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245962

June 19, 2018

BY E-FILING

Ms. Cynthia T. Brown
Chief of Administration
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
June 19, 2018
Part of
Public Record

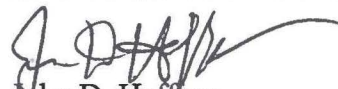
Re: FD 36187, Passaic Street Properties, LLC, Acquisition and Operation Exemption-New York & Greenwood Lake Railway

Dear Ms. Brown:

I am submitting on behalf of New York & Greenwood Lake Railway, Inc. ("NYGL") a public and a confidential version of its Motion to Supplement and/or Strike to be filed in the above-captioned proceeding. The confidential version includes certain correspondence and emails documenting existing or potential traffic movements. Because these confidential documents consist of pages of emails and bills of lading containing proprietary information such as rates, origins and destinations, numbers of car loads, and commodities, it is impossible to send this specific information in a redacted form without inadvertently disclosing this information. Accordingly, this information has been omitted from the public version where appropriate. A confidential version of NYGL's filing is being provided to counsel for Passaic Street Properties, LLC.

Sincerely yours,

CLARK HILL STRASBURGER



John D. Heffner
Attorney

cc: John Fiorilla, Esq.

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36187

**PASSAIC STREET PROPERTIES, LLC
ACQUISITION OF NEW YORK & GREENWOOD LAKE RAILWAY, INC.
OPERATION EXEMPTION**

**VERIFIED NOTICE OF EXEMPTION
PURSUANT TO 49 CFR §1150.31**

**MOTION TO SUPPLEMENT AND/OR STRIKE
OF
NEW YORK & GREENWOOD LAKE RAILWAY, INC.**

Submitted by
John D. Heffner
Clark Hill Strasburger
1025 Connecticut Ave., N.W.
Suite 717
Washington, D.C. 20036
(202) 742-8607
Counsel for Petitioner

Due: June 19, 2018

PUBLIC VERSION

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FD 36187

**PASSAIC STREET PROPERTIES, LLC
ACQUISITION OF NEW YORK & GREENWOOD LAKE RAILWAY, INC.
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**I.
INTRODUCTION**

Pursuant to 49 CFR §§1100.3, 1104.8, 1104.13(a), and 1117.1, New York & Greenwood Lake Railway, Inc. (“NYGL”) moves the Board to supplement its Petition to Reject (“Petition”) filed on May 10, 2018, in the above-captioned matter and/or to strike certain statements contained in the Reply of Passaic Street Properties, LLC (“PSP”) submitted on May 30, 2018.

As the Board will recall, PSP initiated this proceeding by filing a notice of exemption under 49 U.S.C. §10902 (sic) and 49 CFR §1150.31 to acquire a line of railroad owned and operated by NYGL with the sole intent of abandoning it shortly

after purchase. NYGL promptly filed a timely Petition to Reject PSP's notice for failure to comply with Board policy and the exemption standards of the ICC Termination Act ("ICCTA"). NYGL argued that the transaction is controversial and therefore ineligible for an expedited class exemption, that PSP's notice is void *ab initio* as it contains materially false and misleading information, and that this transaction is an attempt by PSP to adversely abandon NYGL's railroad without going through the proper procedures. On May 30, PSP replied ("PSP's Reply") and on May 31, 2018, the Board ruled that it needed additional time to consider the arguments presented and accordingly postponed the exemption's effective date.

II. ARGUMENT

A. The Board should grant NYGL's Motion to supplement its Petition and/or strike PSP's Reply

Because PSP's Reply raises some factual matters requiring a more complete response, NYGL requests that the Board allow it to supplement its Petition and/or to strike improper matter contained in PSP's Reply. NYGL attaches to this filing the verified statements of NYGL's president and owner James Wilson and Josh Wu, a tax partner with Clark Hill Strasburger.

In general the Board's Rules of Practice provide that a party may file a reply or a motion addressed to any pleading within 20 days after the pleading is filed. 49 CFR §1104.13(a). Here the Board should grant NYGL's timely Motion to

supplement its Petition so as to provide a complete record on which to base its decision. *See, Hartwell First United Methodist Church-Adverse Abandonment and Discontinuance-The Great Walton Railroad Company, Inc., In Hart County, GA*, Docket AB-1242, slip op. at 3 (STB served Jan. 31, 2018)(“...[b]ecause this pleading provides information that is necessary to develop a more complete record, the Board will waive its prohibition here and accept both [filings] into the record.”) Moreover, on motion the Board will strike material that is “redundant, irrelevant, immaterial, impertinent, or scandalous.” 49 CFR §1104.8. Here PSP’s Reply raises presents evidence and argument not submitted in its Notice of Exemption concerning the Line’s alleged lack of traffic, the availability of other railroad-served facilities in the area, and the absence of remedies available to NYGL to retake the Line. NYGL would be prejudiced if it cannot respond. Accordingly, and consistent with the Board’s practice of construing its rules liberally to secure a just and speedy determination of issues presented, it should accept NYGL’s Reply and grant its Motion. 49 CFR §1100.3.

B. The Board should strike evidentiary statements by PSP’s counsel

In support of its factual allegations, PSP relies in part on the knowledge of its counsel in this proceeding. *See* Certifications of John Fiorilla cited at pages 2 and 3 of PSP’s Reply and attached to PSP’s Reply. In many jurisdictions including the District of Columbia and presumably in the State of New Jersey where PSP’s

counsel practices, the rules of ethics prohibit a lawyer from also acting as a witness in a proceeding in which he or she is also counsel. *See*, Rule 3.7 of the District of Columbia Rules of Ethics.¹ Accordingly, the Board should strike PSP's counsel's statements referenced in footnotes 1 through 4 on pages 2 and 3.

C. PSP's misstatements and inaccuracies

PSP's 14 page Reply is replete with factual misstatements and inaccurate pronouncements of legal matters outside the Board's expertise and jurisdiction as well as irrelevant to the issue of whether or not PSP is eligible to use the notice of exemption procedure for its acquisition. NYGL alternatively requests that the Board allow it to respond to each one or that PSP's statements be stricken as irrelevant, immaterial, and incorrect.

- PSP asserts that NYGL operated primarily to serve transfer station facilities for a few private companies with a transload facility at its yard in Passaic. It claims that several customers have come and gone leaving NYGL with nothing to

¹ Rule 3.7 states "(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) The testimony relates to an uncontested issue;
- (2) The testimony relates to the nature and value of legal services rendered in the case; or
- (3) Disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may not act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness if the other lawyer would be precluded from acting as advocate in the trial by Rule 1.7 or Rule 1.9. The provisions of this paragraph (b) do not apply if the lawyer who is appearing as an advocate is employed by, and appears on behalf of, a government agency.

move, that plans for new business have not been successful, and that NYGL suspended operations on or about 2012 when its last customer ceased operation. Furthermore, it contends that NYGL has failed to offer any credible evidence that it has the legally (sic) and financial responsibility to resume operation as a transload facility as it failed to redeem the property and that it has failed to demonstrate whether it has taken any steps to locate any alternative facility and tracks or whether it has the financial ability to purchase or lease an alternative facility and tracks.

NYGL's Response:

PSP's assertions are beside the point. The pleading before the Board is PSP's notice of exemption. The issue is whether the Board should reject it or allow it to go into effect. PSP's statements are pure speculation as well as irrelevant and immaterial. It lacks any knowledge of what NYGL may do if it reacquires the subject property.

- PSP claims that the empty rail car which moved from Wyoming to Passaic in November 2017 was the first to have moved in over five years and was moved in an attempt to defeat the effect of applicant's purchase of the property. Other than some car movements in December 2017, PSP adds that no other car has been delivered to Passaic as of the date of the filing. PSP notes that the documents attached to Mr. Wilson's statement fail to identify the location where any future

rail cars will originate and to where they will be destined identifying only the names and addresses of the shipper and consignee. Consequently, PSP opines that it is feasible that the ultimate destination and/or origination of these shipments will be made by truck from outside of Passaic or Garfield, New Jersey.

NYGL's Response: Again, PSP's assertions are beside the point as its statements represent pure speculation and are irrelevant and immaterial as to PSP's eligibility to use the notice of exemption process. Mr. Wilson explains in his statement that its efforts working with a freight broker to generate traffic have begun to pay off. Moreover, he states that other carriers in the area cannot provide the customized services which NYGL will offer by providing customers with a complete package of service entailing both the rail and truck portions of the haul. Finally, Mr. Wilson declines to identify specific customers in the public version of his statement as that information is confidential.

- It is clear, PSP states, the cars that NYGL expects to handle are destined for an unidentified location outside Passaic or Garfield, NJ, and that the cargo will be transloaded to truck to reach the final destination. Based upon a review of their respective websites, PSP then goes on to identify six other railroads serving New Jersey that allegedly could transload bulk materials facilities. PSP emphatically states that these railroads currently provide that service. PSP adds

that it knows of no local shippers who transload this material nor does NYGL claim that such shippers or receivers are directly located on its railroad.

NYGL's Response: NYGL acknowledges that it would transfer the incoming material from rail to truck at its Passaic facility for movement to customers in New Jersey. Significantly, this customer has chosen to use NYGL's services rather than those of the other railroads PSP has identified. The customer and Norfolk Southern Railroad are both aware that there are other possible transload locations and both companies are agreeable to having the traffic to use NYGL's services. See James Wilson statement referenced above.

- PSP claims it could not have sought Board acquisition authority until recently as it "did not have standing to make application to the Board prior to the delivery of the Deeds." PSP Reply at page 5. PSP reasoned that it did not know if it would be the successful bidder until after the auction was concluded and it did not acquire title to the Property until after the 180 day redemption period had expired.

NYGL's Response: PSP's response is fallacious. Board acquisition and operating authority is permissive. *Ohio River Partners, LLC-Acquisition and Operation Exemption-Hannibal Development, LLC*, FD 35984, slip op. at 3 (STB served April 1, 2016). Just because a party seeks Board authority to acquire and/or operate a rail line, it is under no obligation to consummate the transaction. As a

practical matter, many carriers and potential carriers submit their notices of or petitions for exemption for acquisition upon executing the transaction agreement. Some even file as soon as they commence serious acquisition negotiations.² PSP could have done so back in September 2017 at the time it won the auction. Seeking authority *after* consummating the acquisition constitutes an unauthorized acquisition without any attempted explanation.³

- PSP states the Board has no jurisdiction to extend the 180 day right of redemption under 26 U.S.C. §6337(b), nor the right to rescind the IRS levy.

According to PSP's understanding of the Internal Revenue Code, the Internal Revenue Service must provide a delinquent taxpayer not less than 30 days' notice before a tax levy goes into effect, that the delinquent taxpayer has 180 days after the date of the sale to redeem the property by paying the unpaid taxes and any expenses of the levy proceeding, and that the IRS and the courts lack the power to extend the 180 day redemption period. Hence, PSP argues, the Board has no

² The Board's regulations applicable to notices of exemption merely require that the applicant state whether an agreement has been reached or provide details about when an agreement *will be* reached. 49 CFR §1150.33(c).

³ *PPL Susquehanna, LLC and Allegheny Electric Cooperative, Inc.—Acquisition Exemption—Pennsylvania Department of Transportation*, FD 35577 (STB served Dec. 7, 2011) dealt with the situation where an entity inadvertently acquired a rail line without seeking prior Board approval. The Board authorized the transaction after the entity took corrective action. Here PSP acquired the Line and filed the notice without even so much as indicating that acquisition before seeking authority was inadvertent or stating that it was making a corrective filing to cure an inadvertent violation of the Board's rules.

power to undue the IRS' sale to PSP, to compel PSP to transfer title back to the IRS, or require IRS to accept title.

NYGL's Response: The Board has neither the authority nor the expertise to accept as law PSP's tax arguments any more than it has the jurisdiction to adjudicate contractual disputes involving railroad property rights. *Cf. Ohio River Partners, supra*. Because PSP mischaracterizes NYGL's rights under the Internal Revenue Code, NYGL submits the verified statement of Joshua Wu, a tax attorney and partner with Clark Hill Strasburger, to provide the Board with a proper understanding of NYGL's rights to the extent relevant to the relief the Board can grant here.

The verified statement explains that NYGL has rights under the tax law with respect to the property at issue. The statement provides that, contrary to PSP's assertions, the tax law allows for seized property to revert to the government or the taxpayer. Also, PSP's broad assertions concerning its rights during the 180 day redemption period and after the deed to the property was issued are not consistent with the tax law. Finally, the statement notes some discrepancies between the property identified for seizure in the Public Auction Sale and Notice of Seizure and the description of the property in the Reply. In sum, NYGL has administrative and judicial remedies under the tax law, and the tax law may provide a right for NYGL to reacquire the property.

D. Contrary to PSP the Board has the power to grant relief here.

Simply stated, the Board is not powerless to act here. Because PSP assumes that NYGL failed to exhaust its remedies under the Internal Revenue Code, it asserts that the Board lacks the ability to reconvey unlawfully acquired railroad properties back to the IRS. Although there may be no precedent directly on point, the Board clearly has the ability to undo an unauthorized transaction and has ordered reconveyance on occasion. *See, The Land Conservancy of Seattle and King County-Acquisition and Operation Exemption-Burlington Northern and Santa Fe Railway Company*, FD 33389 (STB slip op. served Sept. 26, 1997, reconsideration denied Sept. 13, 2008), cited at pages 6-7 of NYGL's Petition to Reject and *SF&L Railway, Inc.-Acquisition and Operation Exemption-Toledo, Peoria and Western Railway Corporation Between La Harpe and Peoria, IL*, FD 33995 (STB served Oct. 17, 2002), clarified in a later decision (STB served Jan. 31, 2003).

E. The Board should not allow PSP to circumvent the normal adverse abandonment procedure.

PSP claims that "extenuating circumstances" justify its tactic of acquiring the Line for the sole purpose of abandoning it in order to facilitate a redevelopment of this portion of Passaic. What PSP seems to be doing is to conflate into one exemption filing its acquisition notice along with an out of service abandonment notice. In support of the abandonment it cites the physical deterioration of the Line

and adjoining land parcels. Without admitting or denying PSP's assertions, NYGL notes that nothing that PSP alleges distinguishes this property from many others proposed for abandonment under the Board's adverse abandonment procedures.

NYGL believes there may be circumstances underlying PSP's need for expedition that it has failed to disclose to the Board. NYGL has reason to believe that PSP is acquiring the Line for the sole purpose of "flipping it" to one or more public agency purchasers and in the process "making a fast buck." The public interest would be better served if PSP is more honest in providing reasons for this unusual transaction.

At least requiring PSP to seek abandonment through the Board's formal adverse abandonment application procedure would best protect the public convenience and necessity. PSP has failed to show any need for expedition here. Requiring PSP to comply by filing a formal abandonment application of NYGL's rail line would allow the Board to properly weigh the interest of rail shippers in continued rail service versus the interest of the public in making the property available for alternative public uses and issue a reasoned decision on a more complete record than that afforded by an exemption.

III.
CONCLUSION

The Board should allow NYGL to supplement its Petition to Reject with the information to rebut incorrect PSP's assertions and/or to strike PSP's statements as irrelevant and immaterial. Furthermore, it should reject PSP's controversial notice for failure to comply with agency precedent and policy, for providing materially false and misleading information, and for misusing STB acquisition procedures to facilitate the future adverse abandonment of a rail line. The Board should require the Line to be reconveyed pending a properly authorized transaction.

Respectfully submitted,



John D. Heffner
Clark Hill Strasburger
1025 Connecticut Ave., N.W.
Suite 717
Washington, D.C. 20036
(202) 742-8607
Counsel for Petitioner

Due: June 19, 2018

PUBLIC VERSION

VERIFIED STATEMENT OF JAMES R WILSON

James R Wilson being duly sworn, deposes and states as follows:

My name is James R. Wilson and I am the president and owner of a Class III common carrier short line railroad, the New York & Greenwood Lake Railway, Inc ("NYGL"). My principal place of business is 16 Upper Main Street, in Callicoon NY 12723. I am intimately familiar with facts discussed in the accompanying Petition to Reject.

I am submitting this additional verified statement to correct numerous misstatements in PSP's Reply. First, I want to rebut numerous statements by PSP to the effect that (1) there is no traffic and no potential for traffic on the Line, (2) to the extent there is or will be traffic on the Line, NYGL generated these movements in an attempt to defeat PSP's purchase of the Line, and (3) that there are other railroads and facilities in the region that could just as easily handle this traffic.

The cars which were delivered October and November 2017 represented brand new business and a new customer. This business was initiated in May 2017 with a rate request. See emails dated May 2017 from [deleted] requesting rate from Wyoming to Passaic. I am attaching the track and trace report for cars delivered October 25 and November 2, 2017.

It is preposterous to suggest that cars delivered in late 2017 were shipped intentionally only as an attempt to defeat the effect of the purchase. Since PSP is neither a rail carrier nor a rail customer, it would be unlikely to know that the time between quoting a rate and getting the traffic can take months or even years. In fact, I am attaching to the Confidential Version emails that go back to August 2016 (marked with a check mark) documenting NYGL's successful marketing efforts. It is impossible to move a railcar 1,800 miles, on the spur of the moment, especially from a brand new customer.

Regarding PSP's statement that there are other railroads and facilities in the region that could just as easily handle this traffic, there is a shortage of transload space in the New York Metropolitan Area. Because Passaic is only 15 miles from New York City and a short distance to Port Newark, NJ, it is an ideal location for a

transload terminal. NYGL works in conjunction with a transload company, [deleted], to provide a service which is unique to the area. None of the railroads mentioned by PSP provide a customized trucking service or customized transload service. The difference is that the customers who use the rail carriers mentioned by PSP must make their own trucking / transload arrangements. By contrast NYGL provides a more personalized service making the trucking arrangements for the customers thereby relieving them from having to do that work. (see emails [deleted]). To generate that traffic, NYGL is working with a [deleted] broker, that is looking for a rail transload facility in the northeast and specifically on NYGL. I am attaching email rate requests for two commodities through [deleted]. One is supposed to start in two months (pipe) the other (metal panels) to start in June 2019.

Second, regarding the identity and location of NYGL's customers, NYGL is reluctant to name all customers and potential business because every rate request and most transportation agreements or documents contain a confidentiality clause. Nevertheless, I am furnishing this information in the confidential version of my statement.

Third, PSP asserts that the Line is in a poor state of repair. In fact, the Line has been completely rebuilt in the past 14 years. In the hopes that NYGL would be successful in retaining ownership of the Line and developing new traffic on it, NYGL commenced efforts to repair the track and facilities. I am submitting emails and correspondence with New Jersey DOT and Railroad Construction Services, Inc., documenting these efforts.

Finally, I want to point out that the Internal Revenue Service improperly took more property than it was entitled to take and that PSP's acquisition is premised on that larger improper taking. NYGL has engaged new tax counsel to explore its remedies under the Internal Revenue Code and the regulations thereunder. Therefore any attempt by PSP to acquire the Line is premature and improper.

The Board will note that the railroad's deed encompasses the entire railroad right of way extending from milepost 0.0 to 1.75 beginning from Garfield, NJ, in the County of Bergen with the end of the line being in the City of Passaic, Passaic County. In an oversight the IRS seized the entire railroad and conveyed it to PSP.

The Notice of Seizure and Public Sale (attached hereto) contain a very explicit description of the property,
"99-111 Passaic St, Passaic NJ 07055

Real property is a 2.007 acre fenced in lot that houses a metal pole barn /shed and active railroad tracks for shipping”

There is no mention of Garfield, NJ, and the property and street address described by the IRS is only one small portion of the railroad line.

IRS Public Auction Notice property description Sept 13, 2007

“Description of property, Land with a fenced in lot that houses a metal pole barn shed and active railroad tracks for shipping”

Property is located at 99-111 Passaic St, Passaic NJ 07055

Property is approximately 2.01 acres and is classified RR class 2

PARCEL NUMBER 07-05000-02-0001”

According to the state property records, copy attached, there are three separate parcel numbers with the corresponding addresses for the Passaic portion of NYGL line:

5000. Wall St to Passaic River (3.1 acres)

5000.01 57-61 Wall St

5000.02 99-111 Passaic St (2.007 acres)

Only one parcel (5000.02 has the corresponding address 99-111 Passiac St is listed on the IRS Public Sale description.

PSP described the property in Block 5000.02 as follows: “ consists of one main structure, railroad yard, numerous railroad cars and storage container.” However, PSP’s description omitted the corresponding addresses to each parcel. PSP was very well aware that it was bidding only on, parcel 5000.2. STB counsel for PSP previously worked for NYGL on the Passaic property real estate sales issue in 2006 and should be very aware that PSP received property it was not entitled to take. Only Block 5000.02 has the address of 99-111 Passaic St, Passaic NJ 07055. The rest of the railroad property is not included in IRS Public Auction Notice, the Garfield, NJ, portion of rail property is completely omitted in IRS description and PSP’s description. Garfield NJ is in Bergen County on the other side of Passaic River where the rail line runs for approx ¼ mile. PSP has no claim to any other railroad property other than block 5000.02 which is the only parcel identified in sale and seizure notice.

**FD 36187, Passaic Street Properties, LLC, Acquisition and Operation
Exemption-New York & Greenwood Lake Railway**

**Motion to Supplement and/or Strike
of
New York & Greenwood Lake Railway, Inc.**

REDACTED DOCUMENTS

99-111 PASSAIC ST - Passaic, NJ

06/16/2018

Owner Information

Owner Name:	PASSAIC ST PROPERTIES LLC	TAX Billing Zip:	07028
Tax Billing Address:	694 MAIN ST	TAX Billing Zip+4:	
Tax Billing City & State:	PASSAIC NJ 07055	Owner Occupied:	No

Location Information

County:	Passaic	Block #:	5000.02
Municipality:	Passaic	Lot #:	1
Zoning	R-3	Qualifier:	
X-Coordinate	40.8620567	Prior Block:	500
Y-Coordinate	-74.1120911	Prior Lot:	4
GIS Pin:	1607_5000.02_1	Prior Qual:	

Tax Information

Lot Number:	1	Tax Appraisal Area:	07
% Improved:	0%	Tax Non-Usable Code:	14
Tax Area:	07	Tax Rate:	3.487
Legal Description:	2.007 AC	Tax Ratio:	90.50%
Tax Code:			

Characteristics

Land Description:	2.007 AC	Property Class:	Vacant land
Acreage:		Building Class:	0.6245
Year Built:	0	Building Description:	VACANT LAND
Additional Lots:	INC VAC 7TH ST	Class 4 Code:	0



Recorded Deeds

06/16/2018

Deed Book : **03277**
Deed Page : **00174**
Rec. Date : **04/03/2018**
Deed Date : **03/29/2018**
NU Code : **014**

Buyer(s) : **PASSAIC ST PROPERTIES LLC**
Seller(s) : **INTERNAL REVENUE SERVICE**
Sales Price : **\$0**

Subject: **Fwd: South Street Crossing**
Date: 5/9/2018 6:49:03 PM Eastern Standard Time
From: pattinygl@aol.com
To: jwnygl@aol.com

From: JosephD@rccmail.net
To: jwnygl@aol.com
Cc: pattinygl@aol.com
Sent: 10/28/2016 9:38:41 AM Eastern Standard Time
Subject: FW: South Street Crossing

Good morning,

Attached is the quote I sent back in September, please let me know if you have any questions.

Thanks,

Joe

From: Joseph Daloisio
Sent: Thursday, September 08, 2016 3:15 PM
To: 'jwnygl@aol.com' <jwnygl@aol.com>
Subject: South Street Crossing

Hi Jim,

Sorry for the delay in getting this quote, I was away last week. I was able to lower our price from 2 years ago.

Let me know if you have any questions.

Regards,

Joe

**Joseph Daloisio**

T: 973-413-1803

F: 973-684-1355

E: JosephD@rccmail.net

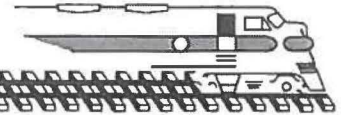
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RCC/BEC is EEO/AA employer.

Railroad Construction Company, Inc.



Contractors Engineers



75-77 Grove Street • Paterson, NJ 07503



Phone: 973-684-0362 • Fax: 973-684-1355

September 8, 2016

New York & Greenwood Lake Railroad
P.O. Box 777
15 Upper Main Street
Callicoon, NY 12723

Email: jwnygl@aol.com
Quote: R161418

Attention: Mr. James Wilson

Dear Mr. Wilson:

In accordance with your request, we take pleasure in submitting our quotation for crossing rehabilitation on South Street in Passaic, New Jersey.

Proposal Agreement:

We agree to furnish all necessary supervision, labor, tools, equipment, transportation, insurance and materials for the rehabilitation of an 80 ft. triple track crossing, for the total cost of **\$277,100.00 (Two Hundred Seventy Seven Thousand One Hundred Dollars)**. This price does not include sales tax.

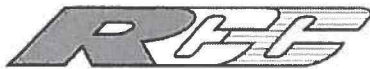
Materials and Scope of Work:

- Provide signs and barricades to close the road at work zone.
- Saw cut existing asphalt.
- Provide necessary excavation of asphalt to top of tie.
- Remove two existing turnouts.
- Remove approximately 120 LF of track.
- Provide necessary excavation to 24" below proposed top of rail.
- Compact existing 6" of sub-ballast.
- Furnish and install new filter fabric.
- Furnish and install 14 welds for joints in roadway not joining frog.
- Furnish and install one #8 turnout using relayer 115# rails, angle bars and tie plates as well as 48 pieces new 7"x9"x9' through 16' creosoted hardwood switch timbers.
- Furnish and install one #6 turnout using relayer 115# rails, angle bars and tie plates as well as 36 pieces new 7"x9"x9' through 16' creosoted hardwood switch timbers.
- Furnish and install 70 pieces new 7"x9"x8'6" creosoted hardwood ties.
- Furnish and install all necessary new spikes, bolts and nut locks.
- Reinstall existing eight pair of relayer compromise joints.
- Furnish and spread necessary 1½" clean stone ballast from 6" below bottom of tie to top of tie.
- Surface and align two turnouts.
- Surface and align 120 LF of track.
- Furnish and install new rubber railseal for field side and gage side of rail on three tracks in crossing.
- Furnish and spread 6" of asphalt to repave area disturbed.
- Furnish & install (3) new crossbuck signs with post and hardware.
- All existing track material to remain property of NYGWL RR on site.

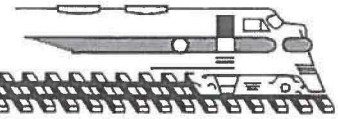
E-mail: Info@RailroadConstruction.com • Website: www.RailroadConstruction.com

EQUAL OPPORTUNITY • AFFIRMATIVE ACTION EMPLOYER

Railroad Construction Company, Inc.



Contractors Engineers



75-77 Grove Street • Paterson, NJ 07503



Phone: 973-684-0362 • Fax: 973-684-1355

New York & Greenwood Lake Railroad
Quote: R161418

September 8, 2016
Page 2

Note:

All detours, road closures, permits and police protection by owner.
This quote is based on a total road closure with work performed during normal work day hours.

Exceptions:

This quote does not include any cost for:

- Overtime, nights, weekends or holiday work hours.
- Permits.
- Police protection.
- Detour plans and set-up.
- Additional insurance.
- Engineering design or submittals.
- Utility protection, repair or relocation.

Guarantee:

All material and workmanship are guaranteed to pass your inspection and approval as well as that of the New Jersey Department of Transportation.

Terms:

Net-30 days; A 1-1/2% service charge per month will be incurred on all balances due over this period.

We thank you for this opportunity to quote, trust our quotation meets with your approval and hope we may be favored with your valued order.

Very truly yours,
Railroad Construction Company, Inc.

Joseph Daloisio

Joseph Daloisio, III.
Railroad Track Division Manager

IF THIS PROPOSAL IS ACCEPTED, PLEASE RETURN SIGNED COPY:

ACCEPTED BY (Print Name and Title): _____

SIGNATURE: _____

DATE: _____

E-mail: Info@RailroadConstruction.com • Website: www.RailroadConstruction.com

EQUAL OPPORTUNITY • AFFIRMATIVE ACTION EMPLOYER

From: mearl.challender@dot.nj.gov
To: pattinygl@aol.com
Cc: Botamina.Gemian@dot.nj.gov
Sent: 1/12/2015 3:48:30 PM Eastern Standard Time
Subject: South Street
Patti,

What is the status of ORDER# 15-2010 CM

The recommendations to the ORDER are essentially the following:

1. UPGRADE the railroad warning devices at the crossing from PASSIVE to ACTIVE
2. Reconstruct the crossing surface.

Please give me a call if you have any questions.

Sincerely,

MEARL R CHALLENGER

Project Engineer - Utilities

Division of Project Management

New Jersey Department of Transportation

PO Box 600

Trenton, NJ 08625

Phone# 609-530-5700

Fax 609-530-5774

**New York & Greenwood Lake Railway
PO Box 106
Glen Ridge NJ 07028**

November 13, 2017

**Todd Hirt
NJ DOT
PO BOX 600
Trenton NJ 08625**

New York Greenwood Lake Railway South Street Crossing Passaic NJ rehabilitation

Quote for Scope of Work South Street Crossing

Provide detour set up and removal, signs and barricades to close road at work zone for one week. weather permitting.

Provide police for traffic control and detours, flagman for trains affected.

Saw cut existing asphalt.

Excavate asphalt to top of tie.

Remove two existing turnouts .

Remove approximately 120 LF of existing track.

Provide necessary excavation to 24 inches below top of rail.

Compact existing 6 inches of sub ballast.

Furnish and install new filter fabric.

Furnish and install 14 welds for joints in roadway *not* joining frog.

Furnish and install one #8 turnout using relayer 115# rails, angle bars and tie plates as well as 48 pieces new 7"x9" x9' through 16' creosoted hardwood switch timbers.

Furnish and install one # 6 turnout using relayer 115# rails, angle bars and tie plates as well as 36 pieces new 7"x9" x9' through 16" creosoted hardwood switch timbers.

Furnish and install 70 pieces new 7"x9"x8'6" creosoted hardwood ties.

Furnish and install all necessary new spikes, bolts, and nut locks .

Reinstall existing eight pair of relayer compromise joints.

Furnish and spread necessary 1 ½ " clean stone ballast from 6" below bottom of tie top of tie.

Surface and align two turnouts.

Surface and align 120 LF of track.

Furnish and install new rubber railseal for field side and gage side of rail on three tracks in crossing.

Furnish and spread 6" of asphalt to repave area disturbed.

Furnish and install (3) new crossbucks signs with post and hardware.

Total cost for project including administration, supervision, labor, tools, equipment, transportation, insurance and materials for rehabilitation on 80 ft triple track crossing is **294,790.00 (Two Hundred Ninety Four Thousand Seven Hundred Ninety Dollars)**

Quote is based on work being completed in one weeks time and does not include overtime, nights, weekends or holidays .

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Project Engineer - Utilities

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New Jersey Department of Transportation

PO Box 600

Trenton, NJ 08625

Phone# 609-530-5700

Fax 609-530-5774

**VERIFIED STATEMENT
OF JOSH WU**

Josh Wu, being duly sworn, deposes and states as follows:

I am a tax attorney and partner with Clark Hill Strasburger. I advise clients on all aspects of federal tax law and in tax controversies and tax litigation matters before the Internal Revenue Service ("IRS"), the U.S. Tax Court, the U.S. Court of Federal Claims, and the U.S. Court of Appeals for the Federal Circuit. I have an LL.M. in Taxation from Georgetown University Law Center and am licensed to practice law in the District of Columbia and New York. A biography is attached.

I have been asked by Surface Transportation Board counsel for New York & Greenwood Lake Railway, Inc. ("NYGL") to review certain tax-related assertions by Passaic Street Properties, LLC ("PSP") in its Reply to NYGL's Petition to Reject filed on May 30, 2018 with the Board. After reviewing the Reply and citations to the Internal Revenue Code contained therein I believe that it does not accurately explain the relevant provisions of the Code.

More specifically, the Reply does not provide a complete view of the relevant Code provisions with respect to (1) the rights conferred to a purchaser at a sale of property seized by the IRS, (2) the nature of the 180 day redemption period, and (3) the discharge of liens, encumbrances and titles under section 6339(c).

As correctly noted in the Reply, sections 6335 through 6339 govern the seizure and sale of property by the IRS to satisfy a tax debt due. The Code provides numerous

procedural methods for taxpayers to avert a seizure and sale, and provides protection as part of the seizure and sale process for the taxpayer. The Collection Due Process procedures, described in the Reply, are only one avenue for a taxpayer to challenge a levy.

The Reply asserts that NYGL seeks an order to “re-convey the property at issue back to the IRS” and suggests that the IRS may not “accept title.” While no case is directly on point, this reasoning is not consistent with the Code and IRS procedures. When a seizure and sale are held void, the property generally reverts to the taxpayer because the IRS seizure and sale is not a transfer of ownership to the IRS. The IRS gains custody and control of the property seized and then, after proper notice, is authorized to sell the property to a third party. If no third party provides a minimum bid for the property and the IRS determines that the “purchase of such property by the United States would be in the best interest of the United States, the property shall be declared to be sold to the United States....” If not sold to the United States, the property “shall be released to the owner [taxpayer] thereof.” Finally, the Code contemplates that, if a third party wins the property at the sale but fails to make payment, the IRS may declare the sale null and void and the property may again be advertised and sold. Thus, there is *ample authority* for a sale to a third party to be voided and the property returned to the taxpayer or the custody and control of the IRS.

The Reply also asserts that, due to the 180 day redemption period, the winning buyer at an IRS sale could not take any action concerning the property and the Board, and requiring otherwise would have a “chilling effect” on IRS levy auctions. From a tax law standpoint only, this assertion is inconsistent with the nature of the 180 day redemption period. Upon acceptance of the winning bidder, the risk of loss and responsibility for the preservation of the property shifts to the purchaser. Even if the IRS cares for the property, it is at the bidder’s expense. Thus, winning bidders routinely accept that they will have a period of responsibility for the property without enjoying full ownership. Further, the 180 day redemption period is designed to protect taxpayers, and is not viewed by Congress as an obstacle to the sale of seized property.

Finally, the Reply correctly asserts that section 6339(c) provides that delivery of the deed to the purchaser discharges any “liens, encumbrances and titles” which attached to the real property after the federal tax lien. The Reply also correctly states that the deed conveys all the “right, title and interest the party delinquent had in and to the real property...at the time the lien of the United States attached thereto.” The Reply then states that the Board has no statutory authority to undo the IRS sale. If the Reply is asserting that section 6339(c) strips all other parties, like the Board, of power to “encumber” the property, such an assertion would not be correct under the tax law.

The provisions in section 6339 are intended to provide that, upon the deed, all the rights the taxpayer had in the property are transferred to the buyer. Because the buyer at a tax sale obtains only a quitclaim deed to the real property, the buyer is responsible for searching the title to the property to determine whether there are any senior liens. Also, the deed only discharges lien holders junior to the IRS. On the other hand, since a purchaser at a sale acquires only the right, title, and interest of the taxpayer, the successful bidder takes the property or rights to property subject to all liens having priority over the tax lien. The sale of property seized by the government, as noted in Treas. Reg. § 301.6335-1(c)(4)(iii), is accomplished on a “caveat emptor” basis. Property is sold “as is” and “where is” and “without recourse to the United States.” As stated by the IRS, a careful reading of sections 6335-6339, the sale provisions, reveals no remedy to a disappointed purchaser. In sum, section 6339 does not strip a third party of its power to assert its rights with respect to a property, unless such rights arose after an IRS lien.

I also understand that there is a discrepancy between the property identified for seizure in the Public Auction Sale and Notice of Seizure. Those documents indicate that the property to be sold consists of a 2.07 acre of real property described as “land with a fenced in lot that houses a metal pole barn shed and active railroad tracks used for shipping...located at 99-111 Passaic Street, Passaic, NJ 07055.” However, the property actually seized consists of three parcels

identified in Mr. Fiorilla's "certification", attached hereto, as Block 5000, Lot 1 consisting of 3.10 acres, Block 5000.1 consisting of a 0.004 acre triangular shaped parcel, and Block 5000.02 Lot 1 consisting of One Main structure, the railroad yard, numerous railroad cars and storage containers. The IRS' procedures in fact *give* the taxpayer administrative and judicial remedies where, as here, the Service took more than it was entitled to take.

I believe my statement provides a more complete view of the tax law with respect to IRS seizure and sale. Concerning the points above, the Reply's narrow explanation of the tax law might lead to some confusion. The simple fact is that NYGL *may indeed have a right to reacquire the property* taken from it that is the subject of PSP's notice of exemption.

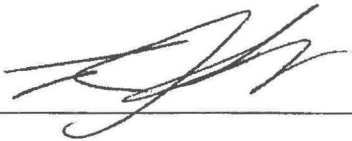
VERIFICATION

STATE OF TEXAS)

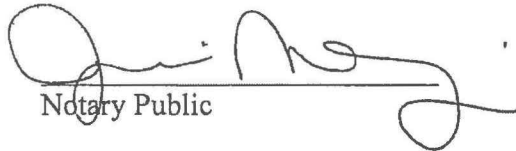
)

CITY OF SAN ANTONIO)

Joshua Wu, being duly sworn according to law, hereby deposes and states that (s)he holds the position of tax attorney, is authorized to make this Verification, had read the foregoing document, and knows the facts asserted therein are true and accurate as stated, to the best of (her)his knowledge, information, and belief.

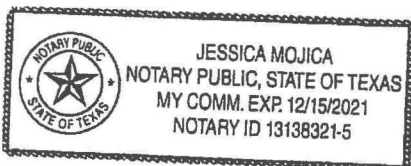


Subscribed to and sworn to before me, a Notary Public, in and for the County of Bexar in the State of Texas, this 14th day of June.



Notary Public

My Commission expires:



T. Joshua Wu
Clark Hill Strasburger

BIOGRAPHICAL INFORMATION

EDUCATION

B.A., Foreign Affairs, University of Virginia
J.D., Syracuse University College of Law
LL.M. in Taxation, Georgetown University Law Center

PROFESSIONAL EXPERIENCE

Partner, Clark Hill Strasburger, Tax Group
Senior Associate, Caplin & Drysdale, Chartered
Senior Associate, Latham & Watkins, Tax Controversy Group
Associate, Morgan Lewis, Tax Controversy & Consulting Group
Summer Associate, U.S. Dept. of Justice, Office of International Affairs
Student Attorney, Low Income Taxpayer Clinic, Syracuse

PUBLICATIONS AND HONORS

Tax Consequences From Damages and Theft in the Sharing Economy, Tax Notes (2017)

The IRS is Coming: How to Prepare for the New IRS Partnership Audit Rules, National Society of Accountants – Main Street Practitioner Magazine (2016)

Co-author. Quietly Finding a Home in the Voluntary Disclosure World, Tax Notes (2015)

Corporate Criminal Defense: Compliance, Investigation and Trial Strategies (2010), co-author, Chapter 14, “Unique Procedures and Considerations in Tax Cases.”

Super Lawyers Rising Star in Tax Law, Thomson Reuters, 2017 and 2018

SELECTED PRESENTATIONS AND SEMINARS

- *Partnership/LLC Equity Compensation - Planning & Possibilities*, Texas BarCLE (May 2018)

CLARK HILL | Strasburger

- *Centralized Partnership Audit Regime*, Strasburger's Tax Symposium (November 2017)
- *Representing Clients in Collection Matters*, Maryland Society of Accounting and Tax Professionals (November 2017)
- *Tax Penalties and How to Fight Them*, Oregon Association of Independent Accountants (October 2017)
- *Ethics in Tax Practice, Estate and Gift Tax Disputes, and Business Planning for Accountants*, South Carolina Society of Accountants (October 2017)
- *So I Missed an Election...Now What?*, Georgia Association of Accountants and Tax Professionals (June 2017)
- *Tax Treatment of Gambling Winnings and Losses, Taxation of Crowdfunding, and Cybersecurity for Tax Professionals*, Maryland Society of Accounting and Tax Professionals (June 2017)
- *The IRS is Coming: How to Prepare for the New IRS Partnership Audit Rules*, New Jersey Society of CPAs (June 2017)
- *Understanding the Forms and Processes for Disclosing Foreign Accounts*, Virginia Society of Enrolled Agents (June 2017)
- *Death and Taxes: Estate Planning Fundamentals*, National Society of Accountants (June 2017)
- *IRS Audit Representation and Tax Research and Authority*, Tennessee Society of Enrolled Agents (June 2017)
- *Representing Clients in Collections Matters*, Maryland/DC Society of Enrolled Agents (May 2017)
- *Game Change: The New Partnership Audit Regime*, American Bar Association (March 2017)
- *Partnerships and Passthroughs*, Federal Bar Association Tax Law Conference (March 2017)
- *Tax Penalties and How to Fight Them, Offers in Compromise, and Nuts and Bolts of an IRS Audit*, Georgia Association of Accounting and Tax Professionals (November 2016)
- *Worker Classification and the Tax Court*, ABA Section of Taxation Meeting (September 2016)
- *Understanding Stages and Strategies in a Criminal Tax Case*, Bloomberg BNA (July 2016)

Public Auction Sale

Notice of

Under the authority in Internal Revenue Code section 6331, the property described below has been seized for nonpayment of internal revenue taxes due from

New York and Greenwood Lake Railway Co

The property will be sold at public auction as provided by Internal Revenue Code section 6335 and related regulations.

Date of Sale: September 13, 2017

Time of Sale: 11:00AM

Place of Sale: 99-111 Passaic Street Passaic New Jersey 07055

Title Offered: Only the right, title, and interest of New York and Greenwood Lake Railway Co in and to the property will be offered for sale. If requested, the Internal Revenue Service will furnish information about possible encumbrances, which may be useful in determining the value of the interest being sold. (See "Nature of Title" for further details.)

Description of Property: **LAND WITH A FENCED IN LOT THAT HOUSES A METAL POLE BARN SHED AND ACTIVE RAILROAD TRACKS USED FOR SHIPPING**
PROPERTY IS LOCATED AT 99-111 PASSAIC ST, PASSAIC NJ 07055
PROPERTY IS APPROXIMATELY 2.01 ACRES AND IS CLASSIFIED AND RR CLASS 2
PARCEL NUMBER 07-06000-02-00001

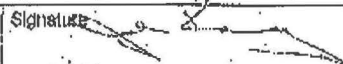
Complete legal description can be found in instrument book 1466 Page 211 recorded July 17, 2007 in Passaic County Clerk's

MINIMUM BID \$70,962.33

Property may be Inspected at: 99-111 Passaic Street Passaic New Jersey--DRIVE BY ONLY--NO TRESPASS

Payment Terms: ☐ Full payment required on acceptance of highest bid
☒ Deferred payment as follows: 20% of successful bid due upon acceptance of highest bid
and remaining balance paid in full no later than October 5, 2017

Form of Payment: All payments must be by cash, a certified, cashier's, or treasurer's check drawn on any bank or trust company incorporated under the laws of the United States or under the laws of any State, Territory, or possession of the United States, or by a United States postal, bank, or express money order. Make check or money order payable to the United States Treasury.

Name John M Kenney	Signature 	Date
Title PALS		<u>August 1, 2017</u>
Address for information about the sale 191 Main Street Poughkeepsie New York 12601 WWW.IRSSALES.GOV		Phone (845) 481-7119

Catalog Number 18480S

www.irs.gov
www.treasury.gov/auctions/irs

Form **2434** (Rev. 11-2015)



Notice of Seizure

Name and address of owner (real estate) or party in possession (personal property)

New York & Greenwood Lake Railway Co
99-111 Passaic St
Passaic, NJ 07055

Under the authority in section 6331 of the Internal Revenue Code, and by virtue of a levy from the Area Director of Internal Revenue of the area shown below, I have seized the property below for nonpayment of past due internal revenue taxes.

Due from	Name	NEW YORK & GREENWOOD LAKE RAILWAY	Amount Due from Form 668B	Internal Revenue Area and Territory
	Address	99-111 Passaic St. Passaic, NJ 07055	\$ 588,781.78	

Description of property

99-111 Passaic St Passaic, NJ 07055

Real property is a 2.007 acre fenced in lot that houses a metal pole barn/shed and active railroad tracks used for shipping.

Deed located at the Passaic County Courthouse Hall of Records located in Deed Book 1486, Page 211.

Was the taxpayer or representative present during the seizure of the property? ☐ Yes ☐ No

If no, the reason the taxpayer was not present:

☐ Unavailable ☐ Declined ☐ Other (explain)

Signature of Revenue Officer making seizure

Address 200 Federal Plaza

Date

Signature of accompanying employee

Address 200 Federal Plaza 3rd Floor

Date

Department of the Treasury
Internal Revenue Service
WILLIAM S MOORHEAD FEDERAL BUILDING
1000 LIBERTY AVENUE, ROOM 704
PITTSBURGH, PA 15222

Date:
November 7, 2017
Taxpayer Identification number:
23-3045096

New York & Greenwood Lake Railway Co.
99-111 Passaic Street
Passaic, NJ 07055

Mr. Wilson;

It was good to speak with you yesterday and to receive confirmation that you plan to redeem the property. I have spoken to the buyer and advised that you will be in contact with him. The purchaser of the property was Passaic Street Properties LLC, 694 Main Ave., Passaic, NJ 07055. The individual to contact is Fadi Samean @ 973-931-6733. I am unsure if Mr. Samean would prefer the check be made payable to him or the LLC. You will need to confirm with Mr. Samean his preference.

Just to reiterate, when you redeem the property the payment should be in the form of certified funds and must be in the hands of the buyer by the 11/15/2017 payoff date. Otherwise, the buyer will be entitled to additional interest. Please make a copy of the check and send it to my attention at the address above, or you can fax it to me at 888-792-5256.

Should you have any questions, I can be reached at my number below.

Telephone No.: 412-404-9712

Sincerely,

Cc: POA


W. Charlton
Advisor
03-49351

CERTIFICATE OF SERVICE

I, John D. Heffner, hereby certify that a copy of "Motion To Supplement and/Or Strike of New York & Greenwood Lake Railway Inc." dated June 19, 2018, was sent by electronic mail to all parties of record in this proceeding.

John K. Fiorilla, Esq.
Capehart Scatchard
8000 Midlantic Drive
Suite 300S
P.O. Box 5016
Mount Laurel, NJ 08054-5016



John D. Heffner

Dated: June 19, 2018