southern shall be excused from providing service beyond such part of the Lead Track under this Southern Trackage Rights Agreement, until such time as Riverport cures said defect and Southern is again able to operate said part of the Lead Track; but Riverport shall be under no

obligation to cure any such defect. It is further understood and agreed that if such a defect prevents Southern from serving the Riverport Complex at all, and such defect continues for sixty (60) days, either Southern or Riverport may elect to cancel this Southern Trackage Rights Agreement under paragraph 8, as though the other party were in default.

10. INDEMNIFICATION.

(a) Riverport agrees to defend, indemnify and hold Southern, its officers, directors, agents, employees, successors and assigns harmless from and against any and all losses, damages, claims, actions, and expenses resulting from death, personal injury, or loss of or damage to property, caused solely by the fault or negligence of Riverport or its officers, directors, agents, employees, successors, or assigns, or caused jointly by the fault or negligence of Riverport or its officers, directors, agents, employees, successors, or assigns, and the fault or negligence of a party other than Southern or its officers, directors, agents, employees, successors, or assigns.

(b) Southern agrees to defend, indemnify and hold Riverport, its officers, directors, agents, employees, successors and assigns harmless from and against any and all losses, damages, claims, actions, and expenses resulting from death, personal injury, or loss of or damage to property, caused solely by the fault or negligence of Southern or its officers, directors, agents, employees, successors, or assigns, or caused by the fault or negligence of Southern or its officers,

directors, agents, employees, successors, or assigns, and the fault or negligence of a party other than Riverport or its officers, directors, agents, employees, successors, or assigns.

(c) Whenever any death, personal injury, or loss or damage to property occurs and arises out of both the fault or negligence of Southern or its officers, directors, agents, employees, successors, or assigns, and the fault or negligence of Riverport or its officers, directors, agents, employees, successors, or assigns, each party shall be responsible for any and all losses, damages, claims, actions, and expenses resulting from the death or personal injury of its employees or from the loss of or damage to property in its custody or control, or in the custody or control of its employees.

11. APPROVALS.

Southern shall be responsible for obtaining any and all necessary governmental approvals for its entry into this Southern Trackage Rights Agreement and for their performance hereunder. Southern agrees to prosecute any necessary applications for such approval as expeditiously as possible. Riverport shall cooperate with Southern in such efforts.

12. SUCCESSORS AND ASSIGNS.

This Southern Trackage Rights Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties, whether or not expressly assumed by such successors and assigns. No party may assign this Southern Trackage Rights Agreement without the written approval of the other parties, which approval shall not be unreasonably withheld.

13. ARBITRATION.

Any controversy or claim between the parties hereto arising out of or relating to this Southern Trackage Rights Agreement, or the breach thereof, which cannot be settled by the parties themselves, shall be settled through arbitration by a sole, disinterested arbitrator to be selected jointly by the parties hereto; however, if the parties fail to select such arbitrator within sixty (60) days after demand for arbitration is made by any party hereto, then they shall jointly submit the matter to binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association. Any decision of an Arbitrator selected under this paragraph shall be required to set forth in detail and in writing the reasons for his decision. The Arbitrator must not issue injunctions and any award shall be limited to the actual damages of the aggrieved party. The decision and award of the arbitrator(s) shall be final and conclusive upon the parties hereto, and judgment may be entered thereon in any court having jurisdiction thereof. Each party to the arbitration shall pay the compensation, costs, fees, and expenses of its own witnesses, exhibits, and counsel. The compensation, costs, and expenses of the arbitrator, if any, shall be borne equally by the parties hereto; provided, however, that any party may prior to or within thirty (30) days following receipt of notice by another party that the noticing party intends to submit a controversy or claim to arbitration pursuant to this section, notify the other parties that it objects to arbitration of said controversy or claim. If the objecting party

gives notice of its objection to arbitration as above stated, then this section 13 shall not apply to said controversy or claim.

14. PARTIAL INVALIDITY.

If any provision of this Southern Trackage Rights Agreement is held by lawful authority to be invalid, void, or unenforceable, the remaining provisions shall continue in full force without impairment or invalidation.

15. REASONABLENESS STANDARD.

It is hereby expressly understood and agreed by and between the parties hereto that any decision, approval or consent required by either party pursuant to this Southern Trackage Rights Agreement shall be made in a reasonable manner and no party shall withhold any decision, approval or consent on an unreasonable basis.

16. NOTICES.

(a) Any notice required to be given pursuant to the terms of this Southern Trackage Rights Agreement shall be made in writing and shall be transmitted by certified mail, return receipt requested. The above specified form of notice shall be the sole method of compliance with the notice requirements of this Southern Trackage Rights Agreement. The effective date of any notice required pursuant to this Southern Trackage Rights Agreement shall be the date of receipt except as otherwise provided herein.

(b) Any notice required to be given pursuant to this Southern Trackage Rights Agreement shall be transmitted to the

respective parties at the following address or at such other places as the parties from time to time designate in writing:

If to Southern: President
Southern Railway Company
Three Commercial Place
Norfolk, Virginia 23510

If to Riverport: President
Louisville and Jefferson County
Riverport Authority
6900 Riverport Drive
Post Office Box 58010
Louisville, Kentucky 40258

17. ADDITIONAL AGREEMENT WITH CSX.

Riverport agrees that, prior to allowing CSX trains to operate over the Joint Portion and extensions thereto, it will enter into an additional agreement with CSX Corporation or its appropriate subsidiary company providing for the terms and conditions under which such operation can be conducted, including the rights and responsibilities of CSX relative to those of Riverport and the Railroads to operate over and to construct spur tracks diverging from the Joint Portion and extensions thereto, which agreement shall not provide greater rights or lower costs to CSX than those provided the Railroads herein for the same or comparable usage. The agreement shall further require CSX to communicate and coordinate its rail operations over said section of track with the Dispatching Railroad, as defined in paragraph 4(e) hereof, in the same manner that Southern is required to communicate and coordinate its rail operations over the Onsite Rail Line with CSX.

IN WITNESS WHEREOF the parties have executed this Southern
Trackage Rights Agreement as of the date first above written.

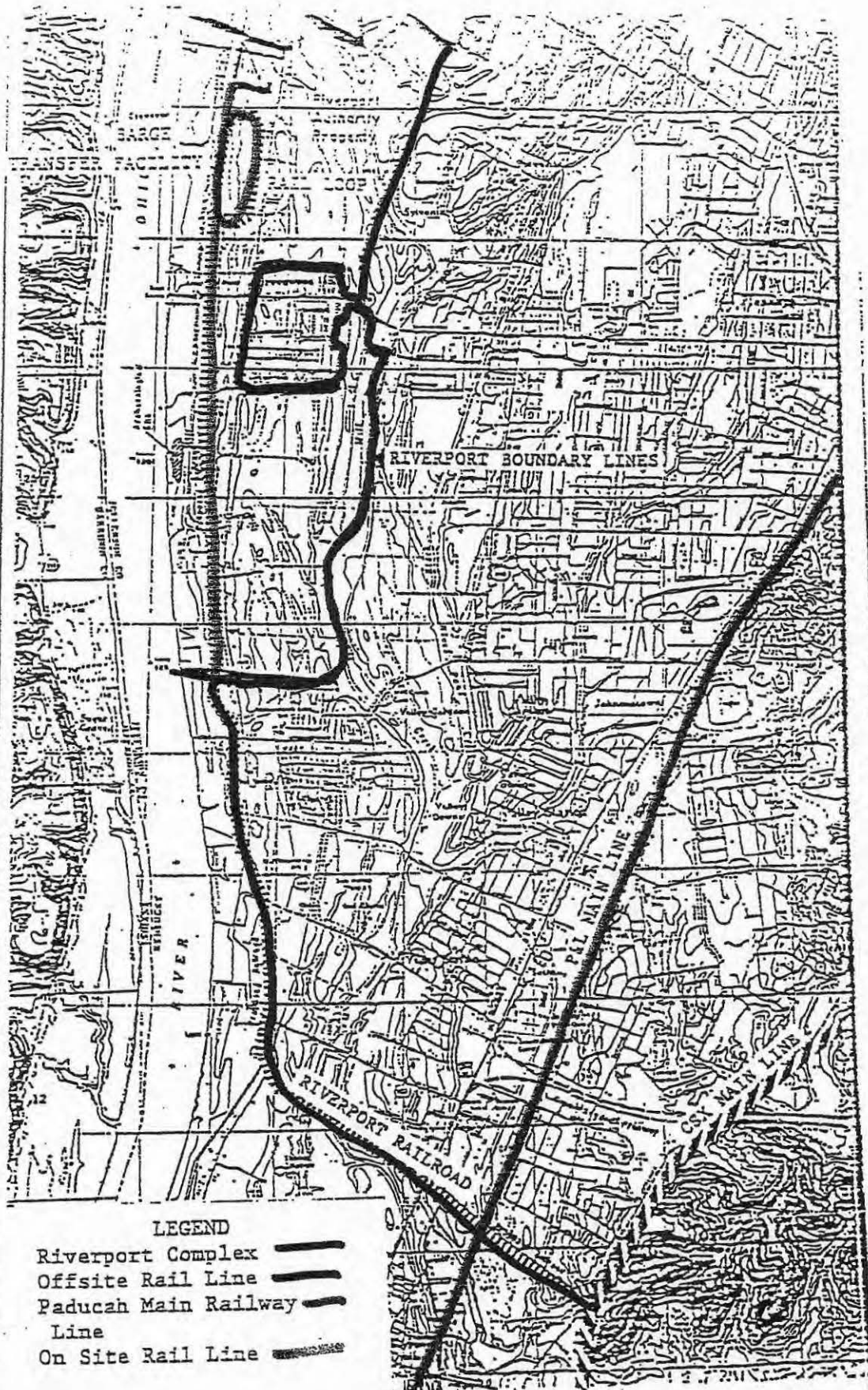
SOUTHERN RAILWAY COMPANY

BY: *W. C. G. G. G.*
TITLE: VICE PRESIDENT-TRANSPORTATION

LOUISVILLE AND JEFFERSON COUNTY
RIVERPORT AUTHORITY

BY: *R. M. Timmerman*
TITLE: President

hh/riv12



LEGEND

- Riverport Complex 
- Offsite Rail Line 
- Paducah Main Railway 
- Line 
- On Site Rail Line 

LOCATION MAP
FOR
RIVERPORT AUTHORITY
CONNECTOR, FEEDER, & LOOP RAILROAD

EXHIBIT A



MINI 2

101

12

EXHIBIT B

MAINTENANCE CHARGES

$$(\$3,275 + (110 \times \text{MGT}) (1.08 \frac{(\text{SPD}-30)}{10})) \times \text{Miles}$$

SPD = Speed = 40 MPH

MGT = 2 Million Gross Tons (1 Million Net Tons)

110 is a weighing factor

1.08 is a speed factor

\$3,275 is a fixed cost which, in addition to track maintenance, includes:

Weed Spray @ \$180.00/mile/year

Inspections as required by FRA

Rail Test @ \$35.00/mile/year

Track Geometry @ \$15.00 /mile/year

$$(\$3,275) (110 \times 2) \times 1.08 \times 4.1 \text{ miles} = \$15,476 \text{ normalized maintenance cost}$$

$$\frac{\$15,476}{1,000,000 \text{ Net Tons}} = \$0.0155/\text{ton}$$

Thus, under this agreement, Southern is required to pay a maintenance charge of one-half of \$.0155/ton for each ton shipped by Southern to Riverport's port transloading facility, but for such cars destined to the Riverport port transloading facility, Southern is not required to pay the car user charge specified in paragraph 3(b) of the agreement. Payments of the maintenance charge are to be made quarterly (calendar basis). If no shipments are made by Southern to the port transloading facility in a given quarter, then Southern will have no maintenance charge in that quarter. Southern will only be responsible for paying the per ton maintenance charge for that tonnage moved by Southern to the port transloading facility, and not for tonnage moved by any other railroad. As stated in paragraph 3(b) of the agreement, Southern shall pay for any shipments by Southern not destined for the port transloading facility the car user charge stated in said paragraph 3(b), but not the maintenance charge described above.

EXHIBIT C

ANNUAL ADJUSTMENT OF CHARGES

The rates and charges to which this Exhibit pertains shall be adjusted upward or downward based upon the annual changes in the Producer Price Index - Industrial Commodities Less Fuel and Related Products and Power (Table 8), hereinafter the "Index" as published by the United States Department of Labor, Bureau of Labor Statistics. In determining the amount of the annual adjustment, if any, the Index as first published for the first quarter of the preceding year shall be subtracted from the Index as first published for the first quarter of the current year and the result shall be divided by the Index as first published for the first quarter of the preceding year. The quotient, stated as a decimal, shall then be multiplied by .60 and rounded to the nearest one-hundredth, and if there is no nearest one-hundredth, to the nearest even one-hundredth, and shall be added to 1.00. The resulting figure shall hereafter be called the Annual Change Factor. The Annual Change Factor shall be multiplied by the Effective Rate from the previous year to determine the Effective Rate for the Current Year. Such new Effective Rate shall be rounded to the nearest one cent, and if there is no nearest one cent, to the nearest even one cent. The base year shall be 1985 and the "first quarter" of each year shall be that calendar quarter ending June 30.

EXHIBIT C

(Continued)

ANNUAL ADJUSTMENT OF CHARGES

The adjustment mechanism for the rate for throughput at the port is represented by the following formula:

$$\text{CER} = \frac{\left(\frac{\text{CFOI} - \text{PFOI} \times .60 + 1.00}{\text{PFQI}} \right)}{\left(\right)} \times \text{PER}$$

where:

CER = CURRENT EFFECTIVE RATE
PER = PREVIOUS EFFECTIVE RATE
CFOI = CURRENT FIRST QUARTER INDEX
PFOI = PREVIOUS FIRST QUARTER INDEX

Exhibit D

To be
Constructed

THIS AGREEMENT, made and entered into by and between

hereinafter styled "Railroad", party of the first part; and

hereinafter styled "Licensee", party of the second part;

W I T N E S S E T H:

THAT the PARTIES HERETO agree as follows:

1. Railroad hereby grants unto Licensee, insofar as Railroad's title enables it so to do, the right to construct, maintain and use a private road crossing, hereinafter called crossing, upon and across, at grade, the right of way or property and track (whether more than one track) of Railroad running between

Located substantially as shown in red outline
upon print of Drawing
hereunto annexed and made a part of this
agreement.

2. Railroad will, for the accommodation of and at the expense of Licensee, perform the work of constructing or installing the portion of said crossing between the rails in said track and to the outside ends of the crossings on each side thereof, and shall revise, relocate and reconstruct signal facilities and other railroad facilities in such manner as may be necessary to this project. If the cost of said work to be performed by Railroad has been estimated, such estimate is attached hereto, and Licensee will pay to Railroad, promptly upon bill rendered therefor, the actual expenditures by Railroad in connection with the construction of said crossing including, but not restricted to, the expenditures herein expressly described.

3. Licensee will, at the expense of Licensee, construct said crossing (except the portion to be constructed by Railroad as aforesaid), including all necessary drainage, and will maintain said portion of said crossing constructed by Licensee in all respects in accordance with the requirements of Railroad looking to the safe and convenient operation and maintenance of its said line of railroad. Licensee agrees to reimburse Railroad upon bill rendered therefor, the cost to Railroad for maintaining said portion of said crossing constructed by Railroad.

4. This license is a personal privilege to Licensee hereunder, and shall not be transferred or assigned without the written consent of Railroad.

5. No person other than Licensee, its agents, employees, patrons, or invitees, shall be permitted to use said crossing; said crossing to be a private crossing for the use and convenience of Licensee, its agents, employees, patrons or invitees, only, and shall not be or be permitted to become a highway for the use of the public. To the end of preventing the use of said crossing by the public, Licensee will, at Licensee's expense, construct and maintain, at a point to be designated by the Superintendent of Railroad, or his duly authorized representative, a signboard clearly indicating that said crossing is for the private purposes of Licensee.

6. In each instance when a vehicle shall approach said crossing the same shall be stopped and shall not proceed over said track of Railroad until the driver or other person in charge thereof shall have ascertained that no train engine or car of Railroad is approaching said crossing.

7. Licensee accepts the privilege hereby granted with full cognizance

of the risk of loss of life, personal injury, and property loss or damage which may be caused: (1) by railroad operations at or in the vicinity of said crossing; or (2) by the construction, maintenance, or use of said crossing by the Licensee or others; or (3) by the presence of equipment or personnel of the Licensee at or in the vicinity of said crossing or on or in the vicinity of the right of way of the Railroad. The Licensee is willing to assume this risk entirely and specifically covenants that the privilege granted hereby shall be used and enjoyed at the sole risk of the Licensee, and that neither the Railroad nor any corporate affiliate of the Railroad shall have any responsibility whatever for any such loss, injury or damage. To that end, the Licensee hereby specifically agrees to indemnify and save harmless the Railroad and all corporate affiliates of the Railroad from and against all cost, expense, liability, or loss resulting from death, personal injury, or property loss or damage, arising out of, connected with, or caused by: (1) railroad operations at or in the vicinity of said crossing; or (2) the construction, maintenance, or use of said crossing by the Licensee or others; or (3) the presence of equipment or personnel of the Licensee at or in the vicinity of said crossing or on or in the vicinity of the right of way of the Railroad. The indemnity obligations imposed upon the Licensee by this paragraph shall be absolute, and shall not be affected by the negligence, either primary or contributory, of the Railroad, or of any corporate affiliate of the Railroad.

8. In order to contribute toward the safety of train and motor vehicle operations at said crossing, Licensee will at all times during the life of this agreement keep the vegetation on its property cut in such manner and to such extent as is necessary to permit a person approaching the crossing from either direction to see approaching trains before such person reaches a position of danger on or near the crossing. Licensee will also prevent the erection on its premises of any structures which would interfere with the view of approaching trains or other rail equipment operating on said tracks.

9. Licensee will procure and maintain during the life of this agreement a policy or policies of insurance covering the liability which is or may be imposed upon him by Article 7 of this agreement, in an amount not less than a combined single limit of \$1,500,000. Licensee agrees to furnish Railroad certificate or certificates evidencing the maintenance of such insurance, and Licensee further agrees to furnish Railroad, upon request, a copy of such policy or policies of insurance.

It is further understood and agreed that the furnishing by Licensee of evidence of such insurance, and acceptance of same by Railroad, is not intended to and shall not limit, modify or otherwise affect the obligations or liabilities of Licensee under Article 7 of this agreement.

10. If said crossing should at any time in the future become a public grade crossing, Licensee shall bear or shall cause such public authority as may assume responsibility for said public grade crossing to bear the cost of furnishing, installing and maintaining automatic signals, or such other protective devices as may be necessary in the judgment of Superintendent of Railroad to protect said public crossing. It is specifically understood that said crossing shall not be permitted to become a public grade crossing without the consent of Railroad, and unless arrangements satisfactory to the Railroad are made for the installation and maintenance of such protective devices, without cost or expense to Railroad.

11. Either party hereto may terminate this agreement at any time hereafter by serving upon the other days' written notice of election so to do. If Licensee shall violate any of its covenants herein Railroad may terminate this agreement forthwith by written notice to Licensee of its election so to do. At or before the expiration of the time limited by any notice to Licensee of Railroad's

election to terminate this agreement, Licensee will discontinue the use of said crossing and restore said right of way or property to condition existing prior to the construction of said crossing thereupon; or, in default thereof, Railroad may, in addition to any other legal remedy it may have, close said crossing and restore the condition of said right of way or property at the expense of Licensee.

12. This agreement shall take effect as of the ____ day of _____, 19____.

IN WITNESS WHEREOF, the parties hereto have executed these presents in duplicate, each part being an original, this ____ day of _____, 19____.

In presence of:

.....
As to Railroad.

.....
Vice President

In presence of:

.....
As to Licensee.

EXHIBIT E

THIS AGREEMENT, made and entered into this ____ day
of _____, 19__, by and between

SOUTHERN RAILWAY COMPANY, a Virginia corporation, and
ILLINOIS CENTRAL GULF RAILROAD COMPANY, a Delaware corporation,
hereinafter collectively styled "Railroads", parties of the first
part; and _____, hereinafter styled
"Permittee", party of the second part;

W I T N E S S E T H: That

WHEREAS, Permittee, at its expense, proposes to install
a public road or highway (hereinafter referred to as "grade
crossing"), upon and across, at grade, the right of way and track
of Railroads at _____, Kentucky, located substantially as
shown on the attached print hereinafter referred to; and

WHEREAS, Permittee has requested Railroads to perform
certain work in connection with the installation of said grade
crossing [and to install crossing signals for the protection of
vehicular traffic at said grade crossing]*, all of which
Railroads are willing to do, but upon the terms and conditions
hereinafter expressed and contained;

NOW, THEREFORE, the PARTIES HERETO agree as follows:

1. Railroads, to the extent that their lease with the
Louisville and Jefferson County Riverport Authority ("Riverport")
dated _____, 1983 enables them so to do, and without warranty,
hereby grant unto Permittee the right to install said grade
crossing upon and across, at grade, the right of way and track of
Railroads, at _____, Kentucky; said grade crossing being located
substantially as shown in red on print of Drawing No. _____,
dated _____, 19__, attached hereto and made a part hereof;
RESERVING, however, unto Railroads the right to continue to
maintain, repair, renew and operate their line of railroad and
appurtenances across said grade crossing, and to construct such
additional track(s) and other railroad facilities across said
grade crossing and to maintain, repair, renew and operate the
same as in the judgment of Railroads may be requisite; it being
understood that if Railroads elect or are required to construct
any additional tracks or other structures or facilities thereon,
and shall find it necessary to disturb said grade crossing or any
portion of the proposed highway located within the limits of said
right of way in so doing, Permittee will, at its own expense,
upon notice in writing so to do served upon it by Railroads, make
such changes in said grade crossing or in said highway as may be
necessary to accommodate the work of Railroads.

* Include if applicable.

2. Railroads will, for the accommodation of and at the expense of Permittee, perform the work of installing the portion of said grade crossing between the rails in said track and to the outside ends of the crossties on each side thereof, and furnish the materials for, and do and perform the work of upgrading said crossing signals in accordance with plans, specifications and estimates prepared by Railroads; said plans, specifications and estimates being made a part hereof. The cost of said work to be performed by Railroads has been estimated to be \$_____, as shown on detailed estimate dated _____, 19____, attached hereto and made a part hereof. Permittee will pay to Railroads, promptly upon bill rendered therefor, the actual cost of all work performed by Railroads in connection with the installation of said grade crossing [and crossing signals]*, including but not limited to the expenditures herein expressly described.

3. Permittee will, at its own cost and expense, install said grade crossing (except the portion to be installed by Railroads as aforesaid), including all necessary grading and drainage. Upon completion of the installation of said grade crossing, Permittee will maintain the same at its own expense, and in all respects in accordance with the requirements of Railroads looking to the safe and convenient operation of said line of railroad.

[4. After said crossing signals have been installed and found in satisfactory working order, the same shall be put into service from and after the hour mutually agreed upon by the parties hereto, and shall thereafter be operated and maintained by Railroads and the expense thereof to be borne by such party as may be required to do so under the provisions of applicable law, as the same may be amended from time to time, so long as Railroads (or either of them) operate their railroad track at said crossing, or until it is agreed between the parties hereto that said signals are no longer necessary, or until said crossing is abandoned or other legal requirements make it necessary to cease operation and maintenance of said signals.]*

[5. In the event said signals are no longer necessary at said crossing or said crossing is abandoned or other legal requirements make it necessary to cease operation and maintenance of said signals, Railroads will remove the same from said right of way of Railroads, and relocate and install said signals at a location to be mutually agreed upon by the parties hereto, and restore said right of way and track of Railroads to condition existing prior to the installation of said signals, all at Permittee's expense. Upon completion of such upgrading and installation, as aforesaid, said signals shall thereafter be operated and maintained at the new location pursuant to the terms and conditions of this agreement, in all respects if applicable and as if such new location were the original site thereof as

* Include if applicable.

herein provided.]*

6. Permittee agrees to indemnify and hold Railroads, and any other corporation controlling, controlled by or under common control with Railroads (or either of them), harmless from and against all loss, damage, liability or expense arising from injury or damage to any person or property while Permittee is engaged in the work of installing or maintaining said grade crossing across the right of way and track of Railroads as hereinabove provided.

7. If any work to be performed by or for Permittee is let by contract, Permittee shall require each contractor before coming upon the Railroads' tracks or right of way, to obtain from the Railroads' authorized representative permission for occupancy and use of the premises and to ascertain and comply with the Railroads' requirements for clearances, operation, and their general safety regulations. The Railroads may furnish each contractor, at such contractor's sole cost and expense, protective services and devices, including, but not limited to, switchtenders, flagmen, or watchmen, as the Railroads may deem necessary for the safety and continuity of railroad traffic during the work. Each contractor shall be required by Permittee to reimburse the Railroads promptly upon receipt of bill for such protective services and devices furnished to the contractor.

8. For any work let by contract, Permittee shall require each of its contractors to furnish evidence of Workmen's Compensation coverage and to maintain at all times during any work: (A) Contractors' Public Liability and Property Damage Liability Insurance, including automobile coverage, with a combined single limit of \$2,000,000 per occurrence with an aggregate limit of \$6 million for the term of the policy; (B) if subcontractors are involved, Contractors' Protective Public Liability and Property Damage Liability Insurance, with the limits prescribed in (A) above; and (C) Railroad Protective Public Liability and Property Damage Liability Insurance with the limits prescribed in (A) above. The Railroad Protective policy shall name Railroads and Riverport as insureds. Permittee shall require each contractor to furnish to the Railroads, with copies to Riverport, the Railroad Protective policy and certificates evidencing the other insurance coverage required in this Section. The Railroad Protective policy and all insurance certificates shall be subject to the Railroads' approval before any work may be started on the property by any contractor.

9. It is agreed that Railroads shall be exempt from any and all charges or assessments of any kind or character on account of the installation or maintenance of said grade crossing within the limits of said right of way, or on account of any other thing done or omitted to be done by Permittee in connection therewith.

* Include if applicable.

10. Should the use of said grade crossing be abandoned, then all rights hereby granted to Permittee shall thereupon cease and terminate and Permittee will, at its sole cost and in a manner satisfactory to Railroads and to Riverport, remove the portion of said grade crossing located within the limits of said right of way of Railroads, and restore said property to condition existing prior to the construction or location of said grade crossing within the limits of said right of way; provided that Railroads, at their option, may remove the crossing proper within the track area and restore said property and Permittee will, in such event, upon bill rendered, pay to Railroads the entire cost incurred by Railroads in such removal and restoration.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed in quadruplicate, each part being an original, as of the day and year first above written.

[PERMITTEE]

By

SOUTHERN RAILWAY COMPANY,
By

ILLINOIS CENTRAL GULF
RAILROAD COMPANY,
By

Dated: _____, 19__

CONVEYANCE DOCUMENTS

1. Deed dated October 26, 1978 between Houston McCord Realty Company, Grantor, and Louisville and Jefferson County Riverport Authority, Grantee, of record in Deed Book, 5051, Page 130, in the Office of the Clerk of Jefferson County, Kentucky, as corrected by Deed of Correction dated September 29, 1980, in Deed Book 5193, Page 382.

2. Assignment of Easement dated March 3, 1981 between Illinois Central Gulf Railroad Company and Kentucky & Indiana Terminal Railroad Company, Grantors, and Louisville and Jefferson County Riverport Authority, Grantee, of record in Deed Book 5217, Page 462, in the Office of the Clerk of Jefferson County, Kentucky.

3. Deed of Easement dated August 25, 1980 between Louisville Gas and Electric Company, Grantor, and Illinois Central Gulf Railroad and Kentucky and Indiana Terminal Railroad Company, Grantees, of record in Deed Book 5186, Page 561, in the Office of the Clerk of Jefferson County, Kentucky.

4. Deed dated September 8, 1976 between Houston-McCord Realty Company, Grantor, and Rogers Kentucky Corporation, Grantee, of record in Deed Book 4881, Page 568, in the Office of the Clerk of Jefferson County, Kentucky, as corrected by Deed of Correction of record in the aforesaid Clerk's Office.

5. Deed dated October 31, 1978 between Rogers Kentucky Corporation, Grantor, and Louisville and Jefferson County Riverport Authority, Grantee, of record in Deed Book 5051, Page 193 in the Office of the Clerk of Jefferson County, Kentucky, as corrected by Deed of Correction dated September 29, 1980 in Deed Book 5193, Page 409.

6. Deed of Easement dated February 26, 1981 between Jefferson County Community Improvement District, Grantor, and Louisville and Jefferson County Riverport Authority, Grantee, of record in Deed Book 5217, Page 458, in the Office of the Clerk of Jefferson County, Kentucky.

7. Grant of Easement and Right-of-Way and Agreement, dated September 29, 1979, between Bruce D. Fruchtenicht and Mary R. Fruchtenicht, Grantors, and the Louisville and Jefferson County Riverport Authority, of record in Deed Book 5133, Page 607, in the Office of the Clerk of Jefferson County, Kentucky.

OPERATING AGREEMENT

THIS OPERATING AGREEMENT, made and entered into as of this 11th day of August, 2000, by and between LOUISVILLE AND JEFFERSON COUNTY RIVERPORT AUTHORITY (hereafter "Riverport"); and Paducah and Louisville Railway, Inc. (hereafter "Paducah").

W I T N E S S E T H:

1. DEFINITIONS.

(a) Offsite Rail Line. A line of railroad owned by the Riverport approximately 4.1 miles long, connecting at its southern end to CSX Transportation, Inc.'s existing line of railroad between Louisville, Kentucky, and Henderson, Kentucky, near Mile Post HR-15, known as CSX's LE & STL Subdivision, extending northwardly to the south property line of the Riverport and highlighted in purple on Exhibit A.

(b) Onsite Rail Line. A line of railroad owned by the Riverport connecting at its southern end to the Riverport Offsite Rail Line, extending northwardly on the Riverport Complex, and highlighted in blue on Exhibit A.

(c) Lead Track. Trackage beginning at the LG&E Lead Track at approximately Station 7+59.50, and ending at point or points of connection with the Port Rail Trackage, as hereinafter defined, which trackage, together with a working track, which is approximately 1,500 track feet in length, and all underlying right-of-way, trestle, bridge, grade crossings, grade crossing protection, sublast, grading, drainage, and all other appurtenances thereto.

(d) Joint Portion. That portion of the Lead Track between Station 34+96.00, plus or minus and the point or points of connection with the Port Rail

Trackage.

(e) Port Rail Trackage. A system of rail trackage owned by the Riverport as part of the bulk commodity transfer facilities within the port area at the Riverport Complex, including a double loop track and one or more connections to the Onsite Rail Line and Lead Track.

(f) Industrial Lead Track. One or more extensions to the Offsite Rail Line, the Onsite Rail Line, the Lead Track or the Port Rail Trackage, owned by the Riverport and built to serve industrial users.

(g) Rail Lines. The Offsite Rail Line, the Onsite Rail Line, the Joint Portion, the Industrial Lead Track and the Port Rail Trackage.

(h) User. Any industry or other facility which is located at the Riverport Complex which ships or receives freight over the Rail Lines.

2. RIGHT TO USE LEAD TRACK AND/OR RAIL LINES.

The Riverport hereby grants to Paducah the non-exclusive right with Norfolk Southern Corporation to use the Lead Track from its beginning at approximately Station 7+59.50 to the northern end of the Joint Portion at approximately at Station 34+96.00, and the non-exclusive right with Norfolk Southern and CSX to use the Lead Track and/or Rail Lines for providing rail service to the Riverport Authority's port and industrial complex ("Riverport Complex") and to users of rail service located within or operating from the Riverport Complex, and for the handling of inbound and outbound rail shipments.

Paducah acknowledges that concurrently with its and Norfolk Southern's use of the Lead Track and its and Norfolk Southern's and CSX's use of the Rail Lines, the Riverport is free to use the Lead Track and/or Rail Lines and grant other railroads and other parties servicing the Riverport complex the right

to use such rail facilities. Paducah's rail freight operations and service within the Riverport Complex shall be in accordance with a mutually acceptable operating plan ("Operating Plan"). Riverport and Paducah recognize and agree that representatives of the parties shall meet to develop such Operating Plan within sixty (60) days of the effective date of this Operating Agreement. The Operating Plan, once developed by the parties, shall be attached as an appendix to this Operating Agreement. The parties recognize and agree that any such Operating Plan shall include, among other operating issues, the following: communications within the Riverport Complex, and the coordination of movements on the Rail Lines, among the freight railroad providers serving the facility; mutually acceptable operating times or windows to preserve access to the facility and its tenants; switching services. Riverport agrees that the operating arrangements and conditions which exist as of the Effective Date shall continue until the parties complete the mutually agreeable Operating Plan contemplated hereunder.

3. CHARGES FOR USE OF LEAD TRACK AND/OR RAIL LINES.

(a) In exchange for Paducah's use of the Lead Track and/or Rail Lines for moving freight that is destined for the port transloading facility, Paducah shall pay to Riverport a charge for maintenance of the Lead Track and/or Rail Lines the amount provided for on Exhibit B attached hereto (2000 basis) ("the Maintenance Charge"). The Maintenance Charge shall be adjusted effective each anniversary date of this Agreement in accordance with Exhibit C attached hereto and made a part hereof; additionally, it is to be adjusted for the additional length added to the Lead Track and/or Rail Lines by each extension thereto. It is understood and agreed that the basis of computing the Maintenance

Charge set forth in Exhibit B is intended to result in a fair and equitable payment to the Riverport for the costs incurred by the Riverport in maintaining and operating the Lead Track and/or Rail Lines. Accordingly, it is further agreed that either party may request renegotiation of the basis of computing the Maintenance Charge not more frequently than once every three years (beginning three years after the effective date of this Agreement), if the requesting party believes that the then existing basis of compensation is no longer providing for the fair and equitable payment of costs. In the event the parties are unable to agree upon a new basis of compensation, then either party may demand that the new basis be established by arbitration pursuant to paragraph 13 of this Agreement. The new basis of compensation, determined by agreement or by arbitration, shall apply from and after the date renegotiation was permitted under this paragraph, or from and after the date renegotiation was requested, whichever is later and until again later reviewed.

(b) In exchange for Paducah's use of the Lead Track and/or Rail Lines for moving freight that is not destined for the port transloading facility, Paducah shall pay to Riverport a car user charge of \$23.42 (2000 basis) for each and every such carload of freight moved over the Lead Track and/or Rail Lines (the "Car Charge"). The Car Charge to Paducah shall not be greater than the charge to any other railroad or customer for the same or substantially similar freight moved to or from the Riverport Complex by such other railroad during a comparable period of time.

(c) The payment of charges provided for hereunder shall be made on a calendar quarterly basis in arrears and not later than sixty (60) days after the last day of each quarter.

(d) Paducah shall maintain a record of the number of cars and tons of material which are moved over the Lead Track and/or Rail Lines and extensions thereto. With each quarterly payment to the Riverport, Paducah shall provide Riverport with a copy of such record. Riverport shall be entitled to inspect the books and other information of Paducah to verify the accuracy of Paducah's record upon reasonable notice at a reasonable time and place.

(e) The Car Charge shall be adjusted effective each anniversary date of this Agreement, in accordance with Exhibit C. If the index set forth on Exhibit C ceases to be published, an appropriate substitute for determining the percentage increase shall be negotiated by the parties hereto.

4. CONSTRUCTION, MAINTENANCE AND OPERATION OF LEAD TRACK AND/OR RAIL LINES.

(a) Paducah shall utilize the Lead Track and/or Rail Lines to afford Riverport and the private companies that now or in the future shall be located within or operating from the Riverport Complex the facility to receive and ship carload freight by railroad, in accordance with lawfully published tariffs, contracts or quotes of the affected railroads. Paducah agrees to provide Riverport and Users located within or operating from the Riverport Complex with service consistent with Paducah common carrier or contract obligations, including the provision of service upon reasonable request therefor, in cooperation with the other rail carriers serving the Riverport Complex.

(b) Except as may be mutually agreed to in writing by the parties, rail cars shall not be loaded on or unloaded directly from the Onsite Rail Line, the Offsite Rail Line, Lead Track or Industrial Lead Track. Loading and unloading shall be performed on such spur tracks as may be constructed to diverge

from the Rail Lines in accordance with Paragraph 4(c), below.

(c) Riverport, Paducah, and Users, to the extent provided in any agreement with Riverport, shall have the right to construct additional spur tracks diverging from the Lead Track and/or Rail Lines to serve Users requiring railroad service in the Riverport Complex, provided that the design and construction of each such track is approved by Riverport and the railroad(s) providing such service, and such railroad's operation (if any) over such spur track is covered by a prior written agreement between the railroad, the owner of said spur track, and/or the User requiring such service. The parties hereto will not unreasonably withhold agreement on such design, construction, or operation.

(d) The parties recognize that Paducah may wish or be required by law to use the Lead Track and/or Rail Lines to provide rail service to shippers or receivers located outside the Riverport Complex. If and when such use is so required or desired, the terms and conditions applicable thereto, as between Riverport and Paducah, shall be subject to negotiation, and arbitration pursuant to subsection 13 hereof if required; and solely for purposes of disputes to which this sentence applies, the provision in paragraph 13 permitting either party to object to arbitration, shall be inapplicable. The terms and conditions for such use, determined as aforesaid, shall be covered by separate agreement between said parties, or by appropriate amendment to this Agreement.

(e) The Riverport shall, at its own cost and expense, (but subject to payment by Paducah of the Maintenance and Car Charges described in paragraphs 3(a) and 3(b) herein) keep up, maintain, repair and renew the Lead Track and/or Rail Lines, and all replacements thereof, and additions and betterments thereto, if any, so that the same and every part thereof shall be in good repair, working

order and condition.

(f) Riverport in its sole discretion may make extensions to the Lead Track and/or Rail Lines. The terms and conditions governing the use of such extensions shall be covered by separate agreement between Riverport and the parties desiring use of such extensions. Railroads desiring to participate and use such extensions shall be granted the right of access thereto on equal terms. Paducah or Riverport may, at its sole-expense, install turnouts in the Offsite Rail Line and, in the case of Riverport, permit other parties to connect tracks to said turnouts for the purpose of rail service, provided that the design and construction of each such track is approved by Riverport and the railroads providing such service. The parties hereto will not unreasonably withhold agreement on such design, construction, or operation. Each carload of freight picked up or delivered by Paducah on such connecting tracks shall be included in the computation of the charges payable to Riverport under this Operating Agreement.

5. CLEARANCE REQUIREMENTS.

(a) Riverport agrees to observe and be bound by the following clearance requirements with respect to the Lead Track and/or Rail Lines: an overhead space of 23 feet measured perpendicularly from the top of the rail (except that overhead clearance where wire lines extend over the Lead Track and/or Rail Lines shall be such as may be prescribed by the National Electric Safety Code, but never less than 27 feet) and a space 25 feet in width, measured 12-1/2 feet on each side from the center line of the Lead Track and/or Rail Lines; provided, however, that all side clearance for the Lead Track and/or Rail Lines must be increased one and one-half (1-1/2) inches for every degree of

curvature therein. Such space shall be kept clear of any obstruction whatsoever including but not limited to all structural facilities or property of Riverport which are or may be placed or erected above or parallel to the Lead Track and/or Rail Lines. Riverport shall not cause to be placed in such space any obstruction, and shall cooperate fully with Railroads to prevent third parties from violating such clearance requirements with respect to the Lead Track and/or Rail Lines.

(b) Notwithstanding anything contained in this Agreement and irrespective of the sole, joint or concurring negligence of Paducah, Riverport shall assume sole responsibility for and shall indemnify and save harmless and defend Paducah from and against all claims, actions, or legal proceedings arising from the failure of Riverport to comply with any clearance requirement set forth in this Agreement. In this connection, it is specifically understood that knowledge on the part of Paducah of a violation of any such clearance requirements, whether such knowledge is actual or implied, shall not constitute a waiver and shall not relieve Riverport of its obligation to indemnify Paducah for losses and claims resulting from any such violations.

(c) Riverport agrees that as a condition of any sale or lease of land within the Riverport Complex, it shall require that its vendee or lessee agree to be bound by standard clearances with respect to the Lead Track and/or Rail Lines, as set forth in Paragraph 5(a) above, and Riverport further agrees that said covenant shall run with the land and shall be enforceable directly by Paducah.

(d) It is understood and agreed that Riverport shall neither install nor voluntarily permit the installation of any grade crossings, wire

lines, pipelines, or any other structures on, over, or across the Lead Track and/or Rail Lines until authorized representatives of Paducah shall have approved the plans and specifications thereof and until the party requesting the said installation has executed an agreement in substantially the form set forth in Exhibit D, hereto, as may be appropriate, covering such installation; provided, however that the sole valid basis for Paducah's withholding of such approval shall be its reasonable belief that the proposed grade crossing, wire line, pipeline, or other structure would create new public safety risks or otherwise interfere with rail operations; and provided further, that Paducah shall not be entitled to any rental or other compensation for any such installation (except for reimbursement of expenses occasioned by the installation) the right to such compensation being reserved exclusively to Riverport.

6. SWITCHING SERVICES.

(a) It is mutually agreed by the parties hereto that all carload shipments consigned to Riverport Authority for delivery and/or transloading shall be deemed to have been fully and completely delivered as soon as the car containing such shipment shall have been placed in the location designated by the Riverport Authority to receive it, and detached from the engine or train by which it was moved, and Paducah shall thereupon be fully and completely relieved of any such liability as common carrier or as bail or otherwise, for loss of or injury to such car and its contents occurring after such delivery, and that Paducah shall not be liable as common carrier, not as bail, nor otherwise, for any property loaded into any car until said car is attached or coupled to the engine or train by which it is to be moved from said tracks toward its destination, and that until said car is so attached or coupled up, the said car and its contents

shall be deemed and held to be in the possession of Riverport Authority so far as liability therefor is concerned.

(b) Riverport shall perform switching services on the Port Rail Trackage for rail cars, including those of unit trains containing material to be moved through the port transloading facilities.

(c) Additionally, Riverport shall have the right upon sixty (60) days written notice to Paducah to operate its owned or leased locomotives on the Lead Track and/or Rail Lines and extensions thereto and to move cars (regardless of ownership) over the Lead Track and/or Rail Lines and extensions thereto using said locomotives, in connection with service to the Riverport Complex, subject to the following conditions:

1) Riverport will coordinate pickup and delivery of cars with Paducah's designated representative and, at all times, will carry out its switching operations in a prompt, safe and efficient manner, complete said operations with the least practicable delay in accordance with the mutually acceptable Operating Plan, and thereafter return the cars (loaded or empty, as the case may be) coupled with air hoses connected and doors closed, to Paducah in the same condition as the same were in when received by Riverport, ordinary wear and tear excepted, such condition to be determined by inspection by Paducah in accordance with the Interchange Rules of the Association of American Railroads.

2) Riverport will be responsible for any accident, injury or damage involving any equipment or locomotive handled by Riverport on Port Rail Trackage and in connection with the rail to barge transfer facility while such equipment is in the custody or under the control of Riverport, it being

specifically understood and agreed that the responsibility of Riverport for said equipment shall commence at the time of delivery by Paducah to Riverport of any such equipment, and shall continue without interruption, until such equipment shall be returned in good order, as aforesaid, to Paducah.

3) Riverport will defend, indemnify and save harmless Paducah from and against any and all claims, demands, suits, judgments or sums of money to any person, corporation, firm or individual accruing for loss of life, injury or damage to person or property resulting from the switching operation of the Riverport.

4) Riverport may, if it so chooses, designate another entity (for example, a contract operator of the port transloading facility) to exercise Riverport's right under this paragraph 6; provided, however, that before any such designee commences operation over the Lead Track and/or Rail Lines, (i) Riverport shall give Paducah at least sixty (60) days advance notice of such designation, including the identity of the designee, (ii) said designee shall expressly assume each and every obligation of Riverport under this paragraph 6, but Riverport shall remain primarily responsible to Paducah, and (iii) said designee shall satisfy the prerequisites to Riverport's operation over the Lead Track and/or Rail Lines and shall be able to provide safe services and be financially sound. Paducah may object to such a designation, within thirty (30) days after notice thereof from Riverport, if and only if Paducah has reasonable grounds for believing that the specified designee will not operate over the Lead Track and/or Rail Lines in a safe, economical, responsible manner and such designee is not financially sound.

Finally, in the event Riverport, or another entity under direction

of Riverport, undertakes to perform the switching services contemplated hereunder, the parties agree to meet and confer relative to the procedures by which Riverport or such other entity will exchange cars and communicate with Paducah and by which Riverport or such other entity will be compensated for the services it provides.

5) Riverport will maintain the insurance required in Paragraph 7 of this Agreement.

7. INSURANCE.

Riverport will, at its expense, for the further protection of Paducah, take out, and at all times thereafter during the life of this Agreement, maintain in full force and effect, a policy or policies of comprehensive general liability insurance including contractual liability insurance specifically covering the liabilities to which Riverport is or may be subjected by the terms of paragraphs 5, 6, or 10 of this Agreement, underwriting for the benefit of Riverport the risk of loss of life, personal injury or property loss or damage including lading damage and losses from breach of carrier obligations to third parties resulting from Riverport's operations over the Lead Track and/or Rail Lines; said insurance policy or policies shall name Paducah as an additional insured and shall be in an amount of at least Five Million Dollars (\$5,000,000.00) for each occurrence, and in any event, not less than the amount of such coverage that Riverport may agree to maintain in an agreement with any other rail carrier serving the Riverport Complex during the term of this Agreement. Neither compliance with this requirement nor PADUCAH's approval of the terms and conditions of any insurance policy shall in any way limit or modify the obligations of Riverport to Paducah.

8. TERM.

(a) The term of this Agreement shall run from the date of this Agreement (the "Effective Date") and shall continue in effect for a term of three (3) years.

(b) In the event of default hereunder by Paducah or Riverport, with respect to any of the terms and provisions hereof, and the continuation of such default for more than sixty (60) days after written notice from the non-defaulting party of the existence of such default, the non-default party or parties may elect to cancel this Agreement by giving thirty (30) days notice in writing of such cancellation to the defaulting party or parties. Such right of cancellation shall be in addition to any other remedies which any party may have under applicable law.

(c) Upon any cancellation of this Agreement under the terms hereof, all rights of the parties hereunder shall absolutely cease, except that no cancellation of this Agreement shall affect the liabilities or obligations of the parties (whether of indemnification or otherwise) which may have accrued prior to such cancellation. Paducah shall surrender use of the Lead Track and/or Rail Lines to Riverport upon or prior to the effective date of such cancellation. Title to any improvements or betterments to the Lead Track and/or Rail Lines made while this Agreement is in effect shall vest in Riverport.

(d) If all or any part of the Lead Track and/or Rail Lines shall be taken or appropriated by any public or quasi-public authority under the threat of or through the power of eminent domain, either party hereto shall have the right, at its option, to terminate this Agreement if such taking or appropriation shall be considered by such party to be of such an extent or nature as to

substantially handicap, impede or impair the intended use of the Lead Track and/or Rail Lines; provided, however, Paducah shall not have the right to terminate if Riverport is able to provide alternative access, reasonably acceptable to Paducah, or replace the track taken without material interruption of the PADUCAH's usage. If a part of the Lead Track and/or Rail Lines shall be so taken or appropriated and neither party hereto shall elect to terminate this Agreement, the charge for the use thereafter to be paid shall be equitably reduced.

(e) In the event the Lead Track and/or Rail Lines shall become unfit for use due to floods, earthquake, Act of God, or force majeure, and the Riverport is unable to restore the Lead Track and/or Rail Lines to fit condition within a reasonable time under the circumstances, either party hereto may elect to terminate this Agreement on thirty (30) days notice.

(f) In the event Paducah is divested of use of the Lead Track and/or Rail Lines, whether as the result of cancellation of this Agreement, or eminent domain proceedings, or otherwise, PADUCAH shall not be entitled to any compensation for the loss of use, except that:

(i) If said loss results from the cancellation of this Agreement, Riverport shall pay to Paducah the net original cost to Paducah, less depreciation, of any additions and betterments to the Lead Track and/or Rail Lines made by Paducah with the consent of Riverport or pursuant to governmental order during the effectiveness of this Agreement; provided, however, that Riverport will be required to pay for such additions, betterments, and track and other materials only if Paducah ask for permission to remove the same from the Lead Track and/or Rail Lines at their expense (including restoration of any

affected portion of such Lead Track and/or Rail Lines to a condition equivalent to its condition immediately prior to the installation of such additions or betterments), within thirty (30) days after the effective date of the cancellation of this Agreement (such notice must describe in detail just what additions, betterments, and track and other materials Paducah wishes to remove), and the Riverport refuses to permit them to do so; and

(ii) If the Lead Track and/or Rail Lines or any part thereof are taken by eminent domain, Paducah may participate in any award of compensation with respect thereto, to the extent that their investment in such additions, betterments, or track or other materials, as described in clause (I) above, have added to the value of the property taken by eminent domain.

9. DEFECT IN TITLE.

It is understood and agreed that if Paducah is prevented from operating over any part of the Lead Track and/or Rail Lines due to a defect in Riverport's property rights therein, Paducah shall be excused from providing service under this Agreement, until such time as Riverport cures said defect and Paducah is again able to operate said part of the Lead Track and/or Rail Lines; but Riverport shall be under no obligation to cure any such defect. It is further understood and agreed that if such a defect prevents Paducah from serving the Riverport Complex at all, and such defect continues for sixty (60) days, either Paducah or Riverport may elect to cancel this Agreement under paragraph 8, as though the other party were in default.

10. INDEMNIFICATION.

(a) Riverport agrees to defend, indemnify and hold Paducah, its officers, directors, agents, employees, successors and assigns harmless from and

against any and all losses, damages, claims, actions, and expenses resulting from death, personal injury, or loss of or damage to property, caused solely by the fault or negligence of Riverport or its officers, directors, agents, employees, successors, or assigns, or caused jointly by the fault or negligence of Riverport or its officers, directors, agents, employees, successors, or assigns, and the fault or negligence of a party other than Paducah or its officers, directors, agents, employees, successors, or assigns.

(b) Paducah agrees to defend, indemnify and hold Riverport, its officers, directors, agents, employees, successors and assigns harmless from and against any and all losses, damages, claims, actions, and expenses resulting from death, personal injury, or loss of or damage to property, caused solely by the fault or negligence of Paducah or its officers, directors, agents, employees, successors, or assigns, or caused by the fault or negligence of Paducah or its officers, directors, agents, employees, successors, or assigns, and the fault or negligence of a party other than Riverport or its officers, directors, agents, employees, successors, or assigns.

(c) Whenever any death, personal injury, or loss or damage to property occurs and arises out of both the fault or negligence of Paducah or its officers, directors, agents, employees, successors, or assigns, and the fault or negligence of Riverport or its officers, directors, agents, employees, successors, or assigns, each party shall be responsible for and indemnify and hold harmless the other from any and all losses, damages, claims, actions, and expenses resulting from the death or personal injury of its employees or from the loss of or damage to property in its custody or control, or in the custody or control of its employees.

11. APPROVALS.

Paducah shall be responsible for obtaining any and all necessary governmental approvals for its entry into this Agreement and for their performance hereunder. Paducah agrees to prosecute any necessary applications for such approval as expeditiously as possible. Riverport shall cooperate with Paducah in such efforts.

12. SUCCESSORS AND ASSIGNS.

This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties, whether or not expressly assumed by such successors and assigns. No party may assign this Agreement without the written approval of the other parties, which approval shall not be unreasonably withheld.

13. ARBITRATION.

Any controversy or claim between the parties hereto arising out of or relating to this Agreement, or the breach thereof, which cannot be settled by the parties themselves, shall be settled through arbitration by a sole, disinterested arbitrator to be selected jointly by the parties hereto; however, if the parties fail to select such arbitrator within sixty (60) days after demand for arbitration is made by any party hereto, then they shall jointly submit the matter to binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association. Any decision of an Arbitrator selected under this paragraph shall be required to set forth in detail and in writing the reasons for his decision. The Arbitrator must not issue injunctions and any award shall be limited to the actual damages of the aggrieved party. The decision and award of the arbitrator(s) shall be final and conclusive upon the parties hereto, and judgment may be entered thereon in any court having

jurisdiction thereof. Each party to the arbitration shall pay the compensation, costs, fees, and expenses of its own witnesses, exhibits, and counsel. The compensation, costs, and expenses of the arbitrator, if any, shall be borne equally by the parties hereto; provided, however, that any party may prior to or within thirty (30) days following receipt of notice by another party that the noticing party intends to submit a controversy or claim to arbitration pursuant to this section, notify the other parties that it objects to arbitration of said controversy or claim. If the objecting party gives notice of its objection to arbitration as above stated, then this section 13 shall not apply to said controversy or claim.

14. PARTIAL INVALIDITY.

If any provision of this Agreement is held by lawful authority to be invalid, void, or unenforceable, the remaining provisions shall continue in full force without impairment or invalidation.

15. REASONABLENESS STANDARD.

It is hereby expressly understood and agreed by and between the parties hereto that any decision, approval or consent required by either party pursuant to this Agreement shall be made in a reasonable manner and no party shall withhold any decision, approval or consent on an unreasonable basis.

16. NOTICES.

(a) Any notice required to be given pursuant to the terms of this Agreement shall be made in writing and shall be transmitted by facsimile, first class mail or electronic transmission with confirmation by 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) Any notice required to be given pursuant to this Agreement shall be transmitted to the respective parties at the following address or at such other places as the parties from time to time designate in writing:

If to Paducah: President
Paducah & Louisville Railway, Inc.
1500 Kentucky Avenue
Paducah, Kentucky 42003

If to Riverport: President
Louisville and Jefferson County
Riverport Authority
6900 Riverport Drive
Post Office Box 58010
Louisville, Kentucky 40258

17. Complete Agreement

This Operating Agreement represents the entire understanding of the parties, may not be modified without their written consent, shall be continued (except for matters referring to federal laws or regulations) according to the laws of the Commonwealth of Kentucky and has been executed by the duly authorized representative of the parties.

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

PADUCAH AND LOUISVILLE RAILWAY, INC.

BY:

TITLE:

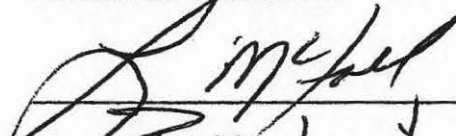
[Signature]

President & CEO

LOUISVILLE AND JEFFERSON COUNTY
RIVERPORT AUTHORITY

BY:

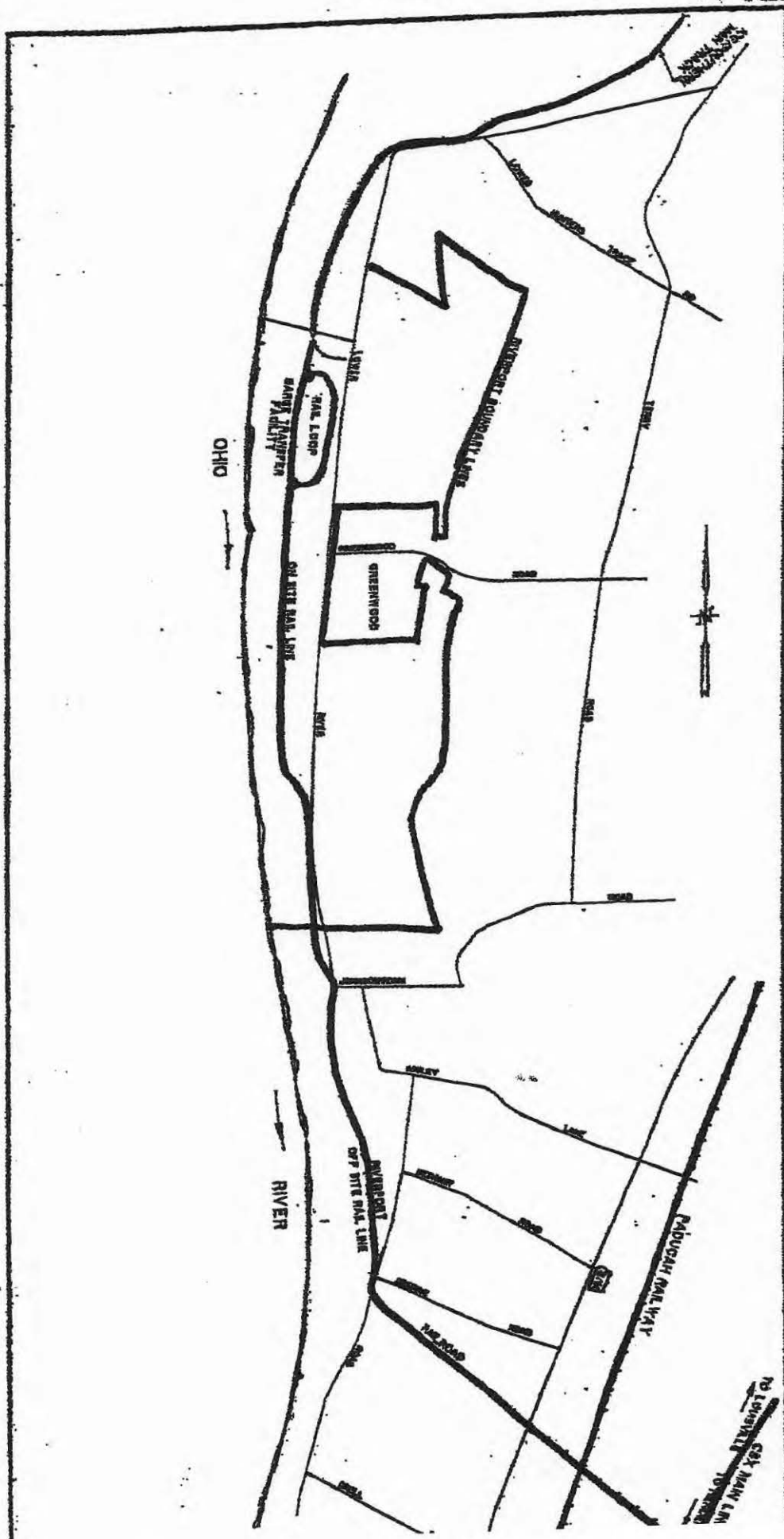
TITLE:



President

ar:\Paducah.01 bw

EXHIBIT A



Riverport Complex

Onsite Rail

Offsite Rail

Lead Track

CSX Main Line

P&L Main Line

EXHIBIT B

MAINTENANCE CHARGES

$$(\$3,275 + (110 \times \text{MGT}) (1.08 (\text{SPD}-30)) \times \text{Miles} \\ 10$$

SPD = Speed - 40 MPH

MGT = 2 Million Gross Tons (1 Million Net Tons)

\$3,275 is a fixed cost which, in addition, to track maintenance includes:

Weed spray @ \$180.00/mile/year

Inspections as required by FRA

Rail test @ \$35.00/mile/year

Track geometry @ \$15.00/mile/year

$$(\$3,275) (110 \times 2) \times 1.08 \times 4.1 \text{ miles} = \$15,476$$

$$\begin{array}{rcl} \$15,476 & & = \$.0155/\text{ton} \\ 1,000,000 \text{ Net Tons} & & \end{array}$$

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EXHIBIT C

ANNUAL ADJUSTMENT OF CHARGES

The rates and charges to which this Exhibit pertains shall be adjusted upward or downward based upon the annual changes in the Producer Price Index - Industrial Commodities Less Fuel and Related Products and Power (Table 8), hereinafter the "Index" as published by the United States Department of Labor, Bureau of Labor Statistics. In determining the amount of the annual adjustment, if any, the Index as first published for the first quarter of the preceding year shall be subtracted from the Index as first published for the first quarter of the current year and the result shall be divided by the Index as first published for the first quarter of the preceding year. The quotient, stated as a decimal, shall then be multiplied by .60 and rounded to the nearest one-hundredth, and if there is no nearest one-hundredth, to the nearest even one-hundredth, and shall be added to 1.00. The resulting figure shall hereafter be called the Annual Change Factor. The Annual Change Factor shall be multiplied by the Effective Rate from the previous year to determine the Effective Rate for the Current Year. Such new Effective Rate shall be rounded to the nearest one cent, and if there is no nearest one cent, to the nearest even one cent. The base year shall be 1985 and the "first quarter" of each year shall be that calendar quarter ending June 30.

EXHIBIT C

(Continued)

ANNUAL ADJUSTMENT OF CHARGES

The adjustment mechanism for the rate for throughput at the port is represented by the following formula:

$$CER = \frac{(\frac{CFOI - PFOI}{PFOI} \times .60 + 1.00)}{1} \times PER$$

where:

CER = CURRENT EFFECTIVE RATE
PER = PREVIOUS EFFECTIVE RATE
CFOI = CURRENT FIRST QUARTER INDEX
PFOI = PREVIOUS FIRST QUARTER INDEX

EXHIBIT D

(Forms for grade crossings, wire lines, pipelines or other structure on,
over or around Rail Lines)

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REPLY EXHIBIT B

LYNCH, COX, GILMAN & GOODMAN P.S.C.

**500 WEST JEFFERSON STREET, SUITE 2100
LOUISVILLE, KENTUCKY 40202
(502) 589-4215
Fax (502) 589-4994
E-Mail doncox@lynchcox.com**

DONALD L. COX

October 2, 2020

INDIANA OFFICE:
426 E. COURT AVENUE
JEFFERSONVILLE, INDIANA 47130
TELEPHONE
(812) 283-8282

via Electronic Mail

Honorable F. Chris Gorman
Conliffe, Sandmann & Sullivan
2000 Waterfront Plaza
325 W. Main Street
Louisville, KY 40202
cgorman@cssattorneys.com

Re: Louisville & Jefferson County Riverport Authority v.
New Albany Main Street Properties, LLC d/b/a Port of Louisville

Dear Chris,

We are in receipt of your "notice" of September 11, 2020 purporting to assert some kind of breach by the Riverport Authority because of the recent determination by the FRA that your operations of the railroad are in violation of FRA regulations which have been in effect long before you first undertook any lease with the Riverport.

We dispute your assertion that we somehow owe you additional money to operate the Port railroad in accordance with FRA standards even though you are required to comply with all federal regulations under the latest lease, indeed all leases you have entered into with the Riverport.

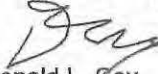
You have not carefully read the Lease. First, in §III(A)(9), you were provided with copies of the railroad agreements. Second, §III(B)(4), does not state what you say it states. Rather, it states "Riverport is not currently in material default of any contract, lease, permit or agreement assigned hereunder or incorporated herein, which could affect the Lessee's operation of the Port Facility of Port Facility area." As you should know, the leases with the railroads are what are called hold-over leases, which could expire upon 30 days written notice. So, at the time the Lease was signed, the railroad agreements were still in effect and are today, but are subject to renegotiation, which is what we are attempting to do currently. Third, all amounts per the terms of each of the railroad agreements, have had the payments escalated annually as provided in the railroad agreements. See attached. Finally, with respect to your comments concerning §XIV(E)

LYNCH, COX, GILMAN & GOODMAN P.S.C.

of the Lease, the FRA has not imposed any type of tax or governmental charge. So, there is nothing to currently discuss. As stated above, we do not interpret this section as applying to requirements of the FRA to maintain trackage or operations to a particular standard. The language in question clearly is referencing tax-like charges and not costs incurred in order to comply with governmental regulations.

Accordingly, for the above reasons, the Riverport is not in default.

Very truly yours,



Donald L. Cox

RAIL CAR INFORMATION

DATE	RR	CARS	INV AMT	INV 1/3 DUE PoL DATE	REIMB RATE	
2019	CSX	437	12,711.85	4,237.29 3/3/2020	29.09	
2019	NS	1345	48,056.85	16,018.95 3/3/2020	35.73	
2019	TOTAL	1782	60,768.70	20,256.24		PAID BY RP CHECK DATED MAY 2020
2018	CSX	527	15,176.34	5,058.78 5/21/2019	28.43 2/1/2017-1/31/2018 29.08 2/1/2018-1/31/2019	NOTE: PAID BY REDUCING AMOUNT DUE US IN FUNDS DRAWN ON THEIR LOC FEB 2020
2018	NS	1493	52,150.49	17,383.50 5/21/2019	34.93	NOTE: PAID BY REDUCING AMOUNT DUE US IN FUNDS DRAWN OF THEIR LOC FEB 2020
2018	TOTAL	2020	67,326.83	22,442.28		
2017	CSX	475	13,339.15	4,446.38 6/22/2018	27.92 2/1/2016-1/31/2017 28.43 1/1/2017-1/31/2018	NOTE: PAID BY REDUCING FUNDS DUE US IN N O D 183,791 PAID JUNE 2020
JAN-JUNE 2017	NS	661	18,554.27	6,184.76 5/18/2018	28.07	
JULY-DEC 2017	NS SUB	790 1451	22,633.50 41,187.77	7,544.50 5/18/2018 13,729.26	28.65	NOTE: PAID BY REDUCING FUNDS DUE US IN N OF D 183,791 PAID JUNE 2020
2017	TOTAL	1926	54,526.92	18,175.64		
JAN-JUNE 2016	CSX	315	8,831.12	2,943.71 2/7/2017	28.07 2/1/2015-1/31/2016 27.92 2/1/2016- 1/31/2017	NOTE: PAID BY REDUCING FUNDS DUE US IN THE N o D \$183,791* PAID JUNE 2020
JULY-DEC 2016	CSX	350	9,799.72	3,266.64 6/22/2018		NOTE: PAID BY REDUCING FUNDS DUE US IN NOD 183,791 PAID JUNE 2020
2016	NS	1373	38,540.11	12,846.70 2/7/2017	28.07	NOTE: PAID BY REDUCING FUNDS DUE US IN THE N o D \$183,791 * PAID JUNE 2020
2016	TOTAL	2038	57,170.95	19,057.05		

* INCLUDED IN \$50,955 DUE 8/31/2017

REPLY EXHIBIT C

PRIVATE ARBITRATION
BEFORE ARBITRATOR JOHN W. HAYS

LOUISVILLE AND JEFFERSON COUNTY
RIVERPORT AUTHORITY

PLAINTIFF

v.

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

DEFENDANT

REASONED OPINION

The parties in this private arbitration are currently parties to a pending civil action in the Jefferson Circuit Court styled *Louisville and Jefferson County Riverport Authority v. New Albany Main Street Properties, LLC D/B/A Port of Louisville*, Case No. 19-CI-003564. Legal issues have arisen in the civil action regarding the interpretation and enforceability the Modified Port Facility Lease that the parties entered on August 19, 2016 (the Lease).¹ Pursuant to an Agreed Order dated October 31, 2019, the parties submitted the following questions for arbitration: “(a) whether, under applicable law, there has been an actionable material breach of any provision or provisions of the Lease which is the subject of this action . . .; and (b) whether the Lease which is the subject of this action is void or otherwise enforceable” Although this is a private arbitration, the parties agreed that the Arbitrator should use the Commercial Arbitration Rules issued by the American Arbitration Association.

After conducting discovery, the parties submitted pre-hearing briefs to the Arbitrator and presented their proof and arguments of counsel in arbitration hearings conducted in Louisville, Kentucky on December 13, 19 and 30, 2019 and January 3 and 9, 2020. A court reporter transcribed the hearing and the Arbitrator has been provided copies of the hearing transcripts. Additionally, the Arbitrator and parties viewed the Port Facility (the Port) on January 14. Thereafter, pursuant to the agreement of the parties and the Arbitrator, the parties submitted post-hearing briefs on February 21, 2020. On February 24, 2020, the Arbitrator advised the parties that the first phase of the Arbitration was closed as of February 21, 2020.

By agreement, the parties requested that the Arbitrator provide a reasoned opinion rather than findings of fact and conclusions of law. This opinion will first address the question whether the Lease is void or otherwise unenforceable, because, if it is, there is no reason to determine whether there has been an actionable material breach.

¹ The Lease was admitted as Plaintiff Exhibit (PX) 11.

A. Is the Lease void?

Ruling:

No. The attempt to amend the Lease in handwriting is unenforceable, because Plaintiff did not approve the amendment. This happened because the parties entered the Lease so close in time to the expiration of the Initial Term that Defendant could not provide timely written notice of intent to renew the Lease. To effectuate the parties' undisputed intent, I find that Plaintiff waived or is estopped from relying upon the written notice requirement for the first renewal term, so the agreed total term of the Lease (assuming Defendant timely renews it for all the possible terms) is less than 20 years.

Reasoning:

Plaintiff is a riverport authority created by the Riverport Authority Act (KRS 65.510, *et seq.*) and is a body politic and corporate with the usual corporate attributes. KRS § 65.520(2). Plaintiff "may contract with any person or governmental agency for the use of the riverport and riverport facilities." KRS § 65.610(1). Plaintiff has a Board that is authorized to act on its behalf, including the authority to enter into contracts for the Board. (Bouvette pp. 58-59, 12/13/19). The Port is one of the assets that Plaintiff manages.

The Lease as prepared by Plaintiff begins by stating "**THIS PORT FACILITY LEASE AGREEMENT** made this ____ day of March, 2016." Although the day was left blank, the plain language leaves no doubt that the parties intended to enter the Lease in March 2016. This is consistent with the fact that Plaintiff issued the Request for Proposal for the Lease on March 11, 2016.

Assuming the parties entered the Lease no later than March 31, 2016, the total term of the Lease (including all extensions) would have been 5 months (the Initial Term), 5 years (1st Renewal Term), 5 years (2nd Renewal Term), 5 years (3rd Renewal Term), and 4 years and 5 months (Final Renewal Term). Consequently, by the four corners of the Lease, the parties' intent was to enter an agreement with a total potential term of 19 years and 10 months. This complies with the Kentucky Constitution and is consistent with the parties' course of conduct in all prior leases for the Port.

The dispute concerning the total potential term of the Lease arose from the fact that the parties did not execute the Lease in March 2016 as was contemplated but instead executed it on August 19, 2016, less than two weeks before the end of the Initial Term. This created a problem, because the Lease requires Defendant to give Plaintiff three months' written notice that Defendant wanted to extend the term. Defendant could have provided this written notice timely if the parties entered the Lease in March, or even April, but could not do so on August 19 when the parties finally executed the Lease. The parties' representatives attempted to correct the problem with a written and initialed amendment to change the Initial Term from August 31, 2016 to August 31, 2021; however, by attempting this they expanded the total potential term to 24 years and 5 months. If this amendment is binding, the Lease arguably violates Sec. 164 of the Kentucky Constitution by granting a franchise or contract for a term exceeding 20 years.

The question that will determine this issue is whether the attempt to amend the Lease with the handwritten changes is binding. I find that it is not, because there is no dispute that Plaintiff's Board did not approve or ratify the handwritten amendment. Plaintiff's president testified that she reviewed the Board's meeting minutes and found no approval of the handwritten changes to the term provision. (Bouvette pp. 58-59, 12/13/19) As a matter of law, public contracts are void if they are entered by someone who lacks authority to bind the public entity. *Louisville Extension Water Dist. V. Diehl Pump & Supply Co.*, 246 S.W.2d 585, 586 (Ky.1952). Because the handwritten changes were not authorized by the Board they are void. However, there is no dispute that the Board approved and entered the Lease without the handwritten changes and that Defendant agrees that the total term should not extend for more than 20 years. Consequently, there is no dispute that the parties intended to limit to the total term of the Lease to less than 20 years and there is no dispute that the parties continued to perform under the Lease without realizing that the handwritten revisions were not binding. To remedy this situation to effectuate the parties' undisputed intent as expressed in the four corners of the Lease, I find that Plaintiff waived or is estopped from relying upon the written notice requirement for the first renewal term of the Lease, so Defendant is currently operating under the 1st Renewal Term of the Lease.

B. Is Plaintiff entitled to terminate the Lease for default?

Ruling:

No. Plaintiff did not prove by a preponderance of the evidence that Defendant materially breached a term of the Lease that Defendant failed to cure timely. The law abhors a forfeiture, and, in this case, the law and equity do not justify forfeiture.

Reasoning:

Pursuant to the Section VIII.A of the Lease, Plaintiff may terminate the Lease for default if Defendant fails to cure the default within 20 days after written notice from Plaintiff. To terminate the Lease for default Plaintiff must prove that the default was a material breach, that Plaintiff gave Defendant written notice of the default and that Defendant failed to cure the default within 20 days after the written notice.

Plaintiff has alleged numerous breaches of the Lease that justify termination of the Lease, some of which were withdrawn and some which are not mentioned in Plaintiff's post-hearing brief. The most efficient way to address Plaintiff's claims is to address each section from Plaintiff's Statement of the Case in its post-hearing brief that pertains to alleged material breaches of the Lease.

1. Failing to maintain the Port Facility and failing to provide repairs to the property.

Section V.B of the Lease requires Defendant to "perform all required maintenance at the Port Facility and Port Facility Area," to "at all times keep the Port Facility in good state of maintenance and repair," and to "make all such repairs to the Port Facility as may be or become necessary to maintain the same in good repair and working order." Repairs must "be made in a good workmanlike manner, (sic) and shall use materials at least equal in equality (sic) to the

damaged materials when new.”

Plaintiff sent a written notice to Defendant on May 15, 2019 that alleged that Defendant had violated Section V. (PX 29) Defendant responded to the notice on June 3, 2019 and denied that Defendant had violated its maintenance and repair obligations. (PX 33)

Because Section V does not provide any detail about what constitutes a “good state of maintenance and repair” or what is “good repair and working order,” I will look outside the four corners of the Lease to determine the parties’ intent. From September 2009 until the parties entered the Lease in August 2016, Plaintiff and Defendant entered two leases and three amendments to the second lease (dated July 1, 2012) regarding the Port:

1. Port Facility Lease, September 1, 2009 (PX 6);
2. Port Facility Lease, July 1, 2012 (PX 7);
3. First Amendment to Port Facility Lease, October 16, 2012 (PX 8);
4. Second Amendment to Port Facility Lease, October 1, 2013 (PX 9); and,
5. Third Amendment to Port Facility Lease, September 1, 2014 (PX 10).

By March 2016, Plaintiff had almost seven years of knowledge about Defendant’s operations and the condition of the Port. The parties’ course of conduct during this time provides compelling evidence about their intent regarding the Lease obligations.

Defendant contends, and Plaintiff does not deny, that Plaintiff did not complain about the maintenance or repairs to the Port during the periods covered by the first two leases. Moreover, Plaintiff entered the Lease in 2016 and never issued a notice of default to Defendant until May 2019. (PX 29) Plaintiff did not introduce any evidence to rebut Defendant’s evidence that they spent substantial sums of money to maintain and repair the Port from 2009 forward, and Plaintiff did not introduce any evidence that the condition of the Port was worse than when Defendant began operating the Port in September 2009.

Plaintiff relies upon two reports issued by its expert, Krech Ojard (KO), to support its claim that Defendant violated the Lease by failing to maintain and repair the property. KO first inspected the Port on February 27, 2019 and did a follow up inspection on June 5, 2019. KO was paid by Watco, one of Defendant’s competitors, that Plaintiff contacted about operating the Port without Defendant’s knowledge. In fact, Plaintiff entered a confidential Memorandum of Understanding (the MOU) with Watco dated February 2, 2019, which documented that Plaintiff:

desires to enter into an agreement with Watco as an independent contractor to perform the services to be negotiated, which may include stevedoring for river barge loading and unloading, rail switching, storage, loading and unloading, and developmental, engineering and marketing services as will be defined through negotiations. (PX 24)(emphasis added)

There are two problems with Plaintiff’s negotiations with Watco and the MOU: (1) both are credible evidence of a breach of the duty of good faith and fair dealing that Plaintiff owes to Defendant under the Lease; and, (2) both are evidence of Plaintiff’s noncompliance with the spirit

if not the letter of public bidding requirements. Based upon this evidence, there is no question that Plaintiff decided that it wanted to lease the Port to Watco **before** it ever obtained any evidence of default by Defendant and months before it sent the first notice of default to Defendant.²

Assuming *arguendo* that Plaintiff's breach of the duty of good faith and fair dealing because of its negotiations with Watco does not preclude it from enforcing its rights under the Lease, the question is whether KO identified a material breach of the Lease that Defendant failed to cure timely. I find no material breach for two reasons: (1) most of the deficiencies KO identified related to equipment that was not in use before Plaintiff and Defendant entered the first lease in September 2009. The equipment had been used to move coal through the Port prior to 2009, but despite Defendant's best efforts, they have never been able to obtain contracts to move coal through the Port in the amounts that moved through it previously; and, (2) Plaintiff did not provide the KO reports to Defendant until September 20, 2019, well after sending multiple default notices and attempting to evict Defendant. Plaintiff's argument that it was not required to provide the reports when received or with one of the default notices is not persuasive. Plaintiff had a duty to provide written notice of any alleged defaults to Defendant before seeking termination of the Lease. That duty includes the good faith duty to provide all material information that Plaintiff has regarding the alleged defaults, so Defendant could appropriately and timely respond to the notice and cure any material defaults. Delaying the delivery of material information about the alleged defaults until after the cure period lapses is not permitted as a matter of law or equity.

Again, assuming *arguendo* that Plaintiff's breach of its duty to provide notice of the alleged defaults does not preclude it from enforcing its rights under the Lease, the question is whether KO identified any material breach of Defendant's duty to maintain and repair the Port. After carefully reviewing all the evidence the parties presented, I find that Defendant did not materially breach its duty to maintain and repair the Port.

Plaintiff attempts to construe the duty to maintain and repair to include the duty to repair the coal loading equipment, even though coal stopped moving through the Port before the first lease and even though Defendant was unable to secure any contracts to move coal through the Port. Plaintiff contends that Exhibit B to the Lease requires Defendant to "keep" this equipment in a good state of repair, but the undisputed evidence establishes that the equipment was not in a good state of repair in 2009. Moreover, the parties' course of conduct for 10 years does not support Plaintiff's current effort to interpret the Lease to require Defendant to repair equipment that had been idle and subject to vandalism before the first lease in 2009.

KO also found deficiencies in the equipment that Defendant has been using in its operations, such as the railway ties and the rail and loop tracks. However, there is no dispute that since 2009, Defendant has been replacing railway ties and has maintained the ties and tracks in compliance with CSX requirements. Plaintiff again seems to be arguing that the maintain-and-repair language requires Defendant to pay to replace all the rail and ties, but the parties' course of conduct for 10 years does not support this interpretation of the Lease.

² Plaintiff eventually bid the lease again and awarded the contract to Watco effective as of October 11, 2019 but expressly contingent upon termination of the Lease. Plaintiff's equitable position in this action is not aided by the fact that the provisional lease awarded to Watco included the requirement that Plaintiff replace the crane and locomotive if they could not be repaired. (PX 65)

2. Disposal of 8½ years of maintenance inspection records.

The Lease requires Defendant to maintain records to document its compliance with its maintenance program. Plaintiff argues that Defendant's disposal of 8½ years of maintenance inspection records proves that Defendant was not performing appropriate maintenance and is a material breach of the requirement that Defendant maintain records to document its compliance with the requirement to have a maintenance program.

Plaintiff did not send Defendant a written notice of default for its alleged failure to maintain records to document its compliance with its maintenance program. Plaintiff's failure to provide written notice and opportunity to cure is a material breach of the Lease by Plaintiff and precludes any claim that Defendant's alleged failure to document its maintenance efforts is a material breach of contract.

Even disregarding Plaintiff's failure to provide notice and opportunity to cure, I find that Defendant did not materially breach its record-keeping obligations. Defendant's witnesses testified that it has kept maintenance records as required but admitted that it disposed of many of the records after discovering they had been damaged by a water leak. (Seger p. 91, 1/9/20). Defendant introduced credible evidence that it has performed maintenance and repairs since it first leased the Port in September 2009. Defendant also produced maintenance records that begin at least as early as June 4, 2019. (DX 77) Disposing of illegible maintenance records is not a material breach of the Lease, and Defendant has maintained records to document its compliance with its maintenance program since June 4, 2019.

3. Operating the property in a manner contrary to the safety standards under OSHA.

Section III.A(1) and III.A(6) of the Lease require Defendant to conduct its operations in compliance with all federal, state and local laws, statutes, ordinances and regulations. Plaintiff contends that Defendant breached Section III by multiple OSHA violations identified in a report dated July 25, 2019 prepared by Plaintiff's expert, Dr. David Stumbo.

The first notice of default that references alleged violations of Section III is dated August 2, 2019. (PX 43) The next notice of default dated September 4, 2019 included the identical notice language. (PX 50) Neither notice specifically mentioned OSHA violations or the specific findings contained in Dr. Stumbo's report dated July 25. Moreover, like the KO report, Plaintiff did not provide Defendant with a copy of Dr. Stumbo's report until September 20. Because Plaintiff failed to provide appropriate notice and opportunity to cure the alleged deficiencies, Plaintiff is precluded from relying upon Dr. Stumbo's findings as a basis for seeking termination of the Lease.

Even assuming *arguendo* that Plaintiff's breach of the notice and cure requirement is ignored, Dr. Stumbo's report does not present persuasive evidence that any OSHA violations he identified are material breaches of the Lease. As detailed in Defendant's post-hearing brief, Defendant presented credible evidence that it cured any deficiencies that posed a safety hazard and credible evidence that any deficiencies not cured did not pose a safety hazard. In weighing the credibility of the evidence presented on this issue, I find Defendant's safety track record

compelling evidence that Defendant has conducted its operations in substantial compliance with its obligations under Section III.

4. Maintaining the crane in an unsafe manner.

Plaintiff relies on a report prepared by Crane 1 to claim that Defendant materially breached the Lease by failing to maintain and repair it properly. Plaintiff provided notice of this claim on December 11, 2019, just two days before the first hearing day in this action. Defendant promptly responded to the notice and presented credible evidence that any safety concerns were cured and that any other alleged deficiencies are not safety concerns and therefore are not material breaches of the Lease. The credible evidence presented during the hearing shows that Defendant has maintained a crane that is nearing the end of its life expectancy in such a way as to maximize the crane's availability rate. (DX 52)

5. Trash and junk has accumulated around the Port Facility.

Section III.A of the Lease requires Defendant to act "in compliance with all federal, state, and local laws, statutes, ordinance and regulations including Riverport's Declaration of Restrictions." Several sections of the Declaration of Restrictions pertain to keeping the property in good condition. Plaintiff contends that Defendant violated these requirements by allowing piles of trash and a pile of railroad ties to be on the property.

None of the multiple notices of default that Plaintiff sent to Defendant mention violations of the Declaration of Restrictions, piles of trash or the pile of railroad ties. Plaintiff mentioned Section III.A in its notices dated August 2 and September 4 but qualified those references with the following: "Specifically, the Port is not being operated in compliance with applicable safety standards, both those customarily employed in port operations and those required by law, including providing a safe and secure work space and requiring compliance with applicable worker safety standards." Consequently, Defendant had no way of knowing that the reference to Section III.A included the sections now at issue in the Declaration of Restrictions.

Plaintiff also produced insufficient evidence to prove that the road in the Port that is adjacent to the railroad ties is a public road. Therefore, I cannot find on the evidence presented that the pile of railroad ties violates the Declaration of Restrictions. Moreover, the Declaration of Restrictions contains enforcement conditions that may also be incorporated by reference into the Lease.

6. Failure to maintain an effective marketing, promotional, advertising and sales campaign for the Port Facility.

Section IV of the Lease requires Defendant "to 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." Plaintiff gave Defendant notice and opportunity to cure this alleged default in the first notice in May 2019 (and several subsequent notices) but did not provide any specific reasons for the claim. (PX 29, 37, 41, 43, 50) Defendant denied the claim timely and provided specific reasons why the claim is not valid. (PX 33)

The Lease does not define what constitutes “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.” Plaintiff did not introduce expert testimony to define how the riverport industry defines this broad requirement. Defendant introduced credible evidence of its marketing efforts and of the steady increase in business at the Port since 2017. Based upon the totality of the evidence presented about Defendant’s marketing efforts, I find that Defendant has not materially breached its marketing obligations under Section IV.

7. Other breaches alleged by Plaintiff.

Plaintiff alleged other breaches of the Lease prior to and during the arbitration process that were not referenced in its post-hearing brief but were referenced in Defendant’s post-hearing brief. The most efficient way to address these claims is to address each section from Defendant’s post-hearing brief that pertains to the other alleged material breaches of the Lease.

a. Failure to cooperate with audit.

Plaintiff alleges that Defendant failed to cooperate with an audit request. Section XIV.H gives Plaintiff the right to **inspect** Defendant’s books and records at any reasonable time during normal business hours. In the June notice of default, Plaintiff claimed that Defendant breached the lease by failing to cooperate with the audit, “by not providing information requested, including financial statement and full tax returns.” (PX 37)

Plaintiff’s notice of default does not comply with the Lease, because nothing in Section XIV.H identifies the books and records that Defendant must keep or requires Defendant to provide copies to Plaintiff. Assuming *arguendo*, that Plaintiff can make these demands under the Lease, I find that Defendant cured any alleged default timely. Finally, under the facts and circumstances presented in this matter, I find that any alleged breach of Section XIV.H was not a material breach of the Lease.

b. Breach of financial reporting requirements.

Plaintiff alleges that Defendant failed to comply with Section III.A.4 by providing “the complete written report and analysis, containing the information listed in the attached Exhibit D,(sic) of the operations of the Port Facility each calendar quarter showing customers served and tons handled or services rendered.” (PX 11) Plaintiff provided written notice of this alleged default in the May 2019 notice of default. (PX 29) Defendant introduced credible evidence that it had regularly provided the information required by the Lease and that it timely cured any alleged breach of the requirement to provide the information in the form required by Exhibit D for Q1 2018 though Q2 2019. I find that this alleged breach does not justify Plaintiff’s request to terminate the Lease.

c. Misrepresentation of qualifications.

Section III A.8 states that Defendant “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.” Plaintiff has suggested that this warranty is inaccurate but offered no evidence that it sent a written notice of default to Defendant on this alleged breach. Moreover, based upon the evidence presented, I find that Defendant’s representations about its qualifications and experience in the industry are accurate.

d. Failure to pay rent or cure default.

Plaintiff notified Defendant on May 15, 2019 that Defendant was in default on the rent and for railroad grant reimbursement. (PX 29) Defendant denies that it was in default and contends that any default was timely cured when Defendant tendered a certified check to Plaintiff for the entire amount claimed due. Assuming *arguendo* that Defendant was in default, I find that Defendant timely cured the default.

e. Letter of credit.

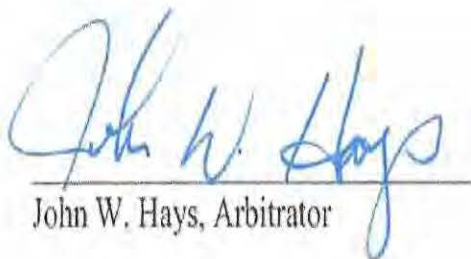
During the hearing, Plaintiff raised the issue about the breadth of terms of the letter of credit that Defendant’s bank sent to Plaintiff on or about December 12, 2019. Although I do not find a written notice of default for this alleged breach, on January 6, 2020, Defendant’s bank sent Plaintiff the letter of credit as required by the Lease. Consequently, I find that Defendant timely cure any alleged breach.

C. Conclusion

I find that the handwritten amendments to the Lease to alter the total term of the Lease are void. Because the parties continued to perform their obligations under the Lease as if the handwritten amendments were enforceable, I find that Plaintiff waived or is estopped from enforcing the written notice requirement for the 1st Renewal Term.

I find that Plaintiff has not proved an actionable material breach for which Plaintiff provided written notice and opportunity to cure that Defendant failed to cure timely.

March 20, 2020


John W. Hays, Arbitrator

REPLY EXHIBIT D

NO. 19-CI-003564

JEFFERSON CIRCUIT COURT
DIVISION THREE
JUDGE MITCH PERRY

LOUISVILLE AND JEFFERSON COUNTY
RIVERPORT AUTHORITY

PLAINTIFF

v.

NEW ALBANY MAIN STREET PROPERTIES, LLC
d/b/a PORT OF LOUISVILLE

DEFENDANT

OPINION AND ORDER

This matter comes before the Court on a Motion to Vacate Arbitration Award brought by the Plaintiff, Louisville and Jefferson County Riverport Authority (“Riverport Authority”) against the Defendant, New Albany Main Street Properties, LLC d/b/a Port of Louisville (“Port of Louisville”). Port of Louisville filed a Response and a separate Motion to Confirm Arbitration Award. The Court held oral arguments on August 19, 2020.

After a careful consideration of the record and the memoranda of the parties, as well as the applicable law, the Court determines that Riverport Authority’s Motion to Vacate Arbitration Award should be denied and that Port of Louisville’s Motion to Confirm Arbitration Award should be granted.

Factual Background

This matter arises out of a commercial lease, hereinafter “Modified Port Facility Lease” or “Modified Lease,” between Riverport Authority and Port of Louisville. Riverport Authority is a statutorily created government entity that owns the leased property. Port of Louisville is an LLC that operates the “Port Facility” on the property as tenants of the lease. The Port Facility is operated under the authorization of a Franchise Agreement wherein Riverport granted Port of Louisville the franchise right to operate the Port Facility during the term of the lease. Riverport Authority filed the current action in an effort to determine the enforceability of the Modified Lease while alleging

Port of Louisville had engaged in certain actions that were inconsistent with its obligations as tenant under the lease.

The Leases

In 2009, Riverport Authority leased several hundred acres of property located on the Ohio River to Port of Louisville. The Lease provided an initial term of five years plus three additional five-year terms, titled "Renewal Terms," for a total of 20 years. The 20-year term is compliant with Section 164 of the Kentucky Constitution which precludes municipalities from entering into a contract for a term exceeding 20 years. The Parties agreed to amend the lease in July 2012 deciding again on a constitutionally compliant 20-year term. Along with the July 2012 amendment, the Parties entered into a Franchise Agreement that allowed Port of Louisville to operate the Port Facility on the property. In August 2016, the Parties executed the Modified Port Facility Lease which is the subject of the current action.

The August 2016 Modified Lease originally granted an initial term of March __ 2016¹ to August 31, 2016. The Lease included three additional five-year terms and one final four year and five-month term, again titled "Renewal Terms," totaling a potential term of 19 years and 10 months. The language of the Modified Lease specified that Port of Louisville was required to give three months' written notice to Riverport Authority prior to exercising their Renewal Terms. The Parties did not execute the lease in March 2016. Rather, the lease was executed on August 19, 2016, 12 days before the end of the initial term. To reflect this, the Parties made handwritten alterations to the lease changing the start of the original initial term from March __ 2016 to August 19, 2016 and altering the end date of the original initial term from August 31, 2016 to August 31, 2021. This alteration modified the total potential term from 19 years and 10 months to 24 years and five months which clearly violates Section 164 of the Kentucky Constitution.

The Arbitration

Riverport Authority brought this suit challenging the enforceability of the Modified Lease and alleging certain breaches of the Lease by Port of Louisville. By Agreed Order, all claims in the action were referred to private arbitration. The scope of arbitration was defined in the Order which stated as follows:

The arbitration shall be heard in phases. The first phase shall be . . . directed at the following issues: whether, under applicable law, there has been an actionable material breach of a provision or provisions of the Lease which is

¹ The Modified Lease intentionally left the day blank.

the subject of this action, such being an issue regarding which both parties have sought a declaration of rights; and (b) whether the Lease which is the subject of this action is void or otherwise enforceable on grounds raised in the Plaintiff's motion for Judgment on the Pleadings and/or Motion for Summary Judgment served September 25, 2019.

Thus, the two issues to be resolved were (1) whether the Modified Lease was void or otherwise enforceable, and (2) whether there had been an actionable material breach of the Modified Lease. The Arbitrator released a Reasoned Opinion concluding that the handwritten changes to the Modified Lease were void, however "to effectuate the parties undisputed intent" the Modified Lease without the handwritten changes was enforceable. Further, the Arbitrator concluded that Riverport Authority failed to prove an actionable material breach of the Modified Lease.

The Arbitrator reasoned that the primary issue regarding enforceability of the Modified Lease "arose from the fact that the parties did not execute the Lease in March 2016 as was contemplated but instead executed it on August 19, 2016, less than two weeks before the end of the Initial Term." *Arbitrators Reasoned Opinion* at 2. The delayed execution of the Lease prevented Port of Louisville from giving the three months written notice required for triggering a Renewal Term. The Parties attempt to correct this issue led to the handwritten modifications resulting in the illegal 24 year and 5-month term.

The Arbitrator concluded that the handwritten modifications were void because Riverport Authority's Board of Directors did not approve the changes. However, according to the Arbitrator, there was no dispute that the Board entered into the original Modified Lease prior to any handwritten changes, that the Parties agreed the total term should not exceed 20 years, and that the Parties continued to perform under the Lease without realizing the handwritten changes were not binding. Therefore, the Arbitrator determined that, based on the parties intent, Riverport Authority "waived or is estopped from relying upon the written notice requirement for the first renewal term of the Lease, so [Port of Louisville] is currently operating under the 1st Renewal Term of the Lease." *Id.* at 3.

Regarding the second issue, the Arbitrator examined all alleged breaches and concluded that Riverport Authority "failed to prove by a preponderance of evidence that [Port of Louisville] materially breached a term of the Lease that [Port of Louisville] failed to cure timely." *Id.*

Riverport Authority filed a Motion to Vacate Arbitration arguing that the Arbitrator exceeded the powers submitted to him as an arbitrator. According to Riverport Authority, their Board of Directors never approved the original Modified Lease without the handwritten changes. They allege that the Arbitrator acted beyond the scope of arbitration by failing to consider the enforceability of the Modified Port Facility Lease, but rather the enforceability of an unsigned, unenforceable draft lease. Port of Louisville filed a competing Motion to Confirm Arbitration Award asserting that the Arbitrator acted within the scope of his authority.

Legal Analysis

Kentucky law provides that courts shall vacate arbitration awards where “[t]he arbitrators exceeded their powers.” KRS 417.160(1)(c). The general test to determine whether an arbitrator exceeded their powers is “whether the award was fairly and honestly made within the scope of the issues submitted for resolution or whether the arbitrators acted beyond the material terms of the contract.” *3D Enterprises Contracting Corp. v. Lexington-Fayette Urban County Government*, 134 S.W.3d 558, 561 (Ky. 2004); *Tackett v. Campbell Corp.*, 781 S.W.2d 758, 760 (Ky. Ct. App. 1989) (explaining that courts are precluded from substituting their judgment “for that of an arbitrator unless the judgment is beyond the scope of the issues submitted to the arbitrator”).

Judicial review of an arbitration decision is highly deferential. *Wagner v. Drees Co.*, 422 S.W.3d 281, 283 (Ky. Ct. App. 2013). For instance, “an arbitrator’s resolution of factual disputes and his application of the law are not subject to review by the courts.” *Conagra Poultry Co. v. Grissom Transp., Inc.*, 186 S.W.3d 243, 245 (Ky. Ct. App. 2006). When reviewing whether an arbitrator exceeded their powers, “a court should not review the merits of the award, *only whether the issues were submitted and covered by the contract.*” *3D Enterprises Contracting Corp.*, 781 S.W.2d at 760 (emphasis added).

Here, the Agreed Order defined the scope of the issues submitted for arbitration. The two issues to be resolved were (1) whether the Modified Lease was void or otherwise enforceable, and (2) whether there had been an actionable material breach of a provision or provisions of the Modified Lease. In their memorandum, Riverport Authority focuses their challenge on the Arbitrators conclusion that the Modified Lease without the handwritten changes was enforceable. Whether the Lease was void or enforceable is clearly a broad issue that gave the Arbitrator

extensive authority to make any number of determinations he deemed reasonable according to the evidence.

Based on the actual intent of the Parties, the Arbitrator concluded that the handwritten changes to the Modified Lease were void, but the original Modified Lease was still enforceable. He reasoned that the contractual terms of the Modified Lease itself in addition to previous course of conduct between the Parties demonstrated that neither Port of Louisville nor Riverport Authority intended to execute an illegal lease. However, based on the evidence before him, the Arbitrator ruled that the Riverport Authority Board of Directors had approved and entered the Modified Lease prior to the handwritten changes, therefore the original Modified Lease was still valid and the Parties were operating under the first Renewal Term period. The Arbitrator effectively severed the illegal handwritten modifications of the lease and enforced the original Modified Lease based on the Parties intent.

This conclusion falls squarely within the scope of the Arbitrators powers and comports with Kentucky contract law. For instance, the decision to sever the handwritten changes and enforce the original Modified Lease per the Parties actual intent contemplates the established doctrines of severability and mutual mistake. *See Louisville & Jefferson Cty. Metro. Sewer Dist. v. T+C Contracting, Inc.*, 570 S.W.3d 551, 559 (Ky. 2018) (recognizing the rule of severability under Kentucky law); *Nichols v. Zurich American Ins. Co.*, 423 S.W.3d 698, 702–03 (Ky. 2014) (explaining that “Kentucky jurisprudence on mutual mistake aligns well with the general authorities on the subject”).

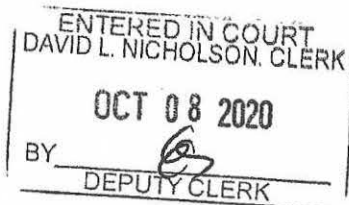
With respect to the second issue, the Arbitrator made clear and reasoned conclusions, claim by claim, that there was no actionable material breach of the Lease. Although Riverport Authority takes no issue with the Arbitrators reasoning on these issues, it stands that his conclusions were similarly within the scope of the issues submitted to the Arbitrator and compliant with Kentucky law.

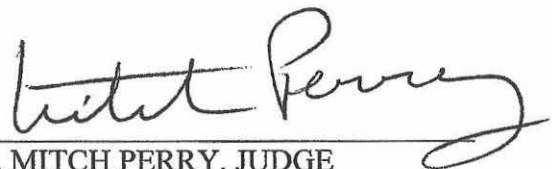
The Arbitrator based his conclusions and judgment on substantial evidence including pre-hearing briefs, proof and arguments presented at arbitration hearings conducted over the course of five days, and a visit to the Port Facility. His rulings resulted from carefully calculated decision-making, fall within the scope of the issues submitted before him for arbitration, and comply with well-established Kentucky law. Judicial review of an arbitration decision is highly deferential and this Court finds no error in the Arbitrators judgment.

The Court being sufficiently advised;

IT IS ORDERED that Riverport Authority's Motion to Vacate Arbitration Award is **DENIED**;

IT IS FURTHER ORDERED that Port of Louisville's Motion to Confirm Arbitration is **GRANTED**.




HON. MITCH PERRY, JUDGE
Date: 10-8-20

CC: Hon. Donald Cox
Counsel for Riverport Authority

Hon. Kenneth Bohnert
Counsel for Port of Louisville

David L. Nicholson, Jefferson Circuit Clerk
600 West Jefferson Street
Louisville, KY 40202-4731



CONLIFFE, SANDMANN & SULLIVAN
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325 W. MAIN STREET
LOUISVILLE, KY 40202
ATTN: KENNETH A. BOHNERT

Package: 000001 of 00023

KCOJ eFiling Cover Sheet

Notice of Appeal

LOUISVILLE AND JEFFERSON COUNTY RIVERPORT VS. NEW ALBANY MAI

Envelope Number: 2901659
Notice by: First Class
Service Fee: \$0.00
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Case Number: 19-CI-003564
Court: CIRCUIT
County: JEFFERSON Circuit
Filed Date: 11/2/2020 4:19:00 PM

This Notice of Appeal was sent to the following via First Class Mail

Court of Appeals	360 Democrat Dr	Frankfort	KY	40601
DONALD L COX	LYNCH, COX, GILMAN & GOODMAN	500 W. JEFFERSON STREET	LOUISVILLE	KY 402020000

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CI 19-CI-003564 David L. Nicholson, Jefferson Circuit Clerk



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Package: 000001 of 00023

NO. 19-CI-003564
ELECTRONICALLY FILED

JEFFERSON CIRCUIT COURT
DIVISION THREE
JUDGE MITCH PERRY

LOUISVILLE AND JEFFERSON COUNTY
RIVERPORT AUTHORITY

PLAINTIFF

v.

NEW ALBANY MAIN STREET PROPERTIES, LLC
d/b/a PORT OF LOUISVILLE

DEFENDANT

NOTICE OF APPEAL

Pursuant to KRS 417.220, the Plaintiff, Louisville and Jefferson County Riverport Authority hereby appeals to the Kentucky Court of Appeals from the Order entered on October 8, 2020 as made final and appealable by an order entered on October 29, 2020 attached hereto. The Appellee, whom against this appeal is taken is New Albany Main Street Properties, LLC d/b/a Port of Louisville.

This Notice of Appeal is accompanied by the appropriate filing

Respectfully submitted,

/s/ Donald L. Cox

Donald L. Cox

Matthew P. Cox

LYNCH, COX, GILMAN & GOODMAN, P.S.C.

500 W. Jefferson St., Ste. 2100

Louisville, KY 40202

(502) 589-4215

doncox@lynchcox.com

mcox@lynchcox.com

***Counsel for Plaintiff, Louisville and
Jefferson County Riverport Authority***

PREHEARING STATEMENT
GIVEN

CERTIFICATE OF SERVICE

This will certify that, on the 2nd day of November 2020, the foregoing was filed via the Court's ECF system, which will provide notice and make copies available to the following registered counsel:

Kenneth A. Bohnert
Conliffe, Sandmann & Sullivan
2000 Waterfront Plaza
325 W. Main Street
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***Counsel for Defendant, New Albany Main Street Properties, LLC
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/s/ Donald L. Cox
Donald L. Cox



Commonwealth of Kentucky
David L. Nicholson, Jefferson Circuit Clerk

Case #: 19-CI-003564

Envelope #: 2901659

Received From: COX, DONALD L

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Case Title: LOUISVILLE AND JEFFERSON COUNTY RIVERPORT
VS. NEW ALBANY MAI

Confirmation Number: 116369208

Filed On: 11/2/2020 4:19:00 PM

#	Item Description	Amount
1	Civil Filing Fee	\$150.00
2	Money Collected For Others(Attorney Tax Fee - Appeals)	\$10.00
3	Money Collected For Others(Postage)	\$1.70
4	Charges For Services(Copy - Photocopy)	\$2.20
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19-CI-003564 11/02/2020
19-CI-003564 10/22/2020

David L. Nicholson, Jefferson Circuit Clerk 10-19-20

NF mH
10/27

NO. 19-CI-003564

JEFFERSON CIRCUIT COURT
DIVISION THREE
HONORABLE MITCH PERRY

LOUISVILLE AND JEFFERSON COUNTY
RIVERPORT AUTHORITY

PLAINTIFF

v.

AGREED FINALITY ORDER

NEW ALBANY MAIN STREET PROPERTIES, LLC
d/b/a PORT OF LOUISVILLE

DEFENDANT

*** **

To the extent necessary, the Court finds and Orders upon agreement of the parties, that its Order of October 8, 2020 is final and appealable and there is no just cause for delay as provided in CR 54.02.



Judge, Jefferson Circuit Court

10/29/20

AGREED TO:

/s/ Donald L. Cox
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ENTERED IN COURT
DAVID L. NICHOLSON, CLERK
OCT 29 2020
BY 
DEPUTY CLERK

/s/ Kenneth A. Bohnert, Esq.
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Filed
Tendered

19-CI-003564 11/02/2020
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REPLY EXHIBIT E

NO. 20-C-006622

JEFFERSON DISTRICT COURT
FORCIBLES

LOUISVILLE AND JEFFERSON COUNTY
RIVERPORT AUTHORITY

PLAINTIFF

v.

NEW ALBANY MAIN STREET PROPERTIES, LLC
d/b/a PORT OF LOUISVILLE

DEFENDANT

MEMORANDUM IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS
OR, IN THE ALTERNATIVE, TO STAY PROCEEDINGS
AND/OR REFER CLAIMS TO ARBITRATION

Defendant, New Albany Main Street Properties, LLC d/b/a Port of Louisville (“Port of Louisville”) operates a 300-acre “Port Facility” on the Ohio River under lease with plaintiff Louisville and Jefferson County Riverport Authority (“Riverport Authority”) executed in 2016. (Lease attached as Exhibit 1 to Forcible Detainer Complaint). Port of Louisville has operated the Port Facility since 2009.

On September 25, 2020, plaintiff Riverport sent a letter to Port of Louisville alleging that the Port was in breach and default of the Lease and demanding that the Port remedy the breach within thirty days or the Lease would be terminated. (Letter, attached as part of Exhibit A to Forcible Detainer Complaint). Riverport alleged that Port of Louisville was operating railroads in and around the Port Facility in a manner contrary to federal law and that a federal agency, the Federal Railroad Administration (“FRA”), had issued what Riverport refers to as a “determination” that allegedly identified deficiencies in the Port’s railroad operations. (Id.; see FRA communication, attached within Exhibit A to Forcible Detainer Complaint).

On October 27, 2020, Riverport initiated this forcible detainer action demanding possession of the leased property on the grounds that Port of Louisville breached the Lease for the reasons stated in Riverport’s September 25, 2020 letter. On October 29, 2020, Port of

Louisville sent a letter to Riverport denying it had breached the Lease. (Letter attached as Exhibit 1 to Port of Louisville Answer). On November 17, 2020, defendant Port of Louisville filed an Answer denying Riverport's allegations and demanding a jury trial. The Answer asserted several affirmative defenses, including res judicata and lack of jurisdiction. (Fifth Affirmative Defense).

On November 18, 2020, Riverport filed a Verified Petition for Declaratory Order with the federal Surface Transportation Board ("STB") pursuant to federal law. (Petition attached as Exhibit 1). In its Petition, Riverport requests that the STB declare that Port of Louisville is operating the railroads in and around the Port Facility in a manner that violates federal law and that the Port should cease operating the railroads. The railroad issues Riverport raises in the federal Petition mirror the issues Riverport alleges here as the basis for its forcible detainer action.

Port of Louisville's res judicata defense is based on the fact that the breach-of-lease claims Riverport asserts here either were brought, or could have been brought, in a related pending circuit court action and arbitration Riverport instituted against Port of Louisville in 2019, actions that involve the same 2016 Lease at issue here. In March 2020, the Arbitrator ruled that the 2016 Lease is enforceable, a ruling Riverport has appealed to the Kentucky Court of Appeals. (Reasoned Opinion attached as Exhibit 2). The Arbitrator also ruled that Port of Louisville did not breach the 2016 Lease and Riverport engaged in bad faith by secretly negotiating with a competitor of Port of Louisville to replace the Port as lessee and operator of the Port Facility. The circuit court has affirmed these rulings.

Port of Louisville now moves the Court to dismiss Riverport's Forcible Detainer Complaint on the grounds that the Complaint asserts claims that Riverport either brought, or could have brought, in the 2019 arbitration and circuit court action, and thus those claims are

barred by res judicata. The defense of res judicata may be raised in a motion to dismiss. *Sedley v. City of West Buechel*, 461 S.W.2d 556, 559 (Ky. 1971).

In the alternative, the Court should either: 1) stay this action pending resolution of Riverport's pending federal administrative proceeding before the Surface Transportation Board, the appeal before the Court of Appeals and the circuit court action and related arbitration currently pending in Jefferson Circuit Court Division Three; or 2) directly refer Plaintiff's claims to the arbitration pending before Arbitrator John Hays. All of these proceedings were instituted by Riverport and involve the same Lease, parties and issues as those in this forcible detainer.

I. Res Judicata Bars Plaintiff's Claims.

Port of Louisville has moved the Court to dismiss Riverport's Forcible Detainer Complaint on the grounds that the Complaint asserts claims that Riverport either brought, or could have brought, in the 2019 arbitration and circuit court action, and thus those claims are barred by res judicata. The doctrine of res judicata and the corollary rule against splitting causes of action are intended to prevent repetitious or multiplicity of suits.

Res judicata consists of two concepts, claim preclusion and issue preclusion. Claim preclusion bars subsequent litigation between the same parties or their privies, on a previously adjudicated cause of action. *Buis v. Elliot*, 142 S.W.3d 137, 139-40 (Ky. 2004). Issue preclusion, on the other hand, precludes re-litigation of an issue that was actually litigated and decided in a prior proceeding. *Id.* at 140.

Under claim preclusion, a judgment on the merits in a prior suit involving the same parties, or their privies, bars a subsequent suit based upon the same cause of action. *City of Louisville v. Louisville Professional Firefighters Ass'n*, 813 S.W.2d 804, 806 (Ky. 1991). For claim preclusion to apply, 1) there must be identity of parties; 2) the prior action must assert the same cause of action as the present action; and 3) the prior action must have been decided on the

merits. *Newman v. Newman*, 451 S.W.2d 417, 419 (Ky. 1970).

A subsidiary of res judicata is the rule that a party may not try a claim or cause of action piecemeal. This rule precludes successive actions arising from one transaction or series of events. *Carroll v. Owens-Corning Fiberglas Corp.*, 37 S.W.3d 699, 700 (Ky. 2000). Instead:

[W]hen a matter is in litigation, parties are required to bring forward their whole case; and ‘the plea of res judicata applies not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to **every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.**’

Hays v. Sturgill, 193 S.W.2d 648, 650 (Ky. 1946); *Powell v. Winchester Bank*, 551 S.W.2d 820, 822-823 (Ky. App. 1977); *Egbert v. Curtis*, 695 S.W.2d 123, 124 (Ky. App. 1985); *Newman v. Newman*, 451 S.W.2d at 419 (“If a cause of action should have been presented and the party failed to do so and the matter should again arise in another action, it will be held that the first action was res adjudicata as to all causes that should have properly been presented.”) .

The key inquiry in deciding whether the prior and current lawsuits concern the same underlying cause of action or controversy is: “whether they both arise from the same transactional nucleus of facts. If the two suits concern the same controversy, then the previous suit is deemed to have adjudicated every matter **which was or could have been brought in support of the cause of action.**” *Yeoman v. Commonwealth*, 983 S.W.2d 459, 465 (Ky. 1998).

Riverport’s pending circuit court lawsuit and related arbitration (instituted in 2019) and plaintiff’s current forcible lawsuit all arise from the same “transactional nucleus of facts” and the same 2016 Lease at issue here. Thus, res judicata and the subsidiary rule against trying cases piecemeal serve to bar plaintiff’s claims in this forcible detainer action, all of which were either brought or could have been brought in Riverport’s 2019 litigation/arbitration.

A. Riverport's Present Forcible Detainer.

The present Forcible Detainer Complaint alleges that Port of Louisville breached the following provisions of the 2016 Lease:

Lease Section III(A)(1) - Requiring Port of Louisville to “conduct and manage its business and operations in a reasonable, prudent and business-like manner, in accordance with customary industry standards, utilizing [its] reasonable best efforts, skill and experience in compliance with all federal, state and local laws, statutes, ordinances, and regulations,” including Riverport’s Declaration of Restrictions.

Lease Section III(A)(2), p.5 - Requiring Port of Louisville to be qualified to do business in the Commonwealth of Kentucky, be in good standing, and have full power and authority to enter into the Lease.¹

Lease Section III(A)(6), p.6 - Requiring Port of Louisville to comply with applicable federal, state and local laws affecting lessee, the Port Facility or any operations contemplated hereunder.

Lease Section III(A)(9), p.7 - requiring Port of Louisville to maintain certain rail lines and tracks within the Port Facility and conduct its operations in a manner consistent with certain Railroad Agreements between Riverport and railroads serving the Port area.

Lease Section V(A)(4), Section V(A)(7), Lease p.10 - obligating Port of Louisville to provide management and terminal operating and cargo solicitation services at the Port Facility incidental to operation of the Port Facility and Port Facility area, including:

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 Port of Louisville.
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.

According to Riverport, Port of Louisville “woefully failed to perform these duties as set forth in the Federal Railway Administration’s recent determination of Riverport operations being

¹ The basis for this specious claim is unknown. In its response letter of October 9, 2020, Port of Louisville provided official public records from the Kentucky Secretary of State (Port of Louisville’s annual report for 2020) showing that it is in good standing and qualified to do business in Kentucky. (Letter attached as Exh. 1 to Port of Louisville Answer). There is no proof to the contrary.

a part of the general Railroad network.” (Forcible Detainer Complaint, Exhibit A). These allegations were the same as those Riverport asserted in the notice-of-default letter it sent to Port of Louisville on September 25, 2020.

Port of Louisville disagrees that it breached any of the Lease provisions Riverport cited in its Complaint. However, for purposes of this Motion to Dismiss, the critical issue is not whether Riverport’s claims have merit. It is the fact that Riverport’s present claims pertaining to Port of Louisville’s railroad operations were either asserted in its pending circuit court and arbitration proceedings and resolved against Riverport, or **could have been asserted** in said proceedings.

All of the alleged factual support that underpins plaintiff’s new claims here - involving Port of Louisville’s maintenance and operation of the railroads - existed when the circuit court action and arbitration was conducted. An examination of the underlying claims in the circuit court and arbitration, the parties’ submissions in the arbitration and the Arbitrator’s decision shows that this is so. Therefore, plaintiff’s Forcible Detainer Complaint is barred by res judicata.

B. The Plaintiff’s Prior Litigation Involving the 2016 Lease.

Since 2009, Port of Louisville has been operating a 300-acre Port Facility on the Ohio River under successive leases with Riverport, including the 2016 Lease at issue here. The leases were awarded under a public bidding process whereby Port of Louisville was the successful bidder for each lease. From 2009 to 2019, Riverport never complained about Port of Louisville’s operations at the Port Facility.

In 2018/2019, Riverport became unhappy with the deal it made under the 2016 Lease and wanted to bring in a new tenant it hoped would generate more rent revenue for Riverport. Therefore, in late 2018/early 2019, Riverport and WATCO Companies, one of Port of Louisville’s major competitors, secretly, and in bad faith, began negotiating an agreement for Watco to replace Port of Louisville as the operator of the Port Facility. (Exh.2, Reasoned

Opinion, pp.4-5, whereby the arbitrator found that Riverport's secret negotiations with Watco were a breach of the duty of good faith and fair dealing Riverport owed to Port of Louisville under the Lease). In fact, Watco paid for an expert report Riverport relied on to support its initial allegations that Port of Louisville was in default of the Lease. (Opinion, p.4).

With the "expert" report in hand, Riverport began to target Port of Louisville with a concerted, relentless, never-ending series of legal actions and other harassment all designed with intent to evict the Port. In 2019 and 2020, Riverport initiated five lawsuits against Port of Louisville, including four forcible detainer actions,² and a circuit court action, seeking to evict Port of Louisville and alleging that the Port has committed material breaches of the 2016 Lease

This started on May 15, 2019, when Riverport provided the first written notice to Port of Louisville alleging that the Port had breached the Lease and was in default. (Opinion, p.4, Exh. 2). On that date, Riverport sent a letter to Port of Louisville alleging that the Port was in default for the following reasons:

- 1) Port of Louisville owed and failed to pay the rent through March 31, 2019 of \$111,591 and another \$72,200 was due for railroad grant reimbursement.
- 2) Port of Louisville failed to conduct an effective marketing campaign to promote and develop usage of the Port Facility.
- 3) Port of Louisville failed to conduct maintenance and repairs at the Port Facility, with many repairs not being done in a workman-like manner and not utilizing materials of proper quality.
- 4) Port of Louisville failed to adopt a preventive or scheduled maintenance program.
- 5) Port of Louisville failed to provide proper reports of financial matters and tonnage through the Port, there has been a discrepancy in the tonnage reported and Port of Louisville failed to provide a written report and analysis of the operations of the Port Facility each quarter showing customers served, tons handled or services rendered.

² In addition to the three forcible detainer actions elsewhere mentioned in this Memorandum, on October 23, 2020, Riverport filed yet another baseless forcible detainer action against Port of Louisville in this Court, the fourth such action in a span of 1 ½ years. (*Riverport Authority v. Port of Louisville*, Case No. 20-C-6520). It too has been dismissed.

6) Port of Louisville failed to repair railway lines in its control resulting in a closure in August 2018.

(Letter attached as Exhibit 3).

With respect to Riverport's May 15, 2019 allegations pertaining to railroads (which form the basis for Riverport's current forcible detainer action), nothing has changed from May 2019 to today. The conditions of the railroads are the same now as they were in 2019, the operations are the same and Port of Louisville is doing what it has always done since 2009. Riverport does not contend otherwise.

On June 10, 2019, Riverport filed a civil action in Jefferson Circuit Court, Div. Three (3) alleging that Port of Louisville breached the Lease (for the reasons stated in the May 15th letter) and seeking to recover damages and "compel compliance with the Lease." (*Riverport Authority v. Port of Louisville*, Case No.19-CI-3564, Complaint attached as Exhibit 4). Riverport's allegations in the circuit court action include those Riverport raises in this forcible detainer.

For example, in its circuit court Complaint, Riverport alleged, as it does now (Forcible Complaint Exh. A), that Port of Louisville required to "conduct and manage its business and operations in a reasonable, prudent and business-like manner, in accordance with customary industry standards, utilizing [its] reasonable best efforts, skill and experience in compliance with all federal, state and local laws, statutes, ordinances, and regulations," including Riverport's Declaration of Restrictions." (Complaint, p.2, paragraph 8, Exh. 4). Riverport also restated the allegations it made against Port of Louisville in its May 15, 2019 notice-of-default letter, which include allegations pertaining to the railroad maintenance and operation issues. (Complaint, p.5. paragraph 23).

On June 12, 2019, Riverport filed a "Forcible Detainer Complaint" in this Court seeking to evict Port of Louisville for the same grounds alleged in its May 15th letter (including the

railroad issues), and additional reasons. (*Riverport Authority v. Port of Louisville*, Case No. 07126). This proceeding was dismissed on June 28, 2019.

Riverport then fired off a series of additional default notices on June 28, 2019, July 19, 2019, August 2, 2019, September 4, 2019 and December 2, 2019. Each notice, except for the last, specifically alleged that Port of Louisville failed to properly operate/maintain rail lines. Each notice claimed that Port of Louisville was in breach of the Lease for the reasons stated in Riverport's May 15th letter and circuit court Complaint. (Collectively attached as Exhibit 5).

On August 6, 2019, Riverport filed a new forcible detainer in this Court again seeking to evict Port of Louisville on the grounds that it breached the 2016 Lease for the reasons stated in Riverport's June 28, 2019 default letter (alleging Port of Louisville's failure to maintain and repair rail lines). (*Riverport Authority v. Port of Louisville*, Case No.19-C-10189). That proceeding was dismissed on April 29, 2020.

C. The Pending Arbitration Relating to the Lease.

On October 31, 2019, the Jefferson Circuit Court entered an Agreed Order referring all claims in the civil action to arbitration before Arbitrator John Hays. (Order attached as Exhibit 6). The arbitration is to be conducted in two phases, the first phase addressing Riverport's breach of Lease claims and a second, later phase addressing the parties' respective money damages claims. In December 2019 and January 2020, Arbitrator Hays conducted an arbitration to decide whether: 1) the 2016 Lease was enforceable; and 2) whether Port of Louisville materially breached the Lease, which included the issue of whether Port of Louisville was properly maintaining and repairing the rail lines and operating them in compliance with the law.

After the arbitration hearing, the parties submitted arbitration statements to the Arbitrator on February 26, 2020. (Exh. 7, Riverport Post-Hearing Memorandum; Exh. 8, Port of Louisville Post-Arbitration Statement). The parties fully briefed and argued the issues of whether Port of

Louisville complied with the 2016 Lease, including the same Lease sections at issue here, whether Port of Louisville was operating the Port Facility in compliance with the law and whether it properly maintained, repaired and operated the railroads.³

On March 20, 2020, the Arbitrator issued an arbitration award, and Reasoned Opinion, which concluded that: 1) the 2016 Lease was enforceable; 2) Riverport acted in bad faith by conspiring with Watco to replace Port of Louisville as the lessee and operator of the Port Facility; and 3) Port of Louisville did not materially breach the Lease. (Reasoned Opinion, Exh. 2). The Arbitrator specifically ruled that Port of Louisville had properly maintained and repaired the Port Facility and maintained and operated the rail lines in compliance with all requirements. (Id., p.5). On October 8, 2020, the Jefferson Circuit Court confirmed the arbitration award.⁴

In the pending circuit court litigation and related arbitration, Riverport alleges that Port of Louisville failed to properly maintain, repair and operate the Port Facility rail lines in compliance with the law. The Arbitrator ruled, and the circuit court confirmed, that Port of Louisville did not do this. With respect to the railroads at or around the Port Facility, nothing has changed since that ruling. Plaintiff's claims here do not involve new railroad incidents or new railroad activities on the part of Port of Louisville.

To the extent that plaintiff Riverport's present allegations in this Forcible Detainer pertaining to rail lines may differ from the railroad issues the parties raised in the circuit court or arbitration, Riverport was certainly free to raise those additional issues in those proceedings. The fact that Riverport did not raise those issues precludes Riverport from raising them now.

³ Riverport Arbitration Statement, pp.3, 4, 9-12, 27-28, Exh. 7; Port of Louisville Arbitration Statement, pp. 17, 22, 26, 33, 34, Exh. 8.

⁴ Opinion and Order, October 8, 2020. The parties are currently proceeding with phase 2 of the arbitration to resolve Port of Louisville damages claims against Riverport.

In filing a new forcible detainer, Riverport is merely unhappy with the result of the arbitration and seeks another bite at the apple here. If Riverport is dissatisfied with the arbitrator's decision, it was free to appeal. However, it is not free to litigate issues here that were raised, or could have been raised, in the prior litigation it instituted.

II. The Court should Stay This Action Pending Resolution of Riverport's Pending Federal Proceeding Before the Surface Transportation Board.

Under the 2016 Lease, Port of Louisville is responsible for operating and maintaining about thirteen miles of railroads in and around the Port Facility. (Lease p.7, Section A.9, Forcible Detainer Complaint, Exh. 1). As the basis for its claim of forcible detainer, Riverport contends that Port of Louisville's railroad operations are subject to certain federal statutes and regulations which the Port is allegedly violating and that these violations constitute a breach of the Lease. (Complaint, Exhibit A).⁵ As part of its Complaint, Riverport attached a communication which the federal FRA sent to Port of Louisville and which Riverport contends supports that allegation. Port of Louisville contends that it is not in breach of the Lease because the railroad-related statutes and regulations in question do not apply to its operations and Port of Louisville has not violated any applicable federal law, the 2016 Lease nor any underlying agreements with the railroads.

On November 18, 2020, Riverport filed a Verified Petition for Declaratory Order with the federal Surface Transportation Board ("STB") pursuant to federal law. (Petition, Exhibit 1). In that Petition, Riverport requests that the STB declare that certain federal laws apply to Port of Louisville's railroad operations, that the Port is operating the railroads in violation of those laws

⁵ The Lease requires that Port of Louisville comply with applicable federal, state and local laws affecting lessee, the Port Facility or any operations contemplated thereunder. (Lease, p.6, Section III(A)(6), Section III(A)(1).

and that it should cease operating the railroads. (Petition, p.26). Port of Louisville must respond to the Petition in writing within 20 days. 49 CFR 1104.13.

Riverport's breach-of-Lease claim in this forcible detainer hinges on its claim that certain federal laws apply to Port of Louisville's railroad operations and that the Port is violating said laws. However, a threshold issue, which must be decided **before** this forcible detainer action can be resolved, is to ascertain exactly what federal laws, if any, actually apply to Port of Louisville's railroad operations under the Lease. That threshold issue is now being considered and addressed in the pending federal administrative action that Riverport recently filed with the STB while this action was pending. Since the controlling issue involves the interpretation and application of a specialized area of federal law affecting interstate commerce, the Court should stay any further proceedings here pending a decision from the federal agency (STB) charged with the responsibility for administering such laws.

III. The Court Should Stay This Action since Riverport has Appealed the Rulings from the Arbitrator and Circuit Court that the 2016 Lease is Enforceable, Which Divests the Court of Jurisdiction Over Plaintiff's Claims.

In the circuit court action and arbitration, Riverport contended that the 2016 Lease, which Riverport itself drafted, is illegal and unenforceable as being in violation of Kentucky Constitution Section 164. This is ironic given that in this forcible detainer action, Riverport is seeking to enforce a Lease it also contends is unenforceable.

On March 20, 2020, the Arbitrator issued a decision disagreeing with Riverport's contention and ruling that the 2016 Lease was enforceable, a ruling the circuit court confirmed. (Exh. 2, Reasoned Opinion, pp. 2-3). On November 2, 2020, Riverport appealed that ruling to the Kentucky Court of Appeals. Riverport's filing of the Notice of Appeal divests the court of jurisdiction over plaintiff's claims until the appellate court rules on Riverport's contention that the 2016 Lease is unenforceable, the same Lease Riverport seeks to enforce here. *Goodlett v.*

Brittain, 544 S.W.3d 656, 665 (Ky. App. 2018). Accordingly, the Court should stay this proceeding pending a ruling from the appellate courts.

IV. The Court Should Stay this Forcible Detainer Action Pending Resolution of the Pending Circuit Court and Arbitration Proceedings Instituted by Plaintiff Riverport.

In lieu of addressing the merits of its Motion to Dismiss, defendant Port of Louisville has moved the Court to stay this present eviction action pending final resolution of the underlying claims for breach and possession currently pending before Jefferson Circuit Court, Division III, in Action No. 19-CI-003564, an action Plaintiff itself filed on June 10, 2019 and which has been referred to a currently-pending arbitration. A stay would be particularly appropriate here since plaintiff's allegations of breach in the prior circuit court action and pending arbitration, the attendant factual issues and remedies sought therein, involve the same Lease and are identical or similar to those plaintiff has alleged and seeks in its new Forcible Detainer Complaint. Kentucky law supports defendant's request for stay.

Firstly, Kentucky law generally provides that when there are two related actions involving similar issues, the second action should be stayed pending resolution of the first action. *Brooks Erection Co. v. William R. Montgomery & Associates, Inc.*, 576 S.W.2d 273, 275 (Ky. 1979) (“a second action based on the same cause will generally be abated where there is a prior action pending in a court of competent jurisdiction within the same state, between the same parties, involving the same or substantially the same subject matter and cause of action, and in which prior action the rights of the parties may be determined and adjudged.”).

Secondly, a trial court has the inherent power to stay discovery or even later related proceedings as part of managing its own docket. *Estate of Cline v. Weddle*, 250 S.W.3d 330, 337 (Ky. 2008). Defendant acknowledges that Kentucky appellate courts have cautioned against granting stays when there is a realistic chance of a party losing crucial evidence through loss or

destruction or possessed by witnesses whose accounts may be lost if discovery is unduly delayed by a stay. *Commonwealth Finance Cabinet v. Wingate*, 460 S.W.3d 843, 851 (Ky. 2015); *Inverultra, S.A. v. Wilson*, 449 S.W.3d 339, 345-47 (Ky. 2014). However, in this case, a stay would not prejudice plaintiff Riverport since a stay would present no risk that evidence would be destroyed or lost. The dispute would simply be resolved in the normal course of litigation that plaintiff itself initiated before filing its forcible detainer action. In fact, both parties have already undertaken discovery in the circuit court action and arbitration and are continuing to do so.

Under those circumstances, this Court should stay this proceeding pending resolution of the prior Jefferson Circuit Court action and related pending arbitration. Alternatively, the Court should directly refer plaintiff's claims to the arbitration pending before Arbitrator John Hays.

V. The Court Should Direct that this Dispute be Heard in the Pending Arbitration Proceedings Involving the 2016 Lease to Which the Parties Consented.

On October 31, 2019, the Jefferson Circuit Court entered an Agreed Order whereby Riverport and Port of Louisville agreed to refer all claims in the civil action related to the 2016 Lease to arbitration before Arbitrator John Hays. (Exhibit 6). One phase of the arbitration is to address the Riverport's breach of Lease claims. Kentucky law favors the enforcement of arbitration agreements. *Medcom Contracting Servs., Inc. v. Shepherdsville Christian Church Disciples of Christ*, 290 S.W.3d 681, 685 (Ky. App. 2009). The Kentucky Uniform Arbitration Act ("KUAA") reflects the state's public policy favoring arbitration agreements. *Kindred Nursing Ctrs. Ltd. Partnership v. Cox*, 486 S.W.3d 892, 894 (Ky. App. 2015).

Kentucky contract law applies to the determination of whether parties agreed to arbitrate a dispute. *Valued Servs. of Kentucky, LLC v. Watkins*, 309 S.W.3d 256, 261 (Ky. App. 2009). Under the KUAA, a written arbitration agreement is valid and enforceable unless there are legal or equitable defenses to the enforcement of any contract. KRS 417.050. Absent legal or

equitable grounds to avoid a contract under Kentucky contract law, Kentucky courts enforce an arbitration agreement according to its terms if the party to be bound: (a) duly executed it; and (b) had an opportunity to read it. *Conseco Fin. Serv. Corp. v. Wilder*, 47 S.W.3d 335, 341 (Ky. App. 2001). In this case, Riverport executed and had an opportunity to read the Agreed Order which referred Riverport's claims under the 2016 Lease to the pending arbitration.

When deciding a motion to compel arbitration, Kentucky courts regard the face of the parties' arbitration agreement and resolve any doubts about the scope of the agreement in favor of arbitration. *Linden v. Griffin*, 436 S.W.3d 521, 525 (Ky. 2014); *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 855 (Ky. 2004); *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 320 (Ky. 2015), rev'd in part on other grounds, *Kindred Nursing Centers Ltd. Partnership v. Clark*, 137 S.Ct. 1421 (2017). In this case, the Court should enforce the parties' arbitration agreement and refer the claims in this forcible detainer to the pending arbitration involving the 2016 Lease to which Riverport freely consented.

VI. Conclusion.

The forcible detainer claims Riverport asserts here was either raised or could have been raised in the currently pending circuit court action and arbitration. Accordingly, plaintiff's claims in this action are barred by res judicata. For this reason, this Court should grant defendant's Motion to Dismiss.

In the alternative, the Court should either: 1) stay this action pending resolution of Riverport's pending federal administrative proceeding before the Surface Transportation Board, the appeal before the Court of Appeals and the circuit court action and related arbitration currently pending in Jefferson Circuit Court Division Three; or 2) directly refer Plaintiff's claims to the arbitration pending before Arbitrator John Hays.

Respectfully submitted,

/s/ Kenneth A. Bohnert

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Counsel for defendant Port of Louisville

CERTIFICATE OF SERVICE

This will certify that on November 22, 2020, a copy of the foregoing was filed using the Court's ECF system which will send Notice of Electronic Filing to the following:

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/s/ Kenneth A. Bohnert

REPLY EXHIBIT F

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September 11, 2020

Via Email and Certified Mail

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

Dear Don and Maria:

I am writing on behalf of New Albany Main Street Properties, LLC d/b/a Port of Louisville with respect to a matter which was addressed during a meeting which I understand occurred this week regarding rail issues. I am informed that, in the presence of representatives of the Port of Louisville and the rail authority, Mr. Kizer, in his capacity as the speaking agent for the Riverport Authority, said that the rail agreements (as defined in Section I.D. of the Lease) had expired 11 years ago (i.e., before the Port of Louisville's initial lease) and it was the lack of those agreements that was the impetus for the Riverport seeking FRA oversight – which oversight would materially increase the Port of Louisville's rail maintenance obligation.

Contrary to what Mr. Kizer now represents, the Riverport covenanted in the Lease that those rail agreements were valid and in effect. (See Lease Section III.B.4). Furthermore, one-third of amounts received by the Riverport under those rail agreements was owed to the Port of Louisville within 30 days of receipt. (See Lease Section VI.G.). Additionally, per the terms of each of the rail agreements which have been provided to the Port of Louisville (the **latest** of which having been executed in 2000, each with a three year term, and no proof of extensions or

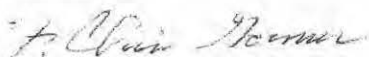
Ms. Maria Bouvette
Donald L. Cox, Esq.
September 11, 2020
Page 2

renewals thereafter), the maintenance charges to be shared with the Port of Louisville were required to be escalated annually pursuant to the Producer Price Index. Because of lack of previous disclosures by the Riverport, the Port of Louisville is unable to calculate the sum total of its share of maintenance charges, inclusive of mandatory fee escalations. A full accounting is required in this regard.

The purpose of this letter is to provide notice of the Riverport's default, pursuant to Section VIII.B. of the Lease, (a) by virtue of its non-performance of the covenant that the rail agreements be valid and in effect; (b) its failure to require and collect mandatory annual increases in maintenance charges from the rail operators; and (c) its failure to fully account for and timely pay to the Port of Louisville its share of the rail proceeds – including its share of all mandatory annual increases. The Port of Louisville reserves the right to terminate the Lease if these material defaults are not cured within 30 days as the Lease provides.

Additionally, moving forward, the Port of Louisville demands a timely adjustment of Lease terms, under Section XIV.E. of the Lease, to account for the material governmental charges or impositions which the Riverport is seeking to have imposed through the FRA. These additional charges or impositions would be expected to make the continued performance of services commercially unreasonable for the Port of Louisville under the current Lease terms. The Port of Louisville is prepared to meet within ten (10) days to discuss the issue and to negotiate appropriate changes to the Lease.

Sincerely,

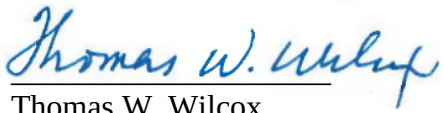


F. Chris Gorman

cc: Mr. Joe Tegart
Mr. Greg Cantrell
Mr. P. R. Siler
Lisa Fleming, Esq.
Kenneth Bohnert, Esq.
Edward Busch, Esq.
Kent Wicker, Esq.

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of January 2021 a copy of the foregoing Reply to Petition for Declaratory Order was served by email on all parties on the official Service List for Docket No. FD 36463.


Thomas W. Wilcox