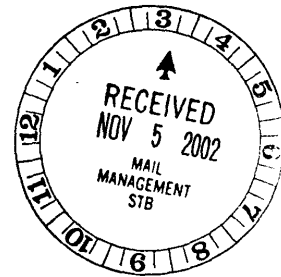


206566

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34276



MASSACHUSETTS PORT AUTHORITY
- ACQUISITION EXEMPTION -
CERTAIN ASSETS OF BOSTON AND MAINE CORPORATION

ENTERED
Office of Proceedings

MASSACHUSETTS PORT AUTHORITY MOTION
TO DISMISS NOTICE OF EXEMPTION

NOV 05 2002

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Part of
Public Record

Pursuant to a Purchase and Sale Agreement between the Massachusetts Port Authority ("Massport") and Boston and Maine Corporation ("B&M"), Massport will acquire B&M's current interest in certain parcels of railroad right-of-way known as the Mystic Wharf Branch in Charlestown, MA and related railroad tracks, fixtures, equipment together with easements, licenses and rights associated with the property. Specifically, Massport will acquire B&M's existing right-of-way extending from MP 0.0 to MP 1.45 in Charlestown, County of Suffolk, Commonwealth of Massachusetts. Massport does not intend to conduct railroad operations over the line nor does it intend to undertake primary or residual common carrier responsibility for service related to the line. Rather, B&M will retain an exclusive permanent easement for purposes of providing rail service on the subject line and B&M's affiliate Springfield Terminal Railway ("ST") will continue to be responsible to provide service over the line.

Massport has filed concurrently herewith a Verified Notice of Exemption ("Notice") pursuant to 49 C.F.R. 1150.31 et seq to acquire the subject line. Massport hereby moves the Board to dismiss that Notice. Massport submits that because of the

nature of the transaction as described in the Notice and as set forth in the proposed Deed and Easement and proposed Operating Agreement attached hereto, this transaction is not subject to STB jurisdiction and consummation of the transaction will not make Massport a rail carrier.

STATEMENT

Massport is a non-carrier body corporate and politic organized and existing pursuant to Chapter 465 of the Acts of 1956 of the Commonwealth of Massachusetts, as amended. Massport is a not-for-profit state authority created to own, operate and maintain Logan Airport, Hanscom Field, the Tobin Bridge and the Port of Boston. Massport owns several maritime industrial properties that abut the Mystic Wharf Branch including:

1. Moran Terminal - an approximately 60 acre former container terminal that is presently used by the Boston Autoport for automobile import and processing;
2. Mystic Pier 1 - a five acre site including a covered shed currently used by Boston Autoport;
3. Mystic Piers 48/49/50 - a 3 acre bulk cargo terminal used to import, store and distribute road salt; and
4. Medford Street Terminal - a 14 acre multi-use marine terminal used to import and stockpile construction materials as well as for an extension of the Boston Autoport.

While none of these tenants currently use rail service, availability of rail service could be of considerable importance to Boston Autoport in developing auto export business. More importantly, Massport believes that continued accessibility to rail service will greatly enhance maritime related redevelopment opportunities for the tenants and

will enable Massport to compete effectively with other east coast ports in attracting new business.

In order to retain access to rail service and to ensure that rail line serving the port will not be abandoned Massport has entered into a Purchase and Sale Agreement with B&M pursuant to which Massport will acquire B&M's current property interests in the Mystic Wharf Branch thereby enabling B&M to redeploy its assets from a line which otherwise would be abandoned because of light usage in current circumstances. At the same time B&M will retain an exclusive permanent rail service easement and its affiliate ST will continue to be responsible for providing service on the Mystic Wharf Branch. At some point Massport may want to develop a haul road on the same property to facilitate further development at the port. However, any such road will not interfere with safety or provision of rail service over the rail line. As previously noted, Massport will not conduct rail freight operations on the subject line, and it will not hold itself out as willing or able to do so.

Specifically, the proposed Deed and Easement provides that Grantor ("B&M") reserves for itself and its successors the exclusive right and obligation as a common carrier to operate, use, repair, replace, renew and maintain the Subject Rail Line and that B&M shall retain and have all rights and all obligations on the Easement Area as are imposed on rail corporations providing rail services as common carriers under applicable law and regulations. Further, B&M is to have the right to pass and repass over portions of the involved premises not included in the Easement Area for the purposes of accessing

the Easement Area and of exercising its rail service rights and obligations. See Deed and Easement, Paragraph 5.¹

Similarly, the proposed Operating Agreement acknowledges "that Massport will acquire the involved right-of-way and related rail assets to ensure the preservation of the railroad right-of-way but will not undertake active or residual common carrier service obligations and, (2) that B&M will retain a rail service easement and ST will continue to be responsible for providing freight rail service over the Mystic Wharf Branch and will continue to maintain the rail facilities located therein. See page 1 of Proposed Operating Agreement."²

The Proposed Operating Agreement provides that B&M/ST shall have exclusive management and control of the operations and maintenance of the Mystic Wharf Branch Rail Facilities to the extent required to conduct freight rail operations". See Section II B, page 3 of Proposed Operating Agreement. Further, Proposed Operating Agreement acknowledges that Massport will have the right to permit others to use portions of the involved properties for non railroad uses provided that any such uses shall not interfere with safe and efficient operation over the property by B&M/ST. See Section III, Paragraph 3 of Proposed Operating Agreement, page 8. Finally, B&M/ST will not be obligated to pay Massport any fees or rent (Section VII, Paragraph A Operating Agreement, page 10) and B&M/ST will be entitled to all freight and other revenues derived from rail freight operations (Section II, Paragraph B Operating Agreement, page 4).

¹ The Proposed Deed and Easement is attached hereto as Exhibit A.

² The Proposed Operating Agreement is attached hereto as Exhibit B.

Thus control and responsibility for rail operations over the Mystic Wharf Branch will continue to be vested entirely in B&M/ST and Massport will not have any part of that responsibility unless and until the Board acts on an appropriate future filing that would give rise to such responsibility and/or an underlying service obligation.

ARGUMENT

Massport is aware that when a non-carrier including a state or state agency acquires an active freight line it must seek STB approval under 49 U.S.C. §10901. However, when a carrier selling rail assets such as track, ties and underlying real estate retains the right to continue providing rail service, the Board has declined to exercise jurisdiction over the transaction³. Such determinations have typically occurred when the selling carrier retains a permanent easement which enables it to continue providing rail freight common carrier service.

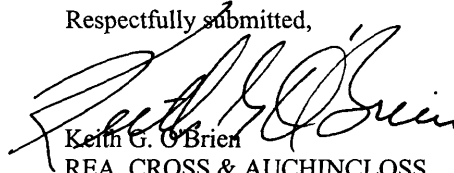
Here B&M/ST will retain a permanent easement for the purpose of providing rail service and they will have complete control over the line to the extent necessary to permit them to carry out the common carrier obligation. Massport is acquiring the assets primarily to foster preservation of the rail corridor and availability of service. Massport will not hold itself out to provide rail service or to undertake an underlying common carrier service obligation.

³ See State of Wisconsin Department of Transportation - Petition for Declaratory Order, STB Finance Docket No. 34181 (STB served August 1, 2002); Utah Transit Authority - Acquisition Exemption - Certain Assets of Union Pacific Railroad Company, STB Finance Docket No. 34170 (STB served May 17, 2002); New Jersey Transit Corporation - Acquisition Exemption - Certain Assets of Consolidated Rail Corporation, STB Finance Docket No. 33786 (STB served February 11, 2000); and Maine DOT - Acquisition Exemption, ME. Central R. Co., 8 I.C.C. 2d 835 (1991).

As a condition to Massport's acquisition of the properties B&M/ST have withdrawn their request to abandon and discontinue service over the Mystic Wharf Branch.⁴ In order to assure that mutual commitments and the respective objectives of the respective parties can be met it is essential that the transaction be consummated no later than November 13, 2002. Therefore the parties have undertaken to ensure that B&M/ST will continue to have full common carrier responsibility even in the eventuality that the Board should conclude that the transaction is subject to its jurisdiction. See Section 1, Part B page 3 of the Operating Agreement.

In an abundance of caution, Massport has filed a Notice of Exemption to acquire the involved property. However, for the reasons set forth above, Massport respectfully submits that the STB does not have jurisdiction over this acquisition of rail assets and urges the Board to grant this motion to dismiss its Notice of Exemption.

Respectfully submitted,



Keith G. O'Brien
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1707 L Street, NW
Suite 570
Washington, DC 20036
(202) 785-3700

Counsel for:
Massachusetts Port Authority

Dated: November 5, 2002

⁴ Copy of Motion to Withdraw Abandonment Application is attached as Exhibit C. See also page 1 of the Proposed Operating Agreement.

EXHIBIT

Deed and Easement

The **BOSTON AND MAINE CORPORATION**, a corporation duly organized and existing under the laws of the State of Delaware, and **SPRINGFIELD TERMINAL RAILWAY COMPANY**, a corporation duly organized and existing under the laws of the State of Vermont, both with offices at Iron Horse Park, North Billerica, Middlesex County, Massachusetts (the "Grantor") in consideration of Four Million Two Hundred Thousand Dollars (\$4,200,000) paid to it in two installments by the **MASSACHUSETTS PORT AUTHORITY**, a body corporate and politic organized and existing pursuant to Chapter 465 of the Acts of 1956 of the Commonwealth of Massachusetts, as amended (the "Grantee"), and other good and valuable consideration, hereby **GRANTS** to the Grantee all of Grantor's right, title and interest, without any warranties or covenants of title except as set forth below, in and to those certain parcels of land containing 221,496 square feet of land, located in the City of Boston and/or Charlestown, County of Suffolk, Commonwealth of Massachusetts as shown on a plan of land entitled "ALTA / ASCM Land Title Survey in Boston, MA (Charlestown), Suffolk County", dated May 12, 2002, and prepared by Bryant Associates, Inc., a copy of which is attached hereto as Exhibit A, together with any right, title and interest Grantor may have in any land underlying the Rail Facilities as hereinafter defined, comprising the Mystic Wharf Branch (the "Premises") with all railroad tracks, rails, ties, connections, switches, ballast or related equipment, above-ground and underground structures, including but not limited to bridges, crossings, culverts, drainage facilities, fences, poles, and all fixtures, personal property and improvements thereon and as are associated with and are a part of the Mystic Wharf Branch Line and all of Grantor's right, title and interest in and to sewer pipes, electrical and telephone poles and/or wires, fibers and fiber optic cables, located in on or under the Mystic Wharf Branch Line as more fully described on Exhibit B attached hereto (the "Rail Facilities") and all of Grantor's right, title and interest in all intangible assets of any nature relating to the land, including, without limitation, all licenses, approvals and permits.

The Grantor retains no rights in and to any portion of the Premises, except the following reservations, conditions, covenants and agreements:

1. This conveyance is made without granting any right of way, either by necessity or otherwise, over any other land or location of the Grantor.
2. Whenever used in this deed, the term "Grantor" shall not only refer to the **BOSTON AND MAINE CORPORATION** and **SPRINGFIELD TERMINAL RAILWAY COMPANY** but also its successors, assigns and affiliates, and the term "Grantee" shall not only refer to the above-named Grantee, but also the Grantee's successors, assigns and grantees, as the case maybe.
3. Grantor hereby represents and warrants that the rail line located on the Premises has not been "abandoned" as that term is defined in applicable federal and state law and regulations.

4. The several exceptions, reservations, conditions, covenants and agreements contained in this deed shall be deemed to run with the land and be binding upon the Grantee forever. In addition to the acceptance and recording of this Deed, the Grantee hereby signifies assent to the said several exceptions, reservations, conditions, covenants and agreements, by joining in its execution.
5. Grantor reserves unto itself and its successors the exclusive right and obligation as a common carrier to operate, use, repair, replace, renew and maintain the Rail Facilities under applicable federal and state law and regulation (the "Allowed Uses") over the Rail Facilities and that portion of the land under the Rail Facilities as are occupied by the Rail Facilities (the "Easement Area"). Grantor shall retain and have all rights and all obligations on the Easement Area as are imposed on rail corporations providing rail services as "common carriers" under applicable state and federal law and regulation. Grantor shall have the right to pass and repass over the portions of the Premises not included in the Easement Area for the purposes of accessing the Easement Area and of exercising its rights and obligations on the Easement Area (the "Common Carrier Easement").

Grantor shall be solely responsible for performing at its sole cost and expense any and all obligations imposed on Grantor hereunder and imposed on common carriers under applicable state and federal law and regulation, including but not limited to the provisions of rail service and the maintenance of the ROW and the Rail Facilities, for a period not to exceed the longer of (i) the period from the date hereof until such time as rail service on the Easement Area is discontinued, or (ii) one (1) year from and after the date hereof. Thereafter, Grantor shall be solely responsible for performing and providing all service and maintenance of the ROW and the Rail Facilities as required by applicable law, and shall receive reimbursement therefor from Grantee in an amount equal to Grantor's actual, documented out-of-pocket expenses, incurred in performing said maintenance in an amount not to exceed Twenty-Five Thousand Dollars (\$25,000) per year. In the event that a third party requests authority to construct, maintain and/or upgrade a public at grade crossing to be located at a previously public or private ways from any public agency of competent jurisdiction and federal, state and/or municipal funding adequate to fund such construction, maintenance and/or upgrade is not available, Grantor and Grantee shall together oppose any such request, including the filing of any appeals. If Grantor and Grantee are unsuccessful in their opposition to such a request, Grantor shall be solely responsible for any and all costs apportioned to Grantor or Grantee for the construction, maintenance and/or upgrade of such at grade crossing. For all other capital work associated with the Rail Facilities, Grantor and Grantee shall negotiate in good faith regarding apportionment for the cost of such work. This section shall not impose any obligations upon Grantor with regard to the cost of construction and/or maintenance of a Haul Road/Rail Corridor and/or non-rail uses of the Properties and/or Rail Facilities.

Grantee shall have the right to use the Easement Area for any other purpose, including but not limited to the construction of a road for freight handling

purposes and/or the installation use and/or maintenance of utility lines, wires, pipes and conduits and to receive income from such purposes, provided such purposes do not prevent or interfere with provision of rail services by Grantor hereunder.

Grantor shall indemnify and hold Grantee harmless from and against any and all losses, claims, damages, actions, suits, liabilities and expenses (including, without limitation, costs of investigation, disbursements and attorneys' fees) that may arise out of or in connection with Grantor's willful or negligent acts or omissions in connection with the Allowed Uses and/or Grantor's passing and repassing over the Premises to access the Easement Area.

This Easement shall not be assignable by Grantor without Grantee's prior written approval.

IN WITNESS WHEREOF, the said **BOSTON AND MAINE CORPORATION** and **SPRINGFIELD TERMINAL RAILWAY COMPANY** have caused this Deed and Easement to be executed under seal in its name and its corporate seal to be hereto affixed by David A. Fink, its Chief Executive Officer, and _____ thereunto duly authorized this ____ day of _____, 2002.

GRANTOR:
BOSTON AND MAINE CORPORATION

Witness

By: _____
David A. Fink, Chief Executive Officer

GRANTOR:
**SPRINGFIELD TERMINAL RAILWAY
COMPANY**

Witness

By: _____
its

GRANTEE:
MASSACHUSETTS PORT AUTHORITY

Witness

By: _____

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

_____, 2002

Then personally appeared the above-named David A. Fink, the Chief Executive Officer of the **BOSTON AND MAINE CORPORATION** and the **SPRINGFIELD RAILWAY TERMINAL COMPANY** and acknowledged the foregoing release deed to be his free act and deed and the free act and deed of said **BOSTON AND MAINE CORPORATION**, before me.

Notary Public

My Commission Expires:

COMMONWEALTH OF MASSACHUSETTS

, ss.

_____, 2002

Then personally appeared the above [NAME], the [TITLE] of the **MASSACHUSETTS PORT AUTHORITY** and acknowledged the foregoing release deed to be his/her free act and deed and the free act and deed of said **MASSACHUSETTS PORT AUTHORITY**, before me.

Notary Public

My Commission Expires:



OPERATING AGREEMENT

This OPERATING AGREEMENT is entered into this ____ day of ____, by and between the **Massachusetts Port Authority**, a body corporate and politic organized and existing pursuant to Chapter 465 of the Acts of 1956 of the Commonwealth of Massachusetts, (hereinafter referred to as "**Massport**" or the "**Authority**") with offices at One Harborside Drive, Suite 200S, Logan Office Center, East Boston, Massachusetts, 02128, and the **Boston & Maine Corporation**, a Delaware corporation, and the **Springfield Terminal Railway Company**, a Vermont corporation, both with a principal place of business at Iron Horse Park, North Billerica, Massachusetts 01862 (collectively, the "**Railroad**").

WHEREAS, on even date herewith, Massport acquired from the Railroad the Properties and the Rail Facilities, as hereinafter defined;

WHEREAS, the parties acknowledge that, prior to acquisition of the Properties by Massport and execution of this Agreement, Railroad submitted an application to abandon the Properties, which application was conditionally approved as set forth in a certain decision by the Surface Transportation Board of the United States Department of Transportation (the "STB"), dated December 18, 2001 (STB Docket No. AB-32 (Sub-No. 92) (the "Decision"), and a related Notice, dated September 18, 2002, received by the STB on October 21, 2002 (the "Notice");

WHEREAS, as a condition of Massport's acquisition, the Railroad has or will withdraw and revoke the Decision, the Notice and/or any other filing evidencing an intent to abandon and will take such other action if necessary to inform the STB that it does not intend to abandon the Properties and the freight rail service thereon;

WHEREAS, as a condition to said acquisition, Railroad has retained an easement to provide freight rail common carrier service and to operate, use, repair, replace, renew and maintain the Properties and the Rail Facilities located therein and thereon (as more fully described in Exhibit C hereto) (the "Easement");

WHEREAS, Massport acquired the Properties to ensure the preservation of the rail right-of-way and the continued availability of rail service to the Port but does not intend to undertake active or residual common carrier service obligations over the Properties and instead intends to have Railroad retain such obligations under the Easement;

WHEREAS, the Parties acknowledge their joint intent to collectively preserve the Properties for the provision of freight rail service to and from the Port of Boston and the Charlestown portion of the Mystic River Designated Port Area;

WHEREAS, Railroad agrees it will continue to provide freight rail service on Mystic Wharf Branch and to operate, use, repair and maintain the Rail Facilities and that portion of the Properties and land occupied by the Rail Facilities, all in accordance with the requirements of this Agreement and applicable federal, state and local statutes and regulations; and

WHEREAS, in order to provide for continued operation of freight rail service by Railroad on the Mystic Wharf Branch and as a material inducement to Massport to acquire the Properties, the parties desire to enter into this Agreement with each other setting forth terms and conditions for the use, management, operation, maintenance and improvement of the Properties and Rail Facilities by Railroad and Massport;

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by both Parties intending to be legally bound, the parties hereby agree as follows:

Section I: General Conditions

A. Definitions

The following terms shall have the meanings indicated when used herein:

"Agreement" shall mean this Operating Agreement.

"CFR" shall mean Code of Federal Regulations.

"Commencement Date" shall mean the date of acquisition of the Properties by Massport.

"Commonwealth" shall mean the Commonwealth of Massachusetts.

"Easement" shall mean the easement retained by Railroad pursuant to a certain Deed and Easement recorded upon acquisition of the Properties by Massport, dated _____, and recorded at the County Registry of Deeds at Book _____ and Page _____, attached hereto as Exhibit C.

"EOTC" shall mean Executive Office of Transportation and Construction.

"FRA" shall mean the Federal Railroad Administration of the United States Department of Transportation.

"Mystic Wharf Branch" shall mean the right-of-way, track and related rail assets located in Charlestown and Somerville and designated USRA Line Code _____, and including the Properties and the Rail Facilities.

"Operator" shall mean the Railroad, as hereinafter defined, when it is providing service and maintenance solely pursuant to this Agreement.

"Properties" shall mean those certain parcels of railroad right-of-way containing approximately 221,496 square feet of land located in the City of Boston and/or Charlestown, County of Suffolk, Commonwealth of Massachusetts, as shown on a plan of land entitled "ALTA / ASCM Land Title Survey in Boston, MA (Charlestown), Suffolk County", dated May 12, 2002, and prepared by Bryant Associates, Inc., a copy of which is attached hereto as Exhibit A, together with all easements, rights of way, sewer rights, waters rights and any other rights appurtenant thereto, and all of Grantor's Right, title and interest in and to all intangible assets of any nature relating to the land, including, without limitation, all licenses, approvals and permits as the same may from time to time be expanded, reduced, altered or relocated as provided for herein.

"Rail Facilities" shall mean all railroad tracks, rails, ties, connections, switches, ballast or related equipment, above-ground and underground structures, including but not limited to bridges, crossings, culverts, drainage facilities, fences, poles, and all fixtures, personal property and improvements thereon and as are associated with and are a part of the Mystic Wharf Branch Line and all of Grantor's right, title and interest in and to sewer pipes, electrical and telephone poles and/or wires, fibers and fiber optic cables, located in on or under the Mystic Wharf Branch Line

as more fully described on Exhibit B attached hereto.

"Railroad" shall mean the Boston & Maine Corporation and/or Springfield Terminal Railway Company.

"Railroad Uses" shall have the meaning set forth at Section III of this Agreement.

"STB" shall mean the Surface Transportation Board of the U.S. Department of Transportation.

"Term" shall mean the term set forth in Section VI(A) of this Agreement, unless the Agreement is sooner terminated or extended as provided for herein.

B. Common Carrier Easement and Obligations

Railroad shall continue to operate and maintain the Properties and the Rail Facilities, in accordance with the terms of the Easement and this Agreement. To the extent there is a conflict between the terms of the Easement and the terms of this Agreement, the terms of the Easement shall govern for so long as such Easement is in effect. In the event the STB rules that acquisition of the Properties and the Rail Facilities by Massport is subject to its jurisdiction, Massport and Railroad mutually agree and intend that Railroad shall continue to be the responsible provider of common carrier service and maintenance in accordance with this Agreement.

C. Authority to Operate

Railroad shall undertake all activities and make all required filings and reports to the STB and/or other applicable governmental authorities to maintain common carrier status in full accordance with this Agreement and applicable federal and state laws and regulations.

Section II. Properties

A. Properties

The land and personalty subject to this Agreement are the Properties and the Rail Facilities, as defined in Section I(A) hereof.

The rights to the Properties granted herein are and shall remain throughout the Term subject to any and all existing licenses, leases, easements and other encumbrances and/or matters of record as of the date hereof, as well as to the terms and conditions of this Agreement.

B. Control of Properties

Railroad shall retain and have exclusive management and control of the operation and maintenance of the Rail Facilities and the Properties to the extent required to operate, use, repair and maintain the Rail Facilities and the Properties for freight rail operations in accordance with this Agreement and applicable federal and state law and regulations, subject to Section III (B) below. Massport shall otherwise have exclusive management and control of the Properties and the Rail Facilities provided that Massport does not prevent Railroad from complying with the obligations set forth in applicable federal and state law and regulation and the obligations set forth in this Agreement. The parties specifically acknowledge that Massport shall have the right to enter upon the Properties as it deems necessary and appropriate in its sole discretion, subject to

reasonable safety rules and practices of Railroad. Massport may enter upon the Properties or authorize its agents to enter upon the Properties in response to any public safety emergency situation, to take corrective action or to remove a threat to public safety in accordance with applicable laws.

All freight and other revenues derived from railroad freight operations and all operating expenses shall accrue to Railroad.

All locomotives, trains, cars and other equipment, and all persons entering upon the Properties, shall be subject to the reasonable rules, timetables, regulations and orders of Railroad in effect from time to time.

Section III: Use and Enjoyment of Properties

A. Railroad Uses

Railroad shall have the right to pass and repass over the Properties and the Rail Facilities for the purposes of operating rail freight services thereon and maintaining the Rail Facilities, and of exercising all of its rights and obligations with respect to the Properties and the Rail Facilities, as set forth herein and under applicable federal and state law and regulation.

Railroad shall notify Massport no less than thirty (30) days prior to submittal of any filings with the STB relating to the operation and maintenance of the Properties and the Rail Facilities.

B. Non-Railroad Uses and Activities

1. Assignment of Non-Railroad Agreements to Massport

Railroad has assigned any and all agreements for non-railroad uses in, on, over and under the Properties to Massport upon conveyance of the Properties. Railroad acknowledges that any existing use of the Properties as of the time of the conveyance has not and does not interfere with the safe and efficient operation of the Properties for freight rail services and does not prevent Railroad from complying with its obligations to provide freight rail services and to maintain the Rail Facilities and/or Properties hereunder, nor do such uses impact the safety and viability of freight rail service on the Properties.

2. Proceeds to Accrue to Massport

Massport shall have the right to any and all proceeds from all non-railroad uses of the Properties existing on the date of this Agreement and after such date, and shall have the right to convert any existing temporary use of the Properties to a permanent use. All income derived from such non-railroad uses of the Properties shall accrue to Massport.

3. Notification to Railroad

Massport retains the right, upon notification to Railroad, to permit others to use portions of the Properties for temporary or permanent non-railroad purposes, provided non-railroad uses shall not interfere with safe and efficient railroad operations.

4. Railroad Review and Comment

Massport agrees to notify Railroad no less than thirty (30) days prior to the execution of any agreement, lease, license or encumbrance for non-railroad uses, and agrees to consider in good faith Railroad's comments regarding the impact of such agreement, lease, license or encumbrance on the safety and/or viability of the existing or future freight rail service on the Properties and/or the Rail Facilities.

Railroad shall review proposed uses and activities to determine whether the use or activity is consistent with the efficient and safe operation of the Properties for freight rail purposes, and shall promptly notify Massport of any use or condition that would preclude Railroad from meeting its obligations to provide freight rail service and/or maintain the Rail Facilities or Properties hereunder. Railroad shall deliver any comments regarding the impact of the proposed non-railroad use or activity to Massport within thirty (30) days of notification, and shall include in such transmittal a description of any charges, fees and/or special costs requiring reimbursement to Railroad on account of such use.

Massport shall consider in good faith any comments received from Railroad regarding any impact the proposed agreement, use or activity may have on the safety and viability of existing and future freight rail service on the Properties. If it is determined that proposed non-rail use of the Properties will adversely affect rail operations or safety, the proposed non-railroad use will be modified or discontinued, if necessary, so as not to interfere with Railroad's common carrier obligations. Failure of Railroad to provide comments within the 30-day period shall constitute Railroad's assent to the proposed use or activity without conditions and without requirement for reimbursement of Railroad's costs.

5. Reimbursement of Railroad Costs

Railroad shall be reimbursed for reasonable and necessary administrative and other maintenance costs incurred by Railroad arising from all non-railroad uses and activities permitted by Massport. Railroad's costs shall be consistent with those customary in the railroad industry with respect to similar activities and uses.

Railroad shall specify in detail the reasonable and necessary administrative and other costs that apply to the proposed non-railroad use or activity in its response to the notification described above. Should Railroad take the position that the proposed use or activity justifies reimbursement of costs, Railroad shall also identify, justify and provide a breakdown of such costs in its response to Massport's notification. Failure of Railroad to provide comments and specify applicable costs within the 30-day period shall constitute Railroad's assent to the use or activity without the requirement for reimbursement of costs to Railroad. In the event Railroad provides such detailed information regarding actual costs Railroad will incur as a result of such non-railroad use and Massport agrees that such costs will reasonably result from such non-railroad use, Massport shall require the third party performing such non-railroad use to enter into a standard form Railroad Service Agreement with Railroad to permit Railroad to collect such costs from said third party.

The reimbursement of costs provided for in this Section II(B)(5) shall not be part of the compensation for maintenance provided for in Section V(B) below.

6. Payment of Reimbursement Costs and Other Fees Due Railroad

Collection of payment for Railroad charges and fees due Railroad from parties other than Massport in connection with administration of requests to use the Properties for non-railroad uses or activities, and for any installation, maintenance, flagging or other costs associated with such a use, shall be the sole responsibility of Railroad. Provided, however, that Railroad shall notify Massport within thirty (30) days of any failure by a third party licensed or otherwise authorized by Massport to pay such fees in accordance with a license or other written authorization executed by Massport.

7. Indemnification of Railroad

When Massport permits other persons or parties to engage in non-railroad uses or to conduct non-railroad activities upon portions of the Properties for any purpose other than purposes related to inspections, surveys and audits conducted on behalf of Massport or the Commonwealth, Massport shall require such other persons or parties to comply with Railroad's safety requirements and to indemnify and hold harmless Railroad from and against all liability from any loss arising from injury (including death) to persons or damage to property, including the Properties, which shall arise out of or in any way be connected with such use of the Properties irrespective of causes other than negligence or willful misconduct of Railroad. Massport shall also require that any other persons using or conducting such activities acquire General Liability and Railroad Protective Insurance coverage upon terms and with limits reasonably acceptable to Railroad prior to initiating any work on the Properties, if reasonable and appropriate.

C. Encroachments

Massport and Railroad agree to work cooperatively to identify any unlicensed or unauthorized uses and activities existing on the Properties as of the date of Massport's acquisition of the Properties, and to encourage the parties responsible for such use or activity to enter into an agreement with Massport governing such use, and/or take other appropriate action regarding such use (including removal of use, activity, structure or other encroachment).

D. Passenger Service

The parties acknowledge and agree that no rail passenger service over the Properties and/or the Rail Facilities will be initiated during the term of this Agreement without the prior written agreement by the parties.

E. Railroad's Covenants

Railroad covenants and agrees that it shall use the Properties solely for the Railroad Uses described above, and for no other uses, and that Railroad shall, from time to time, procure all licenses, permits and approvals necessary therefor at Railroad's sole cost and expense. Failure of Railroad to comply with this section following thirty (30) days notice by Massport of violation of same, shall constitute an event of default under this Agreement.

Section IV: Railroad Services/Operations

A. Administration & Management

1. General

In accordance with applicable federal and state law and regulation, Railroad shall be solely responsible for the management, administration, oversight and costs associated with any and all railroad operations on the Properties. Railroad shall develop timetables, updated track charts, and operating, maintenance and other plans in compliance with applicable federal, state and local laws and regulations

Railroad shall, as of the Commencement Date of this Agreement, and from time to time thereafter, identify a representative to serve as Massport's primary contact with respect to administration, coordination and compliance with this Agreement. This representative shall be a person in senior management position with decision-making authority.

Railroad shall provide all personnel and any equipment required to furnish freight railroad service under this Agreement.

2. Required Approvals

As required in Section I(C) above, and in accordance with applicable federal, state and local law and regulation, Railroad shall obtain and maintain in force any and all applicable federal, state, and/or local permits, licenses, designations and/or approvals necessary to carry out the rail operations and other activities permitted hereunder. Copies of such permits, licenses, designations and/or approvals shall be forwarded to Massport within 30 days of a written request for same by Massport.

3. Marketing

Railroad agrees to cooperate with Massport in marketing the Mystic Wharf Branch to prospective freight rail customers during the term of this Agreement.

4. Community Relations

The track and right-of-way of the Mystic Wharf Branch run through both commercial and residential areas in the Charlestown area of the City of Boston. Railroad agrees to take such actions as are reasonably necessary or desirable to minimize impacts to these communities, provided that such actions do not interfere with Railroad's obligations under this Agreement.

B. Operating and Safety Rules

Railroad shall provide Massport with a copy of the operating and safety rules under which Railroad operates within thirty (30) days of a written request for same by Massport.

C. Code of Conduct

Neither Railroad nor any of its contractors, sub-contractors, licensees or the like shall enter into any contract, sub-contract, or arrangement in connection with this Agreement in which any member, officer or employee of Massport or the Commonwealth during his or her tenure or for one year thereafter has any direct or indirect interest.

Railroad shall not contract with or have any financial dealings with any person, natural or legal, affiliated with, controlled by, or under common ownership with the any employee of Massport or the Commonwealth.

In the performance of this Agreement, Railroad is and shall remain in all respects an independent contractor, and neither is nor may act as an agent or an employee of Massport. Neither Railroad nor any of its officers, employees or members is entitled to any of the benefits, worker's compensation or emoluments provided by Massport to its employees. Railroad shall not be authorized to bind Massport in any contractual matter or obligate Massport in any manner whatsoever to any third party.

It shall be an event of default hereunder if any of Railroad's owners, members or officers be indicted for, convicted of, or pleads guilty to a crime involving any of Railroad's operations hereunder and/or the Properties.

Failure of Railroad to provide such railroad services and maintenance under this Section IV shall constitute an event of default under this Agreement.

Section V: Maintenance Requirements

A. General

Railroad shall be solely responsible for all routine maintenance on the Properties and Rail Facilities during the term of this Agreement. Routine maintenance shall include those activities required to compensate for wear and tear on the Properties and Rail Facilities (including without limitation the track, right-of-way, structures thereon and appurtenances thereto) and to ensure the safe and efficient operation of the Properties as contemplated herein, specifically including, without limitation, all FRA and STB regulations. At a minimum, such maintenance shall include actions required to ensure the safety and security of the right-of-way and Rail Facilities.

Such maintenance work shall also include, but not be limited to: (1) removal of all wrecks and derailments within a reasonable time following their occurrence, and the immediate telephonic notification to Massport of such derailment and response actions being taken by Railroad; and (2) removal of all hazardous materials from the Properties promptly upon their discovery, response to any environmental incident as soon as possible, and notification to Massport of both the environmental incident and response actions being taken by Railroad within 24 hours of the incident's occurrence.

In the event that a third party requests authority to construct, maintain and/or upgrade a public at grade crossing to be located at a previously private or public ways from any public agency of competent jurisdiction and federal, state and/or municipal funding adequate to fund such construction, maintenance and/or upgrade is not available, Railroad and Massport shall together oppose any such request, including the filing of any appeals. If Railroad and Massport are unsuccessful in their opposition to such a request, Railroad shall be solely responsible for any and all costs apportioned to Railroad or Massport for the construction and maintenance of such at grade crossing, not subject to any reimbursement by Massport. For all other capital work associated with the Rail Facilities, Railroad and Massport shall negotiate in good faith regarding apportionment for the cost of such work. This section shall not impose obligations on Railroad with regard to the cost of construction and/or maintenance of a Haul Road/Rail Corridor and/or non-rail uses of the Properties and/or Rail Facilities.

Massport and its authorized representatives may enter the Properties for the purpose of inspecting the Properties to ensure Railroad has complied with the requirements of this Section and other terms and conditions of this Agreement.

B. Compensation For Maintenance

Railroad shall perform and provide all maintenance of the Properties and Rail Facilities at its sole cost and expense for a period of one (1) year from the Commencement Date hereof, or until the STB authorizes discontinuance of freight rail service on the Properties, whichever period is longer. The parties acknowledge that the purchase price paid by Massport to acquire the Properties and Rail Facilities is full and sufficient consideration for performance by Railroad of its maintenance obligations as set forth in this paragraph. At the end of such period, Railroad shall continue to perform maintenance of the Properties and Rail Facilities as required herein during the term hereof, and Massport shall reimburse Railroad for its actual, documented expenses incurred in performing such maintenance, up to a not-to exceed amount of \$25,000 per year. Any and all costs of at grade crossing construction, maintenance and/or upgrades as set forth in Section V(A), above shall be borne solely by Railroad without any reimbursement therefor by Massport. In the event Railroad elects to reinstate active freight rail service upon and over the Properties and Rail Facilities after service has been discontinued pursuant to any and all necessary authorizations by and from the STB, Railroad shall be solely responsible for the costs of all maintenance and improvements of the Properties and Rail Facilities. In the event Massport requests that Railroad reinstate or Massport reinstates active freight rail service after service has been discontinued pursuant to any and all necessary authorizations by and from the STB, Railroad shall continue to perform all maintenance required by applicable law and regulation and by this Agreement and Massport shall be responsible for the reasonable costs of such maintenance.

Any agreement by the parties as to such reactivation of service, and any amendment to either the operating and/or maintenance obligations herein or compensation by one party to the other hereunder, shall be in the form of a written amendment to this Agreement.

C. Liens for Maintenance Work

Railroad shall at all times keep the Properties free of liens for labor and materials. Railroad shall employ for such work only qualified employees or contractors, and shall ensure that all contractors carry all insurance required by Section III and Section V of this Agreement.

Failure to perform all maintenance pursuant to this Section V(A) shall be an event of default under this Agreement.

Section VI: Agreement Term

A. The Term

The Term of this Agreement shall be for a period of twenty (20) years, commencing as of 12:01 a.m. on the Commencement Date set forth herein, and expiring at midnight on _____, 2022, unless sooner extended or terminated in accordance with this Agreement.

B. Extension Term

The Term of this Agreement may only be extended by written agreement of the parties.

Section VII: Payments

A. General

The parties acknowledge that the purchase price paid by Massport for the Properties and Rail Facilities is full and sufficient consideration for performance by Railroad of its obligations hereunder. Except as otherwise stated herein, Massport shall not be obligated to pay Railroad any fees, subsidies or other payments whatsoever during the term of the Agreement.

Railroad shall not be obligated to pay Massport any fees or rent whatsoever during the term of the Agreement, except that Railroad shall be obligated to pay all taxes, utility charges, and other payments due third parties arising directly from Railroad's use of the Properties and Rail Facilities.

B. Utility and Use Charges

Railroad shall pay to Massport or to the appropriate utility company, taxing authority or other third party, if billed directly to Railroad, all of Railroad's utility charges, excise or personal property taxes, usage fees or other charges relating to the Properties, Rail Facilities or Railroad's activities under this Agreement, and all other charges and amounts payable by or due from Railroad under this Agreement specially assessed against Massport as a result of Railroad's use of the Properties or Rail Facilities, whether payable initially to Massport or to a third party (collectively the "Utility and Use Charges").

Railroad shall be responsible for paying all costs arising out of the installation, use and/or maintenance of utilities, including but not limited to electricity installed, used or maintained by or on behalf of Railroad. If necessary, an electric meter or meters shall be installed at Railroad's expense. Upon Massport's request, Railroad shall promptly deliver to Massport receipts or other evidence reasonably satisfactory to Massport evidencing payment of any Utility and Use Charges payable directly to third parties. All Utility and Use Charges are due and payable within thirty (30) days of the date of any invoice therefor.

C. Taxes

Railroad shall be solely responsible for the payment of any taxes, levies, betterments or assessments, fees or charges, whether in existence on the date hereof or becoming applicable during the Term, which may be assessed against Railroad or Massport in relation to Railroad's use or operation of the Properties, any revenue derived therefrom by Railroad, or any equipment or personal property of Railroad located thereon (collectively referred to as "Taxes"). Railroad shall pay all Taxes directly to the taxing authority before delinquency and before any fine, interest or penalty shall become due or be imposed by operation of law for their nonpayment.

Following payment to the taxing authority, Railroad may contest, in good faith for its own account and at its own expense, the validity or amount of any of the Taxes, provided Railroad shall (i) notify Massport prior to such contest, (ii) indemnify Massport against any resulting loss, cost and expense which may result from such contest, and (iii) at the option of Massport, provide

security satisfactory to Massport with respect to its performance of such indemnification. Railroad shall not permit a lien or encumbrance on the Properties by reason of failure to pay any of the Taxes.

Railroad's failure to make payments as required by this Section VII shall constitute an event of default under this Agreement.

Section VIII: Accounting and Reporting

A. General

Railroad shall maintain fair and accurate accounts of the revenues derived and expenses incurred from operating freight services on the Properties and/or providing maintenance of the Properties and the Rail Facilities in accordance with the Agreement.

B. Invoices

Railroad shall invoice Massport for all actually incurred direct costs incurred in maintaining the Properties and Rail Facilities pursuant to Section V(B) above, and shall submit such invoices at least annually. Massport agrees to pay such invoices within sixty (60) days of receipt of same, provided, however, that payment by Massport of such invoices shall be contingent upon documentation by Railroad of the actual costs incurred by the submittal of invoices to Massport, which invoices shall include a true and accurate accounting of hours and hourly wages of persons performing work upon the Premises, as well as copies of receipts for materials utilized in such work, and documentation of any other costs incurred, and, provided further, that the annual subsidy for such actual costs shall not exceed \$25,000, and shall become due and owing only after the longer of (i) the elapse of one year from the Commencement Date or (ii) the issuance by the STB of a discontinuance of rail services on the Properties.

C. Reports

Railroad shall provide Massport with copies of the following reports and documents within thirty (30) days of request by Massport:

- Form R-3's
- Quarterly Reports of Traffic Volumes and Revenues
- Copies of Accident Reports to the FRA
- Reports of Property Removed and Salvaged
- Notice of New Sidetrack Agreements with Customers
- Copies of Agreements with Companies Affiliated with Railroad
- Statements or Records Related to the Railroad's Operations as Massport deems necessary

D. Inspection

Railroad shall make available for inspection by Massport such reports of Railroad's operations and traffic volumes as are prepared by Railroad in the regular course of business.

E. Books, Taxes, Etc.

Railroad shall pay and discharge all obligations and liabilities (including taxes), as appropriate. Railroad shall keep proper books of record, and accounts, including traffic and revenue records.

Railroad shall permit, to the extent it may lawfully do so, any authorized representative of Massport to visit and inspect the Properties and the Rail Facilities, examine all Railroad's books of account, records, reports, contracts and other papers related to the Properties and/or the Rail Facilities, and make copies and extracts therefrom at such reasonable times and as often as may be reasonably requested.

Railroad shall maintain all environmental records as required by law, including but not limited to hazardous waste manifests. Railroad shall make these records available to Massport and/or its authorized representatives upon request. These records must be maintained for the length of the Agreement, and for any period of time required in applicable federal, state or local law and/or regulation following the expiration or termination of the Agreement, or as required by applicable law or regulation, if such law or regulation requires that the records be retained for a longer period.

Section IX: Representations & Warranties

Railroad represents and warrants that the following are true at and as of the Commencement Date.

- A. Railroad is a corporation duly organized, validly existing, in good standing and qualified to do business under the laws of the Commonwealth of Massachusetts.
- B. Railroad has the full power and authority to enter into this Agreement and to carry out its obligations hereunder.
- C. To the best of Railroad's information and belief based on Railroad's experience as a common carrier on the Properties and other rail lines throughout New England, no maintenance costs in excess of \$25,000 shall be required annually on the Properties and/or Rail Facilities.
- D. To the best of Railroad's information and belief based on Railroad's experience as a common carrier on the Properties and other rail lines throughout New England, no capital expenditures in excess of \$10,000 shall be required in the next five years on the railroad bridge crossing Rutherford Avenue and State Route 99 and said railroad bridge is structurally sound.

Section X: Compliance with Laws

Railroad shall be responsible for providing freight rail service, maintaining the Properties and Rail Facilities and performing any improvements thereto and performing all other operation of the Rail Facilities and the Properties in compliance with, and shall cause all work performed by its agents or employees to comply with, all applicable federal, state, county, municipal and other governmental statutes, laws, rules, orders, regulations and ordinances, including all environmental statutes, laws, rules

orders, regulations and ordinances. Railroad shall indemnify and hold harmless Massport against all fines, damages, costs, expenses (including, without limitation, attorney's fees) and other penalties for violations of said statutes, laws, rules, orders, regulations and ordinances.

Section XI: Environmental Compliance

A. General

Massport and Railroad shall comply with, and shall cause all work performed by their respective agents or employees to comply with all applicable federal, state, county, municipal and other governmental statutes, laws, rules, orders, regulations and ordinances, including all applicable environmental statutes, laws, rules orders, regulations and ordinances. Railroad shall indemnify and hold harmless Massport against all fines, damages, costs, expenses and other penalties for its violations thereof. Massport shall indemnify and hold harmless Railroad against all fines, damages, costs, expenses and other penalties for its violations thereof.

Neither Massport nor Railroad shall dump, flush or in any way introduce any hazardous substances or any other toxic substances into or onto the ground, into any septic, sewage or other waste disposal system serving the Properties, or generate, store or dispose of any hazardous substances in or on the Properties or dispose of hazardous substances from the Properties to any other location without the prior written consent of the other party hereto, and then only in compliance with the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. §6901 et seq., the Massachusetts Hazardous Waste Management Act, M.G.L. c. 21C, as amended, the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, M.G.L. c. 21 E, as amended, and all other applicable codes, regulations, ordinances and laws.

Railroad shall notify Massport of any incident which would require the filing of a notice under Chapter 232 of the Acts of 1982 and shall comply with the orders and regulations of all governmental authorities with respect to zoning, building, fire, health and other codes, regulations, ordinances or laws applicable to the Properties. "Hazardous Substances" as used in this Section shall mean "hazardous substances" as defined in the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended, 42 U.S.C. §9601, and regulations adopted pursuant to said Act, and, as used herein, shall also refer to petroleum products, including waste oils. Massport agrees to provide notification to Railroad and to comply with the provisions of this paragraph, as applicable.

B. Environmental Cooperation; Remediation

If, as a result of either party's activities hereunder, Hazardous Materials are discovered on or at the Properties, the parties agree to cooperate with each other in the determination of the party liable for the remediation of the Properties under applicable federal and/or state law. Such cooperation may include the temporary adjustment or termination of the rights granted hereunder, to the extent consistent with federal law. Neither Massport nor Railroad shall be liable to the other for any damages incurred by either party as a result of such temporary adjustment or permanent termination.

Notwithstanding and in addition to the obligation of Railroad stated above and the obligation to indemnify Massport as stated herein, Railroad, upon written demand of Massport, shall conduct, at Railroad's sole cost and expense (or, at Massport's election, reimburse Massport for the cost and expense incurred by Massport in connection with Massport's conduct of), all response actions required by Chapter 21 E and the MCP with respect to the Hazardous Materials (including the

hiring of a licensed site professional) (1) that were placed on or accidentally released on or at the Properties by Railroad its employees, agents or consultants or by the employees, agents, contractors or consultants of Railroad's contractors or subcontractors or (2) that are present on Properties as a result of the migration of such Hazardous Materials from land now or previously owned, leased, occupied or operated by Railroad or for which Railroad is a potentially responsible party under Chapter 21 E.

Massport agrees, upon written demand of Railroad, to conduct, at Massport's sole cost and expense (or, at Railroad's election, reimburse Railroad for the cost and expense incurred by Railroad in connection with Railroad's conduct of), all response actions required by Chapter 21 E and the MCP with respect to the Hazardous Materials (including the hiring of a licensed site professional) (1) that were placed on or accidentally released on or at the Properties by Massport, its employees, agents or consultants or by the employees, agents, contractors or consultants of Massport's contractors or subcontractors or (2) that are present on Properties as a result of the migration of such Hazardous Materials from land now or previously owned, leased, occupied or operated by Massport or for which Massport is a potentially responsible party under Chapter 21 E.

Any such response action, shall be performed in accordance with Chapter 21 E, the MCP, any other applicable statutes and regulations, and in accordance with plans and specifications approved by Massport, shall be completed in a timely manner to the reasonable satisfaction of each party, and shall allow each party, as well as Massport's licensees, lessees and other grantees to use the Properties for the use specified in any written agreement. The responsible party shall also be responsible for the reasonable costs incurred by the other in hiring consultants to review, supervise and inspect any plans, specifications, proposed method of work, installation, operation and results.

C. Other

Massport shall have the right to make such inspections as Massport shall reasonably elect from time to time to determine whether Railroad is in compliance with this Section XII. Railroad shall respond promptly to any reports and/or recommendations resulting from such inspections (no later than sixty (60) days from receipt), and shall promptly undertake appropriate measures to correct any deficiencies identified therein.

Railroad shall comply promptly with the recommendations of Massport (including its consultants) or any insurer, foreseen or unforeseen, ordinary as well as extraordinary, which may be applicable to the Properties, by reason of Railroad's use thereof. In no event shall any activity be conducted by Railroad on the Properties which may give rise to any cancellation of any insurance policy or make any insurance unobtainable.

In the event Railroad fails to comply with the requirements of this Section XI in a timely fashion, Massport may, but shall not be obligated to, undertake or engage others to undertake any response action or remediation activity which, in the reasonable opinion of Massport, is required to correct a condition on or at the Properties in order to comply with any applicable environmental statutes, laws, rules orders, regulations and ordinances. Railroad shall reimburse Massport for the cost thereof, including administrative expenses and charges, on demand.

Notwithstanding the foregoing, failure to comply with this Section shall constitute an event of default under this Agreement.

The terms and provisions of this Section shall survive the expiration or termination of this

Agreement.

Section XII: Insurance and Indemnification

A. Insurance Coverage

Railroad shall provide and maintain in effect at all times throughout the Term of this Agreement Railroad Liability Insurance (including coverage against bodily injury and third party property damage) which shall be in limits of not less than Twenty-Five Million Dollars (\$25,000,000), subject to a deductible or self-insured retention that does not exceed \$250,000 per occurrence. Railroad must also obtain coverage for an extended reporting period for a minimum of one year after the termination of the policy. This coverage shall be maintained during such period as rail service on the Properties is "active", as defined in STB rules and regulations, and has not been discontinued. In the event Railroad has not complied with this provision by the Commencement Date, Railroad shall provide this coverage on the earliest to occur of (i) fourteen (14) days after the Commencement Date or (ii) prior to the operation of any train service on the Properties. During such period as rail service on the Properties has been discontinued as approved by the STB, Railroad may carry a deductible or self-insured retention in a greater amount as carried on Railroad's other operations but not greater than \$3,000,000 per occurrence. Railroad is subject to the Federal Employers Liability Act and shall comply therewith to protect and insure its employees. Railroad shall also provide and maintain such other insurance policies as may reasonably be required by Massport from time to time based on the use and operation of the Properties by Railroad and as are customary in the railroad industry for similar operations. Such insurance shall be in a form acceptable to Massport.

B. Requirements Applicable to Insurance Policies

All insurance policies required under this Section XII shall be obtained from responsible companies qualified to do business in the Commonwealth of Massachusetts and in good standing therein, which companies and the amount of insurance allocated thereto shall be subject to Massport's reasonable approval. All policies of insurance shall name Massport as an additional insured.

Railroad agrees to furnish Massport with insurance certificates of all such insurance prior to the Commencement Date hereof, and of each renewal policy at least ten (10) days prior to the expiration of the policy it renews. Failure to provide said proof within the time specified shall constitute a material breach of and an event of default under this Agreement. Each such policy shall provide that it shall not be terminated, cancelled or materially modified without at least ten (10) days prior written notice to Massport. Copies of all insurance policies shall be provided to the Massport upon request.

C. Third Party Insurance Requirements

Massport and Railroad may require all persons entering upon or permitting work to be performed on the Properties under any agreement or license, including all persons undertaking any construction program, installation or repair under existing or new agreements and all persons using portions of the Properties as authorized pursuant to Section III hereof to agree to indemnify and hold harmless Massport and Railroad, their officers, agents, servants and employees from and against any liability, loss, claims or expenses for death or injury (including Federal Employers

Liability Act Statutes) to any person or damage to any property (including property of or under the control of Massport or Railroad) arising out of any act or omission of said contractor, licensee or other person on account of or in connection with the Properties.

Massport or Railroad shall also require any such person to secure and maintain in effect at all times while on the Properties, Comprehensive General Liability Insurance and (if applicable) Railroad Protective Liability Insurance with such coverage as may be required for occupancy or use of the Properties, taking into account the operations and use of the Properties by Railroad. Such insurance shall be with limits appropriate to the use or occupancy. Massport and Railroad shall be Named as an additional Insured on all such insurance policies of the Properties. In the case of a railroad passenger service operator, there shall be a contractual liability insurance insuring such operator against liability under this Section, unless such operator has otherwise satisfied Massport and Railroad or such arrangements are subject to an order of the STB.

D. Indemnification

Railroad shall indemnify and hold harmless Massport from and against any liability for any losses not fully insured against, arising from injury (including death) to persons or damage to property, including the Properties and Rail Facilities, which shall arise out of or be in any way connected with the Properties and/or Rail Facilities and which shall be caused by any willful or negligent act or omission of Railroad or its contractors and/or subcontractors under this Agreement.

Railroad shall indemnify and hold Massport harmless from and against any and all losses, claims, damages, actions, suits, liabilities and expenses (including without limitation, costs of investigation, disbursements and attorney's fees) that may arise out of or in connection with Railroad's operation and maintenance of the Rail Facilities, Railroad's use, operation and maintenance of the Properties, and/or with the provision of freight rail service or the use, operation, replacement, renewal, maintenance and repair of the Rail Facilities on the Properties and/or Railroad's passing and repassing over the Properties to access the Rail Facilities.

In the event of loss or damage to the Properties or Rail Facilities which shall be caused by any act or omission of a third person, all third party insurance payments shall be made to Massport. Massport shall reimburse Railroad from the proceeds thereof, for all costs incurred by Railroad in repairing such damage upon receipt of all documents substantiating such costs.

Section XIII: Assignability

A. Assignment by Massport

Massport expressly reserves the right to assign its rights under this Agreement at any time to any responsible person, government, or transportation authority by giving notice to Railroad at least ninety (90) days prior to such assignment. Such assignment shall be binding on Railroad or its successors.

B. Assignment by Railroad

Railroad shall not assign, transfer, mortgage or pledge its rights under this Agreement, or grant a security interest in Railroad's rights hereunder or suffer or permit this Agreement or any rights hereby created or any other rights arising under this Agreement to be assigned, transferred or encumbered, in whole or in part, whether voluntarily, involuntarily or by operation of law, or

permit the occupancy of the Properties by anyone other than Railroad, except to Railroad's affiliated entities, including only Portland Terminal Company and Maine Central Railroad Company. Any attempted assignment, transfer, mortgage, pledge, grant of security interest or other encumbrance, except with prior written approval thereof from Massport, shall be void.

No assignment, transfer, mortgage, grant of security interest or other encumbrance, whether or not approved, and no indulgence granted by Massport to any assignee shall in any way impair the continuing primary liability (which after an assignment shall be joint and several with the assignee) of Railroad hereunder, and no approval in a particular instance shall be deemed to be a waiver of the obligation to obtain Massport's approval in any other case.

Section XIV: Prohibited Interests

A. Compliance with State Ethics Law

The parties shall comply with the provisions of the State Ethics Law, M.G.L. c. 278A and with Section VI.E, *Code of Conduct*.

- B. Railroad shall not enter into any contractual agreement with Railroad's directors, stockholders, or officers for the furnishing of goods, services or equipment to be used in the operation of rail freight service or other activities permitted hereunder without the prior written consent of Massport, which may be provided or withheld in Massport's sole discretion.

Section XV: No Third Party Benefit

This Agreement shall not be construed to create any beneficial rights in favor of any third party or any right or privilege for the benefit of the general public.

Section XVI: Events of Default

A. The following shall be Events of Default:

1. Failure of Railroad to operate and/or maintain the Properties and Rail Facilities as required by applicable federal or state law or regulation or by this Agreement.
2. Failure of Railroad to obtain written consent of Massport as required by any Section of this Agreement.
3. Breach by Railroad of any provision of this Agreement and failure to cure such default within thirty (30) days after written notice of such breach by Massport.
4. Filing by Railroad of petition for bankruptcy, reorganization or arrangement of Railroad pursuant to the Bankruptcy Reform Act or any similar proceeding, and such petition is not dismissed within ten (10) days.
5. Violation of any environmental statute, regulation or ordinance, and failure to remedy such violation in accordance with the time frames required by such statute, regulation or ordinance.

6. Indictment for, conviction of, or guilty plea by any owner, member or officer of Railroad for a crime involving any of the Railroad's operations and/or the Properties and/or the Rail Facilities.

B. Specific Performance

If Railroad breaches its duty to serve as a common carrier on the Properties, to operate rail freight service and/or perform maintenance pursuant to this Agreement, the parties agree that damages may not provide an adequate remedy, and Massport may seek specific performance of such obligations in a court of competent jurisdiction.

C. Remedies

In the event that Railroad defaults under this Agreement, Railroad shall pay forthwith to Massport, as compensation, any and all amounts due under this Agreement, plus the value of other consideration to be paid or activities to be performed by Railroad during the remainder of the Term, plus Massport's costs in selecting and commencing operations with another operator, plus Massport's costs in terminating Agreement, and other consideration to be paid and / or activities to be performed by a new operator for the remainder of the Term. Railroad shall specifically be responsible for all costs and damages associated with such default, and all costs incurred in connection with the negotiation of an operating agreement with a third party and/or the assumption of Railroad's obligations hereunder by Massport and/or a third party. Such costs shall include, but not be limited to, attorneys fees, administrative costs, required filing fees, and any costs incurred by Massport (including operating subsidies and the like) required to induce a third party to assume Railroad's obligations hereunder.

D. Remedies Cumulative

Except as otherwise expressly provided herein, any and all rights and remedies which Massport may have under this Agreement and at law and equity shall be cumulative and shall not be deemed inconsistent with each other, and any two or more of all such rights and remedies may be exercised at the same time to the greatest extent permitted by law. Each and every remedy provided to Massport in this Agreement shall be in addition to every other right or remedy now or hereafter existing at law or in equity or otherwise.

E. Massport Right to Cure Defaults

Unless stated otherwise herein, at any time following ten (10) days prior notice to Railroad (except in the case of emergency when no notice shall be required), Massport may (but shall not be obligated to) cure any default of Railroad under this Agreement, and whenever Massport so elects, all costs and expenses incurred by Massport, including reasonable attorney's fees, in curing a default, shall be paid by Railroad to Massport on demand, together with interest thereon from the date of payment by Massport to the date of payment by Railroad.

Railroad shall pay, on demand, Massport's expenses, including reasonable attorney's fees, incurred in enforcing any obligation of Railroad under this Agreement, or curing any default by Railroad under this Agreement.

F. Effect of Waivers of Default

Any consent or permission by Massport to any act or omission which otherwise would be a breach of any covenant or condition herein, or any waiver by Massport of the breach of any covenant or condition herein, shall not in any way be held or construed (unless expressly so declared) to operate so as to impair the continuing obligation of any covenant or condition herein, or otherwise operate to permit the same or similar acts or omissions except as to the specific instance, or to prevent Massport from collecting any sums due and owing pursuant to this Section XVI. The failure of Massport to seek redress for violation of, or to insist upon the strict performance of, any covenant or condition of this Agreement shall not be deemed a waiver of such violation nor prevent a subsequent act, which would have originally constituted a violation, from having all the force and effect of an original violation. The receipt and acceptance by Massport of any payment with knowledge of the breach of any covenant of this Agreement shall not be deemed to have been a waiver of such breach by Massport or of any of Massport's remedies on account thereof, including its right of termination for such default.

G. No Accord and Satisfaction

No acceptance by Massport of a lesser sum than any amount then due shall be deemed to be other than on account of the earliest installment of such fee or charge due, unless Massport elects by written notice to Railroad to credit such sum against the most recent installment due. Any endorsement or statement on any check or any letter accompanying any check or payment as fees or other charge shall not be deemed an accord and satisfaction, and Massport may accept such check or payment without prejudice to Massport's right to recover the balance of such installment or pursue any other remedy under this Agreement or otherwise.

Section XVII: Termination

A. This Operating Agreement shall terminate upon the occurrence of any of the following events:

1. The expiration of the term of this Agreement without prior extension thereof as provided for herein.
2. Provided necessary STB approval has been obtained, upon sixty (60) days written notice to Railroad of Massport's intent to terminate the Agreement.
3. The prevention of either party from honoring its respective commitments under this Agreement as a result of legislative, judicial or other governmental action, and provision by such party of ninety (90) days notice of such event to the other party.
4. The acquisition by Massport of the Common Carrier Easement, discontinuance of service by Railroad, and entry by Massport into an operating agreement with another rail carrier, and assumption by such carrier of the common carrier obligations pursuant to then-current STB regulations and procedures.
5. As otherwise provided in this Agreement.

B. Upon expiration or sooner termination of the Agreement, Railroad shall provide any and all engineering inspections, reports, designs, ratings, repair plans, etc., relative to bridges, grade

crossings, drainage, and capital improvements that transfer to Massport upon exercise of its option to acquire the Common Carrier Easement.

- C. Railroad agrees to cooperate to the fullest extent possible during any transition period from Railroad to a new railroad operator. This requirement shall include but not be limited to attending meetings with representatives of Massport, responding to reasonable inquiries by Massport and its representatives, and accommodating site inspections by Massport and prospective railroad operators, all at no cost to Massport or any other third party.

Section XVIII: Force Majeure

Each party shall be excused from performance of any of its obligations under this Agreement, where such non-performance is occasioned by any event beyond the non-performing party's control, which shall include, without limitation, any order by any federal, state or local governmental body, agency or instrumentality (other than orders relating to correction by Railroad of its non-compliance with applicable laws and regulations applicable to Railroad's performance hereunder); natural disaster; act(s) of war; civil disorder; provided, however that the party excused hereunder shall use all reasonable efforts to minimize its non-performance and to overcome, remedy, or remove such event in the shortest practical time. Massport reserves the right to assume control of the Properties and/or direct Railroad operations during war time.

A strike, work stoppage, or other labor dispute shall not constitute an event beyond Railroad's control, if Railroad fails as soon as reasonably possible to proceed to obtain an order of a court or administrative agency of competent jurisdiction to prevent the continuation of same. Railroad shall use all reasonable efforts to undertake and complete the repair, restoration or replacement of any property which is necessary for the provision of maintenance, service and activities in accordance with this Agreement and with established train schedules, and shall resume normal railroad services and performance of its other obligations hereunder as soon as reasonably possible. In the event either party fails or refuses to use all reasonable efforts as aforesaid, the continuation of an event beyond the control of such party shall not be deemed an excuse for performance hereunder.

Section XIX: Informal Dispute Resolution

A. General

The parties intend to attempt to resolve all issues, claims and disputes relating to or arising under this Agreement in an informal manner. Every effort will be made to develop a business resolution to such issues, claims or disputes.

B. Informal Dispute Resolution Process

The parties shall attempt to resolve any issue, claim or dispute relating to or arising under this Agreement through informal communications between their representatives and/or authorized staff prior to proceeding with formal dispute resolution procedures. The informal dispute resolution procedure shall occur as promptly as practicable under the circumstances, but shall not continue for more than thirty (30) days from the time any issue, claim or dispute is first raised by a representative or authorized staff member of either, unless the parties agree in writing to extend such time in the event progress has been made.

Section XX: Non-Discrimination and Affirmative Action

A. Non-Discrimination Policy

Railroad agrees to comply with all applicable Federal and State statutes, rules and regulations prohibiting discrimination, including: Title VI of the Civil Rights Act of 1964; Title VII of the Civil Rights Act of 1964; the Age Discrimination in Employment Act of 1967; Section 504 of the Rehabilitation Act of 1973; the Americans with Disabilities Act of 1990; Massachusetts General Laws, Chapter 151B; and all applicable Administrative Orders and Executive Orders.

In connection with carrying out the operations and activities under this Agreement, Railroad shall obligate any sub-contractors to comply with all applicable Federal and State statutes, rules and regulations prohibiting discrimination, including: Title VI of the Civil Rights Act of 1964; Title VII of the Civil Rights Act of 1964; the Age Discrimination in Employment Act of 1967; Section 504 of the Rehabilitation Act of 1973; the Americans with Disabilities Act of 1990; Massachusetts General Laws, Chapter 151B; and all applicable Administrative Orders and Executive Orders.

B. Non-Discrimination in Employment and Affirmative Action

Railroad shall not discriminate against any qualified employee or applicant for employment because of race, color, national origin, ancestry, age, sex, sexual orientation, religion, status as a Vietnam Era Veteran, or mental handicap. Railroad shall obligate its subcontractors to comply with all applicable Federal and State statutes, rules and regulations prohibiting discrimination in employment, including: Title VII of the Civil Rights Act of 1964; the Age Discrimination in Employment Act of 1967; Section 504 of the Rehabilitation Act of 1973; the Americans with Disabilities Act of 1990; Massachusetts General Laws, Chapter 151 B; and all relevant Administrative Orders and Executive Orders.

Section XXI: Miscellaneous

A. Entire Agreement

This Agreement expresses the entire agreement between the parties and supersedes all prior or written agreements, commitments, or understandings with respect to the matters provided for herein, and no modification of this Agreement shall be binding upon the party affected unless set forth in writing and duly executed by the parties hereto, except for that certain Purchase and Sale Agreement of even date herewith and the Common Carrier Easement.

B. Notices

All notices, demands, requests or other communications which may be or are required to be given, served or sent by either party to the other pursuant to this Agreement shall be in writing and shall be deemed to have been properly given or sent:

If intended for Massport

By mailing by registered or certified mail, return receipt requested, with postage prepaid, addressed to Massport at:

Massachusetts Port Authority
One Harborside Drive, Suite 200S
East Boston, Massachusetts 02128-2909
Attn: Michael A. Leone, Port Director

with a copy to:

Massachusetts Port Authority
One Harborside Drive, Suite 200S
East Boston, Massachusetts 02128-2909
Attn: Chief Legal Counsel

If intended for Railroad

By mailing by registered or certified mail, return receipt requested, with postage prepaid, addressed to Railroad at:

Boston & Maine Corporation
Iron Horse Park
North Billerica, Massachusetts 01862
Attn: Roland L. Theriault, Vice President – Real Estate

Springfield Terminal Railway Corporation
c/o Boston and Maine Corporation
Iron Horse Park
North Billerica, Massachusetts 01862
Attn: Roland L. Theriault, Vice President – Real Estate
Robert B. Culliford, Esq. – Corporate Counsel

Each party may designate by notice in writing a new address to which any notice, demand, request or communication may thereafter be so given, served or sent. Each notice, demand, request or communication which shall be mailed by registered or certified mail (unless otherwise agreed) to either party in the manner aforesaid shall be deemed sufficiently given, served or sent for all purposes at the time such notice, demand, request or communication shall be either received by the addressee or refused by the addressee upon presentation.

C. Binding Agreement

This Agreement shall be binding upon and inure to the benefit of Massport and Railroad, and their respective successors and assigns.

D. Severability

If fulfillment of any provision hereof or any transaction related hereto shall involve transcending the limit of validity prescribed by law, then the obligation to be fulfilled shall be reduced to the limits of such validity; and if any clause or provision herein contained operates or would prospectively operate to invalidate this Agreement in whole or in part, then such clause or provision only shall be held ineffective, as though not herein contained, and the remainder of this Agreement shall remain operative and in full force and effect.

E. Headings

Section headings used in this Agreement are inserted for convenience of reference only, and shall not be deemed to be a part of this Agreement for any purpose.

F. Amendment

This Agreement shall be amended only by written agreement signed by both parties.

G. Obligations Upon Termination

The termination of this Agreement shall not extinguish the rights of either party to recover sums due under the terms of this Agreement, nor shall it extinguish any action for breach or damages to which the either party may otherwise be entitled.

Upon the expiration or sooner termination of this Agreement by Massport, Railroad shall cooperate with Massport in the submission of any filings necessary to effectuate Massport's rights to transfer common carrier rights and obligations to a third party operator chose by Massport.

H. Governing Law

This Agreement shall be governed and construed in accordance with the laws of the Commonwealth of Massachusetts. Railroad's operations and common carrier obligations under this Agreement shall also comply with the applicable provisions of Federal law and applicable rules, regulations and policies of any agency thereof.

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

MASSACHUSETTS PORT AUTHORITY

By: _____
its
Hereunto duly authorized

By: _____
its
Hereunto duly authorized

**SPRINGFIELD TERMINAL RAILWAY
COMPANY**

By: _____
its
Hereunto duly authorized

BOSTON AND MAINE CORPORATION

By: _____
its
Hereunto duly authorized



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**FINANCE DOCKET NO.
AB-32 (Sub No. 92)**

**BOSTON AND MAINE CORPORATION
ABANDONMENT AND DISCONTINUANCE OF SERVICE
SUFFOLK COUNTY, MASSACHUSETTS**

MOTION TO WITHDRAW ABANDONMENT APPLICATION

Dated: November 5, 2002

**Robert B. Culliford
Iron Horse Park
North Billerica, MA 01862
(978) 663-1029**

Counsel for:
*The Boston and Maine Corporation
The Springfield Terminal Railway
Company*

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

**FINANCE DOCKET NO.
AB-32 (Sub No. 92)**

**BOSTON AND MAINE CORPORATION
ABANDONMENT AND DISCONTINUANCE OF SERVICE
SUFFOLK COUNTY, MASSACHUSETTS**

MOTION TO WITHDRAW ABANDONMENT APPLICATION

The Boston and Maine Corporation ("B&M") hereby moves to withdraw without prejudice its application to abandon and discontinue service over the so-called Mystic Wharf Branch (the "Line"), originally approved on December 21, 2001 in the above-referenced Finance Docket Number. In support of this Motion, the B&M states that it has not yet consummated its abandonment and discontinuance authority, and has been negotiating with the Massachusetts Port Authority ("Massport") for the conveyance of the underlying real estate and trackage constituting the Line.¹ This conveyance will be conducted pursuant to the Board's class exemption procedures for the acquisition and operation of rail lines contained at 49 C.F.R. Part 1150 and is scheduled to be completed on November 13, 2002. In further support of its motion to withdraw its application, the B&M states that it will retain an easement to perform all common carrier freight rail service and maintenance operations over the Line as part of the conveyance, and that Massport and the B&M have negotiated an agreement that will provide for such rail service and maintenance operations. To achieve the objective of the parties, Massport

¹ Massport was originally granted a public use condition in the December 21, 2001 decision authorizing abandonment and discontinuance. While the parties were unable to conclude negotiations during the initial 180 period imposed by this condition, negotiations have continued in good faith and the B&M and Massport are confident that the conveyance will be complete on or before November 13th.

will also be filing a Motion to Dismiss simultaneously with the Notice of Exemption referenced above.

In addition, on or about September 18, 2002, the Springfield Terminal Railway Company ("ST"), an affiliate of the B&M providing rail service over the Line pursuant to an operating lease, served a Notice of Intent to Abandon and Discontinue Service upon all interested parties pursuant to 49 C.F.R. Section 1152.20(a). This Notice of Intent was initially filed to ensure that the Line was completely removed from the Board's jurisdiction in the event that the conveyance to Massport was not successful. However, in light of the progress made in negotiations since the filing of the Notice of Intent, ST did not file a Petition for Exemption within the time period required by 49 C.F.R. Section 1152.20(b)(1). Moreover, ST will also be conveying its interest in the Line to Massport under the same terms and conditions as the B&M, and does not intend to re-serve its Notice of Intent in reliance upon the closing of that transaction.

WHEREFORE, the Boston and Maine Corporation respectfully requests that its Motion to Withdraw its abandonment application be allowed without prejudice to future filings regarding service over the Line.

Dated: November 5, 2002

Respectfully submitted,



Robert B. Culliford
Iron Horse Park
North Billerica, MA 01862
(978) 663-1029

Counsel for:

*The Boston and Maine Corporation
The Springfield Terminal Railway Company*