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July 25 2007

The Honorable Vernon A Williams
Secretary, Surface Transportation Board
395 E St SW
Washington, DC 20423

219846

Att Ms Ann Newman

Re FD 35057, RESPONSE OF NEW YORK & ATLANTIC RAILWAY CO AND COASTAL DISTRIBUTION, LLC
To the
PETITION OF THE TOWN OF BABYLON AND PINELAWN CEMETERY FOR A DECLARATORY ORDER

Honorable Sir

Following please find the original the corrected response of the New York & Atlantic Railway Co and Coastal Distribution LLC to the petition of the Town of Babylon and Pinelawn Cemetery for a Declaratory Order The original and ten copies of respondent's exhibits A B and C and a disk containing same in PDF format were dispatched to you by Federal Express on July 24, 2007

Thank you for your attention to this matter

Very truly yours,

John F McHugh

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35057

PETITION OF THE TOWN OF BABYLON AND PINELAWN CEMETERY FOR DECLARATORY ORDER

RESPONSE OF NEW YORK & ATLANTIC RAILWAY CO. AND COASTAL DISTRIBUTION, LLC.

New York and Atlantic Railway Company ("NY&A") and Coastal Distribution, LLC ("Coastal") (collectively, "Respondents") join the petitioners in requesting that the Board open a proceeding in this matter In *Coastal Distribution, LLC and New York and Atlantic Railway Company v Town of Babylon, et al*, Second Circuit No 06-0981, 216 Fed Appx 97 (Feb 6, 2007), the Second Circuit Court of Appeals upheld a preliminary injunction against the Petitioners entered by the United States District Court for the Eastern District of New York, Seybert, J In affirming, the court summarized,

> The district court did not abuse its discretion by granting the preliminary injunction, but it is necessary to modify the injunction to clarify that the parties are permitted to immediately seek review before the STB, which is the tribunal best equipped to decide the issues of federal transportation policy implicated here

Slip op , p 4 That decision was issued on February 6, 2007 This petition was filed on July 5, 2007, and only after Respondents had commenced summary judgment proceedings in the district court by filing a Statement of Uncontested Facts, as required under local rules

Pinelawn and its collaborator, the Town of Babylon, have already caused the railroad and its operator to incur substantial legal costs, and have succeeded in delaying the full development of this rail facility Accordingly, Respondents welcome the involvement of the Board in the hope of bringing some finality to this legal odyssey

REQUEST FOR RELIEF

NY&A and Coastal request that this Board determine and declare that the Town of Babylon's attempt to apply its zoning laws to terminate the operation of NY&A's decades old transload operation in that town is preempted by the Interstate Commerce Commission Termination Act of 1995 This Board should open the requested proceeding and issue a declaratory order that the facility, regardless of the fee ownership beneath the yard, is part of the national rail system and within the exclusive jurisdiction of the Board

Respondents are constrained to emphasize from the outset that this case involves zoning issues only Petitioners' rhetoric related to health and safety is misleading and absolutely false Despite two years of continuous litigation, there has never been any claim that the transload facility in issue is violating any environmental, sanitation, building or public nuisance law or regulation promulgated by any State or Local authority To the contrary, it is undisputed that there have been no complaints from anyone concerning the operation at Farmingdale A-361 Indeed the New York State Department of Environmental Conservation has noted that it has jurisdiction to enforce its regulations, A-1070-71, and the Respondents have never claimed otherwise Despite the Petition's innuendo, there is no claim that the structure enclosing the operation or the operation is unsafe or is creating a public nuisance This matter arises from a decision of the Babylon Zoning Board of Appeals and nothing more

The Federal Court Record

The material facts are simple and undisputed They were adduced during two days of hearings before Magistrate Judge Thomas J Boyle in the Eastern District of New York (Central Islip) in February, 2005 Filed herewith and referred to herein is a copy of the Statement of Uncontested Facts submitted by NY&A and Coastal in the Eastern District of New York on June 1, 2007 (hereinafter "Facts") That statement cites to the evidence admitted by the District Court and contained in the 1250-page Appendix filed by Pinelawn and Babylon in the Second Circuit (citations "A-__" are to the Appendix) which is Exhibit B hereto Also filed herewith as Exhibit C is the Petitioners' response to Exhibit A Exhibit C identifies absolutely no factual disputes, it contains nothing but legal arguments Accordingly, there is no dispute about the few facts that are necessary to decide the rights of the parties in this matter The decisions of the Second Circuit, of District Judge Seybert, and of Magistrate Judge Boyle are exhibits to the Petition

FACTS[1]

The Railroad

The State of New York in the mid 1990s undertook the privatization of the Long Island Railroad's freight operations in an effort to shift freight traffic off the highways New York & Atlantic Railway acquired the freight operations of the Long Island Railroad in a transaction approved by this Board on January 10, 1997, *New York & Atlantic Railway Company--Operation Exemption--The Long Island Rail Road Company* FD 33300-0 The Board adopted a report by the Section for Environmental Analysis

[1] The following in a summary of the most important facts All are set forth in more detail and replete with references to the Appendix in Exhibit A, Respondents' Statement of Uncontested Facts to the district court

reviewing complaints from municipal officials on Long Island, including those from Queens County, that waste products may travel through their various jurisdictions on the Long Island Railroad under NY&A control The SEA determined that due to factors relating to waste traffic in general, i e . the increasing shortage of local disposal capacity on Long Island, such traffic will increase without regard to the identity of the operator of the railroad or indeed the mode of transport Therefore, the transaction was deemed to have no potential material negative environmental effect

NY&A's Marketing Plan

NY&A took over the freight operations of the Long Island Railroad after forty years of State control, during which the railroad's primary mission was moving commuters NY&A received a freight franchise with few remaining siding-served customers and few remaining siding-served properties on which it could provide service to off-line customers, See A- 213 line 2 to A-214 line 3 Like many or most short line carriers, NY&A had limited financial resources A key to NY&A's marketing strategy was to maximize the use of the few transload facilities, both railroad controlled and shipper controlled, to serve the railroad's potential new customers A- 213-14, A-69

NY&A was also confronted by a peculiar transportation market dominated by the inbound shipment of high valued consumer goods in a region with virtually no mining, agriculture, manufacturing or warehousing activity, See A-204 line 1-18 The railroad, had to look to those commodities used or generated by the Long Island market, which are compatible with carload handling, further limited by LIRR's weight and clearance restrictions, in order to fulfill its contractual obligation to the State to increase rail freight volume on Long Island

NY&A has succeeded Freight traffic on the line has more than doubled Transloading makes up 95% of the additional business the NY&A has generated on Long Island outside the City of New York, A-205 line 5 to A-206 line 3 Transloading is clearly integral to rail service on Long Island

Farmingdale Yard

Of all the freight facilities acquired by NY&A, only one is large enough for transloading bulk materials, and historically, LIRR had used the Farmingdale Yard for a small volume of those commodities Facts, ¶ 9 NY&A attempted to attract additional business to the Farmingdale facility from 1997 to 2000 without success In 2000, hoping to capitalize on CSXT's size and market strength, A-219-24, 497-507, NY&A "leased" the Farmingdale facility to an affiliate of CSXT for $1 per year, on condition that it generate 400 carloads of traffic per year A-498, §3 2 CSXT was a logical candidate for this function because, a substantial portion of the NY&A's traffic is handled by NY&A as agent for CSXT, with CSXT as the line haul carrier and NY&A being paid on a per car basis from freight revenue collected from the shipper by CSXT In two years of this "lease" arrangement, only a handful of bulk material loads were handled at Farmingdale, and NY&A cancelled the lease

Coastal Distribution

Coastal was created as a railroad marketing firm, to assist the Canadian Pacific Railroad's (CPR) marketing efforts on Long Island CPR had gained access to the LIRR in the Conrail merger case, *CSX Corporation and CSX Transportation Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company – Control And Operating Leases/Agreements--Conrail Inc and Consolidated Rail Corporation*, F D 33388 No 89

page 83, (July 20, 1998) However, upon obtaining those rights CPR had no traffic base It approached one of Coastal's current members who had developed a large truck to rail waste transloading facility in the Bronx, seeking assistance in breaking into the regional market, A-315 line 15 to A-317 line 19 Coastal was successful in finding traffic

Coastal's reputation was known to NY&A, A-254 line 3-A-255 line 3 As a result, when Coastal approached NY&A to put a terminal for CPR stone at Farmingdale, NY&A was receptive

The Coastal Arrangement

Contrary to the thrust of the petitioner's statements here, the relationship between Coastal and NY&A was never that of a railroad and a shipper In 2002, NY&A entered into a "lease" comparable to the one it previously had with CSX, except that the minimum throughput to maintain the arrangement was initially tripled to 1,200 cars per year, and growing to 3,200 carloads within three years, A-520 §C 3[2] Thus, the goal of the agreement was clearly to generate substantial additional bulk transload traffic for the railroad and to allow the railroad to terminate the contract if that ambitious goal were not achieved

The Farmingdale Marketing Plan

NY&A made it quite clear that in dealings with Coastal, that the Farmingdale facility was, at all times, a joint project NY&A was not in the real estate business, it was seeking carloadings, Facts ¶11 A-220-30 Consequently, the railroad was fully engaged in developing the marketing plan for the facility, Facts ¶13

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[2] Petitioners pointedly fail to acknowledge the minimum carloading provision of the leases and the subsequent Transload Facility Operation Agreement or the restrictions in those agreements that the facility be used solely to load or unload rail cars moved by the NY&A

Coastal's interest was initially to transload CPR-generated aggregates, but this idea was not pursued for long, NY&A and Coastal jointly concluded that the economics of the aggregate market on Long Island simply didn't support that plan, A-227-228 Instead, NY&A and Coastal jointly decided to target the construction industry This industry was booming on Long Island and it generated an inbound demand for heavy, bulky building materials Most important, it generated outbound traffic of construction and demolition debris ("C&D") A-323 line 10-15 However, many inbound construction materials require weather protection, and a C&D operation must be covered so that dust can be controlled, A-227 line 20-A-228 line 4

Coastal but not NY&A had the financial resources to build the required structure, See A-225, line 14 to A-226, line 7 NY&A and Coastal agreed that Coastal would build such a structure and keep most of the loading fees, but that the facility would continue to be a NY&A facility, under the operating and marketing control of NY&A, and that Coastal must continue to meet the minimum volume requirements or lose not only the "lease" but its capital investment in the structure

Construction

The Railroad and Coastal approached the Town on numerous occasions between 2002 and mid-summer of 2003 to vet the plans as they evolved from a stone terminal to the current transloading facility In each instance the Town absolutely refused to participate at all in the planning of the facility, it even declined NY&A and Coastal's offer of the opportunity to review the plans to assure that the facility met local building and environmental standards and regulations

The Town took the position that it had no jurisdiction over Long Island property At the last meeting between Coastal and the Town, Mr Franchesi, one of the Town's building inspectors asked Coastal, "What is it you don't understand? The Town of Babylon doesn't have any jurisdiction over the Long Island Rail Road Property " A-326, line 18-22 On August 8, 2003 the Town's position was confirmed in writing, when it rejected plans for the facility that had been submitted for review by Coastal's architect "The Town of Babylon does not review plans or issue building permits for the Long Island Railroad property " A-981

Pinelawn Cemetery Enters the Picture

In the Fall of 2003, NY&A and Coastal learned that the LIRR did not in fact own the Farmingdale Yard, but instead had entered into two 99-year leases 99 years earlier Both leases gave LIRR the right to renew for further 99-year terms, but apparently LIRR had failed to timely renew the earlier of the leases The second lease was timely renewed and the President of Pinelawn thereafter signed a renewal of the first lease, even though the time for renewal had apparently expired Pinelawn has subsequently challenged the validity of the lease renewals, and it brought a quiet-title action in Suffolk County Supreme Court *Pinelawn Cemetery v Coastal Distribution, LLC, et al*, Index No 04-8599 The trial court denied Pinelawn's request for a preliminary injunction that would have required NY&A to abandon rail operations at Farmingdale Motions for summary judgment have been filed by LIRR, NY&A and Coastal and are pending disposition

On March 29, 2004, a Babylon building inspector arrived at Farmingdale where the new transloading structure was nearly complete and served a "Stop Work Order" for failure to obtain a permit The Town later asserted that the Order is based solely on

Babylon's Zoning Ordinance that forbids operation of a "transfer station" in a residential area Although Farmingdale Yard is surrounded on three sides by industrial activities and by a massive cemetery on the other side, see photographs at A-955 to A-975, Babylon has rather unbelievably zoned the site "Residential" Counsel for the Township has represented to the district court that Babylon changed its legal position concerning the applicability of its zoning ordinance to the Farmingdale Yard as a result of months of "educational efforts" by Pinelawn Cemetery A-189, lines 3-9

The Transload Facility Operating Agreement

When Pinelawn began its campaign to shut down the Farmingdale facility, NY&A and Coastal realized that in light of the Third Circuit decision in *Hi-Tech Trans, LLC v New Jersey*, 382 F 3d 295 (3rd Cir 2004), their intended relationship was not properly reflected in the lease and could be misinterpreted Accordingly, the parties entered into the Transload Facility Operations Agreement, which specified in much greater detail the operational terms of that relationship, a relationship that had at all times been directed solely at developing railroad traffic for the mutual benefit of both parties The Respondents testified that the new agreement did not change the daily operations at the facility, A-236, lines 4-24 The Magistrate, the District Judge and the Second Circuit all acknowledged that Respondents had been forthright in explaining their relationship

The Transload Facility

Construction of the Farmingdale transload facility was completed soon after NY&A and Coastal filed suit in the federal court, the Township agreed to withhold enforcement actions on its Zoning Board Order pending resolution of Respondents' preliminary injunction request The facility is equipped with a dust suppression system, and there has not been a single complaint concerning dust or any other environmental problem arising due to the operation of the facility The issuance of the Stop Work Order had nothing to do with any environmental, health or safety issue, A-186 lines 1-21

The State of New York Department of Environmental Conservation has inspected the facility and has informed all parties that notwithstanding the facility's status as a rail terminal, the State retains jurisdiction to enforce State health and safety regulations, which relate to the handling of the material on the site, A-1070-1071 Respondents acknowledge that jurisdiction and have assured that the operations of the Farmingdale facility meet the substantive requirements of the agency

Transloading

NY&A holds out the Farmingdale facility to the shipping public as a public bulk transloading facility It is listed on its website as a transloading facility and it quotes *transportation rates to and from the facility* A-494, A-546-47 *In fact, the facility has* handled a wide variety of products for various customers of the NY&A, including sheetrock A-1078-80, aggregate, A-1081-1084, steel, A-1086-1088, bricks, A-1095-97, C&D A-1090-1091, 1098-1109, and telephone poles, A-1092-1094 Dramatic color photographs of these shipments at Farmingdale were admitted into the record before the district court

Construction and Demolition Debris constitutes most of the traffic now utilizing the facility due to the doubt over the operation created by the Town's efforts to close it Other shippers have indicted that they would like to access NY&A service at Farmingdale, but cannot consider doing so until the continuing availability of the facility is assured as a long-term alternative to trucking, A-353-59 Moreover, investment capital for further improvements for other commodities is not available until the facility's legal status is resolved, A-358

C&D material is delivered to Farmingdale by truck, it is weighed in the truck and then dumped on the floor of the facility's three-sided building It is categorized by density and placed into one of two piles, heavy material in one and light in the other, which facilitates loading dense material in the bottom of cars to keep them balanced and straight upright during transit This loading requirement was imposed by NY&A to assure safe operation past the tight clearances of passenger platforms, A-238 line 10-A-239 line 2 Incidental nonconforming material is removed from the debris, i e , metal, mattresses, tires and other material, which does not conform to the requirements for construction and demolition debris established by the consignee in Ohio CSXT, the line haul carrier, requires NY&A and Coastal not to accept any material that may cause a car to be refused by the consignee A-343 lines 12-16 In a month's operation about 40 yards of nonconforming material (metal, mattresses, tires etc) is isolated from about 265 carloads of material handled, about 43,185 cubic yards of material Material transloaded through this terminal is generally shipped by a transfer station that has already removed any valuable material and any non-conforming material A-340, lines 16-23

SUMMARY OF ARGUMENT

The Petitioners assert that the Town of Babylon has the authority to shut down a public rail terminal that has been operating for over a century by invoking the Town's preposterous "residential" zoning classification - simply because the railroad has chosen to engage a contractor to operate that terminal The argument is frivolous and defies well-settled law The transload facility at Farmingdale Yard is a public terminal, and whether it is operated by NY&A employees or by those of a contract agent, it is an integral part of transportation by rail common carrier The facility is subject to the terms of 49 U S C §10501(b) and the Interstate Commerce Clause of the United States Constitution, and the Town of Babylon cannot zone it closed

ARGUMENT

I. THE TRANSLOADING OPERATIONS CONDUCTED AT FARMINGDALE ARE WELL WITHIN THE DEFINITION OF TRANSPORTATION BY RAIL

This Board has just completed an in-depth examination of the scope to which ICCTA, 49 U S C §10501(b) preempts state and local regulation of waste transload facilities *New England Transrail, LLC d/b/a Wilmington & Woburn Terminal Ry -- Construction, Acquisition and Operation Exemption—In Wilmington and Woburn, MA*, STB Finance Docket No 34797 (served July 10, 2007) The transload operation at Farmingdale is similar to that contemplated at Woburn, with two important distinctions First, no grinding or shredding of C&D debris is conducted at Farmingdale Second, NY&A has forbidden the handling of Municipal Solid Waste Accordingly, the two issues that presented concerns in *New England Transrail* for the majority and the dissent, respectively, are not involved in this case Thus, this Board has established in a formal

proceeding that included a broad range of public participation, that the activities conducted at Farmingdale constitute railroad transportation within the meaning of 49 U S C §10501(b)

The status of the property in issue is well established in law and will not be dealt with extensively here The property has been devoted to railway services since 1904 and no abandonment of that service has been sought or approved The expiration of the Pinelawn lease, and whether or not it has been properly renewed, has no effect on the jurisdiction of the Board, *Thompson v Texas Mexican R Co*, 328 U S 134, 147 (1946) Indeed, where a service is active, or even has the potential to become active, termination of that service at the behest of a fee owner will not be considered, See *Yakima Interurban Lines Association--Adverse Abandonment--In Yakima County, WA*, AB_600_0 (September 15, 2005) The petitioner's claim that expiration of the lease divests the facility of its railroad status is frivolous

II. NY&A DID NOT FORFEIT ICCTA PREEMPTION BY CONTRACTING WITH COASTAL TO OPERATE THE FACILITY

The petitioner's primary claim here is that the activities conducted at Farmingdale can be zoned out of existence notwithstanding Section 10501(b) because they are being conducted by Coastal Counsel for the Township candidly admitted in open court that NY&A could operate the facility at Farmingdale without regard to Babylon's zoning ordinance A-185, lines 12-16 The only rationale for shutting down the transload terminal is that it is being operated by Coastal, not NY&A

The Transload Facility Operations Agreement between NY&A and Coastal, A-134-38, provides in part,

> RAILROAD shall control all aspects of the Facility's transloading operations RAILROAD shall have the right to review and audit

> COASTAL'S business records related to the operation of Facility during regular business hours and shall have the right to inspect COASTAL'S operation of the Facility at any time COASTAL operations at the Facility and the Yard shall be subject to the supervisory authority of the RAILROAD's General Manager at Glendale (¶1 022)
>
> COASTAL shall perform transloading services for Customers of the RAILROAD Such services shall include only those commodities movements and equipment approved by RAILROAD, which approval shall not be unreasonably withheld COASTAL shall immediately cease and desist from any operations which shall be found to be in violation of any contractual or obligation of RAILROAD upon notice from RAILROAD (¶1 04(a))
>
> COASTAL shall enforce all rules and regulations, as promulgated by RAILROAD RAILROAD may establish rules related to safety and train operation which are consistent with industry norms or which are mandated by law or regulation (¶1 04(b))
>
> COASTAL may market the Facility and the services of RAILROAD available by use of the Facility COASTAL shall obtain RAILROAD's advance written approval of all written materials, including brochures and other marketing material used by COASTAL in marketing RAILROAD's transload and transportation services related to the Facility Unless RAILROAD otherwise provides to the contrary, any such marketing material and any signage located inside or outside of the Yard shall prominently indicate RAILROAD's name and/or logo (¶1 05(d))
>
> Coastal will make such [track] repairs as RAILROAD shall reasonably determine are necessary to maintain the facility in compliance with applicable regulations Should Coastal fail to make necessary repairs RAILROAD will close the track in question until such repair is made (¶1 07)
>
> All bills of lading and similar documents for outbound rail shipments from the Facility shall be between RAILROAD and the Customer, but COASTAL, as RAILROAD's agent, may execute such Documents All Transport Documentation shall be on a form approved in writing by RAILROAD (¶2 01(a) and (b)

It is well settled that a railroad may contract with an agent to perform any of the services it provides to customers *City of Chicago v Atchison, Topeka and Santa Fe, Railroad*, 357 U S 77 (1958) Indeed, as early as 1911 this question had been answered

in *Interstate Commerce Commission v Diffenbaugh*, 222 U S 42, 44 (1911), referring to a railroad's transloading services utilizing a contract grain elevator

> As the carrier is required to furnish this part of the transportation upon request, he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it

Petitioners rely on the *Hi Tech* case, alleging that as the current relationship between Coastal and NY&A started with a lease with a minimum car generation provision, it is forever inadequate and cannot also be a railroad-agent relationship This case is very different to the one in *Hi Tech* There, Canadian Pacific Railroad, disclaimed any relationship with Hi Tech Here the NY&A has testified that Coastal is its agent and that its consistent intention has at all times been for Coastal to obtain bulk transload business on Long Island At all times, Coastal has had the obligation to generate bulk materials traffic, and its use of the property has been limited to the loading and unloading of rail cars moved by the NY&A The marketing plan was developed jointly by NY&A and Coastal NY&A continues to approve all marketing materials and determines what commodities move through that terminal An NY&A officer visited the property not less than twice a week, NY&A dictates how the cars are to be loaded, and has rejected cars that did not conform to those directions[3]

This Board anticipated the situation here in its more nuanced treatment of the Hi Tech situation.

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[3] On a more fundamental level, there is another key difference here from *Hi Tech* Like virtually every case that resulted in a finding of no preemption, the railroad in *Hi Tech* was not a party to the case It may be that the reluctance of a bona fide railroad to be present and assert its own rights to protection from local regulation speaks silently to whether a third party operation is really being performed "on behalf of" a railroad Here, New York & Atlantic has been a party and has actively participated in every phase of this controversy

> Therefore, this situation is substantially different from a situation in which a rail carrier builds and owns a truck-to-rail transloading facility, and holds it out to the public as its own facility, but chooses to have it run by a contract operator

Hi Tech Trans, LLC—Petition for Declaratory Order—Newark, NJ, Finance Docket 34192 Sub-No 1 (served Aug 14, 2003), note 13 (emphasis added)

The Commission in *Ass'n of P&C Dock Longshoremen v Pittsburgh and Conneaut Dock Co* 8 I C C 2d 289, 290 (1992) ("*P&C Dock*") (recently cited with approval in *Portland and Western Railroad, Inc – Trackage Rights Exemption – Union Pacific Railroad Company*, FD 34883 (Decided July 12, 2006) developed a test to be applied in determining if an entity was a rail carrier, a test which the Commission "distilled" from a long line of decisions That rule is that an agent is treated as a carrier within the Board's jurisdiction if, (1) the entity conducts rail operations (as Coastal clearly does under *New England Transrail* supra,) and (2) holds out that service to the public, as NY&A/Coastal clearly do for all types of commodities Indeed, the Commission reasoned that,

> loading and unloading, performed under contract to a rail carrier, is railroad transportation service *Bush*, 342 I C C at 563, citing *Union Stock Yard & Transit Co v United States*, 308 U S 213, 220-21 (1939) While Union Stock Yard concerned the loading and unloading of livestock, specifically made part of underlying railroad service by 49 U S C § 10748(a), the loading and unloading at issue here is embraced within the statute differently but to no less an extent it is within the broad scope of services-receipt, handling, storage, transfer, and interchange-related to transporting property that, when performed over track with rail equipment, clearly comprises railroad transportation under § 10102
>
> [A]s long as the questioned service is part of the total rail common carrier service that is publicly offered, then the agent providing it for the offering railroad, whether through common ownership or contract, is "deemed" to hold itself out to the public

P&C Dock, supra at 291-92

Pinelawn and Babylon have suggested that the relationship between NY&A and Coastal somehow relieves NY&A of liability it would otherwise have as a common carrier, but that suggestion is specious NY&A faces the same liability to shippers, to neighbors, and to all other third parties today that it faced before any agreement with Coastal NY&A still has the very same common carrier obligation at Farmingdale that it had in 1997 It has the same Carmack Amendment liability, and so on No one can claim that NY&A can escape liability to third parties for actions by Coastal that are within the scope of its agency – that is the fundamental characteristic of an agency relationship The Transload Facility Operations Agreement simply allocates responsibility for losses, as between NY&A and Coastal, just like it allocates other responsibilities and revenues As in any other case where a business owner hires a contractor, the contractor is ultimately liable to the owner for the damage resulting from the contractor's own performance

Pinelawn and Babylon also argue that the revenue-split between Coastal and NY&A somehow removes the protection of §10501(b) preemption No contractor can be expected to work without earning a profit Here, Coastal provided the capital to construct a structure on LIRR property used to facilitate freight rail transportation Coastal undertook to operate and market the facility for NY&A's benefit NY&A chose to structure its arrangement in a way that motivated Coastal to maximize the terminal's throughput, and that guaranteed the Railroad could terminate the arrangement if Coastal failed to produce Harnessing the free market has proved successful so far [4]

[4] Pinelawn's comments about collecting revenues from shippers suggests a misunderstanding of railroad collection procedures On joint line movements with CSXT, NY&A acts solely as agent CSXT quotes through rates and routes to locations on NY&A, and CSXT collects all freight revenue, paying NY&A a per car fee When the traffic includes bulk materials loaded or unloaded at Farmingdale, a separate loading fee

NY&A was unable to generate significant volumes of bulk material transload traffic at Farmingdale with its own personnel NY&A tried to draw on the presumed capabilities of a connecting, line haul, Class I railroad to generate such volumes, but again it was not successful Finally, NY&A contracted with an experienced local bulk material handling firm to generate such volumes, and it has experienced some success, large legal fees and frustrating delays Yet, hiring a contract operator is no different than the situation at dozens of intermodal ramps, auto loading facilities and other multi-modal facilities across the country operated by contract agents for railroads in an attempt to provide seamless service to shippers Ruling for Petitioners in this case will simply result in a swelling of the railroads' employment rolls as they are forced to use their own employees instead of their contract agents to perform necessary transportation functions

Coastal's operation of NY&A's Farmingdale Facility successfully attracted 265 carloads of traffic to the railroad per month That removed some 2,000 round trip truck hauls between Long Island and Ohio from the highways, including from the Long Island Expressway and Rt 80, two of the most congested highway segments in the New York Metropolitan Area Utilizing a contract agent to operate the Farmingdale transload terminal should not cause NY&A to forfeit the protection afforded by 49 U S C §10501(b), with the result that Pinelawn and Babylon's NIMBY concerns prevent C&D and other bulk commodities from moving on and off Long Island by rail

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is charged for that extra service, and it is collected by Coastal Coastal collects the entire transportation charge from the shippers, and remits the railroad portion to CSXT CSXT then remits to NY&A the per car charge for that traffic and for all other line haul traffic handled by CSXT It is much more efficient for Coastal, who is physically present, physically reviews the paper work and physically performs the loading, to collect the fee than for NY&A because NY&A does not ordinarily collect revenue from shippers and is not equipped to do so

III. NO DISCOVERY IS REQUIRED OR APPROPRIATE

It has been two years since this case was initiated It has been two years since a two-day hearing in the Eastern District of New York at which both parties produced and cross-examined witnesses Those hearings generated a 1250 page Appendix filed in the Second Circuit Throughout the entire proceeding Pinelawn and Babylon have sought no discovery Confronted with summary judgment and facing Respondent's Statement of Uncontroverted Material Facts, Petitioners could not even articulate a single fact dispute Rather, they initiated this proceeding and two years after making a record in the district court, and for the very first time, petitioners seek enormous volumes of discovery The information sought by petitioners is not needed to resolve this case

The focus of the discovery request is on the economic terms of the agreement between NY&A and Coastal That is irrelevant The essential financial arrangements are clearly established from the record to date Based on *Conneaut Dock* and *New England Transrail*, the only issue to be resolved here is whether Coastal/New York & Atlantic hold out the Farmingdale Facility to the shipping public as a transload terminal That subject has been developed fully over the last two years and no discovery, particularly discovery related to the financial arrangements between NY&A and Coastal, is needed or proper

CONCLUSION

For the reasons stated above the Board should commence a proceeding and determine that the Farmingdale transload terminal is a railroad facility under the jurisdiction of the Board, and that NY&A's election to have that facility run by Coastal does not change its status as a railroad facility Therefore, this Board should issue an

Order declaring that operation of the Babylon zoning ordinances is preempted, and that no disputes concerning "uniformly applied health and safety regulations, which do not unreasonably limit the railroad's ability to fulfill its common carrier obligations" are presented in this case

Dated July 24, 2007

Respectfully submitted,

Ronald A Lane
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312-252-1500
/s/
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Verification

John F McHugh declares under penalty of perjury that he is the Attorney for Coastal Distribution, LLC and as such am familiar with the facts and I have reviewed this reply and know that the representations of fact made therein are true to the best of my knowledge and belief based upon the record developed in this matter to date

/s/
John F McHugh, Esq

Sylvia Cruz declares under penalty of perjury this 24th day of July 2007 at New York, N Y that she is the office manager for John F McHugh, Exq And that she dispatched a copy of this Response of the New York & Atlantic Railway Company and Coastal Distribution LLC to the Petition of the Town of Babylon and Pinelawn Cemetery for a Declaratory Order as well as the exhibits referred to therein to

Howard M Miller
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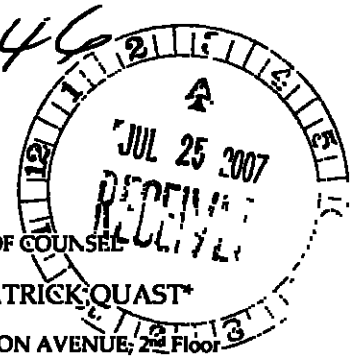
via Federal Express on this 25th day of July, 2007

_____
Sylvia Cruz

219846



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July 24, 2007

Hon Vernon A Williams, Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re Coastal Distribution, LLC, and The NY&A Railway Co v The Town of Babylon, A Municipal Corp , The Town of Babylon Board of Zoning Appeals, and Peter Casserly, as Commissioner of Planning and Development of The Town of Babylon and Pinelawn Cemetery Corp.

Dear Secretary Williams·

Enclosed please find the original unbound and ten copies of the respondents' exhibits for filing in this matter. The respondents reply will be filed under separate cover due to the size of exhibits in question.

Thank you for your attention to this matter

Very truly yours,

John F McHugh

enc

ENTERED
Office of Proceedings

JUL 25 2007

Part of
Public Record

219846

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 3507

PETITION OF THE TOWN OF BABYLON AND PINELAWN CEMETARY FOR A DECLARATORY ORDER

RESPONSE OF NEW YORK & ATLANTIC RAILROAD CO. AND COSTAL DISTRIBUITION LLC.

RESPONDENT'S EXHIBITS

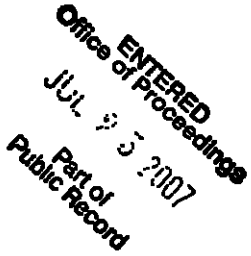

Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY

Plaintiffs,

v

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, AND PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON,

Defendants,

and

PINELAWN CEMETERY CORPORATION

Intervenor Defendant

CV 05-2032
Seybert, J
Boyle, M

PLAINTIFFS' JOINT LOCAL RULE 56.1
STATEMENT OF UNCONTESTED FACTS

Pursuant to the Individual Motion Practices of the Hon Joanna Seybert, Plaintiffs hereby jointly submit the following Statement of Uncontested Facts in support of their motion for summary judgment. Pursuant to the Court's rules a reply must be served within seven days of the date hereof with responses keyed to the following statements by number Plaintiff here relies on the transcript of the hearing before Magistrate Judge Boyle held on May 19 and 20, 2005 as well as affidavits of witnesses submitted on the initial motion for a preliminary injunction as well as the documents admitted into evidence at that hearing Citations are to the official Appendix that was filed with the

Second Circuit Court of Appeals in this case with secondary citations to the lines of the transcript or paragraphs of affidavits It is assumed that all parties have the Appendix

1 This action involves the right of the successor of the Long Island Railroad ("LIRR"), the plaintiff, New York and Atlantic Railway Company ("NYA"), to continue to be a common carrier by rail engaged in transportation by rail as to its possession of a certain terminal facility located in Farmingdale, Town of Babylon, State of New York (the "Farmingdale Facility") operated as a freight transload terminal utilizing the services of its contract-agent, plaintiff, Coastal Distribution, LLC ("Coastal"), and therefore remain subject to the exclusive jurisdiction of the United States Surface Transportation Board.

2. NYA is an interstate carrier by railroad authorized by the Surface Transportation Board to provide common carrier service on Long Island NYA acquired the freight operating franchise of LIRR in 1996 pursuant to an initiative of the State of New York to privatize those operations, leaving LIRR to focus on commuter passenger service A-185-87, A-200-03 LIRR is in turn a common carrier by railroad, chartered by the State of New York on April 24, 1834 The Farmingdale Facility in issue here is located on two parcels of property leased by the LIRR from defendant, Pinelawn Cemetery Corporation pursuant to two leases, one dated in 1904 and one dated in 1905 LIRR used the Farmingdale Facility as a team track (transload) facility continuously until the transfer of freight operations to NYA as outlined below Affidavit of Metropolitan Transportation Authority by Roco Krsulic dated May 10, 2004 ¶ 5 (which is Exhibit E to Declaration of Joseph Rutigliano dated April 25, 2005, A-119), Affidavit of Fred Krebs, President of the New York &Atlantic Railway (NY&A) dated April 21, 2005 ¶ 10, A-69.

3. NYA's freight operating rights are set forth in a Transfer Agreement between LIRR and NYA's corporate predecessor The Transfer Agreement conveys the exclusive right to conduct freight operations over specified portions of the LIRR for a 20-year term, renewable by NYA for a subsequent 10-year term, but renewal is conditioned on NYA meeting and maintaining certain volume, safety and other criteria. A-200-01. The objective of both the State of New York and NYA in entering into the Transfer Agreement was to increase the use of rail to move commercial freight on, off and over Long Island, as a preferable alternative to continued expansion of truck traffic A-202-03

4 Transloading, i e transfer of cargo between highway and rail vehicles is not a new concept Historically, most railway stations included a team track to handle freight for non siding-served customers, Testimony of Fred Krebs, tr 134 lines 19, A-309

5. A team track is a public railway siding which allows freight customers seeking rail service who did not have their own sidings to access rail services by pulling a (team of horses and a) wagon or thereafter, historically, a truck up to a rail car so that cargo can be moved between modes, Krebs tr 31 line 16 – tr 32 line 8, A-206-207, tr. 134 line 2-19, A-309.

6. To serve smaller shippers, railroads have historically provided the service of consolidating freight delivered by numerous customers into carloads for shipment Railroads also received carloads containing multiple shipments for many customers, sorted those cargos and delivered the contents of a car to numerous customers Krebs tr. 33 line 2-6, A-208 tr 74 lines 8- 21, A-249

7 Rail freight service on Long Island is largely dependent on transloading, i e transfer between rail cars and trucks at terminal facilities owned by the railroad or non-railroad owned facilities which provide transload services on request, Krebs tr 38 line 2 - tr. 39 line 3, A 213-214, Krebs aff. ¶ 5 A-69

8. NYA has succeeded in achieving the State's goal of getting trucks off the highway, primarily by increased utilization of transload operations, A-205-06 Because most shippers on Long Island do not have their own rail sidings, NYA has made repeated efforts to increase the volume and efficiency of traffic moving through those limited transload facilities as it received from LIRR. A-204-05 Indeed, 100% of rail freight business developed on Long Island outside New York City since 1997 has been developed via such transload facilities, Krebs tr. 30 line 7-18, A-205

9. The only facility transferred to NYA by LIRR that is suitable for transloading bulk material is the Farmingdale Yard within the Town of Babylon, New York A-208-09, 248 Prior to the privatization of its freight operation, LIRR used the Farmingdale property and the tracks and driveways thereon to transload various types of freight, including telephone poles, brick, and plastic pellets. A-215. LIRR also used the yard for taking delivery of ballast, A-322 In addition, LIRR conducted an intermodal operation at the yard, in which it loaded highway trailers onto rail cars and vice versa. A-215. LIRR also brought its trash by rail from its entire system to Farmingdale, where it was compacted and reloaded into trucks for disposal at a landfill A-250-01 LIRR specifically described the facility as a "waste transfer station" A-121-28 LIRR also stored materials in the yard for its maintenance of way and signal departments. *Id.* Also

located at the Farmingdale Yard is a "wye" track, which is used in railroad operations to turn cars and locomotives facing one direction to face the other A-216-17

10 From 1997 when NYA commenced freight operations until 2000, NYA continued to use the Farmingdale Yard to transload freight between trucks and rail cars. A-216 However, NYA felt the facility was underutilized, and in 2000, it entered into a lease with an arm of CSX Transportation, a major, "Class I" railroad, to market the transload capabilities of the Farmingdale facility and to conduct transloading operations. A-219-24, A-497-507 It also entered into a substantially similar agreement with CSX Transportation at another location. A-222, A-508-18. NYA's purpose for entering into these arrangements was specifically to increase throughput at the yards, and NYA expected that CSX Transportation would be able to bring marketing skills and resources to the facility A-220 The leases called for nominal rent, but required the contractor to meet minimum traffic volumes through the transloading facility in order to renew the leases A-497-507, A-221. After two years of operation, CSX Transportation generated only a handful of cars, far below the required volumes, and NYA declined to renew the lease A-222-23

11. In March, 2002 NYA entered into a lease with Coastal Distribution, LLC ("Coastal"). A-519-24. In 2001 Coastal had approached the NY&A concerning the Farmingdale facility. It was seeking a facility to expand the market for aggregate traffic it had developed in conjunction with the Canadian Pacific Railroad (a class one rail carrier) Krebs tr. 51 line 16 - tr 52 line 9 A-227, tr. 145 line 10-14, Rutigliano A-320. Like the prior leases to CSX Transportation, Coastal was required to generate a substantial level of rail traffic, or NYA could terminate the lease A-223-24. Also like

the prior leases, NYA did not enter into the lease for the purpose of collecting rent, but to increase the amount of rail traffic through the Farmingdale facility A-229-30, A-262 This time, however, NYA sought an experienced transload operator with a proven track record of generating significant bulk material transloading business in the area A-252-54

12 The New York State Department of Transportation supported plaintiffs' proposal to place a transload facility for bulk materials on the Farmingdale property as it is consistent with State policy to remove freight traffic from the highways. A-1059, 320

13. The initial business plan agreed upon by Coastal and NYA called for moving construction aggregates through the facility, but that proposal proved impractical due to the competitive forces involved A-226-27. After reviewing the market and the costs involved, NY&A and Coastal determined that the best transloading use for the property was as a facility that could handle construction materials such as sheet rock and lumber etc. inbound and construction and demolition debris outbound These targeted commodities fit the railroad's marketing plan, which was to increase outbound traffic to balance the railroad's traffic flows in a region dominated by a consumer market Construction materials, for which there is a large market on Long Island, are well-suited for rail shipment. However, either the materials themselves or the activity required to handle the materials required a contained area with dust control Krebs tr 52 line 18 – 53 line 4 A-227-28, 148 line 8-15 A-323, Krebs Aff. ¶¶ 7-8, A-71

14. Plans for the actual structures deemed necessary to attract the targeted business were submitted by NY&A to the LIRR and were approved pursuant to the terms of the 1996 Transfer Agreement, Krebs tr 53 lines 13-21, Krebs ¶ 8 Rutigliano aff ¶ 5

Coastal also sought a review of the plans from the Town of Babylon. Coastal had been in contact with Town planning officials about plans for this site from 2001 forward, A-324, and it specifically vetted its plans with several building inspectors A-325-26 In those meetings, Town officials repeatedly told Coastal that the Town did not have jurisdiction over the building because it was on LIRR property *Id* The last such discussion included one official stating, "What is it that you don't understand? The Town of Babylon doesn't have any jurisdiction over the Long Island Rail Road property" A-326 Coastal's architects also attempted to file the plans with the Town, and they likewise were rebuffed, this time in a letter stating:

> As per our conversation, I am confirming that the Town of Babylon has no jurisdiction over the Long Island Railroad Property. The Town of Babylon does not review plans or issue a building Permits (sic) for the Long Island Railroad property

A-1048

15. In the Fall of 2003, NYA and Coastal learned that LIRR did not own the Farmingdale Yard outright, but leased it under two 99-year leases from Pinelawn Cemetery ("Pinelawn"). A-235, 327. The original term of one lease expired in 2003, the other in 2004 LIRR took timely action to renew the 1905 lease, but the time for renewal of the 1904 lease had already expired. In late October, 2003 at a meeting where Coastal was explaining its plans to Pinelawn, Pinelawn officials delivered to Coastal a document purporting to be its consent to renew the 1904 lease, despite expiration of the original time limit for renewal A-330-331, 1062

16 In reliance on the evidence that LIRR and Pinelawn had renewed both leases, and the Township's adamant refusal to review the plans, Coastal proceeded with construction and expended millions of dollars on the structure A-369-70. The structure

consists of a three-sided shed with lights and a water misting system for dust control, all erected over some of the existing tracks of the Farmingdale yard. A-231-32.

17. On January 15, 2004, after construction of this shed was nearly complete, Pinelawn changed its legal position and claimed that the 1904 lease had not been properly renewed A-331-32. Pinelawn sent a letter to Coastal stating that Pinelawn had not and would not renew the 1904 lease, and demanding that Coastal take down the structure. A-1063

18. Unbeknownst to NYA or Coastal, Pinelawn, after a campaign of some weeks, obtained the cooperation of Town officials who agreed to enter into a concerted effort with Pinelawn to prevent the Railroad from completing or operating the transload facility by invoking the Town's state law authority under the Town's zoning ordinances (the Agreement). A-188-89 The Town, at all times knew that it had no jurisdiction over a railroad. The Town at all times was represented by counsel who knew that no order abandoning the operations at the Farmingdale Facility had been obtained by Pinelawn or by anyone. The Town therefore agreed with Pinelawn to use the Town's state law authority to bar a common carrier by rail licensed by the United States from fulfilling its common carrier obligations imposed by federal law.

19 Pursuant to and in furtherance of the Agreement, on March 29, 2004, a building inspector for the Town of Babylon served a Stop Work Order on the manager of the Farmingdale facility, indicating that the Town had not issued required, but unspecified, permits. A-334, A-1065. Coastal's Managing Member, Mr. Rutigliano inquired about the Order from the inspector who served it, and the Inspector indicated that he "was told to serve it, just to get your attention." A-334. Over the next three

months, the building inspector who served the Stop Work Order repeatedly told Mr. Rutigliano that the Order required Coastal to refrain from erection of the structure, A-366, although at that time the structure had been erected and only lacked some trim work to be completed A-337. Both the Managing Member of Coastal, A-365-67, and the President of NYAR, A-246-47, testified that they did not know what they could do to comply with the Town's requirements.

20. The Township Attorney informed Coastal that the Stop Work Order pertained only to construction of the structure and not to any other activity on the premises. A-336-37. When shown a copy of Pinelawn's lease renewal, the attorney stated, "My boss will not be very happy." A-336.

21. Pursuant to and in furtherance of the Agreement, Pinelawn filed suit in Suffolk County Supreme Court against LIRR, NYA and Coastal in May 2004 to require them to vacate the property encompassed by the disputed lease. A-245-246. On August 4, 2004, Judge Costello denied Pinelawn's request for a preliminary injunction, and the matter is still pending before the Supreme Court.

22. On August 6, 2004, Coastal and NYA cancelled the lease and entered into a Transload Facility Operations Agreement. A-134-38. The new agreement memorialized the previous practices of the parties. A-236-37.

23. With the consent of NYA and LIRR, Coastal appealed issuance of the Order to the Babylon Zoning Board of Appeals. A-339. Pursuant to and in furtherance of the Agreement, the Town Supervisor directed a memorandum to the Chairman of the Zoning Board of Appeals on September 9, 2004 requesting the Board to uphold the Stop Work Order because Coastal was operating a transfer station on the premises in violation

of Babylon's zoning ordinance. A-1068-69 The Town Supervisor took this action notwithstanding his recognition that there was really no doubt about the benefit that the facility provides to the public and the local vendors. A-779.

24. The New York Department of Environmental Conservation ("DEC") is the state agency with exclusive jurisdiction over regulation of waste. Environmental Conservation Law §27-0707 and §71-0201. While the Zoning Board appeal of the Stop Work Order was proceeding, the DEC's Division of Solid & Hazardous Materials inspected the Babylon facility in July or August, 2004 and took no exception to the operations. A-339-40. Coastal met with senior officials of the agency, providing them photographs and other information concerning the facility. A-346-47. On February 15, 2005 the Department issued a determination, concluding that it did not have jurisdiction over the Farmingdale facility to require a transfer station permit because it was a railroad facility that was preempted by federal law from state permit requirements. The Department noted that it "continues to retain police powers to control odor, noise and vermin complaints". A-1070-1071.

25 The DEC's determination was given to the Board of Zoning Appeals prior to April 21, 2005, Rutigliano, tr. 172 line 15 – 173 line 2, A-347-348, Rutigliano aff. ¶ 15, but pursuant to and in furtherance of the Agreement the Zoning Board of Appeals issued a decision and order upholding the Building Department's Stop Work Order. The Board ruled that Babylon's jurisdiction over the facility was not preempted by the New York Public Authorities Law because Coastal was in business for a profit. With respect to federal preemption, the Board found that the Farmingdale operation was subject to

NYA has prohibited Coastal from loading Municipal Solid Waste at the facility, A-239, A-276-78, A-363-65, and Coastal has complied with that restriction. A-276. In the first days of operations, NYA crews did take exception to the way some cars were loaded, and NYA promptly required Coastal to correct them. Coastal did so immediately. A-233-34. NYA has actively monitored and controlled Coastal's activity at the facility.

28. The Transload Facility Operations Agreement, A-134-38, provides in part,

> RAILROAD shall control all aspects of the Facility's transloading operations. RAILROAD shall have the right to review and audit COASTAL'S business records related to the operation of Facility during regular business hours and shall have the right to inspect COASTAL'S operation of the Facility at any time. COASTAL operations at the Facility and the Yard shall be subject to the supervisory authority of the RAILROAD's General Manager at Glendale. (¶1.022)
>
> COASTAL shall perform transloading services for Customers of the RAILROAD Such services shall include only those commodities movements and equipment ... approved by RAILROAD, which approval shall not be unreasonably withheld. COASTAL shall immediately cease and desist from any operations which shall be found to be in violation of any contractual or obligation of RAILROAD upon notice from RAILROAD. (¶1.04(a))
>
> COASTAL shall enforce all rules and regulations, as promulgated by RAILROAD ... RAILROAD may establish rules related to safety and train operation which are consistent with industry norms or which are mandated by law or regulation (¶1.04(b))
>
> COASTAL may market the Facility and the services of RAILROAD available by use of the Facility. COASTAL shall obtain RAILROAD's advance written approval of all written materials, including brochures and other marketing material used by COASTAL in marketing RAILROAD's transload and transportation services related to the Facility. Unless RAILROAD otherwise provides to the contrary, any such marketing material and any signage located inside or outside of the Yard shall prominently indicate RAILROAD's name and/or logo.(¶1.05(d))
>
> Coastal will make such [track] repairs as RAILROAD shall reasonably determine are necessary to maintain the facility in compliance with applicable regulations. Should Coastal fail to make necessary repairs

> RAILROAD will close the track in question until such repair is made. (¶1.07)
>
> All bills of lading and similar documents for outbound rail shipments from the Facility ... shall be between RAILROAD and the Customer, but COASTAL, as RAILROAD's agent, may execute such ... Documents. ... All Transport Documentation shall be on a form approved in writing by RAILROAD ...(¶2.01(a) and (b).

29. Under the Transload Facility Operation Agreement, and the lease it replaced, Coastal is required to produce a minimum volume of railcar transload business. Coastal is prohibited from engaging in any use of the facility other than loading and unloading railcars for NYA's customers. These are the same mechanisms NYA utilized and enforced in prior leases with CSX Transportation to assure that the facility successfully generated railroad traffic, in line with NYA's over-riding objectives for the property. A-200-01. 220, 223-24.

30. NYA holds out the Farmingdale Yard transload facility to the shipping public as a facility for transloading bulk materials between rail cars and trucks. By contract and in fact, Coastal is operating the facility as the agent of the railroad solely to provide shippers with access to rail services and to assist shippers with transloading services, Krebs tr. 65 line 25 A-240, tr. 127 lines 15-20, A-302. All shippers using the Coastal-operated facility to ship and receive bulk and other materials by rail are unrelated to Coastal or NYA. A-231; 1078-80, 1086-88, 1092-97

31. As a consequence of the actions taken pursuant to and in furtherance of the Agreement to terminate the operation of the Farmingdale Yard transload facility, many shippers have been deterred from using rail transportation for fear that long-standing trucking service agreements could not be restored in the event that rail service is halted and therefore have not risked switching to rail services. A-353-59. NYA and

Coastal have been deterred from making further investments in the Facility to accommodate other types of commodities. A-358 Unless enjoined by the Court, the Town and Pinelawn will prevent NYA and Coastal from using the Farmingdale facility for transloading bulk material, in which event, NYA will be unable to provide rail service on Long Island for bulk materials. A-248.

32. No complaint has ever been made by anyone (except at the hearing herein) concerning dust or noise or other nuisance resulting from the operation of the transload facility. A-361. The facilities operations are in plain view to the public. A-339. The Town has been invited to inspect the facility at any time, but the only visit from the Town was to deliver the Stop Work Order. A 339, tr 164

Dated: May 31, 2007

Respectfully submitted,

By: /s/Ronald A. Lane

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of May, 2007, I have caused to be filed with the Clerk of the United States District Court for the Eastern District of New York the foregoing **Plaintiffs' Joint Local Rule 56.1 Statement of Uncontested Facts**, via the ECF system, which sent notification of such filing to the following ECF-registered counsel:

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/s/Ronald A. Lane

Exhibit B
Vol. 1

06-0981-cv(L), 06-0989-cv(CON)

United States Court of Appeals

for the

Second Circuit

COASTAL DISTRIBUTION, LLC, THE NEW YORK AND ATLANTIC RAILWAY COMPANY,

Plaintiffs-Appellees,

– v. –

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON, PINELAWN CEMETERY,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JOINT APPENDIX
Volume I of II (Pages A-1–A-574)

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(For Continuation of Appearances See Inside Cover)

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Fred Krebs	Direct	A-194
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Joseph Rutigliano	Direct	A-315
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Defendants' Witnesses:		
Michael J. Posillico	Direct	A-396
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Plaintiff The New York and Atlantic Railway Company's Exhibit 6 –Lease Agreement Addendum (Farmingdale), dated March 22, 2002 ..... A-519

Plaintiff The New York and Atlantic Railway Company's Exhibit 7 – Lease Agreement (Farmingdale) (Redacted), dated July 11, 2002. A-525

Plaintiff The New York and Atlantic Railway Company's Exhibit 8 –Transload Facility Operations Agreement (Incomplete), dated August 5, 2004 ..... A-531

Plaintiff The New York and Atlantic Railway Company's Exhibit 9 –Freight Tariff NYA 9500 .... A-545

Plaintiff The New York and Atlantic Railway Company's Exhibit 10 –Letter, dated April 4, 2004 .... A-549

Defendant The Town of Babylon's Exhibit B – Unredacted Version of Lease Agreement (Farmingdale), dated July 11, 2002..... A-551

Defendant The Town of Babylon's Exhibit C – Unredacted Version of Transload Facility Operations Agreement, dated August 5, 2004 ... A-557

Defendant The Town of Babylon's Exhibit F – Printout from http://www.anacostia.com/nyar/faciliti.html A-572

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Defendant The Town of Babylon's Exhibit G – Return of Defendants The Town of Babylon, The Town of Babylon Board of Zoning Appeals, and Peter Casserly A-575

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Plaintiff Coastal Distribution, LLC's Exhibit 2 – Letter, dated August 8, 2003 ..... A-1060

Plaintiff Coastal Distribution, LLC's Exhibit 2A – Map A-1061

Plaintiff Coastal Distribution, LLC's Exhibit 3 – Letter, dated October 17, 2003 ..... A-1062

Plaintiff Coastal Distribution, LLC's Exhibit 4 – Letter, dated January 15, 2004 ..... A-1063

Plaintiff Coastal Distribution, LLC's Exhibit 5 – Stop Work Order A-1065

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Plaintiff Coastal Distribution, LLC's Exhibit 7 – Inter-Office Memorandum, dated September 9, 2004 ..... A-1068

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Defendant Pinelawn Cemetery's Exhibit B – Stills from May 17, 2005 Videotape A-1109

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Answer to Amended Complaint by Defendant Pinelawn Cemetery, dated June 13, 2005 ..... A-1126

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Notice of Appeal by Defendant Pinelawn Cemetery, dated February 27, 2006 ..... A-1248

Notice of Appeal by Defendants Town of Babylon and Town of Babylon Board of Zoning Appeals, dated February 28, 2006 ..... A-1250

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APPEAL, CASREF

U.S. District Court
Eastern District of New York (Central Islip)
CIVIL DOCKET FOR CASE #: 2:05-cv-02032-JS-ETB

Coastal Distribution, LLC, et al. v. The Town of Babylon, et al.
Assigned to: Judge Joanna Seybert
Referred to: Magistrate-Judge E. Thomas Boyle
Cause: 49:11702(a)(4) Violations of Interstate Commerce A

Date Filed: 04/26/2005
Jury Demand: None
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: Federal Question

Plaintiff

Coastal Distribution, LLC

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Plaintiff

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V.

Defendant

The Town of Babylon
a Municipal Corporation

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Defendant

The Town of Babylon Board of Zoning Appeals

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Defendant

Peter Casserly
as Commissioner of Planning and Development of the Town of Babylon

represented by **James Patrick Clark**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Pinelawn Cemetery

represented by **Mark A. Cuthbertson**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
04/26/2005	1	COMPLAINT *(rec. no 16228)* against The Town of Babylon, The Town of Babylon Board of Zoning Appeals, Peter Casserly $ 250, filed by Coastal Distribution, LLC. and New York and Atlantic Railway Company (Attachments: # 1 Civil Cover Sheet)(Romano, Daniel) Modified on 4/29/2005 (Romano, Daniel). (Entered: 04/29/2005)
04/26/2005		Summons Issued as to The Town of Babylon, The Town of Babylon Board of Zoning Appeals, Peter Casserly (Romano, Daniel) (Entered: 04/29/2005)
04/26/2005	2	DISCLOSURE of Interested Parties by Coastal Distribution, LLC. (Romano, Daniel) (Entered: 04/29/2005)
04/26/2005	3	Unsigned Order to Show Cause by The New York and Atlantic Railway Company, Coastal Distribution, LLC. (Romano, Daniel) (Entered: 05/02/2005)
04/26/2005	4	MEMORANDUM in Support of Preliminary Injunction by The New York and Atlantic Railway Company, Coastal Distribution, LLC. (Romano, Daniel) (Entered: 05/02/2005)
05/02/2005	5	Minute Entry for proceedings held before Judge Joanna Seybert: Show Cause Hearing held on 4/26/2005. Case to be referred to Magistrate Judge Boyle for Preliminary Injunction Hearing on 5/19/2005 at 10:00am. Parties agree to maintain status quo until hearing. Defendants to answer/respond by 5/13/2005. Intervenor?s briefs to be filed as soon as possible. (Court Reporter M. Steiger) (Baran, Charles) (Entered: 05/02/2005)
05/02/2005	6	REFERRAL ORDER - This case is hereby referred to Magistrate Judge E. Thomas Boyle for the following purpose: To conduct a preliminary injunction hearing and issue a report and recommendation. Ordered by Judge Joanna Seybert on 5/2/05. C/M(Valle, Christine) (Entered: 05/02/2005)
05/02/2005		CASE REFERRED to Magistrate Judge E. Thomas Boyle. (Valle, Christine) (Entered: 05/02/2005)
05/02/2005	7	ORDER. A telephone conference will be held at 9:30 a.m. on May 4, 2005, with E. Thomas Boyle, United States Magistrate Judge. All counsel shall participate.SEE order for further details. Plaintiffs' counsel is directed to notify all parties of this order upon receipt. Ordered by Judge E. Thomas Boyle on 5/2/05. (c/f)(Joy, Dolores) (Entered: 05/02/2005)
05/03/2005	8	Letter from Mark A. Cutherbertson to Mag. Judge Boyle dtd 5/3/05 Regarding request that Pinelawn be permitted to participate in the conference call that you have scheduled. (Lundy, Lisa) Modified on 5/4/2005 (Lundy, Lisa). (Entered: 05/03/2005)
05/03/2005		ORDER granting re 8 Letter. Ordered by Judge E. Thomas Boyle on 5/3/05. (Lundy, Lisa) (Entered: 05/03/2005)

05/04/2005	10	Minute Entry for proceedings held before E. Thomas Boyle : plaintiff John McHugh, James Gaughran Ronald Lane, Defendant James Clark, Rachel Scelfo, Dennis Cohen, Mark CuthbertsonTelephone Status Conference held on 5/4/2005. As discussed on the record today, for the reasons stated, I will recuse myself upon the request of any party. This request shall be made by 5:00 p.m. today or it will be deemed waived. Suject to the foregoing, the evidentiary hearing on the order to show cause by Coastal Distrubution shall commence at 9:30 a.m. on Thursday, May 12, 2005. Evidentiary Hearing set for 5/12/2005 09.30 AM before Magistrate-Judge E Thomas Boyle. (So ordered by E. Thomas Boyle, USMJ) (Lundy, Lisa) Modified on 5/5/2005 (Lundy, Lisa). (Entered: 05/05/2005)
05/05/2005	9	Letter from Dolores P. Joy, Judicial Assistant to Magistrate Judge Boyle to John F. McHugh, Esq. Regarding Rescheduling of evidentiary hearing. (c/f) (Joy, Dolores) (Entered: 05/05/2005)
05/05/2005		Set/Reset Hearings: Evidentiary Hearing set for 5/19/2005 09:30 AM before Magistrate-Judge E. Thomas Boyle. (Lundy, Lisa) (Entered: 05/05/2005)
05/06/2005		Case Ineligible for Arbitration(Bollbach, Jean) (Entered: 05/06/2005)
05/06/2005	11	STIPULATION by Pinelawn Cemetery. (Attachments: # 1 Cover Letter) (Cuthbertson, Mark) (Entered: 05/06/2005)
05/09/2005	12	NOTICE of Appearance by Mark A. Cuthbertson on behalf of Pinelawn Cemetery (Cuthbertson, Mark) (Entered: 05/09/2005)
05/09/2005		ORDER re 11 Stipulation filed by Pinelawn Cemetery. The stipulation permitting Pinelawn to intervene as a party defendant is So Ordered. Ordered by Judge E. Thomas Boyle on 5/09/05. (Hancock, Lauren) (Entered: 05/09/2005)
05/12/2005	13	Letter MOTION for Extension of Time to File Response/Reply as to 4 Memorandum in Support by The Town of Babylon, The Town of Babylon Board of Zoning Appeals, Peter Casserly. (Clark, James) (Entered: 05/12/2005)
05/16/2005	14	RESPONSE in Opposition re 13 Letter MOTION for Extension of Time to File Response/Reply as to 4 Memorandum in Support *MOL IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION* filed by The Town of Babylon, The Town of Babylon Board of Zoning Appeals, Peter Casserly. (Clark, James) (Entered: 05/16/2005)
05/16/2005	15	TRIAL BRIEF *Memorandum of Law in Opposition to Preliminary Injunction* by Pinelawn Cemetery. (Cuthbertson, Mark) (Entered: 05/16/2005)
05/17/2005		ORDER re 13 Letter MOTION for Extension of Time to File Response/Reply as to 4 Memorandum in Support filed by Peter Casserly,, The Town of Babylon,, The Town of Babylon Board of Zoning Appeals. The Town of Babylon and related Defendants' request for an extension of

		time for filing their Memoranda of Law is granted. So Ordered. Ordered by Judge E. Thomas Boyle on 5/13/05. (Hancock, Lauren) (Entered: 05/17/2005)
05/17/2005	16	MOTION for Limited Admission *Pro Hac Vice* by The New York and Atlantic Railway Company. (Joseph, Ronald) Additional attachment(s) added on 5/25/2005 (Valle, Christine). (Entered: 05/17/2005)
05/18/2005		ORDER re 16 MOTION for Limited Admission Pro Hac Vice filed by The New York and Atlantic Railway Company. Motion Granted. Attorney Ronald A. Lane is admitted pro hac vice, and is directed to serve a copy of this Order on all other counsel in this case. Ordered by Judge E. Thomas Boyle on 5/18/05. (Hancock, Lauren) (Entered: 05/18/2005)
05/18/2005	17	Letter from Mark A. Cuthbertson, counsel for Defendant Pinelawn Cemetery to E. Thomas Boyle, U.S.M.J., attn: Ms. Lisa Lundy Regarding Video Player and Television for 5/19/05 Hearing. (Cuthbertson, Mark) (Entered: 05/18/2005)
05/19/2005	19	Minute Entry for proceedings held before E. Thomas Boyle : Plaintiff James Gaughran, John F. McHugh, Ronald A. Lane; Defendant James P. Clark, Howard Miller, Mark A. Cuthbertson, Jonathan S. GaynınEvidentiary Hearing held on 5/19/2005 Evidentiary Hearing set for 5/20/2005 09.30 AM before Magistrate-Judge E. Thomas Boyle. (Court Reporter Owen Wicker.) (Lundy, Lisa) (Entered: 05/23/2005)
05/20/2005	20	Minute Entry for proceedings held before E. Thomas Boyle .Plaintiff James F. Gaughran, John F. McHugh, Ronald A. Lane Defendant James P. Clark, Howard Miller; Mark A. Cuthbertson, Jonathan S. Gaynin Evidentiary Hearing held on 5/20/2005. Decision Reserved (Court Reporter Stephaine Drexel.) (Lundy, Lisa) (Entered: 05/23/2005)
05/20/2005	21	Witness & Exhibit List. (Lundy, Lisa) (Entered: 05/23/2005)
05/23/2005	18	ANSWER to Complaint by The Town of Babylon, The Town of Babylon Board of Zoning Appeals, Peter Casserly.(Clark, James) (Entered: 05/23/2005)
05/23/2005	22	AMENDED COMPLAINT against The New York and Atlantic Railway Company, filed by Coastal Distribution, LLC.(Joseph, Ronald) (Entered: 05/23/2005)
05/26/2005	23	AFFIDAVIT of Service for Order with Docket Entry *of 5/18/05* served on All Counsel on 5-26-05, filed by The New York and Atlantic Railway Company. (Joseph, Ronald) (Entered: 05/26/2005)
06/08/2005	24	TRANSCRIPT of Proceedings held on May 19, 2005 before Mag. Judge E. Thomas Boyle. Court Reporter: Owen M. Wicker. (Lundy, Lisa) (Entered: 06/08/2005)
06/08/2005	25	TRANSCRIPT of Proceedings held on May 20, 2005 before Judge Mag. E. Thomas Boyle. (Lundy, Lisa) (Entered: 06/08/2005)

06/10/2005	26	ORDER. The enclosed document is being returned for the following reason.ELECTRONIC CASE FILING (ECF) - All documents filed with the court shall be filed electronically, in compliance with Administrative Order 2004-08, dated June 22, 2004. Ordered by Judge E. Thomas Boyle on 6/10/05. (c/f)(Joy, Dolores) (Entered: 06/10/2005)
06/13/2005	27	Letter from JF McHugh to Hon. Thomas E. Boyly dated June 9, 05 Regarding Setting Post Hearing Memo. schedule. (McHugh, John) (Entered: 06/13/2005)
06/13/2005	28	ANSWER to Amended Complaint by Pinelawn Cemetery.(Cuthbertson, Mark) (Entered: 06/13/2005)
06/14/2005		ORDER re 27 Letter. All submissions shall be filed on 6/17/05. Ordered by Judge E. Thomas Boyle on 6/14/05. Plaintiff's counsel is directed to notify all parties of this order upon receipt.(Joy, Dolores) (Entered: 06/14/2005)
06/15/2005	29	ANSWER to Amended Complaint by The Town of Babylon, The Town of Babylon Board of Zoning Appeals, Peter Casserly.(Clark, James) (Entered: 06/15/2005)
06/17/2005	30	Proposed Findings of Fact by The New York and Atlantic Railway Company. (Kane, Sean) (Entered: 06/17/2005)
06/17/2005	31	MEMORANDUM in Support *New York & Atlantic Railway Company's Post-Hearing Memorandum* by The New York and Atlantic Railway Company. (Kane, Sean) (Entered: 06/17/2005)
06/17/2005	32	Post Hearing MEMORANDUM in Support *of preliminary injunction refered to in document no. 3, unsigned order to show cause* by Coastal Distribution, LLC. (McHugh, John) Modified on 6/17/2005 (Barhome, Sydelle). (Entered: 06/17/2005)
06/17/2005	33	MEMORANDUM in Opposition *Post-Hearing Memorandum of Law in Opposition to Motion for Preliminary Injunction Submitted by Town of Babylon* by The Town of Babylon, The Town of Babylon Board of Zoning Appeals, Peter Casserly. (Clark, James) (Entered: 06/17/2005)
06/17/2005	34	MEMORANDUM in Opposition *Plaintiffs' Motion for a Preliminary Injunction* by Pinelawn Cemetery. (Cuthbertson, Mark) (Entered: 06/17/2005)
06/21/2005	35	Letter from Howard M. Miller to Hon. E. Thomas Boyle Regarding motion to strike portions of plaintiffs' post-hearing submissions on the ground that they violate this Court's rules. (Miller, Howard) (Entered 06/21/2005)
06/22/2005	36	Letter from Ronald A. Lane to Hon. E. Thomas Boyle Regarding motion to strike portions of post-hearing brief. (Lane, Ronald) (Entered: 06/22/2005)
06/23/2005		ORDER re 35 Letter, 36 Letter. Application to file an oversized brief is granted nunc pro tunc. Ordered by Judge E. Thomas Boyle on 6/23/05.

		(Joy, Dolores) (Entered: 06/23/2005)
06/23/2005	37	REPLY in Opposition *to letter motion of Pinelawn* by Coastal Distribution, LLC. (Attachments: # 1 Supplement Amended Post Hearing Memorandum# 2 Supplement Proposed Findings of Fact)(McHugh, John) (Entered: 06/23/2005)
06/29/2005	38	Letter from Howard Miller to Hon. Joanna Seybert Regarding Town defendants' objections to Magistrate Boyle's June 23, 2005 order allowing plaintiffs to file memoranda of law substantially in excess of the Court's page limits without prior approval of the Court and without prior notice to the defendants. (Miller, Howard) (Entered: 06/29/2005)
07/05/2005	39	ORDER re: 38 Letter dated 6/29/05 from Howard Miller. Application DENIED. Should counsel wish to pursue a formal motion pursuant to Fed. R. Civ. P. 72(a) believing that the ruling was "clearly erroneous or contrary to law" they may do so. Ordered by Judge Joanna Seybert on 7/5/2005. (c/ecf) (Nohs, Bonnie) (Entered: 07/05/2005)
07/15/2005	40	REPORT AND RECOMMENDATIONS I find that the plaintiffs have suffered, and will continue to suffer, irreparable harm if a preliminary injunction is not granted. The plaintiffs will likely succeed on the merits of their claims (1) that the Town's zoning laws are preempted by the ICCTA; (2) that transloading operations fall within the category of rail "transportation" for purposes of the ICCTA; (3) that Coastal, by virtue of its relationship with NYA, is considered a rail carrier under the ICCTA; and (4) that the Town of Babylon is estopped from asserting jurisdiction based on Coastal's detrimental reliance on the Town's assertion that it held no jurisdiction over the property. It is recommended that the plaintiffs be granted a preliminary injunction to enjoin the Town from enforcing the stop work order and any applicable zoning regulations against Coastal. SEE R&R for further details. Objections to R&R due by 7/29/2005. Plaintiffs' counsel is directed to notify all parties of this Report upon receipt. So Ordered. Ordered by Judge E. Thomas Boyle on 7/15/05. (Hancock, Lauren) (Entered: 07/15/2005)
07/25/2005	41	Letter from Mark A. Cuthbertson to Honorable Joanna Seybert Regarding Adjournment of Time to File Objections to M.J. E. Thomas Boyle Report and Recommendation dated July 15, 2005. (Cuthbertson, Mark) (Entered: 07/25/2005)
07/26/2005	42	MOTION for Leave to File Excess Pages by The Town of Babylon. (Clark, James) (Entered: 07/26/2005)
07/27/2005	43	Letter MOTION for Leave to File Excess Pages *(with page 2 which was inadvertently omitted from yesterday's filing)* by The Town of Babylon. (Clark, James) (Entered: 07/27/2005)
07/28/2005		ENDORSED ORDER re: 41 Letter from Mark Cuthbertson requesting a 2-week adjournment to file objections to the R&R of Magistrate Boyle is GRANTED. Objections to be filed by 8/12/05. SO ORDERED by Judge Joanna Seybert on 7/27/2005. (c/ECF) (Nohs, Bonnie) (Entered: 07/28/2005)

07/28/2005		ENDORSED ORDER re: 42 and 43 Letter/Motion for Leave to File Excess Pages is GRANTED. SO ORDERED by Judge Joanna Seybert on 7/28/2005. (c/ECF) (Nohs, Bonnie) (Entered: 07/28/2005)
07/29/2005	44	OBJECTION to 40 Report and Recommendations by The Town of Babylon, The Town of Babylon Board of Zoning Appeals, Peter Casserly. (Clark, James) (Entered: 07/29/2005)
08/03/2005	45	Letter MOTION for Extension of Time to File by Coastal Distribution, LLC. (McHugh, John) (Entered. 08/03/2005)
08/03/2005	46	Letter MOTION for Leave to File Excess Pages by Pinelawn Cemetery. (Cuthbertson, Mark) (Entered: 08/03/2005)
08/05/2005		ENDORSED ORDER re: 45 Motion for Extension of Time to File is APPROVED. Plaintiffs' replies to all of the Defendants' objections are due 8/22/05. Approved by Judge Joanna Seybert on 8/4/2005. (c/ECF) (Nohs, Bonnie) (Entered: 08/05/2005)
08/05/2005		ENDORSED ORDER re: 46 Motion for Leave to File Excess Pages (30) is APPROVED. Ordered by Judge Joanna Seybert on 8/4/2005. (c/ECF) (Nohs, Bonnie) (Entered: 08/05/2005)
08/12/2005	47	OBJECTION to 40 Report and Recommendations *of USMJ E. Thomas Boyle dated July 15,2005* by Pine Lawn Cemetery. (Cuthbertson, Mark) Modified on 8/15/2005 (Mierzejewski, Elizabeth). (Entered: 08/12/2005)
08/22/2005	48	MEMORANDUM in Support *of Magistrate's Report and Recommendations* by The New York and Atlantic Railway Company. (Lane, Ronald) (Entered: 08/22/2005)
08/22/2005	49	RESPONSE in Support re 40 REPORT AND RECOMMENDATIONS re 1 Complaint, filed by Coastal Distribution, LLC,, The New York and Atlantic Railway Company, filed by Coastal Distribution, LLC. (McHugh, John) (Entered: 08/22/2005)
01/31/2006	50	MEMORANDUM AND OPINION - In accordance with the foregoing, the Court adopts Magistrate Judge E. Thomas Boyle's Report and Recommendation. The Court preliminarily enjoins the Town from enforcing its Stop Work Order against Pltffs until resolution of this matter. Ordered by Judge Joanna Seybert on 1/31/06. C/ECF(Valle, Christine) (Entered: 02/01/2006)
02/27/2006	51	NOTICE OF APPEAL as to 50 Memorandum & Opinion, by Pinelawn Cemetery. (Cuthbertson, Mark) (Entered: 02/27/2006)
02/27/2006		Electronic Index to Record on Appeal sent to US Court of Appeals re 34 Memorandum in Opposition, 18 Answer to Complaint, 47 Objection to Report and Recommendations, 27 Letter, 20 Evidentiary Hearing,, 33 Memorandum in Opposition, 17 Letter, 26 Order,, 11 Stipulation, 8 Letter, 15 Trial Brief, 7 Order,, 29 Answer to Amended Complaint, 23 Affidavit of Service, 35 Letter, 16 MOTION for Limited Admission *Pro Hac Vice*, 39 Order,, 28 Answer to Amended Complaint, 49 Response in Support of Motion, 30 Proposed Findings of Fact, 10 Telephone

		Conference,,, Set Hearings,,, 52 Notice of Appeal, 13 Letter MOTION for Extension of Time to File Response/Reply as to 4 Memorandum in Support, 31 Memorandum in Support, 19 Evidentiary Hearing,, Set Hearings,, 50 Memorandum & Opinion,, 48 Memorandum in Support, 5 Show Cause Hearing,, 41 Letter, 6 Order,, 43 Letter MOTION for Leave to File Excess Pages *(with page 2 which was inadvertently omitted from yesterday's filing)*, 22 Amended Complaint, 44 Objection to Report and Recommendations, 32 Memorandum in Support, 46 Letter MOTION for Leave to File Excess Pages, 12 Notice of Appearance, 21 Exhibit List, 40 REPORT AND RECOMMENDATIONS re 1 Complaint, filed by Coastal Distribution, LLC,, The New York and Atlantic Railway Company,, 1 Complaint,, 38 Letter,, 51 Notice of Appeal, 42 MOTION for Leave to File Excess Pages, 2 Disclosure of Interested Parties, 3 Unsigned Order to Show Cause, 37 Reply in Opposition, 45 Letter MOTION for Extension of Time to File, 14 Response in Opposition to Motion,, 4 Memorandum in Support, 9 Letter, 36 Letter For docket entries without a hyperlink, contact the court and we'll arrange for the document(s) to be made available to you. THIS ELECTRONIC INDEX IS SENT ON TWO APPEALS; SEE DOC. # 51 AND DOC. #52 (Romano, Daniel) Modified on 3/1/2006 (Romano, Daniel). (Entered: 03/01/2006)
02/28/2006	52	NOTICE OF APPEAL as to 50 Memorandum & Opinion, by The Town of Babylon, The Town of Babylon Board of Zoning Appeals, Peter Casserly. (Attachments: # 1 Memo & Order Appealed)(Clark, James) (Entered: 02/28/2006)
03/01/2006	53	USCA Appeal Fees received $ 255 receipt number 19067 re 51 Notice of Appeal filed by Pinelawn Cemetery, (Romano, Daniel) (Entered: 03/10/2006)
03/01/2006	54	USCA Appeal Fees received $ 255 receipt number 19077 re 52 Notice of Appeal filed by Peter Casserly,, The Town of Babylon,, The Town of Babylon Board of Zoning Appeals, (Romano, Daniel) (Entered: 03/10/2006)

PACER Service Center			
Transaction Receipt			
06/07/2006 11:15:12			
PACER Login:	cp0024	Client Code:	
Description:	Docket Report	Search Criteria:	2:05-cv-02032-JS-ETB
Billable Pages:	6	Cost:	0.48

A-10

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY

Plaintiffs,

COMPLAINT

v.

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, AND PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON,

Defendants.

Plaintiffs by their co-counsel John F. McHugh, James F. Gaughran, Fletcher and Sippel LLC, and Landman, Corsi, Ballini & Ford, P.C. complain of the defendants as follows:

JURISDICTION

1. This action arises under the Interstate Commerce Commission Termination Act, one of the laws of the United States giving this court jurisdiction pursuant to 28 U.S.C. 1331 and 1337. Further, as this action seeks to enjoin a violation of that act and as such this court has jurisdiction pursuant to 49 U.S.C. 11704(c) (1) and as the actions of the defendants are under color of State Law and seek to bar plaintiffs from the exercise of rights guaranteed by federal law this court has jurisdiction pursuant to 42 U.S.C. §1983 and further the defendants seek to deny the plaintiffs due process of law giving this court

jurisdiction under 42 U S C. §1985 This court also has pendant jurisdiction over related State law claims. Venue is proper due to the principal place of business of all parties.

PARTIES

2. Plaintiff, Coastal Distribution, LLC (Coastal) is a Limited Liability Company organized under the laws of the State of New York having its principal place of business at 1633 New Highway, Farmingdale, N.Y. 11735

3. Plaintiff, New York & Atlantic Railway Company (NY&A) is a common carrier by railroad duly organized and subsisting under the laws of one of the States of the United States duly authorized to operate as a rail common carrier by the United States Surface Transportation Board (STB). In November of 1996 NY&A was granted exclusive freight operating authority on the lines of the Long Island Railroad (LIRR), a subsidiary of the New York State Metropolitan Transportation Authority. Pursuant to the transfer of freight operating authority from the LIRR to NY&A, certain property bordering on New Highway in Farmingdale, within the Town of Babylon owned by defendant Pinelawn Cemetery Corp. and leased to the LIRR was included in the freight operations granted to NY&A. LIRR, as now known, is the successor to a railroad which commenced construction of its rail line from Brooklyn to Greenport in 1836. It completed that line in 1844 but reached Farmingdale and commenced service to that point in 1841. Since that year it has served that area as a common carrier by railroad. The railroad was acquired by the State of New York in the 1950's with full responsibility for general rail transportation services and is now operated by the Long Island Railroad Corp. a corporation wholly owned by the New York State Metropolitan Transportation Authority. While the NY&A has been authorized to fulfill the common carrier

obligations of the LIRR as to freight, the LIRR remains a common carrier by rail without limitation.

4. The Town of Babylon is, on information and belief, a municipal corporation duly organized, subsisting and acting under or under color of the laws of the State of New York.

5. The Town of Babylon Board of Zoning Appeals is an entity created pursuant to § 267 of the New York Town Law with a mandate to provide first line review of decisions of town officials in zoning matters, in this case the actions of the Department of Planning and Development.

6. Peter M. Casserly is the Commissioner of Planning and Development for the Town of Babylon and is responsible for the actions all municipal employees and agents within that Department and is named here as his department improperly issued the Stop Work Order here in issue.

7. Pinelawn Cemetery Corp. (Pinelawn) is not a party here but its identity is necessary here. On information and belief it is a not for profit corporation duly organized under the laws of the State of New York which owns certain parcels of land, leased by it to the LIRR in 1904 and 1906 for ninety nine years, each with the right to renew for another term. LIRR used these two parcels of land as a team track where freight could be transferred between rail cars and highway vehicles from approximately 1904 to the transfer date, the NY&A continued that use until management was transferred to Coastal to continue that use first as an independent terminal operator and after from August of 2004 as agent of NY&A.

8. The Long Island Railroad is not a party here, is a rail carrier and a corporation duly organized under the laws of the State of New York which has a leasehold interest in the Farmingdale facility here in issue and is a necessary party to this action.

I

AS AND FOR A CAUSE OF ACTION
AGAINST THE TOWN OF BABYLON

9. In August of 2004, the NY&A entered into a Transload Facility Operations Agreement wherein NY&A retained Coastal to develop and operate a certain term track facility in Farmingdale, N.Y. within the town of Babylon, as a rail-highway transload facility.

10. Coastal and NY&A had a prior association by lease for the same property entered into in 2002 which lease was for the purpose of developing the facility as a general service common carrier transload facility between highway vehicles and NY&A rail operations.

11. Pursuant to the earlier agreement, Coastal obtained the approval of NY&A and the LIRR for certain improvements to be made on the property to handle the transloading of freight between LIRR cars and highway vehicles.

12. Prior to any construction, Coastal approached the landowner, Pinelawn Cemetery as well as the defendant Town of Babylon and sought a review of Coastal's plans for compliance with municipal building and fire codes as well as to determine if any environmental or other problems were presented by the project in the view of either interested party.

13. On numerous occasions between early 2002 and August of 2003 defendant Peter M. Casserly, his predecessor and other officials of the Planning and Development

Department of the Town of Babylon declined to review the plaintiffs' project stating that the town had no jurisdiction over a railroad property. When the plaintiffs' architect attempted to file the plans with the Town's Planning and Development Department the plans were rejected with a letter dated August 8, 2003, signed by said Peter M. Casserly as Commissioner of the Department asserting that the Town had no jurisdiction over a railroad facility. The plans were submitted for approval to the Long Island Railroad which raised no objection after an inspection of the site. Further, the New York State Department of Environmental Protection, after site inspections and a full review of the plaintiffs' operation determined that the State had no jurisdiction over the facility as it was a railroad facility engaged in rail transportation services.

14. In late October of 2003, after presenting its plans to the defendants, including Pinelawn and their having raised no objection[1], Coastal commenced construction of its facilities based upon the approval of the plans by NY&A and LIRR. On January 15, 2004, the facilities, including a truck scale, a rail car scale, a large structure to protect transloading operations from weather and a perimeter fence were nearing completion. On that date Pinelawn, for the first time, notified the plaintiffs that it deemed its lease of 1904, that of one of two parcels on which the Farmingdale facility was operating, to have expired, that it would not renew the lease and demanding that the plaintiffs remove themselves from the premises.

[1] At that time an issue had been raised about the renewal of the 1904 Long Island Railroad 99 year lease of the premises from Pinelawn. On October 23, 2003 at a meeting at which Pinelawn reviewed plaintiffs plans, Pinelawn presented Coastal with a document signed by Pinelawn's president renewing that lease for a second 99 year term.

15. On March 29, 2004, due exclusively to the political influence of Pinelawn, the Town of Babylon issued a Stop Work Order asserting that plaintiff was "working without a permit", and directing the plaintiffs to cease construction on the premises.

16. On March 29, 2004 the building inspector who had issued the Stop Work Order stated that it was issued solely at the insistence of Pinelawn.

17 In April of 2004 Pinelawn brought an action in the Supreme Court of the State of New York, County of Suffolk, claiming that the lease it had entered into in 1904 with the LIRR had not been properly renewed.

18. Coastal with the approval of the LIRR and the NY&A filed an appeal with the Town of Babylon Zoning Board of Appeals.

19. In August of 2004 the Plaintiffs cancelled their lease between themselves and entered into the current Transload Facility Operating Agreement wherein NY&A assumed control over the facility and appointed Coastal as its agent for the purpose of developing the facility, selling NY&A services to be provided via the Farmingdale facility and conducting the day to day operation of that facility. A copy of that agreement was submitted to the Board of Zoning Appeals.

20. On September 9, 2004, just prior to the first hearing held by the defendant, Zoning Board of Appeals of the Town of Babylon, the members of which are appointed by the Town Supervisor and the other four members of the Town Board, The Town Supervisor, requested that the Board deny the plaintiff's appeal and enforce the Stop Work Order.

21. On information and belief the Town Supervisor was acting in concert with Pinelawn and instructed his appointees to determine the matter in favor of Pinelawn's position without regard to the law.

22. At that hearing and a subsequent hearing, the Town was informed by NY&A and Coastal of the nature of the facility and of the fact that as a railroad facility Pinelawn's claims did not affect the Farmingdale facility's status as an active railroad facility which is outside the Town's regulatory jurisdiction. Further, before the decision of the Zoning Board of Appeals was issued, a determination by the New York State Department of Environmental Conservation, the agency authorized under New York State Law to license waste transfer facilities, was delivered to the Board confirming that the State of New York's regulatory authority over the Farmingdale facility was pre empted by Federal Law.

23. On April 22, 2005 the Zoning Board of Appeals, bowed to political pressure and honored the mandate of the Town's supervisor and affirmed the Stop Work Order. At that time the defendants, and the Town were fully aware that the plaintiffs' facilities and operations were exempt from State regulation and that no basis for their attempt to exercise local jurisdiction existed.

24. Pursuant to the Constitution and laws of the United States the Town of Babylon has no authority to require the plaintiffs to seek Town approval of the construction of facilities to be used for railroad related operations.

25. By reason of the above, the plaintiffs having made no prior application for the relief herein requested and as plaintiffs have no adequate remedy at law they are entitled to a judgment permanently enjoining the Town of Babylon from taking any action to

interfere with the operations of Coastal and of the NY&A or from taking any action to interfere with access to the transportation services of the NY&A including but not limited to attempting to enforce the Stop Work Order giving immediate rise to this action.

Wherefore, plaintiffs demand judgment in their favor and against the defendants permanently enjoining the Town of Babylon, the Town of Babylon Board of Zoning Appeals and Peter Casserly as Commissioner of Planning and Development of the Town of Babylon from attempting to enforce any Stop Work Order or from taking any action which could interfere with the operation of the plaintiffs' transload facility bordering on New Highway, Farmingdale, Town of Babylon, County of Suffolk, State of New York, as well as for the costs and disbursements of this action and such other relief as may be mandated or allowed by law.

Dated, New York, N.Y.
April 25, 2005

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY

Plaintiffs,

v.

ORDER TO SHOW CAUSE TEMPORARY RESTRAINING ORDER

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, and PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON

Defendants.

Upon the Summons and Complaint affixed hereto and the affidavit of Joseph Rutigliano, Principal of the plaintiff Coastal Distribution, LLC, the affidavit of Fred Krebbs, the President of the plaintiff New York and Atlantic Railway and the declarations of James F. Gaughran and John F. McHugh and the legal authority cited in the plaintiffs' Memorandum of Law it is

ORDERED THAT THE DEFENDANTS or their attorneys, SHOW CAUSE before this Court in Room _____ of the Courthouse, _____, _____ New York at _____ .M. on the _____ day of _____ why an order should not be entered enjoining the defendants from taking any action to enforce any Stop Work Order issued by the Town of Babylon against the plaintiffs or from taking any other action to interfere with or obstruct plaintiffs' possession or operation of the rail-highway

transload facility on New Highway in Farmingdale, Town of Babylon, County of Suffolk, in the State of New York. It is further

ORDERED that pending the hearing of this motion the defendants are restrained from taking any action to enforce any order against the plaintiffs including the Stop Work Order issued by the Town of Babylon to Coastal Distribution, LLC on March 29, 2004 and it is further,

ORDERED that sufficient cause having been shown, service of a copy of this ORDER TO SHOW CAUSE, the Summons and Complaint and the papers in support thereof upon the defendants, by _____ shall be deemed sufficient for all purposes.

ENTER

_____
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY

Plaintiffs,

v.

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS and PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON,

Defendants,

Declaration in Support of a Preliminary Injunction

John F. McHugh, an attorney duly admitted to practice before this court declares pursuant to 28 U.S.C. §1746 as follows:

1. I am co-counsel for Coastal Distribution, LLC ("Coastal") and as such am familiar with this matter. Coastal operates a terminal facility under contract with the plaintiff, New York & Atlantic Railway (NY&A) at Farmingdale, New York within the Town of Babylon. The facility is a public "team track" which has been used to transfer freight between rail cars and highway vehicles since about 1904. The modern term for this activity, which is as old as the multi mode land transportation, essentially since the first canals, is "transloading". Without this function arterial transportation services

would be available only to those with their own loading facilities on a transportation artery.

2. In March of 2004 the building inspector of the Town of Babylon, on orders from above which were due to the influence of Pinelawn Cemetery Corp. (affidavit of Joseph Rutigliano ¶9 submitted herewith), issued a Stop Work Order to Coastal stating that Coastal was working without a permit, Exhibit A. In further discussions it was determined that the work in issue was the construction of a large shelter on the property to protect transloading operations from weather and to shield the public from exposure to such operations. On April 22, 2005 the Town of Babylon Zoning Board of Appeals denied the appeal of the Stop Work Order, Exhibit B.

3. Plaintiffs, along with the Metropolitan Transportation Authority and the Long Island Railroad had filed that appeal of the Stop Work Order with the Town Board of Zoning Appeals, to automatically stay the effect of the order, Exhibit C. As is fully explained by Mr. Rutigliano, supra, the town had refused to even consider the plans for the structure when they were presented for inspection long before construction of this facility started, asserting correctly that as this was a railroad facility owned by the Metropolitan Transportation Authority, the parent of the Long Island Railroad, the town had no jurisdiction.

4. Coastal, under contract with the New York & Atlantic Railway, which Railroad has been granted authority by the United States Surface Transportation Board to provide the Long Island Railroad's freight services, see verification of Fred L. Krebs ¶2, submitted herewith, is engaged solely in transloading at this facility for customers of the NY&A and the marketing of rail services which require such transloading. The effect of

the Stop Work Order, or indeed the town's assertion of jurisdiction over the facility in any manner, is to restrict the services the NY&A can provide, i.e. to limit a federally granted interstate commerce franchise.

5. This motion is brought by Order to Show Cause as the plaintiffs are engaged in common carriage and have an obligation imposed by federal law to provide rail transportation and related services on reasonable terms to the public. The plaintiffs have a high probability of success on the merits as the defendants' actions are legally indefensible as is fully set forth in the plaintiffs' Memorandum of Law. Indeed, New York & Atlantic Railway, a federally franchised rail carrier has the right and obligation to maintain such services and it has the right to use Coastal, its contractor, to assist. The town seeks to obstruct plaintiffs' compliance with the terms of their federal franchise, and seeks to assert power which has been beyond local authority since this issue was completely resolved by the Supreme Court in Gibbons v. Ogden 22 U.S. 1, 221 (1824). Any obstruction of such services is a denial of rights granted to plaintiffs by federal law and denies the community services the plaintiffs are mandated by federal law to provide. Any delay in obtaining relief irreparably harms plaintiffs, their customers who are the direct beneficiaries of these services and the communities on which the burden of alternate transportation is imposed in violation of both federal and state policy which favors removal of freight from the overburdened highway system. Further, this action includes a claim under Article 78 of the New York Civil Practice law and Rules, commenced by Order To Show Cause under state imposed procedure.

6. The decision by the Zoning Board of Appeals seeks to justify its action first by miss stating the identity of the applicants, referring only to Coastal and ignoring the fact

that NY&A, the Long Island Railroad and its parent the Metropolitan Transportation were named as co-appellants. The Board then focuses on the steps between arrival of cargo by truck at the Farmingdale facility and its being placed in rail cars, deeming each in turn not to be rail transportation. The Board states that only the direct transfer of cargo from a truck to a rail car, without touching the ground, is rail activity. This absurd conclusion is precisely why such decisions are placed within the exclusive jurisdiction of the Surface Transportation Board by federal law to the absolute exclusion of such local bodies. This Board asserts that as Construction and Demolition debris is dumped onto the ground within the structure in issue and items which are outside the definition of construction and demolition debris, as that term is interpreted by the destination landfill and the laws of the State of Ohio, are removed before the conforming cargo is loaded onto the rail car, the operation is not that of a rail carrier. Of course the process used to transfer the cargo between modes is the only practical way to do so. The cars in issue are open top hopper cars. They stand over fifteen feet above the top of the rail. They are loaded using a grapple. The concept of lifting the truck nearly twenty five feet in the air to dump it directly into the rail car defies comprehension. Indeed, some practical method and device is used to handle every commodity which is loaded onto the rail car by a carrier, including grain elevators, silos for plastics, salt, coal and even sand piles etc. all of which sit in a structure on the ground and are moved by shovels, belts, grapples and or cranes. All these materials handling methods and devices are well understood transportation functions. All loading operations for any mode include inspection to confirm that the goods shipped are those the carrier contracted to carry and are in the condition represented. Indeed, common carriers are well understood to perform

numerous services for customers, including C.O.D. services where they must receive proof of payment for the goods before delivery on order notify bills of lading. None of these services removes a rail carrier from the definition of common carrier by rail as held here by the defendant Zoning Board of Appeals.

7. The Board also found that as Coastal had the obligation to maintain tracks and took responsibility for cars and cargo on delivery to the facility, it was not an agent of the railroad. These clauses in contracts between a principal and agent are so common as to establish that the decision of the Board could not have been issued in good faith. NY& A is responsible at all times to its customers for their cargos. However, it, as may any general contractor, has subcontracted and placed the first obligation to handle the cargo properly in the hands of its agent, Coastal, and it has defined the responsibility of each clearly within the subcontract. This is true of all subcontracts for any purpose whatsoever. Allocation of responsibility between principal and agent does not make the agent less an agent of the principal. Again, this is a concept of law so well understood as to render the decision of the Board could not have been issued in good faith.

8. Conspicuous by its absence from any mention in the Board's decision, and a strong indication of the political influence at work here is the specific clause of the contract which defines the relationship between the railroad and Coastal. It states:

> 1.02. Railroad Control of Operations. RAILROAD shall control all aspects of the Facility's Transloading operations. RAILROAD shall have the right to review and audit COASTAL's business records related to the operation of Facility during regular business hours and shall have the right to inspect COASTAL's operation of the Facility at any time. COASTAL operations at the Facility and the Yard shall b e subject to the supervisory authority of the RAILROAD's General Manager at Glendale.

The balance of the agreement repeatedly asserts Coastal's function as the railroad's agent and reasserts the railroad's right to approve any and all activity at the facility. Thus, while Coastal is clearly a separate entity it is also clearly performing functions of a subcontractor-agent of the railroad. Absolutely contrary to the decision of the defendant Board, the railroad has the absolute contractual right to supervise everything Coastal does on the premises. Yes, as the Board states, Coastal may arrange for disposal services for railroad customers, but not as the agent of the railroad. However, that function has an effect, if at all, in Ohio and not in Babylon, N.Y. and has no relationship to its loading of rail cars in Babylon which is clearly within Coastal's authority as the railroad's agent.

9. The action of the Zoning Board of Appeals here, and that of the town in general, is in open and notorious contempt of federal law. The State of New York Department of Environmental Conservation conducted a full review of Coastal's operation and determined that Coastal is a rail operation and not subject to State licensing requirements. Before that State determination was given to the Board the Board was provided with a full explanation of the applicable law wherein the Surface Transportation Board as well as all state and federal courts presented with similar situations have held that a rail facility is not subject to local licensing regulations. On April 14, 2005, just days before this decision, the Second Circuit reaffirmed this now well understood law citing to the many of the prior opinions providing judicial support for this proposition most of which were cited to the Board by the plaintiffs. Therefore, absolutely no legal support exists for the decision of the Zoning Board of Appeals and the admission by the building inspector, related by Mr. Rutigliano, that his issuance of the order was political is the only explanation for such defiance.

10. Further, the decision of the Board, under state law, must be supported by the evidence. The Board, for instance, cites the personal observations of a witness, Mr. Mruphy. Mr. Murphy testified that he had made no personal observations at all but submitted reports by his employees who did not appear before the Board. Therefore, on every level the decision of the Board and the actions of the Town of Babylon are disingenuous and seek under color of State law of obstruct the plaintiff's exercise of a federal right.

11. Plaintiffs have no adequate remedy at law and no prior application for the relief requested here has been made in any Court.

Wherefore, the injunction sought here will prevent irreparable harm and is required to bar the defendants from extending their authority in open and notorious defiance of long established federal law in order to frustrate both federal and state public policy solely to serve local political interests.

Dated, New York, N.Y.
April 25, 2005

John P. McHugh
6 Water Street
New York, N.Y. 10004
212-483-0875

04/07/2005 11:20 FAX 022

STOP ALL WORK IMMEDIATELY

WARNING OF VIOLATIONS

Eddie Mullen

OF

BUILDING CODE REQUIREMENTS

957-3157

631-

MARTY STEINBURG

Joe R

CALL (516) 957-3058

Please Call Between 8:00am and 4:30pm

RE: SCTM # _____

DIVISION OF BUILDING

TOWN OF BABYLON

200 EAST SUNRISE HIGHWAY

LINDENHURST, N.Y. 11757

1633 New Hwy

CONTACT BLDG Dept Immediately

DATE ISSUED: 3/29/04

BY: Timothy Besemer

LOCATION: Conklin & New Hwy

REMARKS: Working without a Permit

TOWN OF BABYLON
BOARD OF APPEALS
200 East Sunrise Highway
North Lindenhurst NY 11757-2598
(631) 957-3011

Case: 04-267
Applicant: Coastal Distribution, LLC, 1633 New Hwy., E. Farmingdale, NY
Location: on the northeast corner of New Hwy. & Conklin St., E. Farmingdale, NY
Suffolk County Tax Map: #0100-35-2-2

Variances requested: Permission for relief in the form of vacating and annulling a Stop Work Order issued by Building Inspector Bensamer on or about 3-26-04. Residence A Zone

the Zoning Board of Appeals has decided it is: DENIED;
PURSUANT TO ANNEXED FINDINGS

FINDINGS ADOPTED
At the meeting of: APRIL 21, 2005

THOMAS C. YOUNG, ACTING CHAIRMAN

As per application and building plans filed with Zoning Board of Appeals, when all fees are paid as required. The permit holder is responsible for knowing the Town ordinances and restrictive covenants relevant to this variance. Violations may be penalized by fines and/or revocation of the permit. Use permits are to be kept on the subject site. All variances become void if the use does not start or the site work does not begin within 180 days of granting. Subject to Sect. 57 of the New York State Workmen's Compensation Code. This is not a building permit.

Application of:	Coastal Distribution, LLC (Application No 04-267)
Address:	1633 New Highway, East Farmingdale, New York
Location:	n/c/c of New Highway & Conklin Street, East Farmingdale
Public Hearing(s):	September 9, 2004 and February 3, 2005
Relief Sought:	Permission for relief in form of vacating and annulling a Stop Work Order issued by Building Inspector Bessemer on or about 3/25/04
Decision of Board:	Referred to counsel for preparation of written findings in contemplation of upholding Stop Work Order
Date of Decision:	February 10, 2005

INTRODUCTION

The applicant Coastal Distribution, LLC seeks relief in the form of vacating and annulling a Stop Work Order issued by Town of Babylon Building Inspector Bessemer on or about March 25, 2004. The applicant claims that it is operating a railroad transporting facility as an agent for New York-Atlantic Railroad. It claims that its use of the subject site (1633 New Highway in East Farmingdale) is an activity that Federal Law and State Law recognizes as exempt as it relates to the Town's jurisdiction. The applicant therefore claims to be exempt from any Town of Babylon permitting process. The applicant further claims that the stop work order issued by the Building Inspector is a nullity and therefore challenges the issuance of same herein. For the reasons proffered below, the Board herein upholds the issuance of the stop work order.

STATEMENT OF FACTS

a. Public Hearing of September 9, 2004:

The first public hearing conducted regarding this matter was held on September 9, 2004. The applicant, appearing by its attorney, testified that Coastal Distribution, as an agent of New York and Atlantic Railway, operated a transload facility for railroad freight purposes at the subject site on New Highway in East Farmingdale. The applicant

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claimed that the use of the site was "to move freight between trucks and railway cars" and further claimed that this type of activity had occurred on this site for approximately one hundred (100) years.

The basis of the applicant's appeal to the within Board was that it claimed to be a railroad transloading facility, and as such, that it was exempt from local zoning pursuant to federal law. The applicant also claimed that its operations at the site were in conformance with the federal exemption to which it claimed to be entitled.

The subject property is owned by Pinelawn Cemetery. The history of the site is that since 1904, it has been leased to the Long Island Railroad (now owned by the MTA). In 1996, the Long Island Railroad, in an attempt to privatize freight rail service, entered into an agreement with New York and Atlantic Railway for its use of the subject site. The applicant Coastal Distribution became involved with the property in 2002 when it began operating on the site as, what it terms, an "appointed agent" for New York and Atlantic Railroad.

In 2003, the applicant erected a building on the site which it claimed was necessary so that materials could be loaded and unloaded on and off the railroad cars without creating dust and noise. The applicant stated that the building, "provide[d] better service for the customers" and that said structure was "essential" for the operation of a modern transloading facility.

The applicant proffered that its use of the site was only as a transloading facility. When asked by the Board to define a transloading facility, the applicant replied that it was just taking the materials from the trucks, putting it on railroad cars, and loading materials onto the trucks from rail cars to send to New York and other places and vice versa.

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Mr Fred Krebs, the President of New York and Atlantic Railway, spoke on the applicant's behalf. He indicated that New York and Atlantic Railway was registered with the Federal Railroad Administration and with the Surface Transportation Board. He stated that New York and Atlantic was a railroad and that they had "worked out a deal" where Coastal became its agent. (Minutes of public hearing of September 9, 2004, at page 38).

Mr. Krebs testified concerning the operation of the site. He stated that "on that particular site what they're doing is, they're – they're bringing in construction demolition debris and they're taking it off the trucks and putting it into the [rail] cars." (Minutes of September 9, 2004 at page 40). When asked by the Board what constituted "demolition debris," Mr. Krebs stated that "basically, it's everything that's not trash. It cannot have any MSW (municipal solid waste) in it. It's got to be what they call clean debris." (Minutes of September 9, 2004 at page 40).

Mr. Krebs added regarding the site's operation that there was a sorting process to eliminate the items that would ultimately be rejected by landfills. He testified that the final destination for the construction and demolition debris (hereinafter C&D) was landfills in the State of Ohio. (Minutes of September 9, 2004 at pages 40-41).

Martin Sternberg of Coastal Distribution, LLC also testified at the public hearing of September 9, 2004 regarding the day-to-day operation of the site. He stated that Coastal had been operating for approximately three weeks. Coastal was operating five days a week from 7:00 am to 5:00 pm and was accepting predominantly "C&D" material – construction and demolition material. When asked by the Board whether a truck with "C&D" could come to the site and simply dump its load out, Mr. Sternberg replied that Coastal was presently only taking materials that previously went through transfer

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stations. (Minutes of public hearing of September 9, 2004 at page 52). He stated that trucks are dumping loads from transfer stations and that the material was thereafter loaded onto rail cars.

Regarding items that were not permitted at landfills (which are the ultimate destination for C&D materials), Mr Sternberg stated that Coastal was not conducting any sorting on site. He stated that "the material is placed on the floor, we pick it up and put it in the rail cars." He offered that "we're visually looking for materials that we know Ohio [landfill] will not take which would be things – there are many things...of course, liquids, 55-gallon drums, sofas, bedding, tires, and the list goes on and on, as I had said before. Any of that [prohibited] material that we see, we extract it. It goes back onto the truck that delivered it if we see it at that moment. If not, there are containers there to take that type of material which then is transported to an incinerator and disposed of." (Minutes of September 9, 2004 at page 53). When asked by the Board if there was a fee charged for that service, Mr. Sternberg indicated that there was.

Mr. Sternberg claimed that this activity was not sorting, but instead Coastal was "only extracting" the materials which were not allowed to be transported. (Minutes of September 9, 2004 public hearing at page 53).

Two local business owners appeared regarding the application. The first, Mr Michael Delmonico, operating his business at 1630 New Highway stated that he owned a concrete plant and that he was located directly across the street from the Coastal site. He stated that he was impressed with the operation and that it appeared to be "clean and orderly." Second, Mr. Kurt Schneider of GE Modular Space, 967 Conklin Street, Farmingdale, appeared in opposition to the application. He expressed concern with the increased truck traffic that he felt was accessing the subject site. He also voiced his

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concern regarding increased dust in the area that had been generated by the applicant's use of the site. (For full comments by neighboring business owners, see minutes of September 9, 2004 at pages 60-62).

Pinelawn Cemetery, the owner of the subject property, also appeared in opposition to the subject application. The attorney representing Pinelawn Cemetery expressed Pinelawn's concern regarding the operation of the site, including what he believed to be a lack of oversight of Coastal. He raised questions regarding the safety of the site and stated that the applicant's use of the premises was increasing truck traffic "tremendously" on New Highway. (Minutes of September 9, 2004 at page 64).

Pinelawn also contended that Coastal was a profit making organization and that its use of the premises was a "propriety purpose" rather than a governmental purpose. For this reason, they claimed that Coastal was not entitled to any exemption from local zoning.

At the close of the public hearing, both the applicant and Pinelawn Cemetery submitted legal briefs. Both requested a period of time to review the other's brief and submit a reply. Therefore, at the close of the hearing the Board held the record open for a period of two weeks for the submission of further "legal point and briefs to come in" and reserved its decision. (Minutes of September 9, 2004 hearing at page 81).

b. Reopening of the Public Hearing:

After the close of the public hearing of September 9, 2004, both parties submitted a reply to the other's memorandum of law. Pinelawn Cemetery's reply brief included three affidavits by persons that had not attended the hearing of September 9, 2004. The Board deemed the affidavits to be new evidence not presented during the course of the

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public hearing and submitted after the hearing had been closed. The Board considered the submission of this new factual evidence to be improper and promptly rejected and returned same to the attorney for Pinelawn. See October 12, 2004 letter from Louis D'Amaro, Chairman of the Zoning Board of Appeals, to John Armentano (counsel to Pinelawn) and James Gaughran (counsel to the applicant) rejecting and returning the offending affidavits, annexed hereto as Exhibit "A".

Pinelawn, through its counsel, thereafter requested that the Board reopen the hearing for the submission of new factual evidence based on the fact that they were unaware that the record was held open for only further legal points and that there were several statements made by the applicant that had come to light for the first time at the public hearing which they wanted the opportunity to address See October 15, 2004 letter from John Armentano, Esq. to the Board of Appeals in which he requested a reopening of the hearing, annexed hereto as Exhibit "B".

On October 20, 2004, the Board voted to reopen the hearing and record upon Pinelawn's compliance with the Board's notice requirements. Same is reflected in the Board's minutes of October 20, 2004, annexed hereto as Exhibit "C". The Board's basis for reopening the public hearing were its own Rules of Procedure, Section XII (F)(3), which provides that "in its discretion by motion adopted, the Board may continue the hearing to another date for the purpose of enlisting further testimony or receiving other evidence with respect thereto" and Section XII (F)(4) which states that the Board "may on motion duly adopted request further proof from whatever source deemed appropriate in the discretion of the Board." Further, the case law on the matter is clear – new evidence submitted after the close of a public hearing cannot be considered by a Board except at a new hearing. The Board therefore reopened the hearing to ensure that both

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the applicant and Pinelawn Cemetery would have an opportunity to present and rebut any new factual evidence.

Furthermore, because the ex parte affidavits had been submitted to the Board by Pinelawn, and despite the Board's rejection of same, the Board wanted to dispel any appearance of impropriety by continuing the hearing, having the affidavits submitted properly (during the course of a public hearing) and providing the applicant with an opportunity to review and rebut them.

c. Public Hearing of February 3, 2005:

The continued hearing took place on February 3, 2005. At the hearing, the attorney for Pinelawn Cemetery discussed the agency agreement between New York and Atlantic Railway which it called "tremendously disingenuous." (Minutes of public hearing of February 3, 2005 at page 33). According to the attorney for Pinelawn, a month before the last hearing (9/9/04), Coastal and New York and Atlantic "broke the lease" and entered into a new agreement to say that [Coastal] was no longer a tenant, that instead they [Coastal] were an agent. (Minutes of February 3, 2005 at page 33).

Pinelawn also maintained that that the essential element for an agency relationship is the principal's control over the alleged agent. He claimed the necessary control was lacking as indicated by the agreement itself, wherein paragraph 1.05 sets forth that "New York [and] Atlantic's responsibility and liability for the cars and their contents bound to or from the facility end when the cars are uncoupled from New York [and] Atlantic's locomotive at the facility and the railroad's [New York and Atlantic] responsibility and liability is resumed when the cars are coupled to the locomotives." (Minutes of February 3, 2005 hearing at page 33). He claimed that the fact that New

York and Atlantic's responsible began when the rail cars were connected to its locomotive and ended when the rail cars were uncoupled, evidenced the lack of control by New York and Atlantic regarding the actual operation of the subject site.

Coastal Distribution also testified at the second public hearing regarding the agreement between the Coastal Distribution and New York and Atlantic Railway. Mr. Rutigliano of Coastal Distribution, LLC testified that the agency agreement between the parties went into effect on August 5, 2004. When the agreement was executed Coastal was operating the site. Coastal was not the owner of the site, but was upgrading the site by erecting the building. Coastal admitted that it was previously operating under a lease agreement, subleasing the property from New York and Atlantic Railway. Mr. Rutigliano stated that the lease was no longer valid. When asked by the Chairman of the Board of Appeals what had prompted the change from a lease agreement to an agency agreement, the applicant replied "advice of counsel." (Minutes of public hearing of February 3, 2005 at pages 49-50).

In addition to a discussion regarding the relationship between the applicant and New York and Atlantic Railway, Pinelawn brought in a number of witnesses in opposition to the application. First, Michael Poscillico, a business owner operating at 1600 New Highway, Farmingdale, New York testified regarding his first hand knowledge of the site. He stated that he was able to view the operation of the site from his own building located directly across the street. Mr. Poscillico further indicated that he observed trucks, generally tractor trailer trucks, bringing material in. The material was being dumped on a pad inside of the building. He claimed to have personally witnessed either a bobcat or pay loaders pushing the material around. (See minutes of public hearing of February 3, 2004 at page 34).

Mr. Poscillico further offered that his knowledge of "transloading" operations, in his professional experience as a civil engineer and as the president of Blue Water Environmental, means that "you take material from one mode and move it to another mode, and the rule of waste hauling is it never hits the ground." (Minutes of public hearing of February 3, 2005 at page 34).

Mr. Murphy, a private investigator, also appeared in opposition to the application. He stated that he observed a truck being loaded with debris, specifically construction debris, leaving Metropolitan Transfer [station] in the Bronx and coming to the Coastal site. It was material brought from the city out to the Coastal location in Farmingdale. (Minutes of February 3, 2005 at page 35)

Mr. Murphy's second observation was dump trucks from Reality Roofing in Mineola driving into the Coastal site. When the trucks were followed back to Reality Roofing, the witness observed roofing material coming off of a home in Nassau County and being directly delivered to the subject site. (Minutes of February 3, 2005 at page 35). Mr. Murphy proffered that in his opinion the materials being brought to the subject site, "a great portion of that is coming from New York City and very little of it is going to any transfer station." (Minutes of February 3, 2005 at page 36).

After this evidence was presented to the Board by Mr. Murphy, the Board asked the applicant if they were taking materials from New York City and bringing them to the subject site. The attorney for the applicant stated that "as an agent of New York Atlantic we do not have a choice, we have an obligation under the law to accept legally whatever a customer wants to bring." (Minutes of February 3, 2005 at page 43). The attorney for the applicant continued stating that "we cannot discriminate. It's interstate commerce you can't discriminate where they are coming from..." (Page 43). When the Board

expressed that it didn't appear that the applicant's use of the site was actually taking any trucks off of the road, as the applicant had claimed at the September 9, 2004 hearing, the attorney for the applicant replied that some of the material is coming from New York City and some is coming from Long Island. He reiterated that the applicant cannot discriminate. He offered that "we [Coastal] can't tell people that they can't come here." (Minutes of public hearing of February 3, 2005 at page 44).

The attorney for the applicant concluded the second hearing by reiterating that New York and Atlantic and the MTA consented to the application being brought, that the applicant was entitled to an exemption from local zoning, and that if the Town wanted to observe the site's operation, that Coastal was obligated to allow the Town to do so. He stated that the Town was able to issue comments and recommendations, however, the applicant's operation of the site was one that he believed it was entitled to continue.

FEDERAL EXEMPTION CLAIMED BY COASTAL

At the public hearing of September 9, 2004, John F. McHugh, an expert in railroad law, appeared on the applicant's behalf to discuss Coastal's alleged statutory exemptions under federal law. Mr. McHugh explained that the ICC Termination Act vested the Surface Transportation Board with "all control over railroads." He stated that the ICC Termination Act removed jurisdiction over railroad activities from anyone other than the Surface Transportation Board. Mr. McHugh continued, stating that the site was an active railroad operation that was being conducted by Coastal as an agent of New York and Atlantic Railroad, which has a "federal franchise." For this reason, he claimed

that the Board had no jurisdiction. (Minutes of public hearing of September 9, 2004 at page 27)

To further flesh out the applicant's position, Mr. McHugh proffered that a "common carrier" in the railroad industry has a federal franchise which is "a right to provide freight service and an obligation to provide freight service." Because New York and Atlantic Railroad has said federal franchise and was a common carrier, he claimed Coastal, as its agent, had the same rights and obligations. He stated that all [Coastal] was doing at the site was loading and unloading cars for the New York and Atlantic Railroad which he claimed New York and Atlantic had an obligation to do pursuant to its franchise. He claimed that New York and Atlantic "basically delegated the responsibility to another operator." (Minutes of September 9, 2004 at page 32).

Responsibility for the operation of the site was delegated to Coastal through the "Transload Facility Operations Agreement" between the applicant and New York and Atlantic Railroad. The applicant claimed that the agreement detailed Coastal's obligations and ensured that Coastal was only involved in transloading activities. The applicant claimed that it was under the complete control of New York and Atlantic Railway, pursuant to this agreement, and that the agreement established an agency relationship between New York and Atlantic Railway and Coastal, thereby entitling Coastal, as an agent of New York and Atlantic Railway, to the federal exemption pursuant to the ICC Termination Act.

Lastly, the applicant's expert, Mr. McHugh, also set forth some examples of when the federal exemption did not apply to a particular operation. He stated that where there was just a lease and no control by the railroad no exemption applied. (Minutes of September 9, 2004 at page 33). He also stated that storing items for long periods of time

was considered activity that was not covered by the exemption. (Page 33). Also, using railroad property as an aggregate distribution center for one's own product is also not exempt activity. (Page 33).

BOARD'S FINDINGS REGARDING APPLICANT'S CLAIM OF FEDERAL PREEMPTION PURSUANT TO ICC TERMINATION ACT

a. The Applicant Is Not Entitled to An Exemption From Local Zoning Regulation As Its Use of the Site Does Not Qualify As "Transportation By Rail Carrier"

The Board finds that Coastal Distribution's use of the site is not "transportation by rail carrier" so as to come within the Surface Transportation Board's jurisdiction pursuant to the ICC Termination Act. Congress has granted the Surface Transportation Board with exclusive jurisdiction over "transportation by rail carriers" and its regulation of rail carriers preempts state regulation with respect to rail transportation. 49 U.S.C. §10501(b). Thus, to qualify for the exemption claimed pursuant to the ICC Termination Act, the applicant must be conducting "transportation by a rail carrier."

First, the Board finds that the applicant fails to qualify as a "rail carrier". Under the ICC Termination Act, a "rail carrier" is a "person providing common carrier railroad transportation for compensation." 49 U.S.C. §10102(5). There are formal procedures that must be followed to obtain the Surface Transportation Board's authorization to act as a rail carrier. 49 U.S.C. §10910. The record before the Board indicated that it was New York and Atlantic Railway, and not Coastal, who had been granted a federal franchise from the Surface Transportation Board. See testimony of Fred Krebs, President of New York and Atlantic Railway wherein he indicated that New York and Atlantic Railway

was registered with the Federal Railroad Administration and with the Surface Transportation Board, minutes of September 9, 2004 hearing at page 37

While the applicant conceded that it did not go through the arduous process of becoming a certified railroad, it claimed to be an agent of New York and Atlantic Railway, which entitled it to the exemption that would be enjoyed by a party that was a "rail carrier" and was engaged in "transportation by a rail carrier".

The Board finds, based upon substantial evidence in the record, that New York and Atlantic Railway does not have the necessary control over the applicant to create an agency relationship. Evidence presented at the public hearing was that New York and Atlantic had "worked out a deal" where Coastal would become its agent, and that it had done so on the advice of counsel. (Minutes of public hearing of September 9, 2004 at page 38).

Originally, the parties had entered into a simple lease agreement. (Agreement entered into on July 11, 2002, see Exhibit "B" of Coastal's memorandum to the Board). Under the lease agreement, New York and Atlantic Railway agreed to lease the subject premises for Coastal's "exclusive use". (Lease Agreement, paragraph A, Exhibit "B" of Coastal's memorandum to the Board). Coastal had the right to make improvements to the premises. (Lease Agreement, paragraph C(2)). All investments made by Coastal including pavement, lighting, fencing, and security were at the sole expense of Coastal, with no reimbursement by New York and Atlantic. (Lease Agreement, paragraph C(2)). The lease required Coastal to "meet a volume commitment of 1,200 carloads in the initial term of the lease, 1,800 carloads in the second term, 2,400 carloads in the third term, and 3,200 carloads in the fourth term of the lease, with each term representing one year of the five year lease. (Lease Agreement, paragraph C(3)). Under the lease, Coastal agreed to

indemnify New York and Atlantic Railway, the MTA and the LIRR from any and all claims arising out of the use or occupation of the premises and all loss and damage to any property whatsoever on the site. (Lease Agreement, paragraph C(5)). At the end of the project, Coastal had the right to remove all of its structures and other materials and equipment from the premises. (Lease Agreement, paragraph C(8)).

The applicant conceded that a lease agreement between the parties would not have been sufficient to extend the federal exemption from local zoning to the applicant. Mr. McHugh, the applicant's expert, stated that where there was just a lease and no control by the railroad no exemption applied. (See minutes of September 9, 2004 at page 33) On the advice of counsel, New York and Atlantic and Coastal terminated the lease agreement and thereafter, and only one month prior to the September 9, 2004 hearing before the instant Board, the parties entered into the "Transload Facility Operations Agreement" on or about August 6, 2004. (Exhibit "C" of Coastal's memorandum to the Board). The applicant stated this was "a fairly new agreement" which it claimed detailed Coastal's obligation and ensured that Coastal was only involved in transloading activities. The applicant claimed that it was under the complete control of New York and Atlantic Railroad pursuant to this agreement. The Board disagrees based on the terms and conditions contained within the aforementioned agreement.

The Board finds that New York and Atlantic does not have the necessary control over the applicant so as to establish a principle – agent relationship. Same is indicated by each party's obligations as set forth in Article I – Transloading Operations.

Paragraph 1.03 entitled "RAILROAD OBLIGATIONS" sets forth that the railroad (New York and Atlantic) must provide that existing facility "as is, where is." The railroad does not warrant the condition of the facility or the surrounding areas, the yard

or its equipment for any purpose. Paragraph 1.03 stated that Coastal has examined the premises and assumes the risk of using the premises for any purpose, and accepts all conditions and defects present thereon. (See paragraph 1.03 of Transload Facility Operations Agreement, Exhibit "C" of Coastal's memorandum).

Paragraph 1.04 states that the railroad (New York and Atlantic) "shall provide reasonable rail service to the Facility." (Exhibit "C" of Coastal's memorandum). The above constitutes the entire set of obligations and duties set forth in the agreement for New York and Atlantic.

Paragraph 1.05 sets forth that "New York [and] Atlantic's responsibility and liability for the cars and their contents bound to or from the facility end when the cars are uncoupled from New York [and] Atlantic's locomotive at the facility and the railroad's responsibility and liability is resumed when the cars are coupled to the locomotives." (Transload Facility Operations Agreement, Exhibit "C" of Coastal's memorandum) Based on this section of the agreement, the Board finds that New York and Atlantic, the certified railroad in this case, is not responsible or involved in, the activity and operation of the site. Its responsibility and involvement only begins at the point when the rail cars are connected to New York and Atlantic's locomotive and ends when the railcars are disconnected from the locomotive. Same indicates that Coastal is essentially on its own regarding loading and unloading of cars and other site activities.

As for the applicant's duties and obligations relating to the site, paragraph 1.07 of the transload agreement requires that the applicant, and not New York and Atlantic Railway, repair any tracks at the facility. (Exhibit "C" of Coastal's memorandum). Paragraph 1.04(a) provides that the applicant shall perform transloading services between rail cars and trucks at the facility for customers of the railroad. (Exhibit "C").

Paragraph 1.04(b) provides that Coastal shall enforce all rules and regulations at the site, as promulgated by the railroad as to all customers, Coastal employees and visitors at the Yard. (Exhibit "C") Paragraph 1.04(c) provides that Coastal at its sole cost shall acquire or provide any addition loading equipment and that it has the right to install and remove such equipment as the market shall dictate. Paragraph 1.04(d) provides that Coastal can also market the facility and the services of the railroad available by use of the facility. (Exhibit "C").

Based on the above provisions, the Board finds that Coastal is controlling the operation of the site Coastal is marketing the site, erecting structures that it requires on the site and repairing the tracks at the site, not New York and Atlantic, who is the party actually certified as a railroad. Coastal is fundamentally operating independently of the railroad. It is for this reason that the Board finds that Coastal is not an agent of New York and Atlantic and is thus not entitled to exemption from local zoning pursuant to the ICC Termination Act.

This is further confirmed by Article II of the Agreement – Documents and Billing. Paragraph 2.01 of the agreement provides that "all bills of lading and similar documents for outbound rail shipments from the Facility (collectively, "Transport Documentation") for the Commodities transloaded at the Facility shall be between Railroad and the Customer, but Coastal, as the Railroad's agent, may execute such Transportation Documentation on behalf of Railroad. Coastal shall advise Railroad from time to time of the names of the Coastal officers and employees who will execute such Transport Documentation, and shall apply prudent internal control procedures to ensure compliance with the provisions of this Agreement." (Paragraph 2.01 of Agreement, Exhibit "C" of Coastal's memorandum to Board).

The Board finds in reviewing this provision that while the bills and documents for outbound rail shipments are to be made between the Railroad (New York and Atlantic) and the Customer, the Railroad is not actually reviewing those documents. Coastal is executing the documents and the Railroad's only oversight mechanism is that Coastal must from "time to time" advise the Railroad of the name of the officers and employers executing the documentation.

The Board finds this provision, too, shows the true nature of the relationship between Coastal and New York and Atlantic. Coastal is essentially operating on its own by making the agreements, even though they are in the name of the Railroad, with New York and Atlantic exerting little, if any, control over Coastal's operations (ie. merely being advised from time to time of the names of the persons in charge of this documentation)

Moreover, Article II – Documents and Billing, also sets forth that Coastal may enter into its own agreements with customers "whereby Coastal shall be responsible to such Customer for obtaining the disposal of Commodities. In entering into and performing any Disposal Agreements, Coastal shall not make any statement or take any action or fail to take any action that the Railroad is in any way participating in or approving any Disposal Agreement. Any Disposal Agreements shall be entirely independent from the transportation and loading service provided under this agreement." Paragraph 2.01(b) of Transload Facility Operations Agreement.

The Board finds that this additional activity at the site involving the disposal of commodities does not in any way involve the Railroad. The Railroad completely separates itself from any involvement in the disposal of commodities and those agreements are entirely separate from New York and Atlantic. The Board finds that this

disposal use of the site by Coastal is independent of New York and Atlantic, based on the language of the agreement, and does not in any way constitute transportation or a transit purpose. This is an independent proprietary use of the premises, not involving the railroad. Thus, Coastal's use and operation of the site is not exempt from local zoning.

Finally, the Board finds that what is actually occurring at the site is transportation to a rail carrier, rather than transportation by a rail carriet. As stated hereinbefore, Coastal Distribution is not formally certified by the Surface Transportation Board. It is New York and Atlantic Railway, and not the applicant, who went through the arduous procedure of becoming a railroad. The applicant is processing the C&D material prior to New York and Atlantic transporting it. The applicant is essentially getting the property to the railroad – New York and Atlantic.

The Board finds the facts of the instant matter to be incredibly analogous to the facts of the Hi Tech Trans, LLC v. New Jersey case wherein Hi Tech operated a transload facility; trucks hauling C&D waste arrived at the facility; the trucks discharged C&D into a hopper that Hi Tech provides at the facility; and the C& D waste is then loaded directly into rail cars from the hoppers; C&D waste was neither stored nor processed at the facility; and once the rail cars were full, the railroad (CPR in that case) would remove the material to an out-of-state disposal facility. Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295, 299 (3d Cir. 2004).

Here, the facts indicated by the applicant itself are that trucks enter the site and dump C&D material on a pad inside the building. Any non-permitted material is extracted from the pile. Thereafter the remaining clean debris is loaded onto rail cars and removed by New York and Atlantic (the certified railroad). The facts are extremely similar to the facts of the Hi Tech case wherein the Court determined the activity at the

site to be at most, transportation "to rail carrier." Hi Tech Trans LLC v New Jersey, 382 F.3d at 308. Thus, the Board finds that herein, at most, Coastal's use of the site constitutes transportation to rail carrier, rather than by rail carrier For this reason, as well as the reasons set forth hereinbefore, the Board finds that Coastal is not entitled to an exemption from local zoning regulations pursuant to the ICC Termination Act.

b. The Board Finds that Coastal Distribution is Not Merely Transloading at the Site and Therefore its Operation Not Preempted by Federal Law

Based upon the evidence submitted at the public hearings, the Board finds that the applicant is not merely transloading at the site. The evidence introduced at the public hearing was that the applicant was to some extent sorting the materials that were deposited at the site, and doing so for a profit. As the applicant appeared to be using the site for more than just "transloading," the Board finds that its operation is not preempted by federal law.

The Board finds that the applicant itself claimed that Coastal's agency, as well as its operating authority, were limited to the operation of transload facilities on the property (ie. facilities for moving freight between railway cars and trucks as part of New York and Atlantic's line haul common carrier-rail services) The applicant stated that Coastal is not permitted to engage in any other use of the property. (Applicant's Memorandum of Law, pages 1-2).

Same was also communicated to the Board through an Affidavit by Mr. Roco Kraulic, Director of Real Estate for the MTA, who swore to the statement that "it is [the MTA's] understanding that the operators of the facility do not contemplate that there will be any processing or operation related to the freight materials passing through the

site, other than transferring the freight from one mode of transportation (ie. rail) to another (ie truck). (Exhibit "A" of Coastal's memorandum to the Board).

The applicant reiterated same at the public hearing of September 9, 2004, stating that its use of the site was only as a transloading facility The applicant defined transloading facility as "basically taking – just taking the materials from the trucks, putting on railroad cars, loading it onto the trucks to send to New York and other places and vice versa, materials coming out from the city and eastern Long Island and coming into the site and being transferred onto automotive vehicles, mostly trucks, for the area " (Minutes of September 9, 2004 at page 23).

The Board finds based upon the evidence presented that the applicant is operating more than just a "transload facility" at the site. Because it is doing more than merely loading materials from trucks onto the railway and vice versa, the Board finds that the applicant is operating outside the scope of the federal exemption to which it claims to be entitled. Evidence presented by both the applicant and Pinelawn Cemetery support this finding.

First, the evidence presented by the applicant itself was that Coastal was conducting "sorting" at the site. Mr. Fred Krebs, the President of New York and Atlantic Railway testified at the first public hearing that "well. Basically the site is permitted to transload materials...from truck to rail or from rail to truck." (Minutes of September 9, 2004 at page 37). He continued that on the site "they're [Coastal is] bringing in construction demolition debris and they're taking it off the trucks and putting it into the cars. They weigh the car because we have a weight limit." (Minutes of September 9, 2004 at page 40). He claimed that demolition debris was "everything that's not trash...it cannot have any MSW in it. It's got to be what they call clean debris." (Page 40). He

further stated that "the operation is really good. They actually sort out the metal from – from the "C&D" and they take out anything that would be MSW and do not allow it in the car. I mean they're very good about that." (Page 40).

The Chairman of the Zoning Board asked Mr Krebs about when a pile of debris comes in to the site or several truck loads of debris goes into the building, whether it goes through the sorting process that he had described, and what happened to the items that were prohibited or not allowed to go into the cars. Mr. Krebs responded that "well, actually, Marty needs to address that" and further offered that "I just know they do it. I've seen them do it. I don't know what they do (inaudible). I know it doesn't go in the car." (Minutes of September 9, 2004 hearing at page 41).

The Board of Appeals thereafter called Mr. Martin Sternberg, a partner in Coastal Distribution, to testify regarding the operation of the site. He began his testimony by stating that "we do ship out to C&D..C&D comes in and if there are items within the C&D that are not allowed to go and be transported to the State of Ohio which is ruled over by Department of Health in the State of Ohio and they have an agent at the site everyday watching each car as it's off-loading, that item, such as a mattress, is taken out of the load and either put back onto the truck that deposited it or if we didn't see it at that moment, there is a special container on the side in which that material is put into and then brought to an incinerator or class one landfill." (Minutes of September 9, 2004 hearing at page 47-48). Mr. Sternberg was asked by the Board if a truck load of C&D material could be dumped at the site. Mr. Sternberg claimed that they were only taking materials that had already been processed at a transfer station where "it's presorted." (Minutes of September 9, 2004 at page 52). He further stated that "we're not taking

individuals that may have a truckload or just an unauthorized truck of material, no" (Page 52).

Lastly, the Board asked Mr. Sternberg whether any sorting was being conducted at the site to which Mr. Sternberg replied, "we're not doing any sorting on site. The material is placed on the floor, we pick it up and put it in the rail cars. What – we're doing that, we're visually looking [f]or materials that we know Ohio will not take which would be things – there are many things, but of course, liquids, 55-gallon drums, sofas, bedding, tires, and the list goes on and on ..Any of that material that we see, we extract it. It goes back onto the truck that delivered it if we see it at that moment. If not, there are containers there to take that type of material which then is transported to an incinerator and disposed of." (Minutes of September 9, 2004 at page 53). Mr. Sternberg stated that there was a fee charged for this service. (Page 53).

Based upon the testimony of Mr. Krebs and Mr. Sternberg, the Board finds that the applicant is temporarily storing and sorting on the site and doing so for a profit. The Board finds this activity conducted on the site to be over and above the applicant's own definition of a transload facility – merely loading truck materials into rail cars and vice versa – and its claimed exemption based on the use of the property.

In addition to the testimony of Mr. Krebs and Mr. Sternberg, the evidence presented on the behalf of Pinelawn Cemetery also confirmed that the site was being used for more than just a transload facility. Michael Pascillico, a neighboring business owner with offices at 1600 New Highway, in Farmingdale, who is also a civil engineer and the President of Blue Water Environmental, testified that he regularly observed tractor trailer trucks bringing material into the site. He stated that the trucks were dumping onto a pad inside of the building and that he has witnessed either a bobcat or

pay loaders pushing the material around. (Minutes of February 3, 2005 at page 34). Mr. Poscillico also offered that in his experience "transload" means to "take material from one mode and move it to another mode, and the rule of waste hauling is it never hits the ground." (Minutes of public hearing of February 3, 2005 at page 34).

Finally, the Transload Facility Operations Agreement itself sets forth in Article II – Documents and Billing, that Coastal may enter into its own agreements with customers "whereby Coastal shall be responsible to such Customer for obtaining the disposal of Commodities. In entering into and performing any Disposal Agreements, Coastal shall not make any statement or take any action or fail to take any action that the Railroad is in any way participating in or approving any Disposal Agreement. Any Disposal Agreements shall be entirely independent from the transportation and loading service provided under this agreement." Paragraph 2.01(b) of Transload Facility Operations Agreement. This clause contained within the agreement further proves that the premises are being utilized for more than just "transloading."

The Board finds that based on the agreement between the parties, the applicant's own presentation regarding the use of the site, as confirmed by Mr. Poscillico's personal observations as a neighboring business owner, that the materials being transported at the Coastal site are clearly "hitting the ground." The materials deposited at the Coastal site were not merely being loaded into rail cars from trucks. Instead, trucks visiting the site were dumping onto a pad inside the building and their loads were being sorted to some extent – either through visual inspection with prohibited items being "extracted" as stated by the applicant or by being pushed around by a bobcat or payloader, according to Mr. Poscillico. Further, the applicant admitted to conducting this extracting/sorting for a profit.

Based on these facts, the Board finds that the applicant is operating more than just a transload facility and is operating in excess of the federal exemption to which it claims to be entitled.

STATE LAW EXEMPTION CLAIMED BY THE APPLICANT PURSUANT TO PUBLIC AUTHORITIES LAW §1266(8)

At the outset of the September 9, 2004 public hearing, the applicant stated that the basis of its appeal to the Board was that the subject site, as a railroad transloading facility property was exempt from local zoning under both federal and state laws. The applicant testified that the property in question is owned by Pinelawn Cemetery but has since 1904 been leased to the Long Island Railroad (now, the MTA). (Minutes of public hearing of September 9, 2004 at page 22). .The applicant claimed that the MTA had jurisdiction over the property and that they had reviewed and approved of the applicant's building plans for the site. (Page 23). Other than the above statements, the applicant failed to expound on its exemption pursuant to State Law at either of the two public hearings

The applicant did claim in its memorandum to the Board that municipal zoning authority over the subject premises was superseded by the New York State Public Authorities Law §1266(8) which provided that "the authority (Metropolitan Transportation Authority, hereinafter "MTA") may, do all things it deems necessary, convenient or desirable to manage, control and direct the maintenance and operation of transportation facilities, equipment or real property operated by or under contract, lease or other arrangement with the authority and its subsidiaries, and New York city transit authority and its subsidiaries. Except as hereinafter provided, no municipality or

political subdivision, including but not limited to a county, city, village, town or school or other district shall have jurisdiction over any facilities of the authority and its subsidiaries, and New York city transit authority and its subsidiaries, or any of their activities or operations." However, other than setting forth the statute at page two (2) of its memorandum to the Board, the applicant fails to further detail its entitlement to an exemption from local zoning pursuant to State Law.

BOARD'S FINDING REGARDING STATE EXEMPTION CLAIMED BY THE APPLICANT

The Board finds that the applicant's use of the subject premises does not entitle the applicant to an exemption from local zoning as the applicant use of the site is not purely and entirely for "transportation or transit purposes" as required by Public Authorities Law §1266(8). Section 1266(8) dictates that "the local laws, resolutions, ordinances, rules and regulations of a municipality or political subdivision, heretofore or hereafter adopted, conflicting with this title or any rule or regulation of the authority or its subsidiaries, or New York city transit authority or its subsidiaries, shall not be applicable to the activities or operations of the authority and its subsidiaries...except such facilities that are devoted to purposes other than transportation or transit purposes." Because the evidence presented at the public hearings was that the applicant was operating the site in a manner in which more than merely transloading materials, the Board finds that the applicant is not entitled to an exemption from local zoning pursuant to Public Authorities Law §1266(8).

First, the Board finds that the property in question is not owned by the MTA. The property in question is owned by Pinelawn Cemetery, who leased the property to

the LIRR (now owned by the MTA) in 1904 The MTA entered into a transfer agreement for the property with New York and Atlantic Railway in 1996 in an attempt to privatize its freight services, who in turn subleased to the applicant (lease dated July 11, 2002). Thereafter, in August of 2004, the sublease to Coastal was replaced with the Transload Facility Operations Agreement, discussed hereinbefore. Thus, the MTA, the "authority" bestowed with the exemption set forth in Public Authorities Law §1266(8) merely holds the lease from Pinelawn. The operation of the site has been privatized (transferred to New York and Atlantic for this purpose) and thereafter subleased to Coastal. The sublease was later replaced with the Transload Facility Operations Agreement. Based on this history, the Board finds the applicant's use of the site too far removed from the MTA, for its exemption to apply to the applicant.

Second, the Board finds that where a governmental body is entitled to an exemption from local zoning for a particular function, and it leases part of the premises involved therein to a private individual or corporation, the private lessee is likewise entitled to an exemption...If the function be governmental, then the immunity may apply. If the function is proprietary, then the immunity may not apply. People v. Witherspoon, 52 Misc. 2d 320, 321 (Dist. Ct. Suffolk County 1966). In this matter, the Board finds that the applicant's use of the site is a private function. Thus, the state exemption to which they claim to be entitled does not apply.

The evidence presented by the applicant itself was that Coastal was conducting "sorting" at the site. Coastal admitted that "they're bringing in construction demolition debris and they're taking it off the trucks and putting it into the cars." Coastal also weighs the cars because there is a weight limit. (Minutes of September 9, 2004 at page 40).

The President of New York and Atlantic Railway indicated based on his own observation of the site that "the operation is really good. They actually sort out the metal from – from the "C&D" and they take out anything that would be MSW and do not allow it in the car. I mean they're very good about that." (Minutes of September 9, 2004 hearing at page 40).

Mr. Martin Sternberg, a partner in Coastal Distribution stated regarding the operation of the site that "we do ship out to C&D...C&D comes in and if there are items within the C&D that are not allowed to go and be transported to the State of Ohio which is ruled over by Department of Health in the State of Ohio and they have an agent at the site everyday watching each car as it's off-loading, that item, such as a mattress, is taken out of the load and either put back onto the truck that deposited it or if we didn't see it at that moment, there is a special container on the side in which that material is put into and then brought to an incinerator or class one landfill." (Minutes of September 9, 2004 hearing at page 47-48).

Mr. Sternberg claimed that they were only taking materials that had already been processed at a transfer station where "it's presorted." (Minutes of September 9, 2004 at page 52). He also indicated that "we're [Coastal's] not doing any sorting on site. The material is placed on the floor, we pick it up and put it in the rail cars. What – we're doing that, we're visually looking [f]or materials that we know Ohio will not take which would be things – there are many things, but of course, liquids, 55-gallon drums, sofas, bedding, tires, and the list goes on and on...Any of that material that we see, we extract it." (Minutes of September 9, 2004 at page 53).

Coastal admitted that it charged a fee for the above "sorting" or "extracting" service. (Page 53).

And finally, the agreement between the parties sets forth that Coastal may enter into its own agreements with customers "whereby Coastal shall be responsible to such Customer for obtaining the disposal of Commodities. In entering into and performing any Disposal Agreements, Coastal shall not make any statement or take any action or fail to take any action that the Railroad is in any way participating in or approving any Disposal Agreement. Any Disposal Agreements shall be entirely independent from the transportation and loading service provided under this agreement." Paragraph 2.01(b) of Transload Facility Operations Agreement. The paragraph clearly sets forth a proprietary use of the site by Coastal -- one that does not involve the railroad in any way, by its own terms -- that Coastal engages in for profit.

Based on the above procedure outlined by the applicant itself, as well as the above cited provision contained within the Transload Facility Operations Agreement, the Board finds that Coastal distribution is not solely utilizing the subject premises for transportation or transit purposes only. It is instead taking materials that are deposited at the site by trucks, pre-sorting it for a fee, and then transferring it onto railcars. The board finds this money-making endeavor by Coastal of presorting construction and demolition material prior to its transport does not constitute transportation or transit purposes within the meaning of §1266 (8) of the Pubic Authorities Law. The Board therefore finds that the applicant is not exempt from the Town's local zoning ordinances.

CONCLUSION

For all the aforementioned reasons, the Board of Appeals herein upholds the Stop Work Order issued to the applicant on or about 3/25/04.

EXHIBIT "A"

A-59

Town of Babylon

file copy

209 E. Sunrise Highway
Lindenhurst, New York 11757
(631) 957-3000

STEVEN BELLONE
SUPERVISOR

October 12, 2004

John M. Armentano, Esq.
Farrell Fritz, P.C.
West Tower - 14th Floor
EAB Plaza
Uniondale, New York 11556-1320

James F. Gaughran, Esq.
181 New York Avenue
Huntington, New York 11743

Re: In the Matter of the Application of Coastal Distribution, LLC
ZBA No. 04-267

Dears Sirs:

The Zoning Board of Appeals hereby rejects and returns the affidavit of Michael Posillico dated September 23, 2004, the affidavit of James F. Murphy dated September 23, 2004 with accompanying report, and the affidavit of John M. Armentano dated September 23, 2004. The original affidavits are attached hereto.

The Board and its counsel reviewed the transcript and the tape recorded version of the hearing of September 9, 2004. The very last statement on the tape, proffered by the undersigned, made clear that the record was to remain open for a period of two weeks "for further legal points and briefs to come in". The record was closed for all other purposes irrespective of any self serving statements made by counsel on the record in an attempt to permit further factual evidence after the public hearing was concluded. As counsel is well aware, if any interested party wanted to offer further evidence, he or she could have expressly requested a continuance of the public hearing.

Accepting further factual evidence into the record after the close of the hearing, absent a publicly announced continuance, would prejudice the applicant and any other interested party. The applicant would not be afforded an opportunity to respond. Further, any other interested party appearing at the public hearing would not be privy to the new factual evidence, nor given any opportunity to react to same. Such a procedure would violate the very spirit of conducting public hearings and, therefore, would defeat the public's right to a fair and open hearing process.

Lindsay Patrick Henry, Councilman | Wayne R. Horsley, Councilman | Ellen T. McVeety, Councilwoman, Deputy Supervisor | Carol A. Quirk, Councilwoman | Corinne DiSomma, Receiver of Taxes | Janice E. Tinsley-Colbert, Town Clerk

An Equal Opportunity / Affirmative Action Employer

Accordingly, the record was left open for the sole purpose of permitting all interested parties to submit legal briefs, based upon the existing evidentiary record.

Thank you.

Very truly yours,

Louis D'Amaro

LOUIS D'AMARO
Chairman, Zoning Board of Appeals

EXHIBIT "B"

FROM :DAN McCORMICK FAX NO. :6317548299 Apr. 22 2005 04:22PM P5

10

FARRELL FRITZ, P.C.

290 Broad Hollow Road
Melville, NY 11747
Phone: (631) 547-8400
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EAB Plaza
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October 15, 2004

JOHN M. ARMENTANO
PARTNER
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jarmentano@farrellfritz.com

Dec Rec 9 9 04

OUR FILE NUMBER
16413-102

Hon. Louis D'Amaro, Chairman
Babylon Board of Zoning Appeals
Town of Babylon
200 Sunrise Highway
Lindenhurst, NY 11757

Re: In the Matter of the Application of Coastal Distribution, LLC
ZBA No. 04-267

Dear Chairman D'Amaro:

I have your letter of October 12, 2004. As you know, this was a vigorously contested application and, as attorneys for Pinelawn, we did not know the substance of the presentation that was going to be made by the applicant, Coastal. The first time we heard or saw the presentation was when you and the Board did. Under these circumstances, I stated several times during the evening that we would need more time to respond to the purely factual statements that were being made by the applicant. In that regard, I refer you to pages 132 and 164 of the typed transcript which we provided to the Board and which was done on a very expeditious basis.*

I was unaware that the Board had decided not to permit us to submit factual statements which are contained in the affidavits of Messrs. Posillico, Murphy and Armentano. However, we have reviewed your rules and the case law in New York and we hereby respectfully request that you re-open the hearing so that we may present critical factual testimony for your consideration and for the consideration of the Board. The testimony, of course, is in these affidavits and it flatly contradicts some of the points made by Coastal. Not only are these affidavits critical on the merits of the application, but they are also relevant on the credibility of Coastal's case.

Of course, we would be pleased to attend any meeting of the Board at which additional evidence is going to be presented by Mr. Gaughran. I note in his objection to our submission that he does not indicate that he wants to submit any evidence contrary to that set forth in our

* I want to thank you for giving our reporter access to the tapes and for the courtesies that the Board and staff extended to our stenographer.

affidavits. However, of course, if he does, I am sure he will so advise the Board.

In any event, I think it is important for the Board to receive our information and, again, I respectfully ask that the hearing be re-opened to receive these affidavits.

Once again, I want to thank you and the Board for your courtesies and cooperation throughout this proceeding.

Respectfully,

John M. Armentano

John M. Armentano

JMA:sk
cc: James Gaughran, Esq.

EXHIBIT "C"

A-65

John F. McHugh
ATTORNEY AT LAW
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NEW YORK, NY 10004

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OF COUNSEL
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(201) 444-5990
FAX (201) 444-5094

FACSIMILE TRANSMISSION

TO: Ron A. Lane, Esq.

FAX #: (312) 252-2400

FROM: John F. McHugh

RE:

DATE: 4/25/05

THIS FACSIMILE TRANSMISSION CONTAINS 37 PAGES INCLUDING THIS COVER PAGE.

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A-66

HP LaserJet *3330*

HP LASERJET 3330

Apr-25-2005 10:20AM

Fax Call Report

Job	Date	Time	Type	Identification	Duration	Pages	Result
117	4/25/2005	10:08:08AM	Send	13122522400	12 23	37	OK

John F. McHugh
ATTORNEY AT LAW
[illegible]
NEW YORK, NY 10004

[illegible]

OF COUNSEL
[illegible]

FACSIMILE TRANSMISSION

TO: Ron A. Lane, Esq.

FAX #: (32) 252-2400

FROM: John F. McHugh

RE:

DATE: 4/25/05

THIS FACSIMILE TRANSMISSION CONTAINS 37 PAGES INCLUDING THIS COVER PAGE.

IF YOU DO NOT RECEIVE THIS ENTIRE TRANSMISSION OR IF YOU RECEIVED THIS TRANSMISSION IN ERROR, PLEASE CONTACT [illegible]. THIS TRANSMISSION IS INTENDED ONLY FOR THE USE OF THE PERSON OR ENTITY TO WHOM IT IS ADDRESSED. IT MAY CONTAIN PRIVILEGED OR CONFIDENTIAL COMMUNICATIONS. ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THE CONTENTS OF THIS TRANSMISSION, OTHER THAN BY THE INTENDED RECIPIENT IS STRICTLY PROHIBITED.

ZONING BOARD OF APPEALS: TOWN OF BABYLON
COUNTY OF SUFFOLK: STATE OF NEW YORK

In the matter of the application of COASTAL DISTRIBUTION, LLC, METROPOLITAN TRANSIT AUTHORITY, THE LONG ISLAND RAILROAD COMPANY, AND THE NEW YORK AND ATLANTIC RAILWAY FOR AN ADMINISTRATIVE APPEAL CONCERNING THE PREMISES KNOWN AS SUFFOLK COUNTY TAX MAP NUMBER 100-35-2-2 LOCATED AT NEW HIGHWAY, EAST FARMINGDALE, TOWN OF BABYLON, COUNTY OF SUFFOLK, STATE OF NEW YORK.

NOTICE OF APPEAL

SIRS:

PLEASE TAKE NOTICE that the Coastal Distribution, LLC., Metropolitan Transit Authority, The Long Island Railroad Company, and the New York and Atlantic Railway hereby appeals the issuance of a Stopped Work Order dated 3/29/04 (a copy of which is attached hereto) by Building Inspector Timothy Bessemer concerning the premises designated therein as district 100-35-2-2 on the Tax Map of the County of Suffolk and being located on New Highway in East Farmingdale, NY.

Said appeal is taken from the whole of said determination, as well as, each and every part thereof. The grounds of the Appeal include, but are not limited to, the following:

(1) The commencement of erection of a building on the premises was done with the permission of the current lease holder of the premises The MTA, The Long Island Railroad Company, and New York and Atlantic Railway by Coastal Distribution, LLC., and accordingly the Town of Babylon, it's departments, and it's agents do not have authority or jurisdiction, under New York State Law, to issue the above referenced stopped work order, or interfere in any way with said building project.

Dated: Melville, New York
April , 2004

Yours truly,

COASTAL DISTRIBUTION, LLC

By: _____

Joseph Rutigliano, Member
1633 New Highway
Farmingdale, New York 11735

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Coastal Distribution, LLC, and the New York and Atlantic Railroad Company

Plaintiffs,

v.

AFFIDAVIT OF FRED L. KREBS

The Town of Babylon, a Municipal Corporation and ~~Pine Lawn Cemetery Corp.~~

Defendants.

State of New York
ss:
County of Nassau

Fred L. Krebs, being first duly sworn, states and deposes as follows:

1. I am President of the New York & Atlantic Railroad, and I have personal knowledge of the following facts.

2. New York & Atlantic Railroad ("NYA") is a freight carrier by railroad, operating over certain portions of the Long Island Rail Road ("LIRR") by virtue of a Freight Transfer Agreement ("Transfer Agreement") entered into in 1996. Under the Transfer Agreement, NYA took over all LIRR freight activities and leased certain properties used for freight purposes for an initial term of 20 years and an optional extension for an additional 10 years.

3. Among the properties leased by NYA under the Transfer Agreement is the Farmingdale Yard ("the Yard") near Babylon in Suffolk County, New York. I understand that the Yard has been used as a railroad switching yard and freight loading/unloading facility for decades.

4. From the time NYA took over freight operations in 1997, NYA has used the Farmingdale Yard for several purposes. First, the Yard contains the only "wye" (the "Y-shaped" track configuration) for turning cars around on Long Island east of Glendale. Thus, NYA uses the Farmingdale Yard regularly to reorient cars and/or locomotives. Similarly, it also uses the "wye" track to store cars. Second, NYA has used the Yard periodically to transload from rail to truck various commodities – including scrap metal, telephone poles, plastic pellets and large electrical transformers.

5. One of the major reasons for NYA to take over the freight franchise of the LIRR was the potential to develop rail traffic by diverting freight traffic from trucks. Long Island had not had effective freight rail service for some years, while it has grown increasingly developed and congested. Because it is impractical to build new rail lines, one of the principal methods to realize this potential is to construct modern, efficient truck-rail transfer facilities where long-haul rail service can interface with local truck service. One of the prime locations for such an operation is the Farmingdale Yard.

6. Between October 1, 2000 and December 16, 2001, NYA subleased the Farmingdale Yard to CSX TransFlo, a sister company of CSX Transportation Company, a major rail freight carrier in the eastern United States. The sole reason for NYA to sublease the Yard – a yard it had been using itself as an integral part of freight operations – was the prospect that CSX would generate substantial freight traffic at the Yard by operating a rail/truck bulk transfer facility. During that sublease term, CSX marketed through freight service for materials requiring transloading to and from the Yard and points on its system around the eastern United States. During the sublease term, however, NYA retained the right to use the "wye" and to pick up and deliver cars for CSX, and with the permission of CSX, NYA continued to use the Yard from

time to time to transload materials other than those arranged by CSX. NYA did not renew the sublease after its initial term because CSX TransFlo had failed to generate the expected traffic volume. I concluded that traditional railroad personnel did not have the necessary skills to develop the potential at the Yard.

7. In 2002, NYA subleased the Farmingdale Yard to Coastal Distribution, LLC ("Coastal") to operate and market the transfer operation. It required Coastal to generate a minimum volume of rail traffic in order to maintain the sublease. About six months after signing the sublease, Mr. Joseph Rutigliano, one of the members of Coastal, advised me that to be more successful Coastal needed to build a large structure to contain and protect the transfer operation and the transferred materials.

8. NYA had no objection to Coastal building such a structure if it would improve the throughput at the facility and not interfere with normal railroad operations at the Yard, so we consented to the construction. Pursuant to the terms of the Transfer Agreement, LIRR had to approve any construction, and it did so as well. NYA continued to use the track from time to time to store rail cars and to use the Yard occasionally to transload special materials from truck to rail and rail to truck, with the consent of Coastal.

9. The Farmingdale Yard remains a valuable and important yard for freight rail purposes, and NYA continues to use the wye to turn engines and to store cars in a fashion that does not interfere with Coastal's operation of the transload facility. Without question, if Farmingdale Yard were not being used for the current transload operation, NYA would use the Yard for different railroad purposes. The yard's location and configuration make it an integral part of the NYA freight system. NYA was willing to sublease this property only because of the

opportunity to conduct truck freight transfer operations that extend NYA freight rail service beyond the limit of the rails and ties on its right-of-way.

10. In 2004, Pinelawn Cemetery, located adjacent to the Farmingdale Yard, filed suit in the Suffolk County Supreme Court against NYA, LIRR and Coastal, claiming that it was the owner and lessor of the real estate underlying the Farmingdale Yard and that a 99-year lease of the property to LIRR had not been properly renewed. Pinelawn sought to enjoin rail operations, but the trial court judge refused to enter such an order. He concluded that Pinelawn was not likely to succeed in its claim that the lease had not been renewed, and did not address the question of federal preemption. Pinelawn filed an appeal, but no further action has taken place in that case.

- During the course of the litigation Coastal and NYA realized that the sublease between them did not accurately reflect the actual and intended relationship between the parties. First, NYA continues to use the Yard for railroad operating purposes unrelated to the transloading operation conducted by Coastal. Second, Coastal has closely coordinated its operations around the operating requirements of the railroad and was effectively under the control of NYA anyway. Accordingly, the parties terminated the Lease and entered into a Transload Facility Operations Agreement. Under that agreement, Coastal acts as agent for NYA to market and operate the transloading facility. Coastal is responsible for all the expense of operating the facility and in return is allowed to retain the transloading fees. NYA retains all the freight revenue for moving the railcars in and out of the facility.

- We have struggled to find the appropriate economic model to implement our plan to attract truck traffic to rail service, and we believe that the transloading arrangement with Coastal can and will be successful.

- One of the biggest problems faced by NYA and all freight railroads in converting bulk truck traffic to rail is the "not in my backyard" phenomenon. While the public in general benefits from diminished truck traffic, decreased exhaust emissions, and reduced fuel consumption, neighbors frequently desire that the necessary transloading facilities simply be located somewhere else. That appears to be the case in Babylon where the town, under intense pressure from Pinelawn Cemetery, has completely reversed field and now seeks to stop operation of a modern, clean, indoor transload facility located squarely within a commercial/industrial area, that is an integral part of the freight rail transportation service provided by NYA to the Long Island public.

- If the Town of Babylon order remains in effect, NYA will suffer a loss of revenue and the shuttering of a valuable facility. Coastal, still in its start-up may be put out of business (which is probably Pinelawn's goal). At least as important, the Long Island public will be deprived of a viable means to reduce vehicular traffic improve air quality and consume less fuel.

- I cannot understand how the State of New York can conclude that it lacks jurisdiction over this facility to enforce its environmental requirements (requirements with which the facility voluntarily complies), while the Town of Babylon can conclude that they can simply shut down a railroad operation.

NYA turns to this Court to prevent the "not in my backyard" motives of the Town of Babylon from interfering with interstate commerce by rail in Long Island.

VERIFICATION

I have read the foregoing affidavit, I know its contents of personal knowledge, and it is true and correct to the best of my knowledge and belief.

Fred L. Krebs

SUBSCRIBED AND SWORN to
before me this 21st day of April, 2005.

Notary Public

SEAN M. KANE
Notary Public, State of New York
No. 02KA6037143
Qualified in New York County
Commission Expires Feb. 14, 2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY

Plaintiffs,

Declaration

v.

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS and PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON,

Defendants.

Joseph Rutigliano, declares at Farmingdale, New York this 25th of April, 2005 under penalty of perjury pursuant to 28 U.S.C. § 1746 that I am a member of Coastal Distribution, LLC (Coastal) and as such am familiar with this matter in which Coastal and the New York and Atlantic Railroad Company, (NY&A) seek to enjoin enforcement of a decision of the Town of Babylon Board of Zoning Appeals upholding a Stop Work Order issued by the Town of Babylon which was initially issued as Coastal had not obtained a building permit to construct a structure for handling cargo at its rail-

truck transload facility located on a parcel of land leased to the railroad in Farmingdale, N.Y. When called to testify I will testify competently as follows:

1. Coastal in March of 2002, revised on July 11, 2002, entered into an agreement with the New York & Atlantic Railroad (NY&A) wherein Coastal undertook to operate the railroad's transload facility in Farmingdale. Coastal's project to develop a modern transload facility for construction related material was applauded as consistent with the transportation planning goals of the State of New York, Exhibit A.

2. In 1996 the Long Island Railroad (LIRR) had entered into a Transfer Agreement with what became the NY&A, Exhibit B. Pursuant to that agreement, upon approval of the United States Surface Transportation Board (STB), NY&A would take over all of the common carrier freight operations of that railroad. That included the right to occupy, operate and manage all lands owned by the Long Island Railroad (a subsidiary of the New York State Metropolitan Transportation Authority) which had been used for its freight services. The team track facility at Farmingdale, within the Town of Babylon, the parcel now in issue, was included in the list of facilities NY&A was to operate as part of the transferred freight services, See Transfer Agreement, ¶ 1.2.50 and Exhibit B to that Agreement, ¶ 5 d.

3. The 2002 agreement between Coastal and NY&A gave Coastal the right to occupy and operate the team track parcel in Farmingdale. The land had been used by the railway, and its predecessor, the Long Island Railroad, as a team track facility since 1904. At the time of the NY&A Coastal lease the Farmingdale site was still being used for the transloading of freight from rail cars to truck and for certain Long Island Railroad maintenance activities, including the transfer of waste collected at Long Island Railroad

stations from maintenance trucks to long haul trucks for disposal, See Affidavit of Roco Krsulic, Director of Real Estate for the Long Island Railroad, Exhibit C.

4. I am informed that shortly after the Transfer Agreement was approved by the STB the NY&A entered into a joint marketing agreement with CSXT. CSXT is the major trunk line carrier which interchanges with the NY&A at Fresh Pond Junction in Queens. It is one of two trunk line carriers which interchange with NY&A at Fresh Pond, the other being the Canadian Pacific. Within that relationship between CSXT and NY&A the facility became a terminal of CSXT Tran flow and was a transload facility.

5. We succeeded CSXT as the occupant and operator of the facility. Pursuant to Paragraph 3.1.3 of the NY&A-LIRR Transfer Agreement, NY&A had to obtain the approval of the LIRR for the construction of the facilities Coastal sought to build on the Farmingdale property. Pursuant to the lease, Coastal submitted its plans for the facilities to be built on the site to the LIRR on August 25, 2003. The goal of the NY&A and Coastal was to create an infrastructure at the Farmingdale facility to convert it from a team track to a modern transload facility. The modifications and installations submitted for approval were all facilities needed for modern transloading.

6. In early 2002 we approached the Town of Babylon Department of Planning and Development and informed them of our plans to occupy and operate the facility. When our plans were finalized, we approached the town again in early 2003 and asked them about the procedure for approval of the needed improvements including the structure which is the subject of the Stop Work Order now in issue. Prior to August of 2003 we met with that Department on numerous occasions, twice with Peter Casserly, who became the Commissioner responsible for that Department at some point during that

time. During all of this period, the Department's inspectors and its then acting Commissioner, Timothy Bessemer, as well as Commissioner Casserly after his appointment, insisted that the Town had no jurisdiction over Long Island Railroad property and that therefore the Department would not review our proposal even for compliance with local regulations. On my last visit, that in July of 2003, Edward Frabrizio, then a building inspector asked me what it was about "the Town has no jurisdiction" that I did not understand. Thereafter, our architect attempted to file the plans with the town formally. He received Mr. Casserly's letter of August 8, 2003 stating that the Town had no jurisdiction. Exhibit D.

7. During late 2003 and early 2004 Coastal began handling carloads of drywall aggregate, ballast stone, telephone poles, plastic virgin resin and recycled resin on the premises, about seventy five carloads. In late October construction started on the major improvements, including the structure.

8. On January 15, 2004, when our facility was nearly complete, we received a letter from attorneys for Pinelawn Cemetary Inc. informing us for the first time that Pinelawn deemed the August 30, 1904 lease, wherein it had leased the northern half of the Farmingdale site to the Long Island Railroad to have terminated and ordering us to remove our facilities from that portion of the land, the portion on which our structure was installed. I note that in late October, before work started on these improvements, I had been presented a letter by Steven Locke, an officer of Pinelawn Cemetery, signed by the President of Pinelawn Cemetery specifically reinstating that lease for a new 99 year term, Exhibit E. We had commenced construction based upon Pinelawn's representation that this lease had been extended.

9. A Stop Work Order, issued by the Town, was delivered on March 29, 2004. It stated that Coastal was working without a permit. A letter from the Town dated March 31, 2004 clarified the order and indicated that we had failed to obtain a building permit. This position contrasted completely with the Town's position as stated by its Commissioner of Planning and Development as of August 8 of 2003 and as stated at several meetings prior to that date. I went to the Town Hall on March 29 and met with Timothy Bessemer who issued the Stop Work order, who had been the Acting Commissioner attending a few of our meetings with the town in 2003. He informed me that he had been ordered to issue the Stop Work Order due to Pinelawn's claim that it owned the land, that the lease had expired and that the land was therefore not railroad land. He told me that the issuance of the order was just to "get our attention." He said the order pertained only to the construction of the building not to the occupancy or operation of the site. He then said that he was instructed to summon someone from the Town Attorney's office should we appear at Town Hall and he did so. That resulted in the letter of March 31 and a series of letters and meetings which followed.

10. During 2003 and 2004 we received inquiries from many companies interested in using rail for their shipments via our facility. Indeed, while the operation we conceived of when we first approached the NY&A was to handle aggregate and construction materials as the major commodities, it became evident that the market for many types of commodities was large and many commodities could be handled with the appropriate facilities. With the Stop Work Order outstanding, we could not make the type of commitments needed to successfully market the facility. The interest of most potential shippers ceased due to the uncertainty created. Most potential customers who

ship high valued cargos onto Long Island have long standing trucking arrangements. They will not jeopardize their current relationships so long as Coastal cannot make long term commitments. Indeed, many of these shippers had used rail services previously. As those services deteriorated toward the end of LIRR service, they fled to truck. Any cloud on our ability or will to provide regular and reliable service is an absolute bar to our gaining inbound or high value cargo customers for the facility, our initial goal.

11. The one cargo which will use a facility without a long term commitment is Construction and Demolition waste (C&D). Currently, due to the near absence of rail facilities for this commodity in the eastern portion of the Metropolitan Region, and the increasingly limited capacity of land fills in or near the northeast, most C&D generated on Long Island or in New York City must be shipped by truck as far as Virginia or Ohio. Every truck load which can be placed on a rail car within the region saves that shipper a thousand mile truck round trip or more. Despite our uncertain status, C&D facilities and recently, roofing contractors who need to dispose of used roofing materials, send us cargo for shipment to a land fill in Ohio.

12. Coastal with the approval of the LIRR and the NY&A, appealed the Stop Work Order to the Board of Zoning Appeals of the Town of Babylon. That body is appointed by the town supervisor, Steve Bellone and the other members of the Town Baord. On September 9, 2004, just before the first hearing of the Board, Mr. Bellone requested that his appointees deny Coastal's appeal of the Stop Work Order, Exhibit F. The Zoning Board of Appeals, after being fully informed of the law, complied with Mr. Bellone's directive and denied Coastal's appeal on April 22, 2005, Exhibit B to the declaration of John F. McHugh submitted herewith.

13. In addition to Pinlawn, only two corporate residents of the Town objected to our activity, GE Modular testified against us citing traffic concerns. Michael Posillico the owner of the neighboring asphalt plant objected. "Farmingdale Properties" having the same address as the Asphalt Plant's owner also objected. Indeed we are located in an area of heavy industrial activity, including Mr. Posillico's asphalt plant, which incinerates contaminated soils as a regular part of its business, a ready mix concrete and pre cast concrete plant, a trucking company and warehouse, Republic Airport and a large machine shop. The town Zoning Resolution was passed in 1976. I am informed that as the use of the land as a rail-highway transfer facility, i.e. the same type of facility which has existed on the land since 1904 would be a pre-existing grandfathered use under the Zoning Law.

14. In August of 2004, Pinelawn had raised a question about whether this was LIRR land, and therefore within the exclusive jurisdiction of the MTA under New York State law which renders all MTA property exempt from all local regulation. Due to that issue it was determined that the relationship between NY&A and Coastal needed to be formulated pursuant to Federal Law as interpreted by the Surface Transportation Board. The result was the current Transload Facility Operations Agreement. Exhibit G (The Agreement). In that agreement the initial lease, Exhibit H was terminated. NY&A appointed Coastal to operate the facility retaining to itself significant control of the facility. Under the Agreement Coastal has the right to solicit cargos, to provide appropriate facilities to handle those cargos and transfer those cargos between the highway and rail modes at the facility all as the agent of the NY&A. Therefore, the property may be used only for Transloading for the New York & Atlantic's customers as part of NY&A's rail services.

15. At issue here, however, is Coastal's activity on the Farmingdale property. The Stop Work Order relates to building a facility without receiving town approval. While the Town asserts its authority over our facility, the State of New York Department of Environmental Conservation, the entity charged with licensing waste facilities in the State, has reviewed our operation and opined that the State does not have jurisdiction. Exhibit J. This letter was delivered to Coastal after the close of the record before the Zoning Board of Appeals but was delivered to the Town Attorney on April 5, 2005.

16. The facility in issue is used solely for the Transloading of cargo between trucks and rail cars.

17. Coastal is being irreparably harmed by the Stop Work Order.

18. Neither Coastal nor the NY&A have made any prior application to any Court for the relief requested here and this application is made as soon as practicable after the denial of our appeal by the Defendant's Board of Zoning Appeals.

Wherefore, Coastal is being irreparably harmed. It is operating a public rail-truck transfer terminal accessible to all freight shippers and receivers in the region who are willing to pay for the services they require. It is operating under the control of the New York and Atlantic Railroad, discharging that rail common carrier's obligations imposed by Common and Federal Law.

Joseph Rutigliano

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STATE OF NEW YORK
DEPARTMENT OF TRANSPORTATION
ALBANY, N.Y. 12232
http://www.dot.state.ny.us

JOSEPH H. BOARDMAN
COMMISSIONER

GEORGE E. PATAKI
GOVERNOR

May 29, 2002

Mr. Joseph Rutigliano
Coastal Distribution, LLC
30A Glen Street
Glen Cove, NY 11542

Dear Mr. Rutigliano:

Thank you for your letter of April 26, 2002 regarding Coastal Distribution's efforts to establish a construction materials transload facility on Long Island. As you know, New York State is investing in rail infrastructure improvements that facilitate freight movement as a strategy for reducing truck traffic in the New York City (NYC) / Long Island area. Thus, the Department of Transportation (DOT) supports Coastal's efforts as an important step toward that objective.

I discussed your letter with President Bauer and Long Island Railroad's (LIRR) executive staff on May 24, 2002. LIRR is aware of Coastal's interest in establishing a transload facility in the vicinity of the East Farmingdale Yard and is willing to cooperate with you and the New York & Atlantic Railroad (NY&A) to accomplish that objective.

However, LIRR's position, is, essentially, that the area which Coastal proposes to occupy is not part of NY&A's leasehold and is currently utilized by it. Nevertheless, LIRR will vacate such property and permit Coastal's use if it is reimbursed for relocation costs. Toward that end, LIRR indicated a willingness to discuss options for reimbursement, such as reduced prices for purchases from Coastal.

Best wishes for success with your transload facility. Please keep me informed of your progress.

Sincerely,

John F. Guinan, Assistant Commissioner
Office of Passenger & Freight Transportation

cc K. Bauer, President Long Island Rail Road
D. George, Long Island Rail Road
F. Krebs, NY & Atlantic, Rwy.
R. Zorrillo, NYS Office of the Governor
N. Schneider, Freight & Economic Development Division

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TRANSFER AGREEMENT

BETWEEN

THE LONG ISLAND RAIL ROAD COMPANY

AND

SOUTHERN EMPIRE STATE RAILROAD COMPANY

Dated as of November 18, 1996

TRANSFER AGREEMENT
BETWEEN
THE LONG ISLAND RAIL ROAD COMPANY
AND
SOUTHERN EMPIRE STATE RAILROAD COMPANY

This Transfer Agreement is made as of this 18th day of November, 1996, by and between THE LONG ISLAND RAIL ROAD COMPANY, a New York State public benefit corporation, Jamaica Station, Jamaica, New York 11435, (including its successors, the "LIRR") and SOUTHERN EMPIRE STATE RAILROAD COMPANY, a Delaware corporation, (including its successors and permitted assigns, the "Freight Operator").

WITNESSETH:

WHEREAS, the LIRR owns and operates rail freight facilities serving a diversified customer base in the Long Island region;

WHEREAS, the LIRR issued a Request for Proposals ("RFP") for privatization of its freight services;

WHEREAS, Anacostia & Pacific Company, Inc., in contemplation of establishing a Freight Operator, submitted a proposal,

WHEREAS, the Freight Operator submitted a proposal in response to the RFP and a final proposal in response to the LIRR's Request for Best and Final Offers (collectively the "Proposals"); and

WHEREAS, this transaction is intended and should be construed as the LIRR entirely ceasing its operations

relating to the transportation of freight (other than as a customer) and granting the right to the Freight Operator to own, conduct and operate such freight operations on an exclusive basis on and with certain property retained by the LIRR; and,

WHEREAS, the parties wish to establish the terms and conditions upon which the freight services shall be owned and operated by the Freight Operator.

NOW, THEREFORE, in consideration of the benefits accruing to each of the parties as recited to herein, the parties do mutually agree hereto as follows:

ARTICLE 1: AGREEMENT AND DEFINITIONS

1.1 <u>The Agreement</u>

1.1.1 The agreement between the parties consists of this Transfer Agreement, which includes Exhibits 1 through 16 hereto, and documents specifically incorporated herein by reference (collectively, this "Agreement"). The Request for Proposals, the Request for Best and Final Offers and the Proposals are expressly superseded by this Agreement and shall be of no force or effect.

1.1.2 Each of the parties represents and warrants that it will perform in accordance with the terms and conditions of this Agreement.

1.1.3 This Agreement contains the entire understanding between the Freight Operator and the LIRR with respect to the Freight Operations. The parties are not bound by any written or oral statement or representation which is not expressly part of this Agreement. Any waivers, modifications or changes to this Agreement shall not be binding on either party unless set forth in a writing duly executed by both the Freight Operator and the LIRR.

1.1.4 (a) This Agreement is binding upon the Freight Operator upon its execution, but shall be null and void ab initio if (i) the LIRR fails to satisfy the requirements of clause (b)(i) within sixty (60) days of the Freight Operator's execution of this Agreement or such greater period as the Freight Operator, in its sole discretion, shall determine or (ii) the Freight Operator fails to satisfy the requirements of clause (b)(ii) within sixty (60) days of the LIRR's execution of this Agreement or such greater period as the LIRR, in its sole discretion, shall determine.

(b) The later of the dates on which the following requirements are satisfied shall be deemed the "Effective Date":

(i) The LIRR obtains the approval of the Board of Directors of the MTA and thereafter executes this Agreement; or

(ii) The Freight Operator secures approval or exemption for the transactions contemplated by this Agreement from the STB consistent with Article 12.1 hereof.

This Agreement shall be null and void in the event any labor protective provisions are imposed by the STB unless the parties otherwise agree or a party agrees to pay the cost associated with such labor protective provisions.

1.1.5 The Freight Operator shall commence the Freight Operations on or before April 1, 1997, provided that such date shall be extended in the event of the occurrence of an Event of Force Majeure or the existence of an injunction or order prohibiting or delaying such commencement, by the number of days of the duration of such Event of Force Majeure, injunction or order or such other period as may be mutually agreed upon by the parties, and shall continue the Freight Operations throughout the term of this Agreement (including the Extension Period, if applicable) except as otherwise provided herein. Such date on which the Freight Operator commences operations hereunder shall be referred to herein as the "Commencement Date."

1.1.6 The obligations of the Freight Operator hereunder are subject to the condition that on the date the Freight Operator is to commence operations pursuant to Section 1.1.5 there has been no material adverse change in the Freight Premises since September 16,

1996. For purposes of this Article 1.1.6 the expiration of any contract by its terms, including, without limitation, any cancellation by a party other than the LIRR, shall not, nor shall the effects thereof, constitute or be considered as a contributing factor to a material adverse change, provided that the failure to commence, or the termination prior to the Commencement Date, of the contract for movement of excavated rock in the volume [redacted] deemed a material adverse change for purposes of this Article. In the event of a material adverse change, this Agreement shall be deemed terminated and the Concession Fee shall be promptly refunded.

1.2 Definitions

1.2.1 Unless otherwise noted, the following definitions shall apply throughout this Agreement:

1.2.2 "AAR" means the Association of American Railroads.

1.2.3 "AAR Office Manual" means the Office Manual of the AAR Interchange Rules, adopted by the AAR, Operations and Maintenance Department, Technical Services Division, as amended from time to time.

1.2.4 "Abatement Period" means, (a) for any Annual Fee Period two separate periods of at least ten consecutive days; provided that for purposes of this clause (a) if the second of such periods straddles two Annual Fee Periods such period shall nevertheless

earthquakes, (g) quarantine, (f) blockade, (g) strikes, walkouts, lockouts or labor disputes, (h) actions by any governmental agency (other than the LIRR, the MTA or any other governmental agency controlled by the MTA) that have the effect of delaying or materially impeding the Freight Operations, (i) war, (j) insurrection or civil strife, (k) sabotage, (l) explosion, (m) other acts, events or circumstances, whether of the kind herein enumerated or otherwise, and whether caused or occasioned by or happening on account of the act or omission of one of the parties hereto or some person or entity not a party hereto, but only to the extent that such acts, events or circumstances are beyond the reasonable control of the affected party.

1.2.23 "Extension Period" is defined in Article 2.2.1 hereof.

1.2.24 "FRA" means the Federal Railroad Administration and any successor agency performing the same or similar functions.

1.2.25 "Final Termination Date" is defined in Article 14.2 hereof.

1.2.26 "Freight Operations" means all operations related to the movement of freight by rail (other than Company Traffic) on the Operating Premises, including, without limitation, the storage, warehousing, transloading of freight moved by rail and the storage of equipment used for transporting freight by rail.

1.2.27 "Freight Premises" means the real property, including the right-of-way, tracks, appurtenances, buildings, facilities, other physical plants, and improvements thereto used by the Freight Operator pursuant to this Agreement. Freight Premises shall include only the properties identified in Exhibit 1 hereto and all Sidetracks.

1.2.28 "Freight Rolling Stock" means Rolling Stock under the control of or operated by the Freight Operator.

1.2.29 "Freight Switch" means a rail switch and other track components connecting Joint Use Premises with Freight Premises that is used to switch Freight Rolling Stock from and to Joint Use Premises and Freight Premises.

1.2.30 "Hazardous Material" means (i) "hazardous substance" as defined under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601 et seq., and any regulations promulgated thereunder, each as it may be in effect from time to time, (ii) "hazardous materials" as defined under the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801 et seq., and any regulations promulgated thereunder, each as it may be in effect from time to time, (iii) "hazardous waste" as defined under New York Environmental Conservation Law Section 27-0901 et seq., and any regulations promulgated thereunder, each as it may be in effect from time to time, (iv) "hazardous substance" as defined under the Clean Water Act, 33 U.S.C. Section 1321 et seq., and any regulations promulgated thereunder, each as it may be

in effect from time to time, (v) "Petroleum" as defined in N.Y. Environmental Conservation Law § 15.0514, and any regulations promulgated thereunder, each as it may be in effect from time to time, (vi) asbestos and (vii) polychlorinated biphenyls.

1.2.31 "Initial Expiration Date" is defined in Article 2.1 hereof.

1.2.32 "Interchange Rules" means the Interchange Rules included in the AAR Office Manual (or any successor manual).

1.2.33 "Joint Use Premises" means real property, including right-of-way, tracks, appurtenances, buildings, facilities, any other physical plants and improvements thereto used for both Passenger Operations and Freight Operations. Joint Use Premises shall include only the properties identified in Exhibit 2 hereto.

1.2.34 "Light Engines" means one or more locomotive units not coupled to cars or passenger coaches.

1.2.35 "LIRR Operating Rules" means all rules, requirements and procedures governing operations or activities on or about the Joint Use Premises and Passenger Premises, including the dispatching, movement and placement of Rolling Stock and the use and operation of infrastructure components and systems as outlined or incorporated by reference in the LIRR's "Rules of

1.2.46 "Rolling Stock" means a railroad car, locomotive, caboose, intermodel car, inspection car, passenger coach, cab car, bogie, wrecking equipment, work equipment and any other form of equipment with wheels operated on railroad track. Each of the foregoing will constitute a "unit" of Rolling Stock (it being understood that, with respect to any multiplatform car, each platform shall be considered a "unit").

1.2.47 "Sidetrack" means all track on the Freight Premises side of a Clearance Point of a Freight Switch that is used for switching freight cars and equipment to and from freight customer facilities or Team Track.

1.2.48 "STB" means the United States Surface Transportation Board or any successor agency performing the same or similar functions.

1.2.49 "Switch Maintenance Fee" is defined in Article 4.1.1(b) hereof.

1.2.50 "Team Track" means a rail facility, included in the Freight Premises, that is available for use by multiple rail customers for loading and unloading merchandise from Freight Rolling Stock. The Team Tracks are identified on Exhibit 1 hereof.

1.2.51 "Trackage Fee" is defined in Article 4.1.1(a) hereof.

1.3 All adjustments for inflation contained in this Agreement shall be based on the Indices of Railroad Material Prices and Wage Rates for Eastern Class I

Railroads (material prices, wage rates and supplements combined, excluding fuel) or, in the event such indices are discontinued, the Indices of Railroad Material Prices and Wage Rates for all Class I Railroads (material prices, wage rates and supplements combined, excluding fuel). If both such indices are discontinued then all adjustments for inflation contained in this Agreement shall be based on the Composite Implicit Price Deflator published by the Bureau of Economic Analysis, U.S. Department of Commerce or any successor agency.

ARTICLE 2: TERM AND RENEWAL

2.1 Term

Unless otherwise terminated as provided for in this Agreement, this Agreement shall remain in effect from and after the Effective Date through the twentieth anniversary of the Commencement Date (the "Initial Expiration Date").

2.2 Renewal

2.2.1 In the event the Freight Operator meets the following conditions, this Agreement may be renewed at the Freight Operator's option for a term of 10 years (the "Extension Period"), to commence on the Initial Expiration Date:

(a) The Freight Operator is not in material breach of any term(s) of this Agreement.

(b) The Freight Operator's safety record based on the average annual FRA-reportable accidents per 200,000 man hours or, if unavailable, other comparable measure, for the three (3) year period preceding the date of the Renewal Notice is equal to or better than the national industry average for Class C freight railroads for the same period or in the event that a national industry average for Class C freight railroads is not ascertainable such other comparable index as may be available. For purposes of this clause, accidents caused primarily by the LIRR shall be excluded from the Freight Operator's safety record; provided that such accident has been previously determined to be caused primarily by the LIRR.

(c) The annual average of freight carload volume (measured in terms of loaded "units" of Rolling Stock consisting of railroad cars and intermodel cars) transported in the Freight Operations for the three (3) year period preceding the date of the Renewal Notice shall be at least 24,474 carloads, or the percentage increase of the carload volume for the twelve calendar months preceding the Commencement Date to the carload volume for the twelve calendar months preceding the Renewal Date shall be more than 125% of the percentage increase achieved by the Eastern Class I Railroads for the corresponding periods; provided that if no such statistic is available

then the percentage increase achieved by all Class I Railroads nationwide shall be used.

(d) In respect of Capital Improvements for the period from the Commencement Date to the date of the Renewal Notice, the Freight Operator has invested or has caused to be invested in the [redacted]

(e) The Freight Operator gives notice in writing to the LIRR of its intent to renew the Agreement (the "Renewal Notice") no sooner than 13 years, but prior to 18 years, after the Commencement Date.

2.2.2 The terms and conditions of this Agreement shall remain in full force and effect during the Extension Period except for the following:

(a) The Freight Operator shall pay to the LIRR a [redacted] the commencement of the Extension Period, and ten equal annual [redacted] ch on each anniversary of the commencement of the Extension Period.

(b) Capital Expenditures during the Extension Period shall be at [redacted] the amount proposed in the Business Plan, indexed for inflation to the end of the twenty (20) year term of the Agreement using the methodology and indices described in Article 4.2.

2.2.3 Notwithstanding any provisions herein, nothing shall prevent the parties from negotiating any renewals for a term no greater than ten (10) years.

ARTICLE 3: GRANT OF RIGHTS TO USE

3.1 Right to Operate and Use

3.1.1 The Freight Operator shall have the exclusive right to use the Freight Premises and the Joint Use Premises to conduct Freight Operations in accordance with the provisions of this Agreement.

3.1.2 The Freight Operator shall have the exclusive right to manage, direct and control the Freight Premises; provided, that the Freight Operator shall not enter into any contracts, leases or other agreements which extend past the Initial Expiration Date or, if the Agreement is extended, such other applicable termination date, without the LIRR's prior written consent.

3.1.3 The Freight Operator may, at its sole risk and expense, construct or relocate freight-related facilities and infrastructures (such as transloading facilities, shops, team tracks, yards, sidings, etc.) within the Freight Premises, subject to prior review and approval by the LIRR of the Freight Operator's plans, which approval will not unreasonably be withheld; provided that such approval shall be deemed to be granted if the LIRR has not objected to such construction within 45 days of notice thereof. All

facilities constructed by the Freight Operator hereunder, improvements made thereon or improvements made to existing premises by the Freight Operator shall be made in compliance with applicable building codes and other regulations, and shall be owned by the LIRR as part of the Freight Premises.

3.2 Assignment of Contracts

3.2.1 The LIRR hereby assigns and the Freight Operator (a) hereby accepts all existing tariffs, customer contracts, leases, real estate agreements, side track agreements and other agreements applicable to the LIRR's existing Freight Operations and (b) shall have the right, from time to time, to take any lawful action to modify such contracts and agreements. Notwithstanding the foregoing, if any customer contracts, leases or real estate agreements (i) are not set forth on Exhibits 12 and 13 hereto or were not disclosed or made available to the Freight Operator during the Freight Operator's due diligence, (ii) are required to be assumed or otherwise performed by the Freight Operator and (iii) as a result, have a material adverse effect on the Business Plan, then the Freight Operator shall receive an Equitable Abatement in connection with such contracts and agreements.

3.2.2 In the event that the excavation spoils from the water supply shaft that is being created in the area known as Maspeth Yard and is the subject of an easement granted by The Long Island Rail Road Company

to the City of New York Department of General Services commencing on September 1, 1992 pursuant to a Purchase Option Agreement dated August 26, 1992, are not moved from the area by rail as required by Section 5 of the Terms and Conditions of that Agreement, except due to force majeure, the LIRR shall, at the request of the Freight Operator, promptly use good faith efforts to negotiate the "significantly higher compensation" referred to in said Section 5 and shall promptly pay to the Freight Operator from the additional compensation, if any, received the lesser of (i) the full amount of such additional compensation, if any, or (ii) 50% of the difference between $5.4 million and the revenues collected by the Freight Operator for movement of such material.

3.3 Limitations on Grant

3.3.1 The Freight Operator's right to conduct Freight Operations over the Joint Use Premises is subject to the LIRR's management, direction, dispatching, operation and control as set forth in this Agreement.

3.3.2 The grant of rights in Article 3.1 specifically excludes all of the following:

(a) Any right to control, direct or interfere with the LIRR's Passenger Operations on the Operating Premises or the Passenger Premises.

(b) Any subsurface or air rights in or associated with the Freight Premises or elsewhere in or associated with the Operating Premises, which subsurface and air rights shall remain with the LIRR.

(c) All utility occupancies currently located on the Freight Premises, including, but not limited to, the Buckeye Pipeline and all easements and reservations of record. To the extent any such utility has provided the LIRR with any indemnification, the LIRR shall use reasonable efforts to enforce such indemnification in favor of the Freight Operator, if and when applicable.

(d) Any rights to property encumbered by encroachments, tenants, licensees, squatters or other occupancies currently on the Freight Premises. There shall be no obligation on the part of the LIRR to take any action to remove the same except that the LIRR shall continue to pursue litigation pending on the Effective Date and the LIRR shall take actions to remove any encroachment that arose after September 16, 1996 and is existing on the Commencement Date that prevents the movement of Rolling Stock on lines being actively used immediately before the Commencement Date in connection with Freight Operations on the Freight Premises; provided that, encroachment in this sentence shall mean a permanent structure and provided, further that the Freight Operator shall inform the LIRR of

any such encroachments within 30 days after the Commencement Date; provided, however, that the Freight Operator (at its own expense) may on the LIRR's behalf take lawful action to remove any such occupancy which was not granted or approved by the LIRR or its predecessors in title. At the Freight Operator's request the LIRR, to the extent applicable, shall, at the expense of the Freight Operator, cooperate with the Freight Operator in connection therewith.

(e) Any right to use or permit others to use the Freight Premises for purposes not directly related to Freight Operations. Without limiting the generality of the foregoing, the Freight Operator shall not use or permit the use of the Operating Premises for:

(i) Tenancies not directly related to the Freight Operations;

(ii) Utility right-of-way or crossings, including electrical and telephone wires, fiber optic cables and pipelines of any kind (unless such utility is installed for the benefit of the Freight Operator or a permitted subtenant, with the prior permission of the LIRR); and

(iii) Advertising or billboards of any kind and signage not directly related to the Freight Operations;

Notwithstanding the foregoing, with respect to clause (i), the Freight Operator shall be permitted, with the prior consent of the LIRR, to use or permit the use of the Freight Premises for the purposes stated; provided that any contracts entered into with third parties in connection therewith are on terms no less favorable than could be obtained with an unaffiliated third party and that any revenues received therefrom shall be shared equally by the parties hereto.

The parties acknowledge and agree that in the case of clause (iii) above, (x) TDI has the exclusive right to install and maintain billboards on the Freight Premises, (y) no new billboards shall be installed on the Freight Premises without the prior written consent of the Freight Operator and (z) the Freight Operator shall permit TDI to have access to the Freight Premises, upon reasonable notice to the Freight Operator and at reasonable times, for the purpose of maintaining or removing any billboard. To the extent TDI has provided the LIRR with any indemnification, the LIRR shall use reasonable efforts to enforce such indemnification in favor of the Freight Operator, if and when applicable.

(f) The Freight Operator may not lease, license or otherwise assign any portion of the Operating Premises to any person for any purpose except by written consent of the LIRR which may be granted in the sole discretion of the LIRR; provided, however, that the Freight Operator may, without the prior written consent of the LIRR, lease or license portions of the Freight Premises to

shippers or others directly involved in the furtherance of Freight Operations on the Freight Premises (other than any such lease or license that has the effect, individually or taken together with all other leases or licenses, of causing all or a substantial portion of the Freight Operations to be conducted directly by any person or entity other than the Freight Operator), which shall be subordinate and subject to the terms and conditions of this Agreement. The LIRR shall receive prior written notice of any and all such agreements. Such leases and licenses, if any, shall provide for insurance and indemnification of the LIRR and its affiliates (including any government or governmental agency) to the same extent as provided under this Agreement. Such leases and licenses, if any, shall not relieve the Freight Operator of any obligations or duties imposed on it by this Agreement.

(g) Any use of the name The Long Island Rail Road Company or LIRR or any name derived therefrom or confusingly similar thereto, without the prior written consent of the LIRR; provided that the Freight Operator may use any other name with the words "the", "railroad" or "company". The Freight Operator agrees not to hold itself out as (a) having a common identity with the LIRR or any of its affiliates (including any government or governmental agency) or (b) acting as the LIRR's agent.

(h) Any title or estate in the ownership of the Freight Premises, any other part of the Operating Premises or the Passenger Premises.

(i) The right to conduct Passenger Operations.

3.3.3 The LIRR retains the right to use or to allow third parties to use the Freight Premises to construct, inspect, repair and maintain bridges, culverts and other structures (including structures in connection with the utilization by the LIRR of its subsurface or air rights hereunder) or construct utilities with reasonable prior written notice to the Freight Operator, provided however that any such use shall not materially interfere with the Freight Operations. The Freight Operator, upon receipt of prior written notice from the LIRR, will cooperate, without any cost to the Freight Operator, in allowing the LIRR to effectuate or permit any work described in this Article 3.3.3. Any indemnification or release by any third party to the LIRR with respect to the above shall, by its terms, also inure to the benefit of the Freight Operator.

3.3.4 Upon reasonable prior notice to the Freight Operator, the LIRR shall have the right to permit construction of a highway in conjunction with the Freight Premises on the Bay Ridge Branch from the 65th Street Yard (First Avenue) in Brooklyn to the connection with Conrail at Fresh Pond for mitigating the highway traffic congestion through Brooklyn and Queens during and after completion of the Gowanas Expressway

reconstruction and rehabilitation project. In such event, the Freight Operator will be entitled to receive from the LIRR damages as described in the next sentence. Damages means 50% of the revenues received during the twelve months preceding delivery of the aforementioned notice from customers that can no longer be served by rail due to such project multiplied by twice the number of years and fractional portions thereof of such period of interference. In addition, the LIRR shall, without duplication, indemnify the Freight Operator for any Loss or Damage in connection therewith. If the Freight Operator resumes Freight Operations after completion of this construction project, the Freight Operator shall be subject to certain scheduling limitations as to joint use to be agreed upon in writing. The LIRR shall use reasonable efforts to have the project work performed in a manner to minimize disruptions to the Freight Operations.

3.3.5 The following provisions apply to a portion of the Freight Premises known as Yard A and described more fully in Exhibit 5 hereto:

(a) The LIRR reserves the right to take exclusive possession of part or all of Yard A in the event it is needed to be used as part of the Passenger Operations, for expansion of Passenger Operations, or for any regional transportation plan. Subject to the last paragraph of this Article 3.3.5, the LIRR shall only exercise this right upon not less than six months prior

written notice to the Freight Operator and, in any event, only after December 31, 2001.

(b) The parties agree to negotiate, in good faith, mutually acceptable arrangements with the goal of avoiding additional cost or loss of operations by the Freight Operator in connection with any taking described in clause (a) above, including without limitation, the construction at the sole cost of the LIRR of freight facilities, which shall then become part of the Freight Premises, to handle the average daily volume of traffic handled in the Yard A facilities taken possession of by the LIRR under Article 3.3.5(a) hereof in the twelve (12) months preceding the time when the LIRR takes possession under said Article 3.3.5(a), all of which is subject to availability of an alternative site and capital funds.

(c) Should the Parties be unable to reach a mutually acceptable agreement as described in 3.3.5(b) hereof, the LIRR will reduce the Annual Fee for the balance of the term by an amount equal to the increased operational cost and lost profits associated with any taking described in clause (a) above, but in no event shall such amount exceed 25% of the Annual Fee. In the year in which the LIRR so takes possession, the Annual Fee will be prorated on a daily basis and reduced for the balance of the year, following the date of such possession in accordance with

the preceding sentence. In addition, to the extent the Freight Operator has made any Capital Improvements to Yard A, the Freight Operator shall receive from the LIRR the unamortized cost of such improvements; provided that such amortization shall be based on a useful life of seven years.

The foregoing provisions of this Article 3.3.5 shall not apply to the property identified in Exhibit 14, which property the LIRR shall be allowed to take any time after the Commencement Date without any compensation to the Freight Operator.

3.3.6 After giving notice of proposed construction under any provision of this Section 3.3, LIRR representatives shall meet with Freight Operator representatives to review the details of the construction project, including but not limited to work plans and schedules. If the construction project, in Freight Operator's sole opinion, requires flagmen or other personnel for safety or operational considerations, Freight Operator will assign personnel to the project at LIRR's sole expense.

3.3.7 The LIRR may, in respect of the Freight Premises, have its own systematic and periodic program of environmental auditing or a documented, systematic practice regarding its due diligence in preventing, detecting or correcting violations as defined in the Environmental Protection Agency Policy regarding

incentives for self-policing dated December 18, 1995 (or any successor thereto, as announced and in effect from time to time); and the Freight Operator shall provide access to its facilities, records and documents, and make available upon reasonable request such staff as may be necessary for the LIRR to conduct such a program or practice; provided, however, that the LIRR shall provide the Freight Operator with a copy of the written procedures or guidelines under which it conducts the program or practice, and shall conduct a review not more frequently than semi-annually at any facility. Upon preparation of a written report as a result of the audit or practice, the LIRR shall provide the Freight Operator with a copy of the report, and the Freight Operator, within 30 days thereafter shall provide any response or other comment on the recommendations or other materials presented in the report. The Freight Operator understands and agrees that the LIRR may operate such a program or practice for the LIRR's benefit, and the Freight Operator shall not be entitled to rely upon the results thereof for any purpose, except with the express written consent of the LIRR.

3.3.8 The LIRR retains the right of access to and exclusive use of the basement communications room in the LIC Freight Building at 21st Street and Jackson Avenue. The LIRR retains the right of access to such basement communications room on an ongoing basis for its own and NYNEX personnel, and for LIRR highway vehicles to enter and park in the parking lot outside the

building. Notwithstanding the foregoing, (i) LIRR shall be solely responsible for the maintenance and security of the basement communications room in the LIC Freight Building, and (ii) LIRR shall indemnify and hold harmless the Freight Operator for all Loss and Damage arising out of or in connection with the use of the basement communications room (except to the extent caused by the gross negligence, recklessness or willful or wanton misconduct of the Freight Operator).

3.3.9 The LIRR retains the right of access to and exclusive use of the property identified in Exhibit 15 that is located underneath the 21st Street Bridge and extends westward into the culvert between the concrete walls, Tracks 1 through 8 (identified in Exhibit 14 of the Transfer Agreement) in Yard A and the ground storage area in Maspeth Yard (Exhibit 16) from April 1997 through December 1998. The LIRR retains the right of access to these facilities for its own personnel and such contractor(s) as may be designated by the LIRR and where necessary, using LIRR crews and equipment. The Freight Operator will also make available to LIRR the western portion of the salt track in Arch Street Yard and Track 5 in Maspeth (identified in Exhibit 15, which is not part of the Freight Premises), on an as-needed basis as determined by LIRR for loading and unloading cars of Company Traffic consistent with the need of the Freight Operator. Movement of LIRR crews and equipment within Yard A, the Arch Street Yard and Maspeth Yard will be coordinated by the Freight Operator. Notwithstanding the foreoing, (i) LIRR

shall be solely responsible for the maintenance and security of the property described in Exhibit 15, and (ii) LIRR shall indemnify and hold harmless the Freight Operator for all Loss and Damage arising out of or in connection with the use of the property described in Exhibit 15 (except to the extent caused by the gross negligence, recklessness, or willful or wanton misconduct of the Freight Operator).

3.4 Additions to Freight Premises

3.4.1 In the event that the LIRR, in its sole discretion, determines that any portion of the Joint Use Premises which is necessary for the Freight Operations is no longer necessary in connection with its Passenger Operations or other public use, and therefore determines to abandon such portion, the Freight Operator shall have the option to accept such portion as an addition to the Freight Premises, and such portion shall be treated as Freight Premises thereafter and in any event shall no longer be treated as Joint Use Premises.

3.5 Reversion of Freight Premises to the LIRR Under Certain Circumstances

3.5.1 The Freight Operator may, by written notice to the LIRR, designate a portion or portions of the Freight Premises as being unnecessary in connection with the Freight Operations. At the option of the LIRR, such portions of the Freight Premises may revert to the LIRR's control and become a part of the Passenger Premises upon 30 days prior written notice to the Freight Operator; provided however, that (i) if any such portion that reverts to the LIRR includes any part of the right-of-way or an appurtenance associated with any tracks in the Freight Premises, such portion that reverts to the LIRR shall also include such tracks and (ii) in no event shall there revert to the LIRR any tracks or facilities that are only accessible through the Freight Premises. If the LIRR does not elect to have any such portion revert to its control (i) such portion shall remain as part of the Freight Premises and (ii) with respect to any such portion which is only accessible through the Freight Premises, the Freight Operator, with the consent of the LIRR (which consent shall not be unreasonably withheld), may remove and sell the rail and associated track materials thereon in accordance with Article 3.6.5(iii).

3.5.2 At any time during the notice period described in Article 3.5.1 hereof, the Freight Operator may reclaim such portion or portions of the Freight Premises by withdrawing the designation described in

Article 3.5.1 hereof.

3.5.3 In the event of a reversion hereunder, there shall be no reduction in the Annual Fee.

3.6 Condition of Freight Premises

3.6.1 The Freight Operator acknowledges that it has conducted due diligence to its satisfaction prior to signing this Agreement.

3.6.2 The LIRR has conducted an environmental audit dated July 12, 1996, which was made available for the Freight Operator's review.

3.6.3 The Freight Operator acknowledges and agrees that the Freight Premises are being transferred hereunder on an "as is/where is" basis and the Freight Operator shall, subject to the provisions of Article 8.4 hereof, be responsible for the condition of the Freight Premises as of the Commencement Date.

3.6.4 The Freight Operator is prohibited from selling, salvaging, demolishing or removing any part of the Freight Premises, including but not limited to the track, ties, ballast and track supports, without the prior written consent of the LIRR.

3.6.5 Notwithstanding any provision herein to the contrary: (i) the Freight Operator may, upon prior written notification to the LIRR, salvage and sell all surplus track materials stored on the right-of-way

within the Freight Premises, provided, that the net proceeds from any sale shall be shared equally by the Freight Operator and the LIRR; (ii) the Freight Operator may replace any part of the Freight Premises with parts of equal or greater quality and the proceeds from the sale of such replaced parts shall accrue to the Freight Operator; and (iii) net profits, if any, from the sale of any materials with the consent of the LIRR pursuant to Article 3.5.1 hereof shall be shared equally by the Freight Operator and the LIRR.

3.7 Freight Switches

3.7.1 Exhibit 6 hereto sets forth a list of Active Freight Switches, all of which have been classified as either Category A, Category B or Category C Freight Switches. Except as set forth below, the classification of a Freight Switch shall not change prior to the termination of this Agreement, including any Extension Period.

3.7.2 All Category C Freight Switches existing on the Effective Date shall automatically become Category B Freight Switches eighteen (18) months after the Commencement Date, for all purposes under this Agreement, including for purposes of Article 4.1.1(b) hereof.

3.7.3 Any Freight Switch that, after the Commencement Date, is (i) installed, including by way of replacement (other than when replacing a Category A Switch, which

replacement switch shall also be a Category A Switch) or (ii) newly activated, shall, after such installation or activation, be classified as a Category B Freight Switch, for all purposes under this Agreement, including for purposes of Article 4.1.1(b) hereof.

3.7.4 During the first eighteen (18) months after the Commencement Date, the Freight Operator may activate any Freight Switch identified in Exhibit 7 hereto, by providing thirty (30) days written notice to the LIRR. The LIRR shall, within a reasonable period of time, activate any such Freight Switch requested to be added, provided that, for each Freight Switch activated, the Freight Operator will be charged the cost to activate such Freight Switch.

3.7.5 After eighteen (18) months from the Commencement Date, the Freight Operator shall give at least thirty (30) days prior written notice to deactivate a Freight Switch. The monthly Switch Maintenance Fee shall be reduced accordingly following the lapse of such thirty (30) day period. The LIRR, at its sole option, may remove at any time after eighteen (18) months after the Commencement Date those Freight Switches identified in Exhibits 6 or 7 which are deactivated or are not activated by the Freight Operator during this period.

3.7.6 To install a new Freight Switch at any time, or to activate a Freight Switch in place after eighteen (18) months from the Commencement Date, the Freight

Operator shall make such request in writing to the LIRR, and follow the procedures outlined in Exhibit 8 hereto.

3.7.7 (a) The LIRR shall replace or rehabilitate, at its cost, any Category A Freight Switch that is in need of replacement or rehabilitation upon request of the Freight Operator or if the LIRR elects to replace or rehabilitate such Freight Switch.

(b) The LIRR shall replace or rehabilitate, at the Freight Operator's cost, any Category B or Category C Freight Switch that is, or is estimated to be within one (1) year of the date of notice set forth in this Article 3.7.7, in need of replacement or rehabilitation, provided that (i) the LIRR has furnished to the Freight Operator written notice that includes the cost of and schedule for such replacement or rehabilitation at least 120 days prior to the proposed date of initiating such replacement or rehabilitation (provided, that the LIRR shall not be obligated to furnish such notice in emergencies which affect the safety of Passenger Operations on the Joint Use Premises) and (ii) within 60 days after receipt of such notice, the Freight Operator has not notified the LIRR in writing that such Freight Switch should be deactivated rather than replaced or rehabilitated. Upon receipt of any such notice requesting deactivation, the LIRR may, but shall not be obligated to, deactivate the relevant Freight Switch immediately. Nothing set forth in this clause (b) shall preclude the LIRR from replacing or

rehabilitating a Category B or Category C Freight Switch, at its own election, at the LIRR's expense.

(c) The LIRR's obligation to repair Category C Freight Switches during the first 18 months shall be limited to repairs costing in the aggregate for any [redacted] In the event the aggregate cost is projected to exceed $15,000, the LIRR shall furnish notice to the Freight Operator of the required repairs and the associated cost. Within 30 days of such notice, the Freight Operator shall by written notice to the LIRR elect to (i) pay for that portion of the costs related to such repair which [redacted] (ii) deactivate the switch.

3.7.8 In connection with customers for which Category B or Category C Freight Switches are used, the Freight Operator shall continue to serve such customers for at least 18 months from the Commencement Date unless (i) a customer refuses to accept the same price and terms existing on the day prior to the Commencement Date or (ii) the Freight Operator elects to have the Freight Switch deactivated under Article 3.7.7 hereof.

ARTICLE 4: COMPENSATION

4.1 Compensation

4.1.1 The Freight Operator shall pay to the LIRR during the term of this Agreement, the following sums:

20.15.2 The LIRR hereby represents and warrants to the Freight Operator that the grant of rights and other assets by the LIRR to the Freight Operator provides the Freight Operator with sufficient rights to conduct the Freight Operations in a manner substantially similar to that conducted by the LIRR on the Effective Date, subject to the expiration of customer and other contracts that do not extend past the Commencement Date and subject to the requirements of Article 15.3 hereof.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement in duplicate and have caused their corporate seals to be hereunto affixed the day and year first written below.

THE LONG ISLAND RAIL ROAD COMPANY

By: _____
Thomas F. Prendergast
President

Date: 11/19/96

SOUTHERN EMPIRE STATE RAILROAD COMPANY

By: _____

Print Name: R.L. McCaffrey Jr.

Title: President

Date: 15 November 1996

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EXHIBIT 1

MTA/LONG ISLAND RAIL ROAD

FREIGHT PREMISES

1. Branches
   a. Bay Ridge Branch (subject to New York City Transit Authority access on weekends)
   b. Central Extension, Franklin Avenue to Endo Blvd.
   c. Bushwick Branch
   d. North Shore Freight Branch (excluding NYC air rights above 22 ft. ATR)

2. Yards
   a. Fresh Pond Yard
   b. Yard-A (excluding NYC air rights above 22 ft. ATR)
   c. Arch Street yard (excluding NYC air rights above 22 ft. ATR)
   d. Blissville Yard (tracks not in service)
   e. Maspeth Yard
   f. Fremont Yard
   g. Bridgehampton North Siding and Team Yard
   h. Garden City Team Yard
   i. East Farmingdale (PW Long Siding, Wye and Team Yard)
   j. Richmond Hill Team Yard

   Several of the tracks in the yards listed above are out of service.

3. Appurtenant Facilities
   a. Alais Terminal (tracks not in service)
   b. Price Industrial Park
   c. Roosevelt Spur
   d. Kearney's Siding (tracks not in service)
   e. Degnon Terminal (tracks not in service)

4. Buildings
   a. Long Island City, Arch Street Freight House & Offices
   b. Long Island City, Yard-A Freight Car Repair Shop
   c. Long Island City, Yard A Yardmaster's Office
   d. Maspeth Yard Office
   e. Fresh Pond, Car Control Office (former Pond Tower)
   f. Fresh Pond, Welfare Facility
   g. PW Trailer
   h. Pine Aire (Brentwood) Trailer

5. Team Tracks
   a. Bay Shore
   b. Central Islip
   c. Eastport
   d. Farmingdale
   e. Greenlawn
   f. Huntington
   g. Islip
   h. Mattituck
   i. Medford
   j. Port Jefferson
   k. Riverhead
   l. Southampton
   m. Yaphank

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EXHIBIT 2

MTA/LONG ISLAND RAIL ROAD

JOINT USE PREMISES

1. **Branches: Primarily Passenger Operations with Freight Operating Concession**
   - a. Main Line, Jamaica to Greenport
   - b. Montauk Branch, between Montauk and L.I. City Passenger Yard
   - c. Port Jefferson Branch, Hicksville to Port Jefferson
   - d. Central Branch, "B" Tower to Babylon
   - e. Hempstead Branch, between Queens and Garden City Interlockings
   - f. West Hempstead Branch, Valley to WM
   - g. Montauk Cut-off

2. **Yard and Team Tracks: Primarily Passenger Operations with Freight Operating Concession**
   - a. Port Jefferson
   - b. Montauk
   - c. Queens Village
   - d. Speonk
   - e. Hicksville
   - f. Patchogue
   - g. Sayville
   - h. Richmond Hill
   - i. Southhold
   - j. Pinneaire north side

3. **Bridges**
   - a. Cabin "M" Bride
   - b. "DB" Bridge

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

PINELAWN CEMETERY,

Plaintiff,

- against -

COASTAL DISTRIBUTION, LLC, METROPOLITAN TRANSPORTATION AUTHORITY, THE LONG ISLAND RAIL ROAD COMPANY and THE NEW YORK AND ATLANTIC RAILWAY,

Defendants.

AFFIDAVIT

Index No. 8599-04

STATE OF NEW YORK }
} SS:
COUNTY OF NEW YORK }

ROCO KRSULIC, being duly sworn, deposes and says:

1. I am the Director of Real Estate of defendant Metropolitan Transportation Authority (the "MTA") of which defendant The Long Island Rail Road Company (the "LIRR") is a subsidiary and agency (the MTA and LIRR are sometimes herein referred to collectively as the "Railroad"). The Railroad owns and operates railroad and related systems on Long Island. I am fully familiar with the facts and circumstances set forth herein, based upon my own personal knowledge, and from records and documents of the Railroad with which I am familiar.

2. I submit this affidavit in opposition to the motion by plaintiff Pinelawn Cemetery ("Pinelawn") for a preliminary injunction seeking to improperly stop the completion and operation of a railroad transloading facility on property effectively owned by the Railroad, and with respect to which defendants New York and Atlantic Railway ("NYAR") as freight operator for the Railroad,

and Coastal Distribution, LLC ("Coastal") its sub-tenant, have assumed responsibility to manage and operate.

3. It is the Railroad's position that Pinelawn's application is without basis and should be denied. Among other things, the property that it seeks to impair has been utilized by the Railroad, for railroad related purposes, for ninety-nine years, with the leases for the property having been extended and reinstated by Pinelawn, in writing, for another ninety-nine years. Moreover, since it is Railroad property, being used for railroad related purposes – as we understand, a freight transload facility – jurisdiction over the facility is vested by law in the Railroad. In any event, the planned use of the property as described to us is not objectionable to the Railroad, is consistent with the prior use of the property by the Railroad, and appears in harmony with the use of properties in the surrounding area.

4. Accordingly, for these reasons, as further discussed below, and as explained by our attorneys in the accompanying papers, the plaintiff's motion should be denied.

The Farmingdale Rail Yard

5. The property that is the subject of this lawsuit (hereinafter, the "Rail Yard") has been in the hands of the LIRR for one hundred years, and it is my understanding that it has been utilized by the LIRR, for railroad related functions, over that entire period of time. The Rail Yard adjoins the Railroad's main line, and is adjacent to New Highway, in a highly commercial/industrial area of Farmingdale, in Suffolk County. As noted in plaintiff's papers, the Rail Yard has been the subject of two 99 year leases, from Pinelawn to the LIRR, which leases were attached to the motion papers of plaintiff as exhibits 2 and 3, respectively. The leases date from August 1904 and November 1905.

Both leases explicitly contemplated that the Rail Yard would remain in the Railroad's possession, effectively in perpetuity, since they both contained renewal periods for additional 99 year periods.

6. The Rail Yard, while as a technical matter is comprised of two separate parcels, has been effectively utilized by the Railroad over the years as a single piece of railroad Rail Yard. We believe that the LIRR constructed railroad spurs on the Rail Yard soon after taking possession of the Rail Yard very early in the 20th century, and has used the Rail Yard for its purposes, including for the movement of freight, since that time.

7. In recent years, for example, the Rail Yard has been used by the LIRR as a waste transfer station, and to house maintenance facilities and for related purposes. It has never, to our knowledge, been used by the Railroad for farm purposes, and we do not understand the reference to such a thing by plaintiff, since the Rail Yard was granted to the LIRR, which, it is self evident, runs a railroad, and has done so for 170 years. We are not aware that the Rail Yard has been used for any cemetery related purposes since Pinelawn demised it to the LIRR, over one hundred years ago.

8. Thus, in short, the Rail Yard has been in the exclusive possession of the Railroad for more than one hundred years, and it has been used by the Railroad for purposes related to the operation of the Railroad, including the provision of freight services, during that time. Moreover, it was not the expectation of the Railroad that the Rail Yard would revert back to Pinelawn at the conclusion of the initial 99 year lease period. Indeed, to the contrary, it was the Railroad's intention to keep the Rail Yard in the hands of the Railroad, as the Rail Yard is useful to it in connection with the operation of the Railroad, and in particular, at this time, for the provision of freight services by the Railroad's freight operator.

The Rail Yard Is To Be Used by the Railroad's Freight Operator As a Transload Facility

9. The LIRR for many years, prior to 1996, provided not only commuter service to passengers on its rail lines, but provided as well freight services to various commercial customers on Long Island. In connection with the provisions of such services, the LIRR owned and operated various rail freight facilities.

10. In November of 1996, the LIRR entered into a Transfer Agreement with NYAR, pursuant to which, among other things, the LIRR ceased its operations related to the provision of freight services, and transferred its rights and obligations in that regard to NYAR Thus, under the Transfer Agreement, the LIRR granted to NYAR all rights to own, conduct and operate, on an exclusive basis, the freight operations of the Railroad, on and with certain property owned and/or leased by the Railroad, which property would continue to be retained by the Railroad. NYAR commenced the provision of freight services in accordance with the Transfer Agreement in 1997.

11. The Transfer Agreement also, among other things, provided that NYAR could construct freight related facilities and infrastructures, including transloading facilities, in connection with the provision of freight services on Railroad property, with respect to which management and control was vested in NYAR, in accordance with the terms of the Agreement. The Transfer Agreement also permitted NYAR to enter into contracts, subleases or other agreements with third parties in connection with the provision of freight services on Railroad Rail Yard.

12. In February 2002, the Railroad was advised by NYAR that it had entered into a contractual relationship with Coastal, and that it was their intention to use the Rail Yard in order to

construct and operate a transloading facility at the site, in connection with the provision of freight services to its customers on Long Island.

13. A transloading facility is a site at which freight is transferred from rail to truck. That is, the freight arrives at the site via rail, and is unloaded at the facility and transferred to trucks, for delivery to local customers on Long Island. It is our understanding that the operators of the facility do not contemplate that there will be any processing or operation related to the freight materials passing through the site, other than transferring the freight from one mode of transportation, (i.e., rail) to another (i.e., truck).

14. Following NYAR's communication to the Railroad in 2002, there ensued some discussion between the NYAR and the Railroad concerning the use of the Rail Yard, because it involved moving certain of the operations of the LIRR that were then extant at the site. The parties reached an understanding concerning such matters in mid-2002, and the LIRR moved certain of its operations to a different location, so that NYAR (and Coastal) could commence the provision of freight services at the Rail Yard.

15. The Railroad during this time informed NYAR that it was the long term leaseholder of the Rail Yard (and not, as a technical matter, the fee holder) and that the leases ran until August 2003, and November 2004, but were renewable for additional 99 year terms. It was the intent of the Railroad that the Rail Yard would remain in the possession of the Railroad, and that the lease terms would be extended, as was the Railroad's absolute right by virtue of the options granted it under the terms of the leases.

16. The Rail Yard had become important to the freight operations that were being conducted by NYAR, and in which the Railroad possessed an interest. The use of the Rail Yard as

a freight transloading facility was consistent with the purposes for which the land was first acquired by the Railroad, and the Railroad's prior use of the Rail Yard. Such a use also clearly facilitates the provision of freight services by NYAR, in accordance with the terms of the Transfer Agreement between it and the LIRR.

The Leases Are Renewed and Reinstated

17. As noted above, the Rail Yard had been Railroad property for one hundred years, had been utilized for railroad related purposes, including the provision of freight services, over such period of time, and had become part of the freight operations of the Railroad, and transferred to NYAR, for purposes of constructing and operating a transloading facility.

18. Although it had been the Railroad's intention to renew both leases affecting the Rail Yard for additional 99 year terms (and, we believe, Pinelawn's as well since it constructed a fence separating the cemetery property from the Rail Yard), we realized that as of August 2003, the Railroad had not yet exercised the option to renew on the lease set to run as of August 30, 2003. This was completely inadvertent on the Railroad's part, and was a pure oversight on the part of the Railroad.

19. There was, to be perfectly candid, some difficulty within the Railroad in initially locating copies of these ancient leases, so that the Railroad could properly exercise the options. We thereafter made contact with one of Pinelawn's attorneys in an effort to obtain copies of the leases While Pinelawn's attorneys were somewhat slow in accommodating us, we eventually engaged in discussions with Pinelawn about the subject of the Rail Yard, and retaining possession of the Rail Yard for an additional term, as reflected in the leases.

20. It is our understanding, and we were certainly led to believe, that Pinelawn itself regarded the Rail Yard as Railroad property, and did not express any opposition or disagreement to the Rail Yard remaining in the Railroad's possession for an additional 99 year term.

21. However, since with respect to the August 1904 Lease, the time within which the Railroad was to exercise its option had, as a technical matter, passed, the Railroad and Pinelawn agreed to reinstate this Lease. Such reinstatement was not necessary with respect to the other lease affecting the Rail Yard (the November 1905 Lease), since the time within which to exercise the Railroad's option had not yet run, and the Railroad therefore merely exercised its option with respect to that Lease.

22. Pinelawn, contrary to the position it now takes in this litigation, readily agreed to reinstate and extend the 1904 Lease. Accordingly, by Letter Agreement dated October 17, 2003, and signed by Pinelawn's President on October 23, 2003, Pinelawn and the Railroad agreed to reinstate and extend the August 1904 Lease. The Agreement explicitly recites that:

> [the Railroad is] hereby agreeing to reinstate and extend the Lease dated August 30, 1904 for 99 more years through July 31, 2102. Please have an authorized party concur by signing below .....

Pinelawn's President, Mr. Stephen Locke, executed the Agreement in the space provided on the Agreement for that purpose, specifically reciting as well that Pinelawn's concurrence "refers to August 30, 1904 Lease." (See Letter Agreement, annexed to the Safar Aff., as Exhibit A.)

23. Thus, as of October 23, 2003, the leases affecting the Rail Yard had been renewed and reinstated, in writing, by Pinelawn. It was certainly the Railroad's understanding, based upon our discussions with Pinelawn, and the Letter Agreement, that both leases had been extended, and that the Rail Yard would remain in the Railroad's possession, and used for railroad related purposes,

for the ensuing one hundred years. It should be pointed out that one lease extension without the other is senseless, and renders the Rail Yard virtually useless to the Railroad.

24. It is also important for the Court to be aware that the extensions of the leases by Pinelawn were not taking place in a vacuum. NYAR and Coastal were set to commence construction of the transload facility at the Rail Yard site, and the issues involving the extensions of the leases needed to be resolved prior to such time, as Pinelawn was made aware, and well knew.

25. Indeed, it is our understanding that Pinelawn actually delivered a copy of the Letter Agreement to NYAR and Coastal representatives at the Rail Yard itself, on October 23, 2003, when the parties met to discuss the further development of the site by NYAR and Coastal. Pinelawn at that time examined the site and the proposed plans for the transload facility, and provided NYAR and Coastal with its agreement signifying the renewed and extended long term leaseholds. It thus seems quite apparent that Pinelawn intended that Coastal and NYAR rely on the delivery of the lease extensions, so that construction of the transload facility at the Rail Yard could proceed

Pinelawn's New Position Is Baseless

26. The issue of the lease extensions having been resolved by Pinelawn's execution of the Letter Agreement, and delivery to Coastal and NYAR by Pinelawn itself at the Rail Yard site, the construction of the transload facility began, we understand, almost immediately, and was substantially complete before there was any objection by Pinelawn.

27. We do not know why Pinelawn, some months later, suddenly changed course, and expressed the view that the August 1904 Lease had not been extended, that the construction was problematic, and that the Town of Babylon should put a stop to it. We do know that this "litigation position" is directly contrary to the position it had last year, which is reflected in signed writings, and

which was expressed to the Railroad and to Coastal/NYAR. And it was only taken after substantial completion of the facility had occurred, with the apparent concomitant significant expenditure of funds.

28. It is also noteworthy that the Town of Babylon took the position that it had no jurisdiction regarding the Railroad's Rail Yard. This was conceded explicitly in a letter from the Town to a representative of Coastal, when Coastal initially sought approval from the Town for the construction of the transloading facility at the Rail Yard. By law, the Railroad possesses an exemption with respect to Railroad property (whether owned outright or leased by the Railroad), used for railroad related purposes, which is not subject to the permitting or other similar procedures of local municipal authorities. The propriety of the use to which such property is put is within the province of the Railroad.

29. In any event, based on our understanding of the use to which the Rail Yard will be put, it does not appear to be objectionable in any respect.

30. As we have above mentioned, the Railroad has been informed that the facility at the Rail Yard will be a transload facility, which would involve, we have been advised, the transfer of freight from the rail cars upon which it traveled to Long Island, to trucks for delivery to the local freight customers with which NYAR (and/or Coastal) has contracted to provide such services. We understand as well that all, or nearly all, of the transferring of materials will take place inside of the structure at the site, thus apparently minimizing the possibility of any disturbance to the surrounding areas.

31. This use of the Rail Yard appears consistent with, and reflects the nature of, the surrounding areas, which is predominately industrial and commercial in character There are asphalt

and concrete processing plants directly across New Highway, and a large bus depot and Republic Airport in very close proximity to the site.

32. More significantly from the Railroad's perspective, the Rail Yard has always been used for railroad related purposes, including for the provision of freight services, and the proposed use as a transload facility appears to be consistent with such prior use. It is also a use that NYAR has a right to put the Rail Yard to, consistent with the terms of the Agreement transferring all freight operations of the Railroad to it. Indeed, this planned use may be less intrusive than other prior uses of the Rail Yard, including as a waste transfer station.

33. While the LIRR has gotten out of the business of directly providing freight services to customers on Long Island, the Railroad has an interest in facilitating the development and growth of freight operations on Long Island. Such development plays a role in reducing truck traffic and the related adverse effects of such traffic on Long Island, and has other positive consequences

34. Pinelawn's attempt to obtain an injunction from the Court, if successful, would prevent the provision of freight services, and impede freight operations in which the Railroad has an interest. The Railroad does not believe, for all of the reasons discussed above, that Pinelawn should succeed in such effort.

Conclusion

35. For all of the reasons set forth herein, and in the accompanying papers submitted by the Railroad's attorneys, plaintiff's motion for a preliminary injunction should be denied in all respects.

ROCO KRSULIC

Sworn to before me this
10th day of May, 2004.

Notary Public

CAROL ROTHSTEIN
Notary Public, State of New York
No. 01RO6051384
Qualified in Kings County
Commission Expires November 27, 20 06

Town of Babylon

200 E. Sunrise Highway
Lindenhurst, New York 11757
(631) 957-3000

STEVEN BELLONE
SUPERVISOR

August 8, 2003

Oliver Wilhelm
Cybul & Cybul Architects
1064 River Road
Edgewater, New Jersey
07020

RE: Long Island Railroad Property

Dear Mr. Wilhelm:

As per our conversation, I am confirming that the Town of Babylon has no jurisdiction over the Long Island Railroad Property. The Town of Babylon does not review plans or issue a building Permits for the Long Island Railroad property.

Thank you for your attention to this matter. If you have any questions please don not hesitate to call my office (631) 957-7414.

Very truly yours,

Peter M. Casserly
Commissioner
Planning & Development

PMC:ck

Lindsay Patrick Henry, Councilman | Wayne R. Hentley, Councilman | Ellen T. McVeety, Councilwoman, Deputy Supervisor | Carol A. Quirk, Councilwoman | Corinne DiSomma, Receiver of Taxes | Janice E. Tinsley-Colbert, Town Clerk

An Equal Opportunity/Affirmative Action Employer

A-131

347 Madison Avenue
New York, NY 10017-3739
212 878-7000 Tel

Metropolitan Transportation Authority
State of New York

October 17, 2003

Via: Certified Mail – Return Receipt Requested
Fax: 212-704-6288

Jonathan S. Gaynin
Jenkens & Gilchrist Parker Chapin LLP
405 Lexington Avenue
New York, NY 10174

RE. Land Lease Agreements Dated November 1, 1905, and August 30, 1904 Between The Pinelawn Cemetery and The Long Island Railroad Company (LIRR) for Use as a Railroad Yard and Auxiliary Services of the Railroad.

Dear Mr. Gaynin:

On behalf of LIRR we are hereby exercising it's option to renew the above referenced lease dated November 1, 1905 for an additional ninety-nine (99) years thereby extending it through October 31, 2105.

We are also hereby agreeing to reinstate and extend the lease dated August 30, 1904 for 99 more years through July 31, 2102. Please have an authorized party concur by signing below, and return one original copy of this letter to my attention.

If you have any questions please call Mimi Fuhrman, of my staff, at (212) 878 – 7262.

Sincerely,

Roco Krsulic
Director of Real Estate

PINELAWN CEMETERY

Concurrence: President 10/23/03
Date

This concurrence refers to Aug 30 1904 lease.

Cc. S. Antman, F. Krebs
C. Malecchi, K. Rydzewski, Chron/file

A-132

(13)

INTER-OFFICE MEMORANDUM
TOWN OF BABYLON

TO: Louis D'Amaro, Chairman, Zoning Board of Appeals

FROM: Steve Bellone, Supervisor

DATE: September 9, 2004

RE: Zoning Board of Appeals Application No. 04-267, Coastal Distribution LLC

In reference to the above-mentioned application which asks the Board of Appeals to annul and vacate a stop work order issued by Building Inspector Tim Bessemer on or about March 29, 2004 on property located at 1633 New Highway, East Farmingdale, New York ("The Premises"), I respectfully request the Board to uphold the stop work order.

It is my understanding that the stop work order was issued to Coastal Distribution LLC ("Coastal) to prevent Coastal from completing a building on the premises without obtaining a building permit. It is my further understanding that despite the issuance of the stop work order, Coastal completed the building in violation of the stop work order and without obtaining any permits from the Town of Babylon.

I have been advised that Coastal challenges the issuance of the stop work order based on a provision in the Public Authorities Law which provides that the Town does not have authority over any facilities of the Metropolitan Transit Authority ("MTA") or any of its activities or operations except if such facilities are devoted to purposes other than transportation or transit.

I have been advised that since filing the subject application, Coastal has commenced operating a transfer station on the premises without applying for or obtaining any permits from the Town of Babylon and in violation of Article XXII of the Babylon Town Code. As you know, the Town of Babylon restricts transfer stations to industrial zoned properties and only with a special exception permit granted by the Board of Appeals.

The operation of a transfer station involves, but is not limited to, the dumping and processing of solid waste on the premises. The obvious adverse impacts of such an operation include but are not limited to odor, excessive noise, environmental impacts, dust, etc. Clearly, the State Legislature did not intend that purely private business could circumvent a local municipalities right to protect the quality of life of its residents and businesses though its zoning powers by virtue of the private business using property owned or leased by the MTA.

Furthermore, the premises are not located within an industrial zone. In fact, the premises are located in an A Residence District. While the premises do not adjoin any other residences, should the Board grant Coastal's application, the precedent will have been established allowing transfer stations, or any other use for that matter, anywhere in the Town of Babylon, including residential neighborhoods, as long as it is contained on property owned or leased by the MTA.

Because of the obvious adverse impacts associated with the operation of a transfer station, the Town has adopted a comprehensive application and review procedure prior to the granting of a special permit pursuant to Article XXII of the Town Code. I am attaching a copy of Article XXII for your convenience. Coastal's operation of a transfer station without the necessary review and in an area that is not conducive to the operation of a transfer station has a negative impact on all businesses and property owners in close proximity to the subject transfer station.

The present application currently acts as a stay against any enforcement action undertaken by the Town of Babylon. Therefore, I urge the Board of Appeals to deny Coastal's attempt to circumvent the Babylon Town Code immediately so that the Town may continue in its efforts to enforce its code and prevent the operation of an illegal transfer station.

Thank you for your consideration in this matter.

TRANSLOAD FACILITY OPERATIONS AGREEMENT

This TRANSLOAD FACILITY OPERATIONS AGREEMENT, effective as of August 5-6, 2004, is made and entered into by and between New York & Atlantic Railway Company ("Railroad"), and Coastal Distribution, LLC, a limited liability company of the State of New York ("Coastal").

RECITALS

WHEREAS, RAILROAD is a common carrier by rail conducting freight operations over certain tracks and facilities of The Long Island Rail Road Company pursuant to a Transfer Agreement dated November 18, 1996 (the "Transfer Agreement") that permits RAILROAD to lease or license certain properties for use in furtherance of freight operations; and

WHEREAS, RAILROAD and COASTAL are parties to a Lease agreement dated July 11, 2002 (the"Lease") providing for the lease of a yard and transloading facility ("the Facility") at the Farmingdale (P.W.) Rail Yard, located in Babylon, New York (the "Yard"); and

WHEREAS, the parties desire to cancel the Lease and modify their relationship in accordance with the following agreement; and

WHEREAS, RAILROAD desires to continue to offer and provide transloading and rail transportation services via carload to certain railroad customers ("Customers") at the Facility in conjunction with RAILROAD's rail line and the interstate railroad network; and

WHEREAS, COASTAL desires to continue to operate the Facility for and on behalf of RAILROAD; and

WHEREAS, RAILROAD desires to engage COASTAL as RAILROAD's contractor, to operate the Facility on RAILROAD's behalf; and

WHEREAS, the services shall be limited to providing transloading services between rail and truck for such non-hazardous freight, as may be agreed upon as provided herein, such freight being referred to generally as "Commodities" in this agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the representations, warranties, covenants and agreements set forth in this Agreement:

ARTICLE I – TRANSLOADING OPERATIONS

1.01. COASTAL Transloading Services. COASTAL shall, and shall have the exclusive right to, transload Commodities between trucks and rail cars at the Facility, for and on behalf of Railroad, pursuant to the terms of this Agreement. This right and obligation shall not be construed as a property interest in the Yard or the Facility, and is subordinate and subject in all respects to the terms and conditions of the Transfer Agreement.

1.02. RAILROAD Control of Operations. RAILROAD shall control all aspects of the Facility's transloading operations. RAILROAD shall have the right to review and audit COASTAL's business records related to the operation of Facility during regular business hours and shall have the right to inspect COASTAL's operation of the Facility at any time. COASTAL operations at the Facility and the Yard shall be subject to the supervisory authority of the RAILROAD's General Manager at Glendale.

1.03. RAILROAD Obligations. RAILROAD shall provide the existing Facility, AS IS, WHERE IS. RAILROAD shall have the right to change the configuration of track at the Yard so long as such change does not unreasonably interfere with COASTAL'S operations. RAILROAD does not warrant the condition of the Facility or the surrounding areas, the Yard or its equipment for any purpose. COASTAL has examined the premises and assumes the risk of using the premises for any purpose, and accepts all conditions and defects present thereon or associated therewith, known or unknown, provided however, that COASTAL does not waive or relinquish any rights it may have against RAILROAD under the Lease as a result of or arising from the claim of Pinelawn Cemetery to property rights in the Yard as are, or may be, alleged in Pinelawn Cemetery v. Coastal Distribution, LLC, et al., County of Suffolk No. 04-8599. Any such claim shall survive this agreement and the cancellation of that Lease contained herein.

1.04 Rail Service: Railroad shall provide reasonable rail service to the Facility.

1.05 Custody of Lading and Equipment: RAILROAD'S responsibility and liability for the cars and their contents bound to or from the Facility ends when the cars are uncoupled from the RAILROAD'S locomotive at the Facility, and the RAILROAD'S responsibility and liability is resumed when the cars are coupled to RAILROAD'S locomotive.

1.04. COASTAL Obligations.

(a) COASTAL shall perform transloading services between rail cars and trucks at the Facility for Customers of the RAILROAD. Such services shall include only those commodities, movements and equipment allowed by applicable law and regulations and approved by RAILROAD which approval will not be unreasonably withheld. COASTAL shall immediately cease and desist from any operations which shall be found to be in violation of any contractual or other obligation of RAILROAD upon notice from Railroad.

(b) COASTAL shall enforce all rules and regulations, as promulgated by RAILROAD as to all Customers, COASTAL employees and visitors at the Yard. Railroad may

establish rules related to safety and train operation which are consistent with industry norms or which are mandated by law or regulation. RAILROAD and COASTAL will jointly determine all such other rules as will apply to the operation of the facility, such rules will be to assure the efficient operation of the facility and will be designed to minimize adverse impacts on neighbors. Further, Costal shall comply with any and all applicable governmental health, safety and environmental rules or regulations.

(c) COASTAL shall, at its sole cost, acquire or provide any additional loading equipment (not owned by RAILROAD) reasonably necessary for the efficient handling of material and conducting transloading operations at the Facility and Yard. COASTAL shall clearly identify all such equipment as COASTAL equipment. All such equipment will comply with all applicable regulations. COASTAL will have the right to install and remove such equipment as the market may dictate, subject to the approval of RAILROAD (and LIRR to the extent required under the Transfer Agreement).

(d) COASTAL may market the Facility and the services of RAILROAD available by use of the Facility. COASTAL shall obtain RAILROAD's advance written approval of all written materials, including brochures and other marketing material used by COASTAL in marketing RAILROAD's transload and transportation services related to the Facility. Unless RAILROAD otherwise provides to the contrary, any such marketing material and any signage located inside or outside of the Yard shall prominently indicate RAILROAD's name and/or logo.

1.06. Railcars: Unless otherwise agreed by the parties hereto in writing:

(a) COASTAL will provide railcars to be used for any movement of construction and demolition debris or other long-term, repeat Commodity shipments from the Facility. Such railcars must be in good condition and provide appropriate protection to maintain the quality of their lading. Railcars provided by COASTAL and used under this Agreement will be subject to prior approval of RAILROAD, which approval shall not be unreasonably withheld. COASTAL equipment will not earn per-diem while on RAILROAD. COASTAL will provide maintenance for such equipment except that, as necessary to provide running repairs, RAILROAD may repair en route and bill COASTAL in accordance with current Association of American Railroads (AAR) Rules or COASTAL's own repair standards.

(c) Equipment Compliance: All railcars used to transport the Commodities pursuant to this Agreement shall comply with AAR and American National Standard Institute (ISO) specifications, as well as all applicable laws, rules and regulations. It shall be the responsibility of the party providing the equipment in any case to assure such compliance.

(d) Supplemental Equipment: If COASTAL'S need for railcars exceeds its own supply, RAILROAD will, upon request, use its reasonable best efforts to obtain suitable railcars on such terms as may be applicable to such equipment, but at the sole cost of COASTAL. RAILROAD will provide equipment for all non-regular

customers of the facility on terms applicable to such shipments in railroad-supplied equipment.

(e) Equipment Availability: RAILROAD will provide storage for empty COASTAL equipment not to exceed 50 rail cars at no cost to COASTAL.

1.07. Track Inspection: RAILROAD will remain responsible for the inspection of all tracks within the facility. Coastal will make such repairs as RAILROAD shall reasonably determine are necessary to maintain the facility in compliance with applicable regulations. Should Coastal fail to make necessary repairs RAILROAD will close the track in question until such repair is made.

1.07. Tender of Shipment: COASTAL shall ensure that each tender of Commodities for outbound rail shipment is made by or on behalf of RAILROAD'S Customer by e-mail, Electronic Data Interchange or other electronic means as agreed by the parties on a Uniform Straight Bill of Lading for carload shipments, properly classifying the Commodity to be shipped.

1.08. Loading and Unloading of Lading:

(a) Compliance with Loading Rules: COASTAL shall have the sole responsibility, at its sole expense, for properly packaging, labeling, marking, blocking, bracing, placarding, and loading and unloading the Commodities tendered by Customers at the Facility to or from equipment to be transported pursuant to this Agreement. COASTAL shall comply with the loading rules of the AAR and applicable law. COASTAL shall further be responsible for insuring that the load limits of any equipment used for transporting the Commodities under this Agreement are not exceeded.

(b) Overloaded or Improperly Loaded Equipment: In the event it is discovered that equipment has been overloaded or improperly loaded, RAILROAD may set out such equipment at a location convenient to RAILROAD and shall notify COASTAL by facsimile or e-mail of the location of the overloaded or improperly loaded equipment. COASTAL shall have 24 hours to remove excess weight or adjust load; or, if deemed safe, RAILROAD will move the overloaded or improperly loaded equipment to the nearest appropriate site. In any event, COASTAL shall be responsible for all costs for movement of the overloaded or improperly loaded equipment, and payment of any additional expenses incurred by RAILROAD due to improper loading or overloading of equipment. RAILROAD will move the affected equipment to its destination in such manner and at such time as is practicable after RAILROAD receives notice from COASTAL that the problem has been corrected.

1.09. No Selection of Landfill: In the event the Commodities include construction and demolition debris neither RAILROAD, nor COASTAL on behalf of RAILROAD, shall participate in, or take any active interest in, the site selection for the storage or disposal of the materials transported hereunder. RAILROAD shall have no obligation with regard to disposition of Commodities tendered to it for transportation other than to deliver it to the consignee or to

another railroad for interchange. To the extent that COASTAL enters into any agreement with a Customer for disposition of Commodities after transportation of the Commodities by RAILROAD, COASTAL shall not do so as an agent of RAILROAD and shall indemnify, defend and hold the RAILROAD harmless from any claims or liability arising out of COASTAL's activities on its own behalf. For the purpose of monitoring compliance with this agreement, COASTAL shall provide RAILROAD, upon request, a copy of any contract it or any Customer enters into with a destination landfill or treatment site prior to shipping Commodities to that landfill or treatment site.

1.10. Commodity and Analysis Reports: If requested, COASTAL shall provide RAILROAD with a copy of any commodities analysis report that is required to be submitted to any federal, state or local agency or to the operator of any destination disposal sites.

1.11. Incidents: In the event of an incident during transportation over RAILROAD's lines under this Agreement, which involves a release of the Commodities, RAILROAD shall immediately notify COASTAL, and each party shall take immediate action.

(a) In any such incident where the release was caused by an act or omission of RAILROAD, the expenses of cleanup shall be the obligation of RAILROAD under the terms of this Agreement, and COASTAL shall, upon request of RAILROAD and to extent it is authorized by law and regulation:

(1) provide containers for loading of Commodities and accept for disposal Commodities being disposed of by RAILROAD as a result of the cleanup ("RAILROAD's Cleanup Waste"), subject to the parties' mutual agreement on the cost of disposal for RAILROAD's cleanup waste to the extent the net tonnage of that waste exceeds the net tonnage of the original Commodities; and

(2) credit against RAILROAD's disposal costs for RAILROAD's Cleanup Waste any monies already collectible by COASTAL from other parties for the original disposal of the Commodities involved in the incident.

(b) In any such incident where the release was caused by an act or omission of COASTAL, the expenses of cleanup shall be the obligation of COASTAL under the terms of this Agreement, and RAILROAD shall, upon request of COASTAL and to the extent it is authorized by law and regulation:

(1) transport the Commodities being disposed of by COASTAL as a result of the cleanup ("COASTAL's Cleanup Waste"); and

(2) credit against COASTAL's transportation costs for COASTAL's Cleanup Waste any monies already payable by COASTAL to RAILROAD for the original transportation of the Commodities involved in the incident.

1.12. RAILROAD Use. COASTAL acknowledges that RAILROAD may use the tracks and other yard facilities from time to time for railroad purposes so long as that use does not unreasonably interfere with Coastal's operation.

1.13 Exclusive Use: So long as the terms of this Agreement remain in effect, RAILROAD shall not authorize any other party to conduct transloading activities at the Farmingdale (P.W.) Yard or operate the Facility on RAILROAD'S behalf.

1.14 Non Interference: The parties shall use their best efforts to conduct their respective operations so as not to interfere with the operations of the other.

ARTICLE II – DOCUMENTS AND BILLING

2.01. Transport Documentation.

(a) All bills of lading and similar documents for outbound rail shipments from the Facility (collectively, "Transport Documentation") for the Commodities transloaded at the Facility shall be between RAILROAD and the Customer, but COASTAL, as RAILROAD'S agent, may execute such Transportation Documentation on behalf of RAILROAD. COASTAL shall advise RAILROAD from time to time of the names of the COASTAL officers and employees who will execute such Transport Documentation, and shall apply prudent internal control procedures to ensure compliance with the provisions of this Agreement.

(b) All Transport Documentation shall be on a form approved in writing by RAILROAD and shall specifically state that neither RAILROAD nor COASTAL shall take title to any Commodities and that RAILROAD shall not, under any circumstances, be responsible or liable for disposal of Commodities. COASTAL may enter into separate agreements (collectively, "Disposal Agreements") in its own name with Customers whereby COASTAL shall be responsible to such Customer for obtaining the disposal of COMMODITIES. In entering into and performing any Disposal Agreements, COASTAL shall not make any statement or take any action or fail to take any action that suggests that RAILROAD is in any way participating in or approving any Disposal Agreement of disposal arrangement. Any Disposal Agreements shall be entirely independent from the transportation and loading service provided under this agreement. Coastal shall separately invoice and collect any fees or charges on its own behalf under any Disposal Agreements.

2.02. Billing and Collection. COASTAL shall promptly bill and collect from Customers all Loading Fees (as defined below) for loading or unloading services rendered to the Customer by COASTAL. COASTAL shall remit to RAILROAD within two business days of clearance of funds by COASTAL'S bank such portion of the Loading Fees for RAILROAD'S corresponding Usage Fee (as defined below). COASTAL shall provide RAILROAD with a monthly accounting of the rail cars and trucks loaded by COASTAL under this Agreement, amounts billed and funds received. Loaded freight transportation charges will be collected by the Class I carrier unless otherwise provided by applicable transportation contract or tariff.

ARTICLE III –LOADING AND USAGE FEES

3.01. Rates and Charges. For and as its sole compensation for performing the transloading services, COASTAL shall be entitled to charge a Loading Fee ("Loading Fee") for such services, which fee shall be in addition to the rail freight transportation charge otherwise payable to RAILROAD for loaded freight car movements.

3.02 Use Charge: COASTAL shall pay to RAILROAD, for the use of the Facility and in recognition of the previous contributions to construction of the Facility by the parties, a usage fee (the "Usage Fee") of twenty dollars ($20) per loaded rail car (inbound or outbound). The Usage Fee for each loaded car in excess of 1,200 in any contract year (as determined by the anniversary of the effective date) shall be reduced to five dollars ($5).

3.03 Payment. Usage Fees payable to RAILROAD under this agreement shall be paid as provided in Section 2.02 above.

3.04 Discrepancies: Any discrepancy in billing or charges provided for under this agreement shall be reconciled between the parties. Any claim for adjustment or correction of charges paid, collected or remitted shall be made in writing by the party making the claim and delivered to other party within six (6) months of the date upon which the charge was paid, collected or remitted or shall be deemed waived. Any such claim shall be resolved pursuant to Section 7.03.

ARTICLE IV – COVENANTS OF COASTAL

4.01. Use of the Facility. During the term of this Agreement, COASTAL agrees and covenants as follows:

(a) COASTAL shall use the Facility only for the transfer of Commodities between trucks and railcars transported by RAILROAD.

(b) COASTAL shall access the Facility using only RAILROAD's primary access route off New Highway and shall not load or unload railcars outside the Facility.

(c) COASTAL may not allow other persons to operate the Facility without the prior written permission of RAILROAD which permission may be withheld for any reason.

(d) COASTAL shall, at its sole cost and expense, obtain any applicable required permits, licenses, waivers, consents or other governmental authority required for it to operate the Facility. Any costs incurred by RAILROAD in the process of obtaining any permits or operating authority for COASTAL will be paid by COASTAL, provided however COASTAL will not be responsible for any legal fees incurred by RAILROAD in reviewing submissions made by COASTAL or costs incurred by RAILROAD in obtaining any additional permits, authority or exemptions in the name of RAILROAD.

(e) Should RAILROAD'S operations be interrupted by any government agency, public authority or any entity authorized to do so, due to any deficiency in COASTAL'S permits or as the result of COASTAL's failure to obtain or comply with same, COASTAL shall defend, indemnify and hold RAILROAD harmless from any and all costs, including attorney's fees.

(f) COASTAL shall take reasonable steps to assure that any hauler, motor carrier or other person, party or entity operating to, at or from the Facility is duly licensed and authorized to so operate under applicable law.

(g) COASTAL and its affiliates, agents, contractors, employees and invitees shall adhere to RAILROAD's standard safety policies then in effect based on rule books, and revisions thereto, as provided to COASTAL by RAILROAD.

(h) COASTAL covenants that as of the Effective Date of this agreement, the Facility has been constructed and operated in compliance with (i) any applicable laws and regulations, and (ii) all buildings on the premises were built and all buildings to be built will comply with all requirements of the LIRR as may be imposed under the *Transfer Agreement and with any applicable standards contained in any* building and or fire codes and any other standard, law or regulation, except to the extent that RAILROAD and COASTAL agree such standards are not applicable. COASTAL covenants that it will maintain the Facility in compliance with such requirements during the term of this agreement. If COASTAL fails to take action within a reasonable time to comply with any such requirements, RAILROAD shall have the right, but not the obligation, to take the action required to comply with said requirements at the sole cost of COASTAL.

4.02. Condition of the Facility.

(a) COASTAL promises: 1) not to damage or misuse the Facility or allow its employees, contractors, agents or invitees to do so; 2) not to make any structural changes to the Facility without the prior written consent of RAILROAD; 3) to immediately notify RAILROAD of any conditions at the Facility that are dangerous to human health or safety, or that may damage the Facility; 4) that if COASTAL vacates the Facility, all fixtures and improvements will be left in good condition, except for ordinary wear and tear and shall become the property of RAILROAD and The Long Island Railroad; and 5) not to permit waste of the Facility. Notwithstanding the foregoing, unless COASTAL is in material breach of this agreement, upon the termination of this agreement COASTAL may elect, subject to requirements of the Transfer Agreement, to remove any improvements made at its own cost and leave the premises in its pre July 11, 2002 condition.

(b) COASTAL, at its expense, shall be solely responsible for all necessary repairs, maintenance and upkeep of the Facility.

(c) COASTAL shall not permit any liens to encumber the Facility for any labor or material furnished in connection with any work performed or claimed to have been performed in or about the Facility.

(d) If the Facility is destroyed or damaged so it is unfit to be used for the purposes existing prior to COASTAL'S occupancy, COASTAL will be responsible for returning the Facility to that condition which existed on July 11, 2002.

4.03. Insurance. Coastal shall maintain the following types of insurance with insurance carriers having a current AM Best rating of not less than A-VIII, in the amounts provided for below and otherwise in form and substance acceptable to RAILROAD:

(a) Comprehensive General Liability Insurance with minimum limit per any one occurrence of $5,000,000. All exclusions as relating to Railroad Right of Way must be deleted from the policy, if this is not the case, then insurance as set forth in Section 4.03(d) shall be provided by COASTAL.

(b) Automobile Liability Insurance (covering owned, hired and non-owned vehicles) in minimum limits of $2,000,000 for injury to or death of any one person, of $5,000,000 for injury to or death of more than one person in any one accident, of $5,000,000 for damage to property in any one accident.

(c) Workers Compensation Insurance in an amount not less than required by The State of New York and as follows:

Coverage A – Statutory Policy form

Coverage B – Employer's Liability

- Bodily injury by Accident: $1,000,000 each accident
- Bodily Injury by Disease: $1,000,000 each employee & Policy Limit

(d) Railroad Protective Liability Insurance in the amount of at least $10,000,000. The form shall be on an occurrence basis and be executed in favor of RAILROAD as a named insured. Costal and all of its insurer(s) agree to waive subrogation (including without limitation Worker's Compensation) against RAILROAD, LIRR, MTA, their agents and employees, which waiver(s) by insurer(s) shall also be expressed and evidenced in the certificates of insurance (including without limitation Worker's Compensation).

(e) All of Coastal's insurance shall be primary insurance with respect to the additional insured and will not participate with any other available insurance (and upon RAILROAD"S request Coastal's certificates of insurance shall reflect the foregoing primary aspect). All deductibles shall require written consent of RAILROAD. All of COASTAL'S insurance of any type shall be from insurer(s) approved by RAILROAD. Failure by RAILROAD to object to the lack or contents of any of the certificate(s) or coverage(s) to be provided by Coastal shall

not serve to waive or limit RAILROAD'S rights or remedies nor to eliminate or effect COASTAL'S obligations, waivers or liabilities under this contract.

COASTAL shall furnish RAILROAD Certificates of Insurance, in duplicate, evidencing all required insurance to be in full force and effect and that the same will not be canceled without at least thirty (30) days advance written notice by Insurance Company to RAILROAD. The New York and Atlantic Railway, the Metropolitan Transit Authority and The Long Island Railroad shall be shown as additional insured.

4.04. Maintenance. COASTAL shall obtain and pay for all utility charges for the Facility. COASTAL shall also pay the costs of maintenance and repair of the Facility.

4.05. Compliance with Regulations. COASTAL agrees to use the Facility in strict conformance with all applicable rules, regulations and ordinances of federal, state and municipal authorities including without limitation, any regulations concerning the handling of construction and demolition debris, except to the extent that RAILROAD and COASTAL agree such standards are not applicable.

ARTICLE V – TERM

5.01. Initial Term. The Agreement shall expire on the date five years after the effective date of this agreement (the "Initial Term"); provided, however, that RAILROAD shall also have the right to terminate this Agreement prior to expiration in the event:

(a) COASTAL breaches or fails to comply with any of the covenants, terms or conditions of this Agreement;

(b) RAILROAD loses the right to provide COASTAL with access to the Facility for any reason; or

(c) The Facility fails to meet the following minimum volume levels during the respective contract years (measured from the anniversaries of the effective date):

(i) 1200 carloads in the first contract year,

(ii) 1800 carloads in the second contract year,

(iii) 2400 carloads in the third contract year, and

(iv) 3200 carloads in the fourth and all subsequent contract years.

5.02 Renewal: The parties agree to discuss renewal terms for this agreement on and after the first anniversary of the Effective Date, unless COASTAL is in material breach of this agreement. Provided however, in no event will this agreement be renewed or extended to apply after March 31, 2017.

5.04 Dangerous or Unlawful Condition: Notwithstanding section 5.03 above, should any condition be created by COASTAL on the Facility that creates or contributes to a dangerous condition or results in RAILROAD or COASTAL being cited for a violation of any federal, state or local law, rule, ordinance or regulation regulating health, safety or the environment or which could result in conviction of a crime, misdemeanor or violation, RAILROAD, in its sole and absolute discretion, may immediately limit COASTAL's rights under this Agreement to prohibit the activity giving rise to such safety or environmental hazard or violation pending a final determination of the facts or of liability. However, to the extent that any such citation is not made against RAILROAD (i.e. is made against COASTAL alone) or does not relate to an immediate dangerous human health or safety condition, RAILROAD shall not have the right to terminate the activity until there is a non-appealable finding by the agency or the court with applicable jurisdiction, so long as (i) COASTAL is contesting the rule, regulation, citation or charge in good faith; and (ii) COASTAL and RAILROAD are legally able to continue to operate the Facility under the terms of this Agreement.

5.05 Coastal Termination. COASTAL shall have the right to terminate this agreement on sixty (60) days written notice to RAILROAD.

5.06 Effect of Termination. Upon termination COASTAL shall cease using the Facility and shall immediately remove its personal property there from. Except for termination by reason of breach, upon termination, the parties' obligations to each other shall immediately cease and, except for money then currently due and owing, and the indemnification rights provided herein, the parties' financial obligations to the other shall cease.

ARTICLE VI –INDEMNIFICATION

6.01. Indemnification. Coastal hereby assumes, releases and agrees to protect, save harmless, defend and indemnify RAILROAD, the Metropolitan Transit Authority and Long Island Rail Road Company, and their respective officers, shareholders, directors, employees, agents and assigns from and against any and all claims and liability caused by, arising out of or resulting in any manner from the condition, existence, use or occupancy of the Premises by COASTAL during the term of this agreement, including but not limited to:

(a) All loss and damage to any property whatsoever, including the Facility, the property of NY&A, MTA, LIRR and of all other persons whomsoever placed or stored at the Facility and including the loss or interference with any use or service thereof;

(b) All loss and damage on account of injury to or death of any person whomsoever, including but not limited to employees and patrons of the parties hereto and all other persons whomsoever on or around the Facility; and

(c) All consequential loss or damage occurring off the Facility premises but arising from acts or events on or around the Facility.

Notwithstanding the foregoing, COASTAL shall not be responsible for and will not indemnify RAILROAD, Metropolitan Transit Authority or Long Island Rail Road Company from and against any claims or liability arising out of or in connection with their own gross negligence or gross willful misconduct.

ARTICLE VII – MISCELLANEOUS

7.01 Termination of Lease. This Agreement supercedes the Lease dated July 11, 2002 by and between the parties and all amendments, modifications and interpretations thereof, and said Lease shall be hereby terminated and of no further force and effect.

7.01 Amendment and Waiver. This Agreement may not be amended or waived except in a writing executed by the party against which such amendment or waiver is sought to be enforced. No course of dealing between or among any persons having any interest in this Agreement will be deemed effective to modify or amend any part of this Agreement or any rights or obligations of any person under or by reason of this Agreement.

7.02 Notices. All notices, demands and other communications to be given or delivered under or by reason of the provisions of this Agreement will be in writing and will be deemed to have been given when personally delivered or three business days after being mailed, if mailed by first class mail, return receipt requested, or when receipt is acknowledged, if sent by facsimile, telecopy or other electronic transmission device. Notices, demands and communications to COASTAL or RAILROAD will, unless another address is specified in writing, be sent to the address indicated below:

Notices to COASTAL:

Joseph Rutigliano, Principal
Coastal Distribution LLC
1633 New Highway
Farmingdale, N.Y. 11735
631-756-2000
Fax 631-756-2001

With a copy to:

John F. McHugh, Esq.
6 Water Street, Suite 401
New York, N.Y. 10004
212-483-0875
Fax: 212-483-0876

Notices to RAILROAD:

Fred L. Krebs, President
New York & Atlantic Railway Company
68-01 Otto Road
Glendale, New York 11385

With a copy to:

Ronald A. Lane, Esq.
Fletcher and Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2875
312-252-1500
Fax: 312-252-2400

7.03 Arbitration. Any controversy or claim arising out of or relating to this Agreement or the breach thereof, other than disputes which are within the exclusive jurisdiction of the Surface Transportation Board, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules (including the Emergency Interim Relief Procedures), and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Notwithstanding the foregoing, the parties hereto shall first use commercially reasonable efforts to settle any dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of ten (10) days, then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration as provided herein. The arbitrator shall be selected by the parties. In the event that they are unable to agree on the selection of an arbitrator within ten (10) days, the parties or their attorneys may request the American Arbitration Association to appoint the arbitrator. Prior to the commencement of hearings, the arbitrator shall provide an oath or undertaking of impartiality. The place of arbitration shall be New York, New York. Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under this Agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the arbitration. The award shall be made within two (2) months of the filing of the notice of intention to arbitrate (demand), and the arbitrator shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by mutual written agreement of the parties. The prevailing party shall be entitled to an award of reasonable attorney fees. The determination as to which party, if any, is the prevailing party and whether and how much in attorney's fees shall be awarded will be made by the arbitrator.

7.04 Assignment. This Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. Neither this Agreement nor any of the rights, interests or obligations hereunder may be assigned by COASTAL without the prior written consent of RAILROAD, which consent will not be unreasonably withheld. A Change of Control shall be deemed an assignment for the purposes

of this Agreement. RAILROAD shall have the right to assign this Agreement to any carrier which should succeed it as authorized by the Surface Transportation Board.

7.05 No Third Party Beneficiaries. Nothing in this Agreement shall confer any rights upon any person or entity that is not a party or permitted assignee of a party to this Agreement.

7.06 Severability. Whenever possible, each provision of this Agreement will be interpreted in such a manner as to be effective and valid under applicable Law, but if any provision of this Agreement is held to be prohibited by or invalid under applicable Law, such provision will be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

7.07 Complete Agreement. This Agreement, and the other documents referred to herein contain the complete agreement among the parties and supersede any prior understandings, agreements or representations by or among the parties, written or oral, which may have related to the subject matter hereof in any way. However, the letter agreement entered into by the parties on June___, 2004 in connection with LIRR's endorsement of COASTAL's application for zoning changes shall remain in effect unchanged. The section and paragraph headings of this Agreement are for reference purposes and shall not affect the meaning or interpretation of the Agreement.

7.08 Time of Essence. With regard to all dates and time periods set forth or referred to in this Agreement, time is of the essence.

7.09 Signatures; Counterparts. This Agreement may be executed in one or more counterparts, any one of which need not contain the signatures of more than one party, but all such counterparts taken together will constitute one and the same instrument. A facsimile signature will be considered an original signature.

7.10 Governing Law. This agreement shall be interpreted under the applicable laws of the United States and the regulations of such Federal Authorities as have exclusive jurisdiction over the activities contemplated. In matters involving the construction and interpretation of this document the internal laws, without regard for conflicts of laws principles, of the State of New York will apply.

7.11 Force Majeure. If either party is unable to meet its obligations hereunder as a result of acts of God, war, terrorism, insurrection, floods, strikes, derailments, or any like causes beyond its reasonable control, that party's obligations and those of such other party affected by such force majeure event, will be suspended for the duration of same; provided, however, that the parties will make all reasonable efforts to continue to meet their respective obligations during the duration of the force majeure event; and, provided further, that the party declaring a force majeure event shall promptly notify the other party of the same (including its anticipated duration), the nature of the force majeure event, and when it is completed. The suspension of any obligation owing to a force majeure event will neither cause the term of this Agreement to be extended nor affect any rights accrued under this Agreement prior to the force majeure event.

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Coastal

7/2002

LEASE AGREEMENT: FARMINGDALE - 1

THIS LEASE AGREEMENT ("Agreement") made and entered into this 11 day of July, 2002, by and between New York & Atlantic Railway Co., hereafter referred to as "NYA" and Coastal Distribution, LLC. (and any of its agents, licensees and/or assignees), hereafter referred to as "Lessee".

A. Premises. NYA hereby agrees to let and Lessee hereby agrees to hire of NYA certain property located at Farmingdale Team Yard (PW) as more particularly described by the drawing attached hereto as Exhibit A (the "Premises"), for Lessee's exclusive use, at the rate and for the term set forth herein.

B. NYA Warranties. NYA warrants it is the owner (or agent for the owner) of the Premises, that it is fully authorized to enter into this agreement and has the right to grant Lessee the use of the Premises and each and all of the rights herein granted. It is agreed to by the Lessee the rights conveyed by this lease are subject to, and limited by, the rights conferred to NYA by the Transfer Agreement between the Long Island Rail Road and NYA.

C. Agreements. It is mutually agreed by and between the parties hereto as follows:

1 Rent / Rebates. The rate for Lessee's use of the Premises as provided herein shall be [redacted] per month, payable in advance, as provided in section C.14 hereof. The NYA and Lessee hereby agree to the following payment/rebate arrangement regarding the movement of LIRR material from the premises:

a. Lessee will make [redacted] in funds available to NYA

NYA will contribute the following to achieve a [redacted] payment to Lessee, which is equal to one-half of total funds required.

b. NYA will add [redacted] to figure in "1-a" above, and submit funds to the LIRR in the amount of [redacted].

c. NYA will rebate Lessee in the amount of [redacted] per rail car shipped where "Coastal Distribution", or affiliates as specified, show as consignee, at the station of Farmingdale, NY. This rebate will remain in effect until the amount of [redacted] has been apportioned to the Lessee. The term of this rebate shall not exceed three years from the effective date.

d. NYA will reduce the rent on premises for the first twenty-four months of the agreement, to the amount of [redacted] per month. The security payment made by Lessee for the previously cancelled contract will be applied as the payment for September 2004 rent.

2. Improvements. Lessee shall have the right to make improvements to the premises. All investments, made by Lessee, including pavement, lighting, fencing, security of any kind, etc. shall be at the sole expense of Lessee with no reimbursement of any kind.

3. Term. This Agreement shall remain in effect for five (5) years from the date when the first railcar consigned to Lessee is brought to the Premises (the "Commencement Date"). The Agreement shall terminate five (5) years after the Commencement Date ("Termination Date"). The initial term of the volume commitment of the Agreement shall begin on the Commencement Date and shall end exactly one year later (i.e. if the Commencement Date is on August 1st, 2002, than the initial term shall end on August 1st, 2003). Each term following the initial term shall begin on the anniversary of the Commencement Date and

shall end the following year. After the initial term of the Agreement, Lessee shall automatically be entitled to another year until Termination Date provided that.

I. Lessee will meet a volume commitment of 1,200 carloads in the initial term, 1,800 carloads in the second term, 2,400 carloads in the third term, and 3,200 carloads for each term thereafter.

II. Lessee has not been in any material breach of any of the provisions of this Agreement.

III. NYA agrees to work with Lessee to renew Agreement after its expiration based on adherence by Lessee to all of the statutes as laid forth in this Agreement over its five-year term. The Agreement cannot be renewed past March 31st, 2017.

4. Damage, Vandalism, Graffiti, etc. NYA will not be held responsible for any damage/vandalism/graffiti, etc. to any material or equipment stored on the premises.

5. Indemnification. Lessee hereby assumes, releases and agrees to protect, save harmless, defend and indemnify NYA, MTA and LIRR, and its respective officers, shareholders, directors, employees, agents and assigns from and against any and all claims and liability caused by, arising out of or resulting in any manner from the condition, existence, use or occupancy of the Premises and any adjoining lands used by Lessee during the term of this agreement, including but not limited to:

I. All loss and damage to any property whatsoever, including property of NYA, MTA, LIRR and of all other persons whomsoever placed or stored upon Premises and upon any temporary usage area(s), and the loss of interference with any use or service thereof;

II. All loss and damage on account of injury to or death of any person whomsoever, including but not limited to employees and patrons of the parties hereto and all other persons whomsoever on the Premises and upon such temporary usage area(s); and

III. All consequential loss or damage occurring off the Premises but arising from acts or events on the Premises.

Notwithstanding the foregoing, Lessee shall not be responsible for and will not indemnify NYA, MTA or LIRR from and against any claims or liability arising out of or in connection with the gross negligence or gross willful misconduct of NYA, MTA or LIRR.

6. Required Insurance. Lessee shall maintain the following types of insurance with insurance carriers having a current A.M Best rating of not less than A-VIII, in the amounts provided for below and otherwise in form and substance acceptable to NYA:

I. Comprehensive General Liability Insurance with minimum limit per any one occurrence of $5,000,000. All exclusions as relating to Railroad Right of Way must be deleted from the policy, if this is not

the case, then Insurance as set forth in Section 6.IV shall be provided by the lessee.

II. Automobile Liability Insurance (covering owned, hired and non-owned vehicles) in minimum limits of $2,000,000 for injury to or death of any one person, of $5,000,000 for injury to or death of more than one person in any one accident, of $5,000,000 for damage to property in any one accident.

III. Workers Compensation Insurance in an amount not less than required by The State of New York and as follows:

Coverage A – Statutory Policy form

Coverage B – Employer's Liability

- Bodily Injury by Accident: $1,000,000 each accident
- Bodily Injury by Disease: $1,000,000 each employee & Policy Limit

IV. Railroad Protective Liability Insurance in the amount of at least $10,000,000. The form shall be on an occurrence basis and be executed in favor of NYA as a named insured.

V. Lessee and all of its insurer(s) agree to waive subrogation (including without limitation Worker's Compensation) against NYA, LIRR, MTA, their agents and employees, which waiver(s) by insurer(s) shall also be expressed and evidenced in the certificates of insurance (including without limitation Worker's Compensation).

VI. All of Lessee's insurance shall be primary insurance with respect to the additional insured and will not participate with any other available insurance (and upon NYA's request Lessee's certificates of insurance shall reflect the foregoing primary aspect) All deductibles shall require written consent of NYA. All of Lessee's insurance of any type shall be from insurer(s) approved by NYA. Failure by NYA to object to the lack or contents of any of the certificate(s) or coverage(s) to be provided by Lessee shall not serve to waive or limit NYA's rights or remedies nor to eliminate or effect Lessee's obligations, waivers or liabilities under this contract.

Lessee shall furnish NYA Certificates of Insurance, in duplicate, evidencing all required insurance to be in full force and effect and that the same will not be canceled without at least thirty (30) days advance written notice by Insurance Company to NYA. The New York and Atlantic Railway, the Metropolitan Transit Authority and the Long Island Rail Road shall be shown as additional insured.

7. Condition of Premises. NYA does not warrant the condition of its property, equipment and facilities for any purpose. Lessee assumes the risk of using the Premises for any purpose, and accepts all conditions and defects present thereon, or associated therewith.

8. Removal of Improvements. At the end of the project, Lessee shall have the right to remove all of its structures and other material and equipment from said premises at the sole cost and expense of Lessee if they so desire; provided, that removal of such structures and other material and equipment will not damage the Premises in any way.

9. Emergency Interruptions. When requested by NYA, Lessee agrees to stop any activity in which it is engaged whenever NYA deems an emergency, as necessary to insure the timely and safe operations of the railroad and in no event will train operations or safety be jeopardized.

10. Compliance with Procedures and Instructions. Lessee, its officers, employees, agents, contractors and invitees agree to comply with all NYA operating procedures, safety rules, and instructions from NYA personnel.

11. Liability. Lessee agrees that when railcars are placed for unloading/loading at Premises, the security of the railcars and their contents shall remain with Lessee.

12. Freight Payments. Lessee shall maintain good credit with NYA. Lessee shall pay freight bills within fifteen (15) days of receipt. If account of Lessee is in arrears at any time during the term of the Agreement, this will be considered a violation of the Agreement, and NYA will be entitled to terminate the Agreement as specified in section 13.I hereof.

13. Termination.

I. This Agreement is subject to immediate termination by either party in the event of violations by the other party of any of the terms and conditions of this Agreement. Lessee shall have been given sixty (60) days written notice to cure any breach of any obligations of the Agreement. However, Lessee shall have been given fifteen (15) days written notice to cure violations as proscribed in section C.12 hereof.

II. Lessee shall have the right to cancel this agreement on sixty (60) days written notice.

III. NYA shall have the right to cancel this agreement on sixty (60) days written notice provided the railcar volume commitments as stated in section C.3.I hereof are not met.

14. Effective Date. This Agreement shall not become effective until Lessee has returned a signed copy of this Agreement, furnished evidence of insurance as specified in section C.6 hereof. All rental payments are due on the first day of every month. Lessee shall have a ten-day grace period for payment of rent.

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AGREED AND ACCEPTED:

Lessee
Coastal Distribution, LLC.
30 A Glen Street
Glen Cove, New York 11542
Tel. 516-676-3700

By: _____
Joseph Ruvig Mbro

DATED: July 11, 2002

Lessor
New York & Atlantic Railway Co.
68-01 Otto Road
Glendale, New York 11385
Tel. 718-497-3023

By: _____

Check Payable To:
New York & Atlantic Railway Co.
Accounting Office
53 West Jackson Boulevard, Suite 335
Chicago, IL 60604
Fed. I.D.#: 13-3926500

DATED: July 11, 2002

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New York State Department of Environmental Conservation
Division of Solid & Hazardous Materials, Region One
Building 40 - SUNY, Stony Brook, New York 11790-2356
Phone: (631) 444-0375 • FAX: (631) 444-0231
Website: www.dec.state.ny.us

Denise M. Sheehan
Acting
Commissioner

February 15, 2005

Mr. Joseph Rutigliano
Coastal Distribution, LLC.
1633 New Highway
Farmingdale, N.Y. 11735

Re: Farmingdale Multi-Modal Transload Facility

Dear Mr. Rutigliano:

A decision has been made relative to the question as to whether New York State's Solid Waste Regulations, 6 NYCRR Part 360 (Part 360) regulations are preempted by the Surface Transportation Board (STB) in regard to the Coastal Distribution, LLc's (Coastal) rail haul facility, named Farmingdale Multi-Modal Transload Facility, located at 1633 New Highway, Farmingdale, N.Y. 11735.

It is the New York State Department of Environmental Conservation's(the Department) understanding that Coastal has been contracted by New York & Atlantic Railway (NY&A Railway) to operate transloading operations that NY&A Railway offers to its customers. Pursuant to the contract between the parties, NY&A Railway has control of the facility and the operations. The Department's Regional Staff have raised the question as to whether or not Part 360 regulations are preempted by the STB.

Based on a review of this specific case, it has been determined that the Department is preempted from requiring a Part 360 transfer station permit since: (1) the transloading operations are considered transportation pursuant to 49 U.S.C. 10102(9)(A),(B); and (2) the transportation activities are performed by a rail carrier pursuant to 49 U.S.C. 10102(5). The STB has found that transloading activities fall within the definition of transportation. In this case, while the transportation activities are not directly performed by NY&A Railway, Coastal is acting on behalf of NY&A Railway, and the Coastal's activities are part of the railroad service that is being offered to NY&A Railway's customers. The Department continues to retain police powers to control odor, noise and vermin complaints.

If you have any questions regarding this issue, please feel free to contact me at your convenience. Thank you for your patience in this matter.

Sincerely,

Anthony J. Cave, P.E.
Regional Engineer for Environmental Quality

cc: Peter A. Scully, Regional Director, Region One, NYSDEC
Jeffrey C. Schmitt, P.E., Bureau Director, Bureau of Solid Waste, Reduction and Recycling
James B. Crane

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILROAD COMPANY

Plaintiffs, Declaration

v.

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON AND PINELAWN CEMETERY CORP.

Defendants.

and

THE LONG ISLAND RAILROAD,

As a necessary party

JAMES F. GAUGHRAN, declares under penalty of perjury pursuant to 28 U.S.C. §1746 as follows:

1. I am an attorney duly admitted to practice law before the Courts of the State of New York and am fully familiar with the facts and circumstances herein through my review of the office files and personal visits to the site of Coastal Distributions, LLC ("Coastal") which is the subject of this action.

2. The undisputed evidence is that the subject property has been used as a railroad freight facility continuously since at least August 30, 1904 and November 1, 1905 when Pinelawn Cemetery first leased the subject properties to the Long Island

Railroad ("LIRR"). In 2003, the Metropolitan Transportation Authority ("MTA") and the LIRR renewed these leases for an additional 99 years.

3. In 1996, MTA and LIRR subleased the premises to New York and Atlantic Railway ("NYA") for the same railroad freight purposes that the premises had previously been used by MTA and LIRR. In 2002, NYA subleased the premises to Coastal to operate the facility, which arrangement was superceded by a license agreement with Coastal on August 6, 2004 to act under the control of NYA as its agent for the same railroad freight purposes the property had previously been used for.

4. These facts are confirmed by Roco Kruslic, Director of Real Estate for the MTA, in an affidavit submitted to the Babylon Zoning Board of Appeals ("ZBA") (Exhibit ___ hereto). Mr. Kruslic states that "...the property that it (Town of Babylon) seeks to impair has been utilized by the railroad for railroad related purposes for 99 years, with the leases for the property having been extended and reinstated by Pinelawn, in writing, for another 99 years." The record of the ZBA contains all of these facts. See pp. 4-6, Exhibit ___ hereto.

5. It also is undisputed that the current zoning for the subject property is for residential use. Apart from the valid arguments that the subject railroad use is exempt from local zoning requirements, it also clearly is a legal nonconforming use since the use of the property lawfully existed prior to residential zoning of the property.

6. The Zoning Code of the Town of Babylon expressly permits the subject use to continue as a legal nonconforming use. §213-1 of the code defines Nonconforming Building or Use as follows: "One that does not conform to the regulations of the district in which it is situated." The code further provides at §213-225

as follows: "Continuation of nonconforming uses. The lawful use of a building existing on July 25, 1954, may be continued although such use does not conform to the provisions of this chapter." The code also states at §213-22 as follows: "Continuation of legal nonconforming use. A. The term 'legal nonconforming use,' as used in this Article, shall mean any nonconforming use which, at the time such use was commenced, was maintainable as a matter of right under the statutes, ordinances and general rules of law then in effect in the Town of Babylon. B. Any legal nonconforming use may be continued; provided, however, that a legal nonconforming use shall not be abandoned or changed unless changed to a conforming use. A legal nonconforming use, if changed to a conforming use, may not be thereafter changed to any nonconforming use."

7. There also is no question that the railroad use of the property has continued since at least 1905 and there has been no change in use of the subject premises.

8. Based on the foregoing as well as established law in the State of New York, Coastal was entitled to continue the legal nonconforming use of the premises that dates back to 1905. Indeed, the Town has recognized this status in not seeking to disturb the railroad use of the subject property, as well as other railroad property in the town, until a town official issued a stop-work order that triggered the application to the ZBA.

9. In sum, Coastal is entitled to continue the railroad use of the subject property without interference from the town since it is clearly a legal nonconforming use.

This right is in addition to and separate and apart from its right to an exemption from local zoning requirements pursuant to both federal and state law.

Dated, Huntington, New York
April 22, 2005

James F. Gaughran

AO 440 (Rev 1/93) Summons in a Civil Action

United States District Court

EASTERN DISTRICT OF NEW YORK

COASTAL DISTRIBUTION, LLC
and THE NEW YORK and ATLANTIC
RAILROAD

SUMMONS IN A CIVIL ACTION

V.

CASE NUMBER:

THE TOWN of BABYLON, A MUNICIPAL
CORPORATION, THE TOWN of BABYLON
BOARD of ZONING APPEALS, and PETER CASSERLY
as COMISSIONER of PLANNING and DEVELOPMENT
of the TOWN of BABYLON

TO: (Name and Address of Defendant)

Peter Casserly
Commissioner of Planning and Development
Town of Babylon
200 East Sunrise Highway
Babylon, NY 11704

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

John F. McHugh
6 Water Street
New York, NY 10004
(212) 483-0875

James F. Gaughran
191 New York Avenue
Huntington, NY 11747
(631) 385-7004

Ronald A. Lane
Fletcher Sipple, LLC
29 N. Wacker Drive,920
Chicago, IL 60606
(312) 252-1500

---) See Attached

an answer to the complaint which is herewith served upon you, within _____ days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK

DATE

BY DEPUTY CLERK

Ronald E. Joseph
Landman Corsi Bullaine & Ford, P.C.
120 Broadway
New York, NY 10004
(212) 238-4800

AO 440 (Rev 1/93) Summons in a Civil Action

United States District Court

EASTERN DISTRICT OF NEW YORK

COASTAL DISTRICT, LLC
and THE NEW YORK and ATLANTIC
RAILROAD

SUMMONS IN A CIVIL ACTION

V.

CASE NUMBER:

THE TOWN of BABYLON, A MUNICIPAL
CORPORATION, THE TOWN of BABYLON
BOARD of ZONING APPEALS, and PETER CASSERLY
as COMISSIONER of PLANNING and DEVELOPMENT
of the TOWN of BABYLON

TO: (Name and Address of Defendant)
The Town of Babylon Board of Zoning Appeals
200 East Sunrise Highway
Babylon, NY 11704

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

John F. McHugh
6 Water Street
New York, NY 10004
(212) 483-0875

James F. Gaughran
191 New York Avenue
Huntington, NY 11747
(631) 385-7004

Ronald A. Lane
Fletcher Sipple, LLC
29 N. Wacker Drive,920
Chicago, IL 60606
(312) 252-1500

---) See Attached

an answer to the complaint which is herewith served upon you, within _____ days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK

DATE

BY DEPUTY CLERK

Ronald E. Joseph
Landman Corsi Bullaine & Ford, P.C.
120 Broadway
New York, NY 10004
(212) 238-4800

AO 440 (Rev 1/01) Summons in a Civil Action

United States District Court

EASTERN DISTRICT OF NEW YORK

COASTAL DISTRIBUTION, LLC
and THE NEW YORK and ATLANTIC
RAILROAD

SUMMONS IN A CIVIL ACTION

V.

CASE NUMBER:

THE TOWN of BABYLON, A MUNICIPAL
CORPORATION, THE TOWN of BABYLON
BOARD of ZONING APPEALS, and PETER CASSERLY
as COMISSIONER of PLANNING and DEVELOPMENT
of the TOWN of BABYLON

TO: (Name and Address of Defendant)

The Town of Babylon, a Municipal Corporation
200 East Sunrise Highway
Babylon, NY 11704

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

John F. McHugh
6 Water Street
New York, NY 10004
(212) 483-0875

James F. Gaughran
191 New York Avenue
Huntington, NY 11747
(631) 385-7004

Ronald A. Lane
Fletcher Sipple, LLC
29 N. Wacker Drive,920
Chicago, IL 60606
(312) 252-1500

---) See Attached

an answer to the complaint which is herewith served upon you, within _____ days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK

DATE

BY DEPUTY CLERK

Ronald E. Joseph
Landman Corsi Bullaine & Ford, P.C.
120 Broadway
New York, NY 10004
(212) 238-4800

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY

Plaintiffs, COMPLAINT

v.

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, AND PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON,

Defendants.

Plaintiffs by their co-counsel John F. McHugh, James F. Gaughran, Fletcher and Sippel LLC, and Landman, Corsi, Ballini & Ford, P.C. complain of the defendants as follows:

JURISDICTION

1. This action arises under the Interstate Commerce Commission Termination Act, one of the laws of the United States giving this court jurisdiction pursuant to 28 U.S.C. 1331 and 1337. Further, as this action seeks to enjoin a violation of that act and as such this court has jurisdiction pursuant to 49 U.S.C. 11704(c) (1) and as the actions of the defendants are under color of State Law and seek to bar plaintiffs from the exercise of rights guaranteed by federal law this court has jurisdiction pursuant to 42 U.S.C. §1983 and further the defendants seek to deny the plaintiffs due process of law giving this court

jurisdiction under 42 U.S.C. §1985. This court also has pendant jurisdiction over related State law claims. Venue is proper due to the principal place of business of all parties.

PARTIES

2. Plaintiff, Coastal Distribution, LLC (Coastal) is a Limited Liability Company organized under the laws of the State of New York having its principal place of business at 1633 New Highway, Farmingdale, N.Y. 11735

3. Plaintiff, New York & Atlantic Railway Company (NY&A) is a common carrier by railroad duly organized and subsisting under the laws of one of the States of the United States duly authorized to operate as a rail common carrier by the United States Surface Transportation Board (STB). In November of 1996 NY&A was granted exclusive freight operating authority on the lines of the Long Island Railroad (LIRR), a subsidiary of the New York State Metropolitan Transportation Authority. Pursuant to the transfer of freight operating authority from the LIRR to NY&A, certain property bordering on New Highway in Farmingdale, within the Town of Babylon owned by defendant Pinelawn Cemetery Corp. and leased to the LIRR was included in the freight operations granted to NY&A. LIRR, as now known, is the successor to a railroad which commenced construction of its rail line from Brooklyn to Greenport in 1836. It completed that line in 1844 but reached Farmingdale and commenced service to that point in 1841. Since that year it has served that area as a common carrier by railroad. The railroad was acquired by the State of New York in the 1950's with full responsibility for general rail transportation services and is now operated by the Long Island Railroad Corp. a corporation wholly owned by the New York State Metropolitan Transportation Authority. While the NY&A has been authorized to fulfill the common carrier

obligations of the LIRR as to freight, the LIRR remains a common carrier by rail without limitation.

4. The Town of Babylon is, on information and belief, a municipal corporation duly organized, subsisting and acting under or under color of the laws of the State of New York.

5. The Town of Babylon Board of Zoning Appeals is an entity created pursuant to § 267 of the New York Town Law with a mandate to provide first line review of decisions of town officials in zoning matters, in this case the actions of the Department of Planning and Development.

6. Peter M. Casserly is the Commissioner of Planning and Development for the Town of Babylon and is responsible for the actions all municipal employees and agents within that Department and is named here as his department improperly issued the Stop Work Order here in issue.

7. Pinelawn Cemetery Corp. (Pinelawn) is not a party here but its identity is necessary here. On information and belief it is a not for profit corporation duly organized under the laws of the State of New York which owns certain parcels of land, leased by it to the LIRR in 1904 and 1906 for ninety nine years, each with the right to renew for another term. LIRR used these two parcels of land as a team track where freight could be transferred between rail cars and highway vehicles from approximately 1904 to the transfer date, the NY&A continued that use until management was transferred to Coastal to continue that use first as an independent terminal operator and after from August of 2004 as agent of NY&A.

8. The Long Island Railroad is not a party here, is a rail carrier and a corporation duly organized under the laws of the State of New York which has a leasehold interest in the Farmingdale facility here in issue and is a necessary party to this action.

I

AS AND FOR A CAUSE OF ACTION
AGAINST THE TOWN OF BABYLON

9. In August of 2004, the NY&A entered into a Transload Facility Operations Agreement wherein NY&A retained Coastal to develop and operate a certain term track facility in Farmingdale, N.Y. within the town of Babylon, as a rail-highway transload facility.

10. Coastal and NY&A had a prior association by lease for the same property entered into in 2002 which lease was for the purpose of developing the facility as a general service common carrier transload facility between highway vehicles and NY&A rail operations.

11. Pursuant to the earlier agreement, Coastal obtained the approval of NY&A and the LIRR for certain improvements to be made on the property to handle the transloading of freight between LIRR cars and highway vehicles.

12. Prior to any construction, Coastal approached the landowner, Pinelawn Cemetery as well as the defendant Town of Babylon and sought a review of Coastal's plans for compliance with municipal building and fire codes as well as to determine if any environmental or other problems were presented by the project in the view of either interested party.

13. On numerous occasions between early 2002 and August of 2003 defendant Peter M. Casserly, his predecessor and other officials of the Planning and Development

Department of the Town of Babylon declined to review the plaintiffs' project stating that the town had no jurisdiction over a railroad property. When the plaintiffs' architect attempted to file the plans with the Town's Planning and Development Department the plans were rejected with a letter dated August 8, 2003, signed by said Peter M. Casserly as Commissioner of the Department asserting that the Town had no jurisdiction over a railroad facility. The plans were submitted for approval to the Long Island Railroad which raised no objection after an inspection of the site. Further, the New York State Department of Environmental Protection, after site inspections and a full review of the plaintiffs' operation determined that the State had no jurisdiction over the facility as it was a railroad facility engaged in rail transportation services.

14. In late October of 2003, after presenting its plans to the defendants, including Pinelawn and their having raised no objection[1], Coastal commenced construction of its facilities based upon the approval of the plans by NY&A and LIRR. On January 15, 2004, the facilities, including a truck scale, a rail car scale, a large structure to protect transloading operations from weather and a perimeter fence were nearing completion. On that date Pinelawn, for the first time, notified the plaintiffs that it deemed its lease of 1904, that of one of two parcels on which the Farmingdale facility was operating, to have expired, that it would not renew the lease and demanding that the plaintiffs remove themselves from the premises.

[1] At that time an issue had been raised about the renewal of the 1904 Long Island Railroad 99 year lease of the premises from Pinelawn. On October 23, 2003 at a meeting at which Pinelawn reviewed plaintiffs plans, Pinelawn presented Coastal with a document signed by Pinelawn's president renewing that lease for a second 99 year term.

15. On March 29, 2004, due exclusively to the political influence of Pinelawn, the Town of Babylon issued a Stop Work Order asserting that plaintiff was "working without a permit", and directing the plaintiffs to cease construction on the premises.

16. On March 29, 2004 the building inspector who had issued the Stop Work Order stated that it was issued solely at the insistence of Pinelawn.

17. In April of 2004 Pinelawn brought an action in the Supreme Court of the State of New York, County of Suffolk, claiming that the lease it had entered into in 1904 with the LIRR had not been properly renewed.

18. Coastal with the approval of the LIRR and the NY&A filed an appeal with the Town of Babylon Zoning Board of Appeals.

19. In August of 2004 the Plaintiffs cancelled their lease between themselves and entered into the current Transload Facility Operating Agreement wherein NY&A assumed control over the facility and appointed Coastal as its agent for the purpose of developing the facility, selling NY&A services to be provided via the Farmingdale facility and conducting the day to day operation of that facility. A copy of that agreement was submitted to the Board of Zoning Appeals.

20. On September 9, 2004, just prior to the first hearing held by the defendant, Zoning Board of Appeals of the Town of Babylon, the members of which are appointed by the Town Supervisor and the other four members of the Town Board, The Town Supervisor, requested that the Board deny the plaintiff's appeal and enforce the Stop Work Order.

21. On information and belief the Town Supervisor was acting in concert with Pinelawn and instructed his appointees to determine the matter in favor of Pinelawn's position without regard to the law.

22. At that hearing and a subsequent hearing, the Town was informed by NY&A and Coastal of the nature of the facility and of the fact that as a railroad facility Pinelawn's claims did not affect the Farmingdale facility's status as an active railroad facility which is outside the Town's regulatory jurisdiction. Further, before the decision of the Zoning Board of Appeals was issued, a determination by the New York State Department of Environmental Conservation, the agency authorized under New York State Law to license waste transfer facilities, was delivered to the Board confirming that the State of New York's regulatory authority over the Farmingdale facility was pre empted by Federal Law.

23. On April 22, 2005 the Zoning Board of Appeals, bowed to political pressure and honored the mandate of the Town's supervisor and affirmed the Stop Work Order. At that time the defendants, and the Town were fully aware that the plaintiffs' facilities and operations were exempt from State regulation and that no basis for their attempt to exercise local jurisdiction existed.

24. Pursuant to the Constitution and laws of the United States the Town of Babylon has no authority to require the plaintiffs to seek Town approval of the construction of facilities to be used for railroad related operations.

25. By reason of the above, the plaintiffs having made no prior application for the relief herein requested and as plaintiffs have no adequate remedy at law they are entitled to a judgment permanently enjoining the Town of Babylon from taking any action to

interfere with the operations of Coastal and of the NY&A or from taking any action to interfere with access to the transportation services of the NY&A including but not limited to attempting to enforce the Stop Work Order giving immediate rise to this action.

Wherefore, plaintiffs demand judgment in their favor and against the defendants permanently enjoining the Town of Babylon, the Town of Babylon Board of Zoning Appeals and Peter Casserly as Commissioner of Planning and Development of the Town of Babylon from attempting to enforce any Stop Work Order or from taking any action which could interfere with the operation of the plaintiffs' transload facility bordering on New Highway, Farmingdale, Town of Babylon, County of Suffolk, State of New York, as well as for the costs and disbursements of this action and such other relief as may be mandated or allowed by law.

Dated, New York, N.Y.
April 25, 2005

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A-174

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY

05-CV-2032 (JS)

Plaintiffs,

STIPULATION

v.

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS and PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON.

Defendants.

The parties, by their undersigned counsel, hereby stipulate as follows:

1. Pinelawn Cemetery has an interest in the subject of this action and is so situated that the disposition of the action may impair or impede its ability to protect that interest.

2. No party to this action adequately represents this interest of Pinelawn Cemetery

3. Pinelawn Cemetery is made a party defendant to this action.

4. A facsimile copy of any signature to this stipulation shall be binding upon the parties and shall be deemed an original for all purposes.

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SO ORDERED

_____
Joanna Seybert
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

COASTAL DISTRIBUTION, LLC, et al.,

Plaintiffs,

v.

THE TOWN OF BABYLON, et al.,

Defendants.

----------X

05-CV-02032

United States Courthouse
Central Islip, New York

May 19, 2005
9:30 a.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE E. THOMAS BOYLE
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs: Coastal Distribution LLC	JAMES F. GAUGHRAN, ESQ. 191 New York Avenue Huntington New York 11743
	JOHN F. McHUGH, ESQ. 6 Water Street New York, New York 10004
New York and Atlantic	RONALD A. LANE, ESQ. Fletcher & Sipple LLC 29 North Wacker Drive Chicago, Illinois 60606-2875
For the Defendant: Town of Babylon	JAMES P. CLARK, ESQ. HOWARD M. MILLER, ESQ. Bond, Schoeneck & King, PLLC 1399 Franklin Avenue Garden City, New York 11530-1679

(Cont'd)

For the Defendant:
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Proceedings recorded by mechanical stenography; transcript produced by computer transcription.

(Case called).

THE COURT: Before we get started, if each side can give me some idea how many witnesses you will call. I want to gauge how much time we'll be engaged in this hearing.

MR. McHUGH: Coastal Distributing has one, and I believe New York Atlantic has one.

MR. CLARK: Your Honor, it is unlikely that the town defendants will have any witnesses today.

MR. CUTBERTSON: Your Honor, Pinelawn, I believe, will call five witnesses, very briefly, perhaps an hour-and-a-half.

THE COURT: What is the testimony you will be establishing with Pinelawn?

MR. CUTHBERTSON: Your Honor, the first witness took some surveillance video of the site and made some observations to the site. It will be helpful. The second is a property owner who made observations over a course of an extended period. The investigation was done only a short period. Two or actually three other investigators, two of whom made observations --

THE COURT: As far as what is going on in the site?

MR. CUTHBERTSON: And materials coming onto the

site. And the last investigator will confirm that, and I would like to put his report into evidence, very short.

THE COURT: Did any of them testify at a town hearing.

MR. CUTHBERTSON: One of them did. One of them -- two of the private investigators, the principal of their company testified based on a report that they had prepared, and then the first private investigator, his surveillances is post-ZBA hearing, your Honor.

THE COURT: Let me say at the outset, and I reviewed the briefs and I thought they were very, very well done by everyone.

If each side would like to give a brief overview of the issues and their presentation, I think that might be helpful to the Court.

Say five minutes each side.

MR. LANE: Your Honor, if I may, by way of introduction I want to mention that I'm an attorney from Chicago, Illinois. I've been advised telephonically I've been admitted pro hac vice for purposes of this case.

THE COURT: You were. I have the papers inside and that application was granted.

MR. LANE: The case you will hear this morning, your Honor, will establish that the New York and Atlantic Railroad is a freight company and operates a freight

franchise on the Long Island Rail Road. The Long Island Rail Road today is just a passenger commuter operation.

The testimony will establish the kind of operation that the New York and Atlantic Railroad runs and will establish the key role that the transload facilities play in that operation.

The testimony will review the use of the site in Farmingdale, the historic use and the current use, and will go through the different arrangements that have been placed over time to operate what is there in Farmingdale. And the evidence will explain what is going on there, what has been going on there. You'll have a feeling for the kind of operation that is present in Farmingdale.

THE COURT: What use do you claim, so I can look at the evidence as it comes in, is the essence of transloading, the transloading operation which you claim as opposed to the operation that the defendants claim taking things to and from a site and sorting them out, etcetera.

MR. LANE: Our position will be that the loading facility distinctly takes materials out of trucks and puts them out in rail cars, takes them off of rail cars and puts them on trucks. The activities don't go on on the premises of the railroad.

THE COURT: Will you say that is a critical

fact --

MR. LANE: I think it is.

THE COURT: -- in at least the case so far.

MR. LANE: That's the way I see it. I think it is clear that it is a railroad facility on the behalf of the railroad and it is preempted from local regulation. It's a railroad.

And that's briefly the sum and substance of the case.

THE COURT: The defendant?

MR. CLARK: Your Honor --

THE COURT: I'm sorry.

MR. McHUGH: I represent the operator of the facility.

THE COURT: I heard from whom?

MR. McHUGH: From New York and Atlantic Railroad.

I'm the agent that runs the facility. Coastal will testify as to its expertise in railroad marketing activity and the operation of the transload facilities. They will testify as to the details, how things are done on the site and why they are done, and why it is the only practical way to do it in order to facilitate a railroad transportation of these materials safely, which is a critical issue here; how to do it safely, how to get the

product for the railroad and how to do it safely.

They will testify they do not own trucks. They operate completely on the site with regard to this facility. And they do nothing off site. What they will testify to is why this facility had to be modernized in order to function.

Basically the site as they found it has been a site that had been used essentially the same way since 1904, and the market has changed, and in order to attract traffic, the railroad has to facilitate modernization. This is a capital situation such as Coastal must be attracted to the railroad industry in order to facilitate getting freight off the highway and onto the railroads, and that's why organizations such as Coastal are used by the industry.

THE COURT: Let me ask you to make an effort to be clear on this with the Town at the outset.

MR. McHUGH: Clear. Basically there will be testimony that they took their plans to the Town and asked the Town to look at the plans for the purpose of complying with local building regulations, fire regulations and to make sure nothing being done at the Coastal facility would cause problems. It was a submission to the Town to make sure we were in compliance with applicable regulations and fire vehicles, notwithstanding exemption to apply.

If the railroad builds a building, it does not need a permit because of presumption but has to comply with fire and safety codes because the Town continues to have safety jurisdiction.

THE COURT: And when will that be shown in relation to the stop work order?

MR. McHUGH: The stop work order is essentially for the failure to get a preapproval. The Town does not have authority to preapprove a railroad facility. The Town does have authority to make sure that that facility as built complies with local safety regulations.

There's a distinction there. Essentially a railroad has the right to maintain -- for instance, a truck that is owned by a railroad, to give a better example, as in the case of the Sante Fe case in Chicago where busses were being operated in the public streets by a railroad contractor.

The railroad contractor did not need to get a license from the city in order to operate on the city streets, but those buses still had to obey the traffic law, couldn't go through red lights. Essentially that's the line of distinction. For instance, the railroad does not need to get a building permit but the applicable rules and regulations as to building standards do apply and the City could cite Coastal Distribution or anybody else for a

nuisance of a municipal law.

THE COURT: What is the difference in time, that's what I was trying to get at, when you first approached the Town with regard to your project or construction, renovation, whatever you want to call it, and the stop work order?

MR. McHUGH: A long time. The Town was first approached by the Coastal people when this was essentially a dream. They were approached continuously from 2001 through the summer of 2003. And in the summer of 2003 they got a letter back from the Town, telling the architect who submitted his plans to the Town pursuant to his license, the Town sent him a letter back saying that the Town would not look at them because the Town had no jurisdiction at all.

So, there will be testimony also that the principals of Coastal sat down with the Town, the building inspectors and the head of the planning department several times during earlier of 2003, asking for them to give them some advice on the specifics, and in each case they were told the Town had no jurisdiction.

The last communication with the Town was in August 8 of 2003. The stop work order was March 31 -- March 29 of 2004. So there was a substantial -- the building was essentially built when the stop work order

was issued.

THE COURT: Thank you very much.

MR. CLARK: Good morning, your Honor. We obviously disagree as to what the critical issue is here this morning. It is an issue as to what exactly they are doing at the site, but under the act, the Interstate Commerce Termination Commission Act, which is where the exception flows from, the critical issue is whether Coastal is a retail carrier. The exemption only goes to rail carriers. It's clear, no dispute about that, New York and Atlantic is a rail container.

They went to the board, got licensed. As a result they are entitled to the exemption that goes with that. As Mr. McHugh said, if a railroad builds a building, we can't require them to get a building permit. In most cases we would agree with that. Coastal is not a railroad. We can require them to get a building permit because they are not a railroad. Never went to the Surface Transportation Board, never got licensed as a rail carrier. What they are trying to do here is essentially get that exemption by contract. They have a contract with New York and Atlantic, and they are taking the position as a result of that contract, the exemption that New York and Atlantic Railroad went to the Surface Transportation Board and applied for and got flow-through to Coastal.

The law and the case law doesn't support that. And I'm confident that the facts, as we've indicated in our brief, and certainly, as it will come out today, show even with this contract in place, New York and Atlantic Railroad has no control over what is going on at that site. They have nominal control, because it says so on the agreement.

On a day-to-day basis they have no control what is happening at that site. Coastal is an independent contractor, provides a service to New York and Atlantic Railroad. As such they are not entitled to New York and Atlantic Railroad rail carrier exemption. That is the critical issue. Also an issue, obviously, as to what they are doing, because there is an issue as to what is transloading.

Mr. Lane has given his definition of what he believes transloading is. It's our position even based on that definition what Coastal is doing is beyond that, and therefore, not part of rail transportation so as to fall under the act.

Those are the key issues here with respect to the law and the facts in this case as seen by the Town, and we do believe that, as will be shown through the evidence, that, one, Coastal is not a rail carrier, not entitled to the contract, and what they are doing, even if they were a

rail carrier, still has to be deemed an exemption under the act, and what they are doing there is beyond transloading, as that definition has been used, and therefore is beyond transportation under the act.

And I will address actually the issue on the Town's position --

THE COURT: Would you agree if the Court concludes there is transloading going on here, they are covered under the act.

MR. CLARK: No, because it is a two-step process. You have to be a rail carrier, before they even get to what they are doing.

THE COURT: So they can't subcontract out that function, even though it is purely a railroad function, transloading.

MR. CLARK: The case law says they cannot subcontract that out. If they want to do transloading, if New York and Atlantic Railroad wants to do transloading and do what is defined as transloading, as that is commonly accepted, if New York and Atlantic Railroad wanted to operate this site, this is a different case.

But this is not what New York and Atlantic Railroad is doing. They've contracted it out. And the law does not permit New York and Atlantic Railroad to essentially bestow their rail carrier status on Coastal

because Coastal says the position here is, we should be governed by the Surface Transportation Board. That is who governs rail carriers. The Surface Transportation Board doesn't even know who Coastal is. They have not applied, they haven't gone in to get a license. They are taking a position, no, the Town and State can't regulate us. The Surface Transportation Board has to regulate us.

The Surface Transportation Board can only regulate rail carriers, only people they've licensed. So basically, if Coastal has its way here, they will be in Neverland. They will say the Town and State can't regulate it because we're a rail carrier, and the Surface Transportation Board says they are not a rail carrier, we have no jurisdiction over them, we can only regulate rail carriers.

MR. CUTHBERTSON: I will not repeat the legal arguments made by Mr. Clark. I think he has done a great job. I will indicate that Pinelawn Cemetery is the owner of the property, and with respect to the Town's initial case, there was no jurisdiction on the property.

That was based on the mistaken assumption that the MTA owned the property. The MTA is a lessee on the property, albeit of a 99-year lease for a one percent portion of the property that has been renewed. Another portion of that property is in dispute and is currently

the subject of litigation in Supreme Court in Suffolk County.

So that in essence, once that was brought to the attention of the Town by my client, Pinelawn Cemetery, who did so over a number of months, who tried to educate the Town essentially as they were educating themselves as to the status of the title of the property, the Town finally agreed with that position and issued the stop work order because they felt that the MTA did not have jurisdiction.

THE COURT: In this action by virtue of your intervention, are you seeking to assert any right that is unique as to Pinelawn as distinct from the issues that the Town has?

MR. CUTHBERTSON: I don't believe so. The rights and responsibilities under the lease are the subject of different litigation.

THE COURT: And your interest is as the owner of the property or lessor?

MR. CUTHBERTSON: There's an illegal use on the property and we're concerned about it.

THE COURT: I know there is a federal facility down there, a cemetery. It's not you.

MR. CUTHBERTSON: No, it's not.

I'd also just add this is an injunction hearing. There has been no irreparable harm to this plaintiff.

They have operated from the beginning nonstop. They have never, ever had to halt their operations. When their appeal was pending before the Zoning Board of Appeals, there was an automatic stay.

The Town took the position there is an automatic stay under the Town law. Subsequent to the decision from the ZBA, there was almost immediately this order to show cause, and the Town consented not to enforce the stop work order during the pendency of that.

So in this whole time frame that Coastal has been operating there has been no work stoppage and therefore no irreparable harm. We would agree -- I agree that the issue, the main issues here are whether Coastal is a rail carrier, which we believe they are not and we also believe they are not agents of New York and Atlantic Railroad.

And on that score I don't think you really have to take our word for it or the word of our witnesses. The agreement that they have, the agreement between New York and Atlantic Railroad and Coastal, a so-called operational agreement for the facility, really tells the tale of what the relationship is about in this case.

Coincidentally that operations agreement was entered into one month before the first zoning board of appeals hearing. Before that the parties had a lease, their own expert at the Zoning Board of Appeals hearing

testify if there were a lease in place between these parties that that would not qualify for a federal exemption.

Pinelawn's final role is to bring on witnesses who have knowledge and information about how the facility is being operated and more to the issue of whether there is transloading going on or the sorting of garbage, and we believe that garbage is being sorted at the site.

We have photos, videos and witness testimony that will show that, and we'll also show this isn't the only safe way to get this material onto the railroad tracks. There are a number of other ways to do so that would not involve putting this on the ground, sorting it and presenting additional health and safety risks.

Could I just confer with counsel for a minute.

THE COURT: Yes.

MR. CUTHBERTSON: Mr. Clark, on behalf of the defendants Town of Babylon and Pinelawn, both assert in their memorandum of law the appropriate way this particular case should be decided is based upon the findings of fact that were made by the Zoning Board of Appeals. We don't feel that there is a necessity for this hearing and that this Court, based on the authorities we've cited in the memorandum of law, could and should rely on the findings of fact from the Zoning Board of

Appeals.

THE COURT: Right. I noticed that that was a predominant theme in the opposition. As you know, this case came to me set down for an evidentiary hearing. That was the reason for the referral. Otherwise Judge Seybert would have kept the case herself. So I assume those issues were raised by her.

MR. CLARK: They were not.

MR. CUTHBERTSON: They were not.

MR. CLARK: Your Honor, when we appeared on the order to show cause, Judge Seybert -- we were actually at the bench going through calendars, and Judge Seybert didn't have time for the hearing, so she just assigned it as we were standing there.

There was no discussion of any legal issues. It was immediately assigned to you at that point.

THE COURT: Well, the general practice -- and I don't have the order of referral right at my fingertips but the general practice is to refer it out where there is a need for the evidentiary hearing. Otherwise the Judge would keep the issue himself or herself.

MR. CUTHBERTSON: Your Honor, to that point, I will not belabor it. We had all of five hours notice to come here on the order to show cause, and certainly weren't prepared to make the argument relative to the

findings of fact and that they are dispositive in this case. And only after starting to prepare the legal briefs for this case, we were able to brief those authorities.

THE COURT: Let me just see if I can quickly put my hands on the referral order.

I don't seem to have it. Let's see if we can locate it.

Does that complete it for the defendants? This gentleman is also from the Town of Babylon, is that right?

MR. GAYNIN: No, Pinelawn Cemetery.

THE COURT: All right.

MR. CUTHBERTSON: The only other point, we raised arguments relative to abstention in this case with respect to Judge Seybert and there hasn't been a ruling on that.

THE COURT: Call your first witness, please.

MR. LANE: Your Honor, New York and Atlantic Railroad calls Mr. Fred Krebs.

F R E D K R E B S , having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

THE WITNESS: Fred Krebs, K-R-E-B-S. I'm the president of New York and Atlantic Railroad.

THE COURT: Good morning.

DIRECT EXAMINATION

BY MR. LANE:

Q Mr. Krebs, please describe your position with the New York and Atlantic Railroad.

A I'm the president of New York and Atlantic Railroad.

Q Will you give us a brief overview of your career prior to you arriving there??

A I started back in the railroad in 1963. I worked in the summers. In the summertime I worked for the section gang for the Milwaukee Railroad. It was a tie gang. While I was in high school and after I graduated from high school, I worked the first summer, drafted, spent five years in the Army, came out as a captain after serving in Vietnam, went back to work on the railroad.

I went back in the section. When I got back on the section, I said, I'm way too old for this. So I went into train service, and I started doing that in the summer while I went to college.

After I graduated from college, I went to Milwaukee as a trainman, was promoted, left Milwaukee in '77 and went to the Southern Pacific. I stayed there until '81, and I got out of the railroad business.

Went into construction in Dallas, Texas. Left construction in 1990, came back to the railroad industry with the short line in Alabama called Eastern Alabama

Railway. I was the general manager.

I started that company up for a company called Kyle Railways, Inc., and it was a holding company for Short Line Railroads. I started that company up. A year later I went to San Joaquin Valley Railroad. It was in Exeter, California.

Started that railroad, stayed there for -- that was in '91. I stayed there until '97, when I came to New York and Atlantic.

I got here in September of '97. It was right after the startup. The railroad -- the contract was signed in 1996. The start-up day was May 12, 1997, and I got here, I think it was September 6 or 7, something like that, in 1997. I stayed until June of '90, and I had an opportunity in Dallas that I went after, and it didn't come to fruition and about a year later, I got a call from the owners of New York and Atlantic Railroad, after they found out this other deal hasn't worked. They wanted me to come back, so I came back to New York and Atlantic Railroad in September of 2001.

I've been here ever since.

When I came in September of 1997, I came as the president also.

THE COURT: So you came a long way since your tie gang days?

THE WITNESS: Yes, it's been a long haul. Forgive the pun.

MR. LANE: Your Honor, I've previously supplied a copy of the exhibits we intend to introduce to counsel. I believe you have a copy as well. We've placed a stack of documents in front of you, Mr. Krebs.

Could you identify for me New York and Atlantic Railroad Exhibit 1?

A Exhibit 1 is our home page on the web site.

Q There's a map at the top of the page. What does that map show?

A That shows the lines that we run over the freight line -- well, the Long Island Rail Road lines that we run over, some of which are shared and some of which are freight only.

Q And there's more information on the rest of the page, that's basic information about the railroad?

A Yes.

Q There's a reference at the top right-hand corner, Anacostia & Pacific, Inc. What is Anacostia & Pacific, Inc.?

A They are the holding company, nonoperating, that owns New York and Atlantic Railroad. They also own four other railroads.

Q You mentioned the Long Island Rail Road. For the

record, I imagine everybody here is aware of that, what is the Long Island Rail Road?
A The Long Island Rail Road is a commuter railroad. It supplies commuter service for Long Island, Queens and Brooklyn.
Q And historically did it also provide freight service?
A Yes.
Q Do you know who currently owns the Long Island Rail Road?
A The MTA. They own the stock in it. The MTA is a state agency.
Q What happened to the Long Island Rail Road's freight operations?
A Well, the Long Island Rail Road, you know, moves the equivalent of Des Moines, Iowa in and out of New York City every morning. That's what they do best.

They are not a freight railroad. Over the years the freight service has dwindled down to almost nothing. When we took it over, it had gone from roughly 100,000 carloads in the 1950s to 9,600 carloads when we took it over in 1997. Now, keep in mind 100,000 carloads back then, there were also smaller cars and the equivalent today would be close to 60, 70,000 carloads of the size cars we handle.
Q Mr. Krebs, could you turn what has been marked as

Exhibit New York and Atlantic Railroad Number 2?

MR. CLARK: Are you going to introduce Exhibit 1?

MR. LANE: I was going to wait until the end.

MR. CLARK: That's fine, if you want to wait. We have no objection either way. We don't have any jury here. Just to save time for the hearing, is there any objection to anyone's exhibits at all?

MR. McHUGH: We haven't seen theirs and they haven't seen ours, your Honor, Coastal. We can submit them over the break.

MR. CLARK: Your Honor, other than possibly as to relevance of New York and Atlantic Railroad Number 4 and 5, we wouldn't have any objection to any of the others.

THE COURT: All right. Let's say all the exhibits are in and then I'll be glad to hear any objections on the record at the appropriate time just to move it along.

MR. LANE: Okay. Fine. Thank you.

BY MR. LANE:

Q Mr. Krebs, what is Exhibit Number 2?

A That is, I think, just a portion of a transcript.

Q Is that Articles 1 through 3 of the transfer agreement?

A Actually, part of actually 4 is the signature page.

Exhibits 1 and 2.

Q Thank you.

MR. CUTHBERTSON: Your Honor, I did not notice this until I flipped through the agreement. I would object to the portions of this that are redacted. First of all, it's part of the overall agreement, and there are portions -- presumably the business terms which may be relevant to this litigation.

THE COURT: Why don't you put them in as a defendant's exhibit.

MR. CUTHBERTSON: I'm sorry?

THE COURT: You can put it in as a defendants' exhibit.

MR. CUTHBERTSON: The whole agreement, sure.

THE COURT: Yes.

Let me just ask, Southern Empire State Railroad Company, who are they?

THE WITNESS: When they were ready to start the operation in November of 1996, Southern Empire State Railroad Company was the name that Anacostia picked. Due to some history of that name, they were unable to use it and they changed it to New York and Atlantic Railroad.

THE COURT: Okay.

THE WITNESS: And I think there was a letter attached that said New York and Atlantic was the name, and

changed our permit in the state of New York to New York and Atlantic Railroad.

THE COURT: Thank you.

BY MR. LANE:

Q Just generally, not going into details, can you summarize the nature of the structure of this agreement in relationship between New York and Atlantic Railroad and the Long Island Rail Road?

A Well, basically what it is, it gives NYA the exclusive right to handle rail freight on their passenger lines as well as their freight only lines. We have to do it according to some stipulations in the agreement, of course, and according to the FRA regulations and according to Long Island Rail Road operating rules and their timetable, which are unique. That's why I bring that up.

Q And how long does this agreement last?

A It was a 20-year franchise from 1997 with an automatic ten-year renewal, providing that we met certain stipulations, one of which is a safety issue that we have to be safe. If we do things way worse than the industry does, they cannot renew.

We have to pay our fees to them, obviously, and we have to grow the business.

Q Are there freight level thresholds set out in the agreement?

A Yes. I don't know offhand but we've already met them.

Q Can you turn to the back of Exhibit 1, the document labeled Exhibit 1. It's on the back. It's a bit confusing, it's Exhibit 1 at the back of New York and Atlantic Railroad Exhibit Number 2.

What is it? What is listed on that Exhibit 1?

A That is a list of freight premises, what is exclusively operated by us and not the Long Island Rail Road.

Q And is the East Farmingdale yard identified on that?

A Yes, it is under "yards" as item I.

Q Is there any indication in the agreement, in the exhibits as to whether the Long Island Rail Road owned that yard and the fees or a lessee?

A No.

Q Beyond the entry of yards, do you see number 3, appurtenant facilities?

A Yes.

Q Look at that?

A Those are industrial parks that were alongside our franchise.

Q And item number 4, buildings, what is that?

A That's the same thing, listed building that we took over.

Q Item 5, team tracks.
A 5 was the team tracks.
Up in "yards" there is one that we don't have anymore, Item H, the Garden City team there.
Q Okay. For clarity, Exhibit 2 identifies some other property. What is listed on Exhibit 2?
A That is the joint use. That's basically where we run out on the Long Island Rail Road to service our customers out on Long Island.
Q So the joint use doesn't refer to both freight and passengers, it does?
A And then one item, Hicksville, is no longer a joint use facility, it's freight only. That changed. That was Item E, 2E.
Q Was the transfer agreement between Long Island Rail Road and what was then the Southern Empire State Railroad Company, was that approved by the State Transportation Board?
A Yes.
Q So is New York and Atlantic Railroad subject to the State Transportation Board?
A Yes.
Q Now, why did the organizers of what became the New York and Atlantic Railroad acquire the freight franchise of the Long Island Rail Road?

A Well, basically what happened is, in the mid-'90s the Governor's office decided that there was way too many trucks on the road. And that they needed -- they had seen the traffic patterns on the Long Island Rail Road drop substantially over the last few years, including switches being removed for customers and so on.

So the Governor said what we need to do is privatize the freight. It came out on the bid list and Anacostia & Pacific entered into the bidding process and won it.

The reason they looked at it was because they also saw how the traffic had dropped, while the general population had risen, and that is not a common way that things happen. Usually, as the general population rises, the freight increases.

They thought this was an opportunity that we could really win. It's a win-win for everybody. The people on Long Island win and we can win. So we put in our bid and we won the bid.

Q And did you, when you were executing the business plan as New York and Atlantic Railroad's president, did you have a business plan to grow the business?

A Yes.

There were certain things we saw. When we first got here, there were two things that were really glaring

that we noticed. One of them was -- was that, one, there is no outbound traffic. When we first got here, the inbound traffic was in the neighborhood of 85 percent and the outbound traffic was 15 percent.

And there's two reasons for that. One is that -- and I don't mean to, you know, be derogatory or anything, but New York doesn't produce much other than paper and waste.

They -- there's not a lot of manufacturing out there. So you are not going to produce a lot of the things in outbound traffic, but we knew obviously there was some outbound traffic available.

The second thing we noticed that Queens and Brooklyn, what we call Fresh Pond, which is where our headquarters are in Queens, Queens and Brooklyn or Fresh Pond West was about 75 percent of traffic, and Fresh Pond East, which we call Long Island, was 25 percent of the traffic.

We said that's ridiculous. There's all these people out there, and they are eating and building houses and doing all these things. There should be more traffic. So those were the two key items we looked at.

What we've done since we've been here is that instead of being 70-30 inbound-outbound, we're now about 52 percent outbound and 48 percent inbound traffic, and

our Island traffic, 2004, actually surpassed our Queens traffic, Queens-Brooklyn. We actually went to 53 percent of our traffic which is Fresh Pond East and 47 percent is Fresh Pond West.

Q Now, Mr. Krebs, what part does transloading play in your efforts to grow the railroad business?

A Well, it's almost 100 percent of growth. It's real close to that. One thing is that the traffic out on Fresh Pond East has grown over 33 percent.

About 95 percent of all of our new traffic -- and incidentally, we did 9,400 cars in 1997, we'll do 19,000 cars in 2005. So in eight years we've overdoubled the traffic, which is a little bit better than we thought we would do, by the way.

But the transload idea is virtually every new car we have. Something comes in from -- into a center from multiple customers and it is loaded up or onloaded. We have both situations.

Q Just to again, for the record, I take it that there's not much coal traffic out on Long Island?

A No, that's one of the things, when my owners get on me how much money we're making, I humor them, 19,000 cars, one car at a time. We don't get many big movements. That's what is good about our Coastal partnerships. We grab ahold of 10 or 12 cars at time, and that is almost

the same effort of driving one car, and we don't have that anymore. We're a one-car facility, so to speak. That's why the transload centers are so important.

Q Did you receive any kind of recognition for your marketing efforts?

A Yes. The Short Line Association, the American Short Line and Regional Railroad Association gave us the marketing award. We won first place for our transload center we have in Maspeth, Queens. It's all food products there.

Q I'd like to take a minute to define some terms so that we all know what we're talking about here.

You mentioned team tracks before. Will you explain what a team track is and what happens on a team track?

A A team track basically is a track we provide for the public that a guy will call us up and say, I have a carload of lumber. I'm in Islip. Can I unload it somewhere in Islip? And we'll have a team track, we'll send him over there, he'll drive it over with his forklift, truck, and onloads it and takes it wherever he takes it. There is very little storage available for him. It's a take it off, put it on your truck, and get it out of there, move.

We may have a team track it that has 10 different

people on it. But it's our tracks and we let them use them. We give them -- we get an insurance certificate for them. Because of our agreement we have to be named additional insureds, us and the Long Island Rail Road.

Q When you say there is a team track and has 10 different people on it, what does that mean?

A We could have five cars on the track one day and there are four, five different companies.

Q Sir, when we refer to a dock, what is a dock facility?

A A dock facility is something where they generally onload box cars. You back up the dock and put a forklift on it. They generally back a truck up to the opposite sides of the dock and they come through the car, over the dock. Some people call that a pass-through operation. We have that even with a building in one of our facilities. But the dock is just something that facilitates unloading a box car. Unfortunately, you can't unload the new flat cars that way. That's impossible because they have a center beam in them and you can't get to the other side of it, obviously.

Q Are there any team tracks, docks, located on the New York and Atlantic Railroad?

A There are a number of them listed in Exhibit 2 -- Exhibit 1 of Exhibit 2.

Q What is a freight house?
A Well, in the old days a freight house is a little different than now. In the old days when you have a freight house, it would come in and there would be a guy there onloading for you, and onload stuff and distribute it to different people.

We have a freight house down in Long Island City now and it's a little bit different. We have separate customers that have parts of the house, and they unload. They do very little storage. There's a little bit, but not very much. But it's a facility that you can onload and if they can't get it to their facility immediately, they've got covered storage basically.

Q Okay.

And what would you call a facility like the one we're talking about that Coastal operates?
A It's a transload facility.
Q And what typically do you find at a transload facility?
A Basically it goes from one mode of traffic to the other. In our case, everything that goes through that facility either comes in by truck and goes out by rail or it comes in by rail and goes out by truck. We have no truck-truck there at all. We don't allow it.
Q Aside from the facility in Farmingdale, do you have

any transload facilities that are suitable for bulk commodities?

A Not like this one, no. We have a plumber yard, and that is kind of bulk, but not the same as this.

Q Okay. Would you turn your attention to New York and Atlantic Railroad Exhibit No. 3 and tell me what that is?

A Well, that's a listing of our facilities.

Q If you can -- just go down here and explain what kind of facilities you are getting to. What is Hamilton Drayge, Inc.?

A It's actually a moving company, a moving and storage company, and we made a deal with them. He has a track that comes right into its building and its lot and we made a deal with him that he starts bringing in freight for a number of different customers. I think he must have six or eight or ten, something like that. And he actually differs for him. Some of them they bring in, bring their own truck. A lot of it is stored inside of his building. A real nice warehouse there.

Q Does he perform services other than loading and unloading?

A He has trucks and will actually deliver the stuff, and then storage.

Q Okay. How about Galaso Trucking?

A That is somewhat the same, except he does somewhat

oddball stuff. We get in a big generator, he is really specialized, doesn't have much storage there. So what he really does good is if GE, for example -- I'm sorry, Con Ed will get a GE transformer in, and he'll -- he'll get his boom or his crane, boom it up, rig it and load it on the truck for it and take it wherever he needs to take it.

Q So he performs services off the railroad?

A Yes.

Q Is Hamilton Drayge and Galaso, are they occupying New York and Atlantic Railroad space?

A No.

Q How about the Jackson Avenue reload?

A We've got four or five customers down there. And what they do is -- let me see. It's almost exclusively inbound there. We have a lumber guy, a brick guy, rice, and oil, corn oil, and some soy oil.

What those people do, they generally bring in the product and it sits there for quite a while. We have a small yard there, and the lumber and bricks sits there, the rice guy is strictly a pass-through from the rail car to his trucks and he takes it to his own facility.

Q Do you perform any loading or unloading? Does the railroad perform any loading or unloading?

A No.

And we have another tank car guy that brings in

the deicer for the streets, for New York City.
Q How about JJT Trucking?
A He's one of the guys at Long Island City. He's the one that handles the brick. He brings in brick, stores it there, ships it out. He does all the delivering and everything.
Q And Georgia Pacific Company?
A Well, Georgia Pac -- Pacific, that's a lumber facility out in Yaphank that they bring in mainly their own stuff. But we have a deal with them that if we have a shipper out there that needs a place to unload, they can unload it there or load, for that matter. I don't think we've ever had one.
Q All right. Where the transload operations are identified, there's a heading of public delivery tracks. A number of locations are identified. What kind of facilities are they?
A Well, those are just the public delivery tracks. They are like team tracks. There are places somebody calls us up. Let them go on the property, load, unload, whatever, and then that way we can get access to rail.
Q The heading public warehouse/cold storage facility?
A Well, Elm, they are a company that -- it's almost one million square feet of storage space with indoor unloading facilities which is the one of two places we have like

that on our railroad. For example, in San Joachin, we had 12 places, and there's two. There is an eight-car spot in the building, which is unique, the one was a three-car spot. And he does public storage, anyway.

So what we got him doing, he started bringing in for all the surrounding small lumber yards, for example, that deal in plywood, things that have to be inside, and he does all the unloading for them, he's doing some food distribution, and then he stores everything for them. So when they come in with their trucks -- plus he delivers -- when they come in with their trucks, it's dry. It's something that they don't have to take the whole load. All of these places don't have a big enough warehouse for rail, and it takes them out of the game sometime.

So this is really the same. It's a good deal for everybody. It's the same thing that we did with Coastal for our inbound stuff.

Q And Conservative Express and Cold Storage of Nassau, those are similar kind of facilities?

A Yeah, they are facilities. We've never been able to really get much done with them. But we have them on there because if somebody comes to that area, we might be able to drum up some business. Occasionally we get a car for them. But Elm, Elm was to the tune, I think we spot them every day usually five to six cars a day, five days a

week.

Q Now, there's a lot of variety, it appears, in all these different facilities. Why are there so many different kinds of arrangements of facilities?

A Because one of the things we don't have is room here. Like I said, when the Long Island Rail Road had this, they -- as soon as something would happen to a customer, for example, and there's some cases where we have warehouses alongside the track that may have a ten-car spot on them.

And if the customer for any reason moved or went broke or whatever happened, immediately the Long Island would take a switch out. And it's not just because they didn't want freight service, but they have issues with the switches. They run passenger trains. You have to maintain switches. They are expensive to maintain. I pay them now to maintain every switch that goes into a facility. I have to pay them to maintain it for me.

So what their plan was, they would take the switches out. Well, every time you do that, you have less and less space to onload rail cars. So you end up with a lot of little tiny places, and you cater to unique individuals.

If some guy needs to unload widgets, we figure that out. If he needs to unload lumber, we find out how

to unload lumber that's basically why we have a lot of little deals out there. That's why short line does that. That's why we come in and do these things.

Q Let's turn now to the East Farmingdale facility arrangement here. Could you describe the yard at East Farmingdale?

A Well, basically the yard is -- the Long Island Rail Road is the single main line there. At Farmingdale they go from double track to single track, and there is a power switch at the end of the double track.

It's single tracks from Farmingdale all the way to Deer Park. At Farmingdale right at the power switch there is a switch is coming out at the west end of the yard, there's a power switch that goes into -- what is it called, the Long Island Siding, and the Long Island Siding is part of Farmingdale.

Off of this siding there are two tracks, the east leg of the Y and the west leg of the Y, and what they do is come in from different directions and connect at the top of the Y, and then there's a little two track yard inside the facility.

Q How many cars could you place in the Y portion?

A Depending what you are talking about. If you are talking about how many cars can you put in the yard to facilitate a loading operation, it's probably in the

neighborhood of 20, but we also have a long siding which we can store cars in one end or between the two legs of the Y. It's a pretty good sized facility for us. As a matter of fact, I think it is our biggest facility out on Long Island.

Q Could you describe the way that the Long Island Rail Road used that facility?

A They use it as a transload center. They actually tried an operation -- I'm not sure of the exact years, but I think it was the early '90s, where they tried to do some traffic called bogey traffic and they went out and got a bunch of state funding and built what they called bogeys, and they were -- they were these five-pack units that would carry a trailer, and we still have the crane on the property, which now belongs to me.

And they would load these little trailers onto those bogeys and move them out into the general railroad of the United States. However, they were unique. Nothing else fit on them at all, and so the plan wasn't very successful.

Q Was there anything else that the Long Island Rail Road used?

A Yes, they transloaded scrap metal, they transloaded some large telephone poles for Con Ed. I think they had some brick there, some plastic pellets. That's the same

thing we've done there the whole time.
Q Did they handle any garbage or trash there?
A Not that I know of.
Q When you took over New York and Atlantic Railroad, how did you, the railroad, use that facility?
A Basically the same thing as the Long Island Rail Road did for a while. We had a few customers that were loading or unloading there.

And it was the same stuff. Telephone poles. We actually unloaded a few transformers there.
Q Let me back up. What was the operating purpose for the track structure you described as a Y?
A Well, the Y was actually -- well, it's twofold. One is if you see box cars on the road sometimes, you'll look on the side of two really distinctive signs. One is do not load, and the other is do not unload from the other side. The do not load from the other side is what causes us a lot of grief, because if you run a car out to Long Island and should have it on the dock and the unload from other side is facing from the dock, you can't unload it, you can't get the doors open.

So they build Ys over the railroad in different places so they don't have to take it all the way back to Long Island to Y the turn, which means turn it around. You run around the Y one time and it's facing another

direction. And we do that with locomotives.

Every once in a while we have a case where we'll have a feed failure in one direction on a locomotive, so we have to Y it, so when you are going the other direction you have to use the speed control. So those are things that Ys are used for, mainly to turn cars or locomotives around.

So we have a Y in Fresh Pond and we have a Y in Long Island, in Farmingdale.

Q Mr. Krebs, let me hand you a document that counsel for the City provided, and it may help visualize what you're talking about.

Do you recognize what that document is?

A Yes, that's 3W, it's Pinelawn Y, is what it is called on the railroad, but it's Farmingdale.

Q And that's the property we're talking about?

A Yes.

Q And there's two colored portions there. Can you explain where the Y track is and how it works in relationship to those colors?

A Well, if you look in about a quarter of the way or a third of the way up of the yellow portion, that is the top of the Y. And if you go down that curved track that goes to the left, that's the west leg of the Y. And you go down to the curved portion that goes to the right, that is

the east leg of the Y.

And then you can see where they come down, the west leg crosses New Highway, and you see it goes in and meet up with a straight line running east-west. That's the long siding I was talking about.

And you have at the other end the east leg that runs into the same track that runs east-west and that's at the end of the long siding.

There is the other solid line that is just south of that line that the two Y tracks come into. That is the single main track I'm talking about that the Long Island Rail Road runs over, and us.

Q And then up at the very top of the diagram, those tracks?

A That's where the two tracks -- where the storage tracks are, the holding tracks, whatever you prefer to call them.

Q Thank you.

A And the very top, by the way, is C, the crane is -- that is sitting up there.

Q All right.

A The trailer.

THE COURT: The top north.

THE WITNESS: Pardon me?

THE COURT: The top north?

THE WITNESS: Yes.

BY MR. LANE:

Q So to go back, we were talking about how New York and Atlantic Railroad used this property. You mentioned you used the track for the Y, for returning cars both ways?

A Yes.

Q Did you use it to transload there?

A Yes, we used it for transloading for ourselves, plus we had another agent that tried to make Farmingdale work.

Q Okay. Let me turn to that subject --

THE COURT: Do you want to mark that as an Exhibit 2A, or however you want to mark it?

MR. LANE: We plan to introduce it with your number on it.

MR. CLARK: Doesn't matter.

THE COURT: 2A.

Plaintiff's 2A.

Q Mr. Krebs, would you turn to Exhibit 4, please.

Do you recognize that document?

A Yes.

Q What is that?

A Well, it was an agreement that we went into with CSX Transflow so that they could market and develop Farmingdale. We had two locations that they were interested in. There, a fancy name for a transload is

they call it transflow. We went into an agreement with them for two years to try to make Farmingdale useful.

Q Just, again, by way of definition, can you explain what CSX is?

A CSX is CSX Transportation, and they are a Class 1 railroad that operates east of the Mississippi River. That's one of the Class 1s that we connect with.

Q Is that the CSX that acquired Anacostia?

A CSX and North Fork Southern split up Conrail in '98, I think it was, and this is the CSX. They ended up with the interchange at Fresh Pond that Conrail had, and North Fork Southern ended up with the south end coming out of Bay Ridge.

Q I take it CSX is a large, large railroad?

A They are enormous. I think they are 24,000 miles of track. $8 billion company or something like that, 6 billion.

Q Why did New York and Atlantic Railroad want to enter into this lease agreement at Farmingdale?

A Well, basically what we wanted was we wanted to utilize their marketing skills to make a transload center out of Farmingdale and Maspeth because they had more resources than us.

Q Did you feel that the Farmingdale yard was underutilized?

A Yes.
Q If you look on that Exhibit No. 4, Paragraph 2.1, how much was the rent that CSX paid to that facility?
A It was $1.
Q Why is it that you charged CSX a nominal rent?
A Because we don't make money off of rent, we make money moving of freight cars. That's what we're in the business of.
Q What was the term of that agreement?
A It was two years.
Q Let me refer you to Paragraph 3.1. Look at that and see if that refreshes your recollection any.
A One year. Okay. I thought it was two.
Q And if you look at Paragraph 3.2, are there any conditions for CSX to renew that lease?
A Yeah. They have to meet a certain car count.
Q What was that car count?
A (Perusing.) 400.
Q Did they meet it?
A No.
Q How many cars did CSX load or unload at Farmingdale?
A I'm not sure, but I think it was four.
Q Approximately four?
A Yes, I think that's what it was.
Q Did you enter into a similar arrangement with CSX

with any other facility?
A Yes, at the Maspeth yard.
Q If you turn to Exhibit 5, is that what is referred to as the Maspeth yard, the lease?
A Yes.
Q Look at Paragraph Number 2. What was the rent that they paid at that yard?
A A dollar.
Q Did that agreement have any contingencies for renewal?
A The same as the Farmingdale agreement.
Q And did CSX generate the required 400 loads? --
A No.
Q -- at Maspeth?
A No.
Q What happened to the arrangement with CSX?
A Well, actually what happened is that they extended it, the agreement, for another year, to 2001. And I'm happy to say that that's when I was gone, because I wouldn't have done that.
Q How many cars did CSX load or unload in year number two?
A About the same, three or four. It wasn't anything.
Q And did New York and Atlantic Railroad renew those leases?

A No.
Q All right. Let me ask you then to turn to New York and Atlantic Railroad Exhibit Number 6, and let me ask you what is that?
A This is a letter to Coastal distribution that is attached to the lease agreement (perusing).
Q Will you describe what you were trying to accomplish when you entered into this agreement?
A Well, what we were trying to accomplish is to get Farmingdale handling the number of cars it should be handling, because we were building business in other places, and it wasn't being built there.
Q All right. And were you familiar with Coastal distribution?
A Not really. I met them in 2001. I probably -- I met them right after I got back. It had to be September or October of 2001.
Q Okay. In the lease agreement itself, what was the rent that was called for there?
A 2,000 a month.
Q Was there a volume commitment?
A Yes.
Q What was that volume commitment?
A 1,200 car loads in the normal term, 1,800 car loads second term, 2,400 third term, 3,200 car loads for each

term thereafter.

Q That's a substantial number you were looking for from CSX?

A Yes.

Q Why did you think that Coastal would be able to meet those standards?

A You are asking me, did I think so?

Q Yes.

A No. I really didn't. They did, but I didn't think they would.

Q The letter that is attached to Exhibit 6 on front here, what does that letter deal with?

A Well, I have to read it again, but it had to deal with the occupancy of the place, and with the Long Island Rail Road. They are in a portion of it.

Q What was the issue or was there an issue with the Long Island Rail Road at the time?

A Well, they were occupying the inside of the Y and the inside of the Y is what we needed to facilitate this operation.

So I went to the Long Island Rail Road and I told them, according to our transfer agreement, that Farmingdale was ours. And they said, well, they didn't have a place to go, and all this kind of stuff. We started to have kind of a disagreement as to who the

property belonged to, and the Long Island Rail Road swore it was theirs, and I said, well, you're wrong, the transfer agreement swears it's mine. So we almost evicted them, but we ended up getting them out of there. We had to assist them.

Q What did you have to do to assist them?

A Well, we had to help pay to move them.

Q Let me turn your attention to Exhibit New York and Atlantic Railroad Number 7.

Let me ask you, what is that?

A Well, that's the agreement that we wrote with Coastal after we got Long Island Rail Road moved.

Q How does it differ from the first lease?

A Well, basically the only difference was, New York and Atlantic Railroad didn't have the cash to get them out of there. And rather than go through a court battle with them, Coastal basically offered to assist in the move. And so what I said to Coastal was, if you are willing to do that, what I'll do, I'll share the burden with you, but I can't share it up front. I cannot give you 50, 60,000 bucks, whatever it was.

And I said, well, I'll pay you back on a per-car basis, and if you are going to move all the cars you say you will move, I'll give you whatever the amount was and pay you back, and that way you'll be whole, and that way I

won't have to put the money up front.

Q Were there any other significant changes between the first lease you entered with Coastal and this one?

A No, I don't think there were. We may have extended it or something, but I think it was virtually identical. Except we split up, you know, how we were going to pay for this.

Q Okay.

Now, what kind of results did you have in the operation with Farmingdale when Coastal operated it?

A Well, so far we have had good results. It really started to be something different, and they shipped a lot of cars. And it worked pretty good.

Q What was the original business plan for that facility when Coastal first came in?

A Well, the original was they are going to bring in aggregates and onload them there and sell them to people, which they still do bring in aggregates.

But the problem with aggregates is there's about five million tons of aggregate that comes onto Long Island every year, which you would think the Island would sink eventually, as much as they bring it on here.

And of these five million tons, there was basically one 40-car train coming onto the Island.

Well, we thought, Coastal and us thought that

would be a good thing. The problem with that is it is brought in by barge. Even though the railroads do compete with trucks on a daily basis, a lot of people don't realize, and especially in New York, that we compete with barges, too. Because barges bring in these enormous numbers and they bring them in pretty cheap. What we found was it would have been really tough to make a living on aggregate.

Q So did you then come up with a different plan?

A Yes.

THE COURT: What are aggregates?

THE WITNESS: Rocks, stone, gravel.

THE COURT: Sand?

THE WITNESS: Sand, too, but it was mainly gravel that they were bringing in.

BY MR. LANE:

Q What was the next effort that you made?

A Well, that's when we came up with the plan of the C&D operation.

Q Did that operation require any different kind of facility at Farmingdale?

A Yes.

Q What did it require?

A Well, to make it safe and presentable and good for the entire neighborhood, basically, we decided it had to

be covered, and it had to be wet down, misted, to keep the dust down, that sort of thing. We changed the layout of the yard. We had to do some track repair. We didn't change the track, we just brought it up.

Q You said it required construction, though?

A Yes.

Q Let me go back to Exhibit 2, transfer agreement. Let me direct you to page 19, Paragraph 3.3.2. Paragraph 3.1.3.

Are you familiar with that provision in the agreement?

A Yes. I've actually used it a number of times.

Q How does that agreement relate to this project?

A Basically, we were going to construct a facility that needed to be approved by the Long Island Rail Road, and so we got the plans and we went to the Long Island Rail Road with the plans.

Q And did you present it to them?

A Yes.

Q Did they object?

A No.

Q Did they ask for any share of rentals from the facility?

A No, they actually get a share now. There are fees, the car fees. They didn't ask for anything additional.

Q Nothing specific?
A No.
Q Let me ask you to turn to page 21, Paragraph 3.3.2, the limitations on authority or limitations on the grant, and specifically subparagraph I on page 23, little i, number 3. How does that relate to this project?
A I'm not sure what you are asking me.
Q Okay. I'm sorry. It's kind of a confusing question.

Let me just ask it directly.

Under the transfer agreement, are you permitted to construct facilities that are not directly related to freight operations?
A Oh, no.
Q Let me also call your attention to, on page 24, the first paragraph, it provides an exception, I think, for leasing the premises available for nonfreight purposes.
A Right.
Q What is the arrangement that you have with the Long Island Rail Road about nonfreight leases?
A Well, if we do anything on the property that is nonfreight and I have to share the revenue, the rent. Because there is no other revenue other than rent.
Q Did the Long Island ever suggest that the transload was not a freight operation, that you needed to share

revenue with them?
A No.
Q Have you ever leased any nonfreight property?
A Yes.
Q And did you share the revenue with Long Island Rail Road?
A Yes.
Q What's the nature of that lease?
A Well, what it is, it's a little yard we have down in Maspeth, Queens, when they built the water tunnel, the new water tunnel in the late '90s. They have the entrance to the tunnel is there.

And after they had the tunnel built, they had to put in all the gauges and all that kind of stuff. Well, it's on our property, but I had to let them use it, so I leased out the area so that they could finish the construction up. And all the money I get from that lease, I share it 50-50 with the Long Island Rail Road.
Q Have you had any other nonfreight leases you've entered into?
A No.
Q Now, why wouldn't you have more leases, nonfreight property?
A Well, one, we don't have any property that we could rent out to people. And, two, that's not how you make

money on the railroad, you make money by moving freight cars.

Q Now, moving back to the operation of Farmingdale, a shed was build over the railroad tracks, as I understand?

A That's correct.

Q Could you describe that structure?

A I think you would consider it a Butler-type building that was directed over the tracks with lights and a misting system to keep the dust down, and it affords a place to load the C&D, and a place to put it on the ground while you are waiting for cars or while you are loading it, that is clean and presentable.

Q Is C&D the only thing that is handled at that facility?

A No, we actually have handled some lumber, sheet rock and a lot of poles and some steel, plastic, inbound and outbound. Recycled outbound, virgin plastic outbound.

Q For the record, when we refer to C&D, what do you mean?

A Construction and demolition debris.

Q Describe in words, what is construction and demolition debris?

A Well, it's basically pieces of concrete that have been broken out of construction sites, and there might be a little steel in it, but it's mainly concrete.

Q Okay. Is the function that is being performed at that facility, this Farmingdale yard, does this function different from the function that CSX was performing?
A The actual function isn't.
Q The volume is different?
A The volume is different, and they never did that commodity. They did all the others, or tried to.
Q Is it different from the use that New York and Atlantic Railroad made of that property from 1997 until CSX came in?
A No.
Q It's different from the use that the Long Island Rail Road put it to?
A No.
Q Now it's covered?
A Yes.
Q Have you ever been to that facility?
A Yes.
Q You go there regularly?
A Yes.
Q How often?
A A minimum of two times a week, sometimes more. Sometimes I'd go in, sometimes I'd just drive by it, look at the outside, a variety of different ways.
Normally I'd go in and talk to them about some of

the problems they might be having.
Q And who do you talk to?
A Well, I've talked to Joseph or Marty or Eddie, the guy that runs the place for Joseph and Marty.
Q Have you taken any exception to the way they operate there?
A Not -- not to the way they operate it. They do a pretty good job. We did have an exception once, but --
Q What was that?
A Technically, it wasn't the way they operated. They loaded a car or two cars wrong, and we sent them back to them and made them fix them.
Q What was wrong with that?
A They were crowned too high and the netting wasn't put on properly.
Q Explain that for those of us who might not know.
A You load your car up, you have this little crown on it to make sure that the edges, the stuff is below the edges so it doesn't fall out, which is absolutely critical for us, because we run over the Long Island Rail Road with passengers. And they have to net it, and they hadn't done it according the way we had instructed them. So we sent it back to them and they had to reload it and repack it.
Q Is that early in the operations?
A Yes, it was real early. I don't remember exactly,

but it probably was in the first month or so.
Q Have you had any other exceptions?
A No.
Q Does New York and Atlantic Railroad still use the yard for any purpose?
A Yes.
Q I should be more specific. Other than the transloading operations being conducted by Coastal, do you use it for any other purpose?
A Yes, we do.
Q What is that?
A We still Y cars there and Y locomotives. What we'll normally do, so we don't hinder the operation, to make sure we get cars loaded, we'll do it at night when we are supplying cars for them, when we are spotting and pulling.
Q Now, that shed structure that is there, who owns it?
A Actually, the Long Island Rail Road.
Q And your office building, who owns that building?
A Well, we're in a trailer and we are the proud owners of that.
Q Okay.
A However, we just built a new shop with an office on the side of it that we did -- we're just finishing it up, and the Long Island Rail Road owns it.
Q Now, at some point I understand the lease arrangement

that we've just discussed as -- I'm sorry, New York and Atlantic Railroad Number 7, that lease arrangement was terminated?

A Yes.

Q Let me turn or direct your attention then to New York and Atlantic Railroad Number 8. Let me ask you, what is that document?

A Pardon me?

Q What is document -- Exhibit No. 8?

A That's our transload facility operations agreement.

Q Why did you terminate the prior lease arrangement at Coastal?

A There were a couple reasons. One is we actually had more control over this agreement because they are literally a part of us, and there were some other issues that were coming up that we wanted to deal with.

Q Does one of those issues involve Pinelawn?

A Yes.

Q What was that issue?

A Well, out of the clear blue, there were claims made that the property didn't belong to us through our lease, and which I have to tell you, I was stunned when I first heard that, because there was never any mention of that by the Long Island Rail Road.

Q Okay. So there was a property issue?

A Yes.
Q You didn't know who was entitled to the property?
A Yes.
Q Let's talk then a little bit about of this Exhibit No. 8.

Overall, just generally, what is the structure of this agreement you entered into with Coastal?
A Basically it is an agreement that we have Coastal handle one portion of the freight for us, and then we handle the other portion of it. They handle the loading and the marketing and we handle the transportation side of it.
Q And in that respect is it any different from the lease arrangement that was in effect?
A Not a lot.
Q Does the agreement still require Coastal to generate a minimum volume?
A Yes.
Q Now, let's look at some of the provisions here. Section 1.02, what does that paragraph mean to you?
A We have total control over the operations.
Q As a practical matter, is that any different from the situation you had under the old agreement?
A No.
Q Okay.

A It's a little clearer and a little better, but...
Q How do you exercise control over Coastal under this agreement?
A Well, through observation, and if they are not doing something that they are required, I just don't give them cars.
Q Do you have personnel regularly on the facility?
A Yes. Besides myself, yes.
Q Who would those people be?
A Well, the trainmen that spot them every night go into the facility and they, of course, check the condition of the cars and the loads and all that. And then we have to inspect the track, do what is called a yard inspection, according to the Federal Railroad Administration, and a switch inspection, which is a monthly requirement, and I go there. Our trainmaster also will go out there.

He sometimes uses the facility, our trainmaster does. He'll go out there and have trainees, the trainmen that were training, they'll sometimes go out, and he'll use the Farmingdale facility.

Q Is there any special reason why New York and Atlantic Railroad has to be especially careful the way it handles this material?
A Well, absolutely. Running on the Long Island is a real experience. I've worked on the railroad a lot of

places, as I was telling you, and the training requirements here are more stringent than anywhere I've ever been. Our trained engine men literally have to be trained under passenger guidelines, because the Long Island runs about 740 trains a day and we run nine. And what a lot of people don't realize is we don't run on line trains at night, we're in the middle of the passenger trains in the middle of the day, in the afternoons and in the morning.

And then you add to the facts just the physical structure of the Long Island Rail Road. The thing that makes it unique, these passenger trains have to be able to unload. To be unloaded they have people docks instead of freight docks. And these platforms that they have are extremely close clearance, because obviously you can't put a plate between the platform every time the door opens, so you have extremely close clearance.

So we have to be extremely diligent in loads that come in or go out on this railroad. It can be literally a disaster if, for example, we had a car that was leaning and hit the platform. Nine times out of ten, 99 times out of 100, when we go by a platform, there are people on it. I would almost guarantee you.

It would be horrible if something happens. So our training, our diligence to what happens, not only at

Coastal, by the way, but everywhere, is that we have to make sure that it is done and that it is done properly.

Q Okay. Let me direct your attention to paragraph -- well, let me ask you, under this agreement does Coastal need your approval for handling of various kind of commodities?

A Well, they do and they don't.

They have to get approval to handle MSW. We will not let them handle that at all. But if, for example, a carload of lumber, it's kind of a given, since we've given them approval to handle the first cargo of lumber, they can handle another one. They don't mention each car.

THE COURT: What was the first one you mentioned, what does that stand for?

A Municipal solid waste.

THE COURT: They need your approval?

THE WITNESS: They need our approval. We're not allowing that.

THE COURT: And that's under the agreement?

THE WITNESS: Yes.

BY MR. LANE:

Q Do you have the right under the agreement to set rules to govern the operations of a facility?

A Yes.

Q Have you done that?

A Yes.
Q What kind of rules have you set?
A Well, how the loading and off loading are performed. We got the trainmasters to figure out how to do it the most economical way. That's how we do it.
Q Under the agreement is Coastal obligated to market your facility?
A Well, I guess technically under the agreement they don't have to, but if they don't, they will not meet the requirement and we'll kick them out.
Q To your knowledge, have they been marketing under Atlantic's orders?
A Very well.
Q Have they submitted the appropriate paperwork between your company and their company for billing and freight documents and so on? Did that happen?
A Yes.
Q And was that satisfactory?
A Yes.
Q They paid you the fees they are required to pay?
A Yes.
THE COURT: What kind of paperwork do they have to give you at the railroad?
THE WITNESS: Well, there's a couple things. One is they do the billing themselves as our agent. We just

have them do the billing for us. We don't have to mess with it. That was the economics of the deal that we like. The only thing, they have to keep accurate car records. As do we, so we can get our share of the revenue from them. And they have submitted all those things on time.

BY MR. LANE:

Q Under the agreement, is Coastal permitted to use that facility for any purpose other than loading and unloading rail cars?

A No.

Q To your knowledge, have they used the facility to do anything other than load and unload rail cars?

A No.

Q Now, let's turn to Paragraph 5.01.

THE COURT: Let's take a break now, 15 minutes. We'll take a break at 12:30 for lunch, resume at 1:30 and we'll go the rest of the day, and if we don't finish up we'll resume tomorrow morning at 9:30.

(Whereupon, a recess was taken.)

MR. CUTHBERTSON: Your Honor, before we begin, I have a witness that has a real timing issue. I haven't had a chance to discuss it with counsel. If we might be able to take him out of order after the lunch break.

THE COURT: Why don't you discuss it over the

lunch break and work it out.

MR. CUTHBERTSON: Fine.

THE COURT: So I think we left off at 5.01 on Exhibit 8.

BY MR. LANE:

Q Yes. On Section C there, are those the covered thresholds that they have to meet?

A Yes.

Q Is that an important part of the contract to you?

A Yes.

Q Why is it important?

A Because we want to utilize the facility to the maximum.

Q Okay. Who sets the loading fee that will be charged at the facility?

A Coastal.

Q Why doesn't New York and Atlantic Railroad set that fee?

A Well, because we don't know all the things that go into loading the materials and moving it around and that sort of thing.

Q What would happen if they set a fee that was too high? What would happen?

A I assume nobody would use the service.

THE COURT: There are no tariffs that apply to

that, uniform tariffs.

THE WITNESS: No, all the uniform tariffs were removed when the railroad was deregulated under the under the Stagers Act.

Q Just to clarify, you are speaking about the loading and unloading fees, correct?

A Well, no, he was talking about tariffs. I'm talking about all the standard tariffs against the railroad. When they were deregulated they were gotten rid of. There are many tariffs gotten rid of, but they are not standardized for --

THE COURT: So as to the railroad you set your own fee?

THE WITNESS: Yes.

THE COURT: And loading and unloading, Coastal sets that?

THE WITNESS: They set that fee.

BY MR. LANE:

Q And does New York and Atlantic Railroad get any portion of that loading fee?

A Yes.

Q What is that?

A Per car. $20 per car.

Q And while we're on this subject of tariffs, let me focus your attention for a moment on Exhibit 9, and I'll

ask you what that is.
A That's NYA's railroad freight tariff.
Q And what is contained in this tariff?
A Well, it tells what we move commodities for, and out of what locations, and that sort of thing.
Q Tell us where we would find the rate for the transportation, the movement part of this service from Farmingdale to the interchange with another railroad.
A Well, it will take me a while to do that, but I can (perusing).

Basically, well, according to the commodities, you'd go to the commodity list, and that would be the rate you'd pay, and under the group it tells you the station names and it refers you where to go to get the rate.

Q Okay. Now, this tariff, is that filed through the transportation board?
A Yes.
Q It is publicly available?
A Yes.
Q Let me also ask -- earlier we talked about what C&D consisted of, construction and demolition debris. Did you have anything further you wanted to elaborate on that?
A Yeah. What it is is everything that comes out of a construction site, less asbestos. You can't move that. It may have insulation on it, wood, metal, glass.

Q It's not just concrete?
A No, it's not just concrete.
Q I wanted to clarify that. Earlier we referred to the real estate dispute involving Pinelawn.
Was there litigation brought in connection with that dispute?
A No.
Q Referring to the Pinelawn's claim of ownership of part of the property?
A Yes. There was to that.
Q There was litigation?
A Yes.
Q Do you know where that was brought?
A In Suffolk County, I believe.
Q Do you know what happened in that litigation?
A Well, it's all pending.
Q Do you know if Pinelawn sought to remove the railroad from that property?
A That's what it looked like to me.
Q Was any injunction entered in that case?
A Yes.
Q Okay. What did the injunction require?
A Well, no, we weren't stopped from using the property --
Q Okay.

A -- is what I'm saying.
Q All right. Now, at some point, I understand that the township of Babylon issued a stop work order. Did you learn about that order?
A Yes.
Q How did you learn about it?
A Joseph called me.
Q All right. Did you see the order?
A Yes.
Q What does it require you to do?
A Well, I wasn't really sure what it required. I didn't know if they wanted us to stop everything. We thought they wanted us to stop building and we were virtually done with building things.
Q What did the Town of Babylon say to you you had violated?
A That we didn't have a permit.
Q What kind of a permit?
A I assume a building permit.
Q Did they tell you that you needed a building permit?
A No.
Q After you got the order, did they tell you that you needed a building permit?
A No.
Q Let me turn your attention to Exhibit No. 10.

Can you identify that?

A Yeah. That was a letter I wrote to the Town Attorney of Babylon.

Q Why did you write that letter?

A Well, to kind of, you know, clear up what we were doing out there and how we were proceeding and what our goals were.

Q Do you know whether Coastal appealed the stop work order?

A Yes.

Q What was the result of that appeal, do you know?

A Well, I think it is still pending. Originally, they didn't do anything, and then they went back, and then I guess they got another stop work order.

Q Now, at this point, do you know what you are supposed to do under that order?

A Well, it looks like they are trying to put us out of business, is what it looks like. I'm not perfectly sure.

Q Has the Town taken any steps to enforce that order that you are aware of?

A Not with me.

Q Have they issued any kind of citation?

A No.

Q Filing a lawsuit against the railroad?

A No.

Q Are there any other sites located on Long Island Rail Road that are feasible for considering an alternate transit route operation?
A No.
Q Will happen if you are required to shut down your operation at Farmingdale?
A Well, actually there will be a number of things happening. One, we'll probably lay off a couple people. And, two, there'll be hundreds and hundreds of trucks going on the LIE, driving this stuff wherever they take it, to Pennsylvania; when they go by truck they go to a different place. It will be a real -- I don't know if it will be a disaster, but it will be really bad for the area.

MR. LANE: Just one moment.

(Counsel confer.)

MR. LANE: Your Honor, that finishes my questions for the moment. I'd tender the witness to the other parties subject the right to recall.

MR. McHUGH: I just have a bit, your Honor.

CROSS-EXAMINATION

BY MR. McHUGH:

Q Mr. Krebs, good afternoon. You mentioned freight house, you mentioned, as something that happened in the past. Would you tell me what happened in the freight house? Where did the cargo come from and where did it go to?

A Well, it came from somewhere far away. I mean, it came on a railroad car. It went into a freight house and then it was divided up and went out to different users.

Q So it was sorted in the freight house?

A Yes.

Q And it was put on delivery trucks for local delivery?

A Yes.

Q And going the other way, the local delivery trucks brought it in and it was consolidated; is that correct?

A Yes.

Q And then it was put on rail cars and there were small packages, big packages, everything out of the sun; is that correct?

A Yes.

Q And so is it safe to say that a railroad car is substantially larger than a truck?

A Yes. Depending on the commodity, it's anywhere from -- I think the lowest commodity is 2.9 and it

actually goes up to 4. 2.9 trucks per rail car to 4 trucks per rail car.

Q That assumes fully loaded trucks?

A Yes. Sometimes overloaded.

Q Now, you indicated that when you were discussing putting Coastal on this facility, the Long Island was still there and occupying part of the facility?

A Yes.

Q And they were in the middle of the Y?

A Yes.

Q Can you tell us what were they doing in the middle of the Y?

A Well, they were giving us part of -- I believe it was the signal department where they dispatched -- not signal, maintenance and way department, where they were dispatching crews out of there. They used it for storage.

They also had a garbage compactor there where they brought in all the trash off of the Long Island system that was out on the Island and compacted it there.

Then they brought in material, actually most of it by rail, and transloaded it onto trucks.

Q As to the trash that was compacted, what did they do with the trash that was compacted after it was compacted?

A They hauled it up to a dump, to a landfill.

Q How did they do that?
A By truck.
Q So it was truck to truck?
A Truck to truck.
Q So there was station traffic for the Long Island Rail Road?
A Yes.
Q And the maintenance and way facility, that was all put there?
A Yes, there was a lot of storage for maintenance and way, signal and track.
Q Now, as to your crews, when they pick up the cars at night, before they pick them up from Coastal or any places, what is the duty with respect to the conditions of the cars and the conditions of the loading?
A Actually it is a kind of a twofold deal. They have a FRA requirement, they have to examine the cars and make sure there is no FRA defects in the car. That is basically the safety appliances. Because some shippers tend to damage cars when they ship them. So that's one of the first things they look for.

The second thing they look for is if it's an outbound load, is that the car is not leaning; that if it's loaded, that the load is secured properly. In the case of C&D, that it has a tarp or netting over the top.

That's basically what they look for. And minor mechanical things on the car. But those are limited.

Q So this is done whenever they pick up a load?

A Every car, plus they do a brake test.

Q You mentioned FRA. Explain that.

A Federal Railroad Administration.

Q What is the role of the Federal Railroad Administration?

A They have make sure that the railroads comply with all the safety requirements that the FRA has imposed on us.

Q Okay. Does that include the condition of the track?

A Yes.

Q And does it include the condition of the equipment?

A Yes, track, equipment and personnel.

Q What about the facilities?

A When you say facilities, railroad facility. When you go into a track, make sure all the track is maintained properly --

Q Okay.

A -- and clearances are proper. If you build something, it has to be according to the regulations.

Q Now, you indicated that you had worked with Coastal with regard to coming up with the way they loaded things because of the clearance problems in the Long Island Rail

Road?
A Yes.
Q Could you tell us what the significance is, how you load something with respect to the clearance problems in the Long Island Rail Road?
A If you load something improperly, the car could lean, tilt improperly, one way or the other, and it can strike a platform or a canopy.

The second thing, it could actually fall off the car completely and cause damage. With the clearances that we have, it's absolutely critical that the cars are straight upright, that they are loaded properly.
Q And can you explain to us the difference between C&D and MSW?
A Well, MSW is protrusible waste, and I don't know how to spell it and my mother always told me don't use a word you can't spell, but basically it has garbage, it has food in it, baby diapers, whatever you can think of, it is in it. Where C&D doesn't.
Q Now, can you tell us, if you are aware, of what kind of credentials Coastal had -- well, who approached who? Did New York and Atlantic Railroad approach Coastal or vice versa with regard to the Farmingdale facility?
A Coastal came to us.
Q And you decided to enter into an agreement with

Coastal. Could you tell us what criteria you used to determine that they were a likely successor to CSXT?

A They didn't walk in. We checked them out, to be honest, to see if they knew what they were talking about. We found they had been in the waste business for a number of years, so we decided to work with them.

Once they did the aggregate deal, and they did an extremely good job of it, even though you couldn't make money out of it, it was amazing how many cars they brought in on the property, that's when we knew they were for real.

Q Were they working with another railroad on that aggregate job?

A CP.

Q They were working for CP at that time?

A I don't know if they were working for them, but that's who they were dealing with, was CP.

Q And could you tell us approximately how many cars of aggregate they generated?

A Well, on us, we were bringing in like a 15-car train, I think, every week, once we got going. They also got the Long Island Rail Road's ballast for their capital projects. I don't know how many cars that is, because my deal with the Long Island Rail Road is a little different. I have to bring the freight on and hand it to

the Long Island Rail Road, and I actually don't keep track of them. But it had to be hundreds of Long Island Rail Road cars that they brought on.

MR. McHUGH: Thank you. No further questions.

THE COURT: Do we have any federal requirement with regard to the construction of the shed?

THE WITNESS: There are none. No, I'm sorry, I take that back. Where we come through the door, there has to be a certain amount of clearance, so if a guy is riding inside of the car he doesn't get knocked off. But other than that, as far as the actual structure of the building, no.

THE COURT: As far as this particular project, the renovation, was there any application made to any federal agencies actually?

THE WITNESS: No.

THE COURT: Let's go to the defendant. If that generates anything, we can come back tomorrow.

MR. CLARK: Do you want to start for five minutes?

THE COURT: Yes, let's start.

CROSS-EXAMINATION

BY MR. CLARK:

Q Good afternoon, Mr. Krebs. My name is James Clark. I'm counsel for the Town of Babylon. You testified earlier that New York and Atlantic Railroad is a rail carrier, correct?

A Yes.

Q And it's been licensed as such by the Surface Transportation Board?

A Yes.

Q Can you just, if you would, go through for the Court the process that New York and Atlantic Railroad had to go through to get that license?

A Yes. Basically the way you do it, you put an application to the STB, Surface Transportation Board, and they basically write you a letter back saying, yes, you are a railroad and you can operate as a railroad, which entitles you to certain things.

Q And do you know what the requirements are to be designated as a railroad by the STB?

A I know some of them.

Q Okay. What would those be?

A Well, one of them, for example, you have to be able to connect to the general railroad and transportation system of the United States. Another a narrow gauge

railroad has to do some things before they become a railroad and have railroad employees.

In other words, you have to have the facilities available to be able to move cars and you have to operate on the railroad, obviously.

Q Okay. Is Coastal a licensed rail carrier?

A No.

Q Based on those requirements that you just outlined for the Court, could Coastal be licensed as a rail carrier?

A Actually, they probably could.

Q Well, did they connect to the general railroad system of the United States?

A Yes.

Q And how was that?

A Well, the track that is in our yard connects to the siding, which connects to the main line, which connects to the interchange, which connects to everything.

Q Okay. Is that Coastal's track?

A No, it's ours.

Q Okay. And Coastal doesn't own a locomotive, correct?

A No, they don't.

Q Do you know if Coastal ever applied for rail carrier status with the STB?

A Do I know if they have?

Q Yes.
A No.
Q Do you know if Coastal is currently regulated by the STB?
A No.
Q No, you don't know, or no, they are not?
A No, through us. They are not.
Q But New York and Atlantic Railroad is regulated by the STB?
A Yes.
Q And as a rail carrier, New York and Atlantic Railroad has a special status vis-a-vis its employees, correct?
A Well --
Q Well, New York and Atlantic Railroad employees are railroad employees?
A Yes, they are.
Q So they don't participate in Social Security?
A No, they don't.
Q They are in railroad retirement, right?
A Yes.
Q And there is no worker's comp for New York and Atlantic Railroad employees?
A Unfortunately, no.
Q And do you know if Coastal's employees are in the railroad retirement system?

A No. No, they are not.
Q Okay. And does Coastal maintain worker's comp insurance?
A Yes, they have to.
Q That is pursuant to your agreement with them; is that correct?
A Also state law.
Q But pursuant to your agreement, right?
A Yes.
Q Now, are New York and Atlantic Railroad's unionized?
A Some of them.
Q And which are?
A The train and engine men.
Q Now, you testified that you first entered -- "you" being New York and Atlantic Railroad -- first entered a relationship with Coastal in 2002, correct?
A Yes, I believe that is right.
Q And that was memorialized by what was previously marked as New York and Atlantic Railroad Exhibit 6, right, the March 22, 2002 letter and use agreement?
A Yes.
Q And that was after you had terminated your relationship with CSX --
A Yes.
Q -- who was providing loading services for New York

and Atlantic Railroad, correct?
A Well, they were occupying the area.
Q And that was a lease agreement you had with CSX?
A Yes.
Q They provided loading services for the four cars that they got?
A Yes.
Q Okay.
And CSX was a licensed rail carrier, correct?
A Yeah, they are.
Q Now, you testified before, I believe, that you decided not to renew CSX because they just weren't productive; is that right?
A Yes.
Q Isn't it a fact that you stated that you had determined that CSX couldn't perform the job because traditional railroad personnel didn't have the necessary skills to develop the potential at the yard?
A No, that's not what I said.
Q That's not what you said.
A No.
Q Okay.
Do you recall submitting an affidavit in this case?
A I probably did, yes. It's been a lot of things

happening in this case.

MR. CLARK: May I approach, your Honor?

THE COURT: Yes.

Q Actually, you can read the paragraph. Actually read it to yourself.

THE COURT: Take your time and read the paragraph through?

THE WITNESS: I've read it.

A Yes, I did say that.

Q That is a copy of your affidavit that you submitted?

A Yes.

Q In Paragraph 6, you indicate that "New York and Atlantic Railroad did not renew the sublease after its initial term because CSX Transflow had failed to generate the expected traffic volume. I concluded that traditional railroad personnel did not have the necessary skills to develop the potential at the yard. " That's what you said?

A Yes, I did say that.

Q Was that accurate?

A Well, apparently it was, because they didn't develop anything.

Q Okay. And you believed that traditional railroad personnel didn't have the necessary skills to develop that business?

A I believe that CSX didn't.

Q Okay. And CSX was a traditional railroad personnel?
A Yes.
THE COURT: Whenever you get to a convenient point, Mr. Clark, you can break. I don't want to interrupt your presentation.
MR. CLARK: I'll be there in two minutes.
Q When you said in your affidavit that CSX didn't have the necessary skills to develop the site, what did you think those necessary skills were?
A Well, the skills to go out on Long Island and find customers and bring them into the site, and when you say traditional railroad personnel, you have to remember this was Transflow, which is a division of CSX, and they came in and they just couldn't do it.
Q Okay. But I didn't say traditional railroad personnel, you said traditional railroad personnel.
A I understand that. Traditional railroad personnel. The fact of the matter is they worked for the railroad and they developed four cars in two years. Now, does that sound to you like somebody that was developing a site?
Q So the skills you were looking for was somebody to go out and drum up business on Long Island, right?
A Yes.
Q At some point then in 2002, you met with the representatives of Coastal, correct, or 2001?

A 2001.
Q Okay. You came to the conclusion that Coastal had those skills; correct?
A Well, I came to the conclusion they might have them.
Q They certainly represented to you that they did?
A Yes, they did.
Q And did you consider Coastal to be traditional railroad personnel?
A No.

MR. CLARK: That's a good enough spot.

THE COURT: Very good. You may step down. We'll resume at 1:30.

(Whereupon, an afternoon recess was taken.)

AFTERNOON SESSION

THE COURT: Both sides ready?

MR. CLARK: Yes, your Honor.

THE COURT: Did you work out that problem?

MR. CLARK: I have not.

THE COURT: Who is your witness?

MR. CLARK: Michael Posillico. He owns a business across the street. He has been here since 10:30, and unfortunately he has a number of business meetings he has to attend to.

THE COURT: A number of business meetings?

MR. CLARK: He's a businessman. He runs a large environmental --

THE COURT: He's in business, too. I don't know why this priority is necessary. He has something urgent he needs to commit to?

MR. CLARK: He has to leave by 2:30, is the latest time in which he could leave, your Honor.

THE COURT: Mr. Perillo, what seems to be the problem here?

MR. CLARK: It's Posillico, your Honor.

THE COURT: What is the problem?

MR. POSILLICO: I have to pick up my children at 2:30 o'clock and I have nobody to care for them until five o'clock.

THE COURT: We'll make sure that you're out of here.

MR. POSILLICO: I have to leave here by 2:30.

THE COURT: Are you available tomorrow?

MR. POSILLICO: Yes, I am.

THE COURT: Let's continue. We're on cross by Mr. Clark.

MR. CLARK: Thank you, your Honor.

CROSS-EXAMINATION (Continued)

BY MR. CLARK:

Q Mr. Krebs, the initial lease that New York and Atlantic Railroad entered into with Coastal in March, the 2002 lease, do you know what the annual rent pursuant to that lease was?

A Without looking, I think it was through 2001, I believe.

Q Do you want to look at it?

A 2000.

Q The lease that CSX had with New York and Atlantic Railroad, the rent under that was a dollar a year, correct?

A Yes.

Q And you testified before that that was because New York and Atlantic Railroad wasn't in business of making

money from rent?
A Yes.
Q Is there a reason why Coastal was charged $24,000 a year?
A Yes.
Q Why is that?
A Because even though they had good credentials, one of their partners actually was involved with Harlem River yards, it's an operation up in the Bronx, and they moved 40 cars of waste every day. Even though he had come from that environment, I wanted to get something from my property if I was going to tie it up.

And after being basically burned by CSX, I decided I should get something out of it. But that's not making money. $2,000 a month is not much rent.
Q Okay. And the rent, then, in the subsequent lease, the lease that was entered into in July of 2002, was that the same?
A Yes.
Q It's still $2,000 a month?
A Yes.
Q Do you know if that monthly rate changed throughout the term of the agreement?
A Like I said, I have to look. I don't remember. I don't think it did, but it was in the $2,000 area.

Q Showing you B for identification.

THE COURT: D as in David?

MR. CLARK: B as in boy, your Honor.

Q Do you recognize that document?

A Yes.

Q Is that the unredacted version of the July 2002 agreement, lease agreement with Coastal?

A Yes.

Q And according to that agreement, if you will look at subparagraph (c) on the first page --

A Yes.

Q -- It indicates that the rent was $2,000 a month, correct?

A Yes.

Q And that in addition, the lessee, which was Coastal, which would make 115,000 in funds available to New York and Atlantic Railroad?

A Yes.

Q And that was the money that was used to pay to the Long Island Rail Road to vacate the premises?

A Right, plus our 15.

Q New York and Atlantic Railroad added 15 to that and 130,000 was paid to the Long Island Rail Road?

A Correct.

Q Now, in 2002, there was no facility on that site that

Coastal had leased, correct, no building?
A There was no building. A tent and trailer.
Q Right. And whose idea was it to build the actual building that is currently on that site?
A Coastal.
Q And do you know who paid for that construction?
A No.
Q New York and Atlantic Railroad did?
A No, I didn't.
Q And do you know who owns that building?
A Yes.
Q And who is that?
A Well, technically the Long Island Rail Road. It's on their property.
Q And that's the basis for your belief that they own it because it is on their property?
A If we leave everything that is there, we have to give back to them or give to them, just like our shop, the building.
Q Isn't it a fact that the property is owned by Pinelawn?
A Yes.
Q Okay. So is the building then Pinelawn's?
A No. We have a lease with Pinelawn or MTA does, the Long Island Rail Road.

Q If you look at what I just showed you as Town Exhibit B, which is the July 2002 lease. Do you see that?
A Yes.
Q If you look at Paragraph 8, which is page 3 --
A Right.
Q -- that is entitled Removal of Improvements, correct?
A Yes.
Q Now, when I speak of a facility, the actual building, when that was constructed, this lease was in effect, correct?
A Yes.
Q And Paragraph 8 indicates "At the end of the project, lessee, which was Coastal, shall have the right to remove all of its structures and all of its equipment from said premises at the sole cost and expense of lessee, if they so desire, provided that removal of such structures and other material and equipment will not damage the premises in any way." Do you see that?
A Yes.
Q So under the terms of that provision of the agreement, then, Coastal, if they wanted to, could have taken the building down?
A Yes.
Q And you testified prior that there were other entities that had conducted loading operations on the same

property in the past; is that correct?
A Yes.
Q And that included CSX?
A Yes.
Q And the Long Island Rail Road?
A Yes.
Q And New York and Atlantic Railroad, correct?
A Yes.
Q And all of those entities are rail carriers?
A Right. But we didn't load or unload anything.
Q New York and Atlantic Railroad didn't?
A No.
Q And at no time did New York and Atlantic Railroad ever do any transloading on that site?
A No, not one piece of equipment.
Q Do you know if, other than Coastal, if any other nonretail carriers ever engaged in loading and unloading on that site?
A Yes.
Q Who?
A There was a trash -- not a trash, but a scrap dealer that did it --
Q When was that?
A -- while the Long Island Rail Road had it and while we had it.

Q What was the name of that dealer?
A I don't know. And the plastic guy was there.
Q If I direct your attention to the operations agreement, I don't know what number it is, but --
A 8.
Q It's 8?
A Yes.
Q Okay. Will be New York and Atlantic Railroad Number 8. That was entered into in August of 2004, correct?
A I don't see number 8 on it, but, yes.
Q Is there a signature page on the last page?
A No.
Q Well, then, you'll use mine (handing).
I'll refer you to what's been previously marked as Town Exhibit C.
A Yes.
Q And there's a signature page on Town Exhibit C?
A Yes.
Q And that indicates that the agreement was signed on August 5, 2004?
A Yes.
Q And it was signed by you and Mr. Rutigliano on behalf of Coastal?
A Yes.
Q August 5, 2004 was approximately a month before the

hearing on the appeal of the stop work order before the Babylon Zoning Board of Appeals?

A Yes --

Q You --

A -- I guess.

Q You testified at that hearing?

A Yes.

Q Do you recall if it was in September of 2004?

A Yes, that sounds about right.

Q Whose idea was it to terminate the lease and enter into this facility operations agreement in August of 2004?

A Well, I don't actually remember who, actually, thought of it.

Q Well, did New York and Atlantic Railroad go to Coastal and say, you know what, we want to terminate your lease and enter into this type of agreement?

A I think it was through conversation that we were having that we decided to do it. It came up in a conversation.

Q And do you recall when it first came up?

A No.

THE COURT: Does it really make any difference as far as the issues of the hearing how long it was discussed?

MR. CLARK: Actually, it may, because of the

timing of things, your Honor.

THE COURT: It was a month before the ZBA hearing.

MR. CLARK: That's when the agreement was actually signed. I'll simplify it.

Q Do you recall how long prior to August 5, 2004 was the issue of terminating the lease agreement first raised?

A Well, I don't remember exactly. I do remember it took us a long time to write it.

Q Okay. Who participated in negotiating the terms of the lease or the terms of the new agreement?

A Well, a lot of lawyers, and Joseph and myself.

Q And I believe you testified before that operationally, at least, nothing changed at the facility after you had entered into this agreement; is that correct?

A I'm not sure exactly what you are asking me.

Q Were the operations of the facility the same before August 5, 2004, as they were after August 5, 2004?

A Well, I guess so. When the original agreement started, we were doing a different commodity.

Q I understand. But on August 4, 2004, the lease agreement was in effect, correct?

A Yes.

Q And on August 5, this agreement went into effect,

right?
A Yes.
Q And operationally on the site, did anything change?
A I don't -- nothing significant.
Q Anything at all?
A I don't really recall.
Q Now, you testified earlier that Coastal handles the marketing and the loading, and New York and Atlantic Railroad handles the transportation; is that correct?
A Yes, but they also owned their own cars.
Q Right, okay. And since 2004, at least the main commodity that has been loaded and transported out of that site has been C&D debris, right?
A Yes.
Q Now, who makes the arrangements with the customers to load and ship that commodity, the C&D debris?
A Coastal.
Q And I think you testified earlier that under the terms of your agreement, the transload facility operations agreement, Coastal can't take any MSW; is that correct?
A Right.
Q Do you know where in the agreement it says that?
A I have to find it.
Q Go ahead.
A You want me to find it?

Q If you would.
A (Perusing.)
THE COURT: Can counsel be of assistance here? I'm looking at Mr. Lane.
MR. LANE: I was looking for that earlier, your Honor.
THE COURT: All right.
Can you be of assistance?
MR. CLARK: I can't find it either.
THE COURT: Can we agree that it is not there?
MR. LANE: I'm sorry, Judge. Section 1.04(a).
THE COURT: What exhibit is that?
MR. CLARK: It's Town's C.
THE COURT: C. 1.04, you say?
MR. LANE: 1.04(a).
THE WITNESS: It says --
A I see it. Do you want me to read it?
1.04(a) specifies it has to be rail cars to trucks and such services shall include only those commodities, movements and equipment allowed by applicable law and regulations and approved by the railroad, which approval will not be unreasonably withheld.
Q So 1.04(a) is what you would point to to say to say that the agreement does not accept MSW?
A Yes.

THE COURT: What particular provision is there that excludes that?

A At the time this was written we couldn't haul MSW anywhere in the railroad, so that's why we had to keep this in there.

THE COURT: So you say it is covered under the provision and applicable law regulations approved by the railroad?

THE WITNESS: They have to approve it through us, whatever they ship.

THE COURT: And you didn't have approval for that?

THE WITNESS: We didn't have, at the time this was written.

THE COURT: You do now?

THE WITNESS: Yes, and we still haven't hauled any MSW out of there.

BY MR. CLARK:

Q Do you know, Mr. Krebs, if the MSW is delivered to that site?

A I know it's not.

Q You know it's not delivered at all?

A I have never seen any since I've been there.

Q And MSW, as you've defined it, is just garbage?

A Trash, garbage, yes.

Q And under your agreement, if they can't haul it, Coastal would be obligated to do something else with it, correct?

A Well, they would be obligated not to receive it. May be dumped by accident or something, but they couldn't ship it.

THE COURT: Is it still your position, notwithstanding the fact that you can now transport that on the rail?

THE WITNESS: Yes, I don't want any MSW out of there.

THE COURT: What authority do you have under the contract to exclude it if it is no longer prohibited?

THE WITNESS: Well, the same as we've done in Maspeth, we're not hauling it out of there. We have a transload center. Right now we're not equipped to be able to haul it.

THE COURT: Why not?

THE WITNESS: Service--wise between the two railroads and facility-wise there.

THE COURT: Why not?

THE WITNESS: We don't have the proper facility to handle it.

THE COURT: Why not?

THE WITNESS: Well, I don't know. What I'm

saying is that right now we aren't allowing MSW to be hauled off that piece of property

BY MR. CLARK:

Q And, in fact, it's your testimony that MSW has never been brought onto that site, correct?

A As far as I know, it never has.

Q Okay. Do you recall testifying at the zoning board hearing on September 9, 2004?

A Yes.

Q Do you recall giving this testimony:

"And the landfills, by the way, in Ohio were very, very strict about it because they get their tipping fee is rated on whether it is MSW or C&D and they get a lot more money for MSW than C&D. So if you are saying C&D, it better be C&D, and I've actually witnessed that. I have to tell you, the operation is really good. They actually sort out the metal from the C&D and they take out anything that would be MSW and do not allow it in the car. I mean, they are very good about that." Do you recall giving that testimony?

A Yes.

Q So at the zoning board you testified that you witnessed Coastal receiving MSW and --

A No, receiving MSW that is taking out products that can't go to C&D. It's not classified as MSW. A mattress

doesn't make it MSW.
Q Well, you testified at the zoning board, they actually sort out the metal from the C&D and they take out anything that would be MSW and do not allow it in the car.
A That's right.
Q Okay. So you witnessed that.
A Yes, I witnessed the sorting out the metal and the mattresses. I have.
Q And if metal and mattresses --
A Metal isn't.
Q Metal isn't?
A No.
Q Just let me finish. Metals and mattresses are not C&D, correct?
A No.
Q And you are saying they are not MSW?
A Well, it contaminates the C&D.
Q No, my question is, is the mattress MSW, garbage?
A All I know is the mattress can't go in the C&D landfill. If you actually classify it as MSW, I don't know.
Q Well, you testified at the zoning board you've seen the Coastal employees sorting through the debris and extracting metals and anything we consider MSW, correct?
A You can say it as many times also you want. You will

get the same answers from me. Metal is taken out because, one, it has a value, and, two, they will not let any stay there that is contaminated, that would contaminate the C&D. That's what I said.

Q And when you say contaminated C&D, what do you mean by that?

A That would cause problems at an Ohio C&D landfill.

Q Start because they will not accept the mattress as C&D; is that correct?

A That's correct.

Q And they will not accept metal as C&D?

A No, that is not correct.

Q So Coastal takes the metal out because it has a value?

A I would assume it is taken out.

MR. McHUGH: Objection.

THE COURT: Overruled.

Q What does Coastal do with the metal they extract?

A I assume they take it to the scrap dealer.

Q Do you know what they do?

A Yes.

Q And that's what they do?

A Yes.

Q And does New York and Atlantic Railroad get any money as a result of that?

A No.

THE COURT: What do they do with the mattresses after they sort it out?

MR. CLARK: That was my next question, your Honor.

THE COURT: I was afraid you weren't going to get to it.

THE WITNESS: Actually, what they did when I was there, like if a tire or a mattress was in there, they would keep track of it and give it back to the person that brought it in.

BY MR. CLARK:

Q That's what they did at the time you were there?

A At the times I saw it.

Q How many occasions have you seen that process take place, the sorting and extracting?

A Well, every time you go there. But they are looking for stuff. That doesn't mean they are actually sorting stuff out, but they are looking for it.

Q How many times have you actually seen them take things out?

A I've seen metal a number of times, a mattress maybe once or twice.

Q And that occurs on your twice weekly visits?

Is that a yes? You have to respond.

A Yes.
Q Now, I just want to walk through the marketing and loading process, if you will.
You testified that Coastal enters into the agreements for the outbound shipments, correct?
A Yes.
Q And they set the terms of that agreement as far as the loading fee?
A Yes.
Q And the freight fee is set by New York and Atlantic Railroad, and that's pursuant to what was previously identified as New York and Atlantic Railroad Exhibit 9?
A No.
Q No.
A No.
Q How is the freight fee set?
A Well, we enter into an agreement with CSX, and we set a fee for that. That's for somebody that if somebody shipped a car off the street, that would be the rate.
Q That is what this is, Exhibit 9?
A That's what they call a Rule 11 rate.
Q Okay. So the rates, then, that are applied to the shipments that come out of the Coastal facility, those are pursuant to your agreement with CSX?
A Yes.

Q How is that calculated, by weight?
A No.
Q By content?
A That's a portion of it.
Q Okay. What else is involved in that?
A The distance it travels.
Q Anything else?
A That's pretty much it. Since we have a weight restriction, it doesn't really affect us much.
Q And do you know what Coastal's loading fees are?
A No.
Q Did you ever ask?
A No.
Q Do you know if they ever filed anything with the STB?
A No.
Q Do you know if the STB regulates the loading rates in any way?
A They don't regulate anybody's loading fees.
Q That would include Coastal's?
A And us. They don't have the authority to regulate freight rates.
Q And do you know if New York and Atlantic Railroad has ever quoted Coastal's loading fees to customers?
A No, I don't.
Q And you haven't because you don't know what the

loading fees are, right?
A No.
Q Now, the freight transportation charge, that varies, according to distance and content?
A Yes, size, distance, content.
Q Those are the three factors, mainly?
A Pretty much.
Q And is there a disposal agreement entered into at any point with the customer, meaning at the end of the line what's going to happen to the C&D?
A Well, Coastal has an agreement with somebody.
Q Coastal does?
A With the landfill.
Q With the landfill in Ohio?
A Yes.
Q And Coastal charges the customer for that part of the process?
A Yes, I would think so.
Q And New York and Atlantic Railroad is not involved in that process at all, correct?
A No.
Q And they are not involved in the initial contracting with the customer at all, correct?
A No.
Q And Coastal then makes whatever necessary

arrangements need to be made with the landfills at the end of the line?

A I would assume so, yes.

Q And in doing so, they don't do that on behalf of New York and Atlantic Railroad, correct?

A No.

Q That's not correct?

A No, they don't do it.

Q So as far as that step in the process and the initial contracting with the customer and arranging for the loading fees, the disposal fees, New York and Atlantic Railroad has no involvement in that, correct?

A No.

Q No, they have no involvement?

A Correct.

Q Now, the next step, then, would be that the trucks come and deliver the C&D debris to the site, correct?

A The next step from what?

Q After the contract. You entered into the contract, you say we want you to bring in, and we want you to load and ship this.

A Yes.

Q Now, the trucks that come in and deliver the debris, are they owned by New York and Atlantic Railroad?

A No.

Q Are the drivers employed by New York and Atlantic Railroad?
A No.
Q Does New York and Atlantic Railroad exercise any supervision over those trucks or trucking companies?
A Yes.
Q And how is that?
A In our normal safety operations that we have gone through with Coastal, you know, the route they take and that sort of thing.
Q Okay.
A And if we see them do something unsafe, we would say something.
Q Other than safety, operationally?
A No.
Q Did New York and Atlantic Railroad have any control over who Coastal contracts with to deliver C&D debris to the site?
A Within the agreement we do.
Q And where is that?
A Paragraph 1.04(A). If we knew they were taking something, like MSW, we would have control over it. We'd stop them.
Q That's the contract. That's not the trucking company, though.

My question is, do you have any control over who they enter into these contracts with?
A No, that I don't.
THE COURT: Can I just clarify. Coastal doesn't own and operate the trucks. It comes to the site.
MR. CLARK: It contracts -- I'll not testify.
THE COURT: They deal with outsiders who do that.
MR. McHUGH: Coastal does not own or control any trucks.
THE COURT: Thank you.
BY MR. CLARK:
Q And does New York and Atlantic Railroad know where those trucks come from in terms of where they are delivering materials from?
A Some of them did.
Q How would they know that?
A Well, the marking on the door, or something like that, we'd know. If we're there to see it. But generally speaking, no, we don't.
Q So you wouldn't necessarily know the identity of the trucking company, correct, unless there was a marking on the truck?
A Correct.
Q And you wouldn't know where the sites were that they are trucking materials from?

A Correct.
Q And you wouldn't know what was contained in the trucks other than what's supposed to be contained in the trucks, correct?
A Correct.
Q So, then, with respect to the delivery process, the step in the process where the trucks deliver the C&D debris, New York and Atlantic Railroad has no direct involvement in that part of the process either, correct?
A No, that's why we have Coastal there, to do it for us.
Q Now, once the trucks arrive, they dump their debris on the floor of the Coastal facility, correct?
A Correct.
Q And New York and Atlantic Railroad is not involved in that part of the process either, correct?
A No.
Q No, that's not correct?
A No, we're not.
Q New York and Atlantic Railroad has no employees involved in that process, correct?
A No.
Q In fact, does New York and Atlantic Railroad have any employees who are full-time assigned to work at the Coastal facility?

A No.
Q And once the debris has been dropped on the floor, it is then, as we just discussed, sorted, and anything that is not C&D is extracted by the Coastal employees, correct?
A Yes.
Q And in that process they use payloaders, bobcats, things like that; is that right?
A Yes.
Q And do you know if those pieces of machinery and equipment, do those belong to Coastal?
A Yes.
Q And that work is all done by Coastal employees, correct?
A Yes.
Q And in terms of the manner in which they do that, the manner in which they sort and extract, does New York and Atlantic Railroad govern how they do that?
A No.
Q Is there any equipment at the Coastal's facility that is owned by New York and Atlantic Railroad?
A Yes.
Q And what is that?
A That crane lifter at the end of the yard and we'll store track equipment there periodically.
Q Other than that?

A No.
Q And the tools, then, that are used for the sorting and the loading, that is Coastal's equipment, correct?
A Yes.
Q New York and Atlantic Railroad doesn't provide any machinery or tools to Coastal for that process?
A No.
Q Once the material, then, has been sorted and extracted, the material that is uncontaminated C&D is then loaded. Is that the next step?
A Yes.
Q And that's done by Coastal employees?
A Yes.
Q Using Coastal equipment?
A Yes.
Q And they actually load into Coastal's rail cars, right?
A Yes.
Q And New York and Atlantic Railroad has no involvement in that step in the process either, correct?
A Other than the fact that it has to be loaded correctly.
Q They have to check once the loads have been done, whether it has been loaded correctly?
A Yes.

Q And under the terms of your agreement, if they haven't been loaded correctly, that then goes back to Coastal. It's their responsibility to fix it, right?
A Yes.
Q In fact, under the terms of your agreement, everything that happens at the facility before the New York and Atlantic Railroad locomotive coupled up with those cars, it's Coastal's responsibility, right?
A Yes.
Q And they indemnify New York and Atlantic Railroad for anything that could possibly happen at the facility, is that right?
A Yes.
Q And in fact they indemnified New York and Atlantic Railroad for any damages that could happen outside the facility resulting from something that happened in the facility, right?
A Well, if it's connected to one of their shipments.
Q Right. If they don't load something properly and then it falls off once you're pulling it, they are on the hook for that, right?
A Yes.
Q And I just direct your attention to 1.08(A) of the operations agreement, which is Town's Exhibit C.
That's entitled compliance with loading rules.

Do you see that?

A Yes.

Q And it indicates, "Coastal shall have the sole responsibility at its sole expense for properly packaging, labeling, marking, blocking, raising, placarding, loading and unloading the commodities tendered by customers at the facility to or from equipment to be transported pursuant to this agreement." Right?

A Yes.

Q That basically says Coastal, you're on your own for what you are doing on that site, right?

MR. LANE: Okay to the characterization.

THE COURT: Okay. I'll sustain it.

I can read it.

MR. CLARK: Withdrawn.

Q And 1.08(a) says that all the expenses that are associated with the loading process are borne by Coastal?

A Yes.

Q So New York and Atlantic Railroad doesn't pay anything towards the operation of that site, correct?

A No.

Q No, they don't?

A No, we don't.

Q And once the cars are then loaded, that's when New York and Atlantic Railroad gets involved, correct?

A Yes.
Q And their involvement is the locomotive comes in, couples up to the cars, and they are ultimately then shipped out?
A They are inspected and shipped out.
Q Okay. I believe you have testified early that that generally happens at night so as not to interfere with the operations at the Coastal facility?
A Generally, but probably a couple times a week, we'll do it in the daytime.
Q When you say they are inspected, they are inspected by whom?
A The train crew.
Q Your train crew. New York and Atlantic Railroad's train crew?
A Yes.
Q And the cars at that point when they are inspected, they are already loaded, right?
A Yes.
Q Has the netting been placed on the top of them?
A Yes.
Q So the visual inspection is basically what the train crew can see is at the top of the car, right?
A Well, yeah, they look over the car to make sure it is sitting straight and directly loaded and no damage to the

car.
Q Right. Are they looking for what is in the car? I mean, is that part of their inspection?
A Other than the fact they look to make sure it was put in correctly, no, they are not.
Q So they are not concerned about what is in it, just whether it was loaded properly, correct?
A Yes.
Q And if you look at 1.05 of the operations agreement, it's a little confusing, because it goes 1.05, 1.05 and 1.04. But we'll stick to the 1.05, and it's entitled Custody of Lading and Equipment?
A Yes.
Q It says, "Railroad's responsibility and liability for the cars and their contents bound to or from the facility ends when the cars are uncoupled from the railroad's locomotive at the facility and the railroad's responsibility and liability is resumed when the cars are coupled to the railroad's locomotive," right?
A Yes.
Q So up until the point when those loaded cars are coupled to your locomotive, you have no responsibility over or liability for them, correct?
A No.
Q No, that's not, correct?

A No, we do not.
Q And once they've been coupled is when the crane crew inspects them to see if they've been loaded properly, right?
A Actually, they do it before they couple on.
Q But they come in on the locomotive, the train crew, right?
A Yes.
Q And then once they've been coupled, inspected, then they are shipped to their destination, right?
A Yes.
Q And does Coastal have any involvement in the process once they've been coupled and they are on their way?
A Yes.
Q And what is that?
A They do all the billing for the cars.
Q In terms of the actual transporting, once they are coupled to a New York and Atlantic Railroad locomotive, does Coastal have any further involvement?
A Well, they check on how fast they are moving and to make sure that -- because we have to get it back timely, they make sure they are moving throughout the route. But they don't own the locomotive and they don't pull the cars.
THE COURT: Did I understand you to say they own

some of the cars themselves?

THE WITNESS: They own them all -- well, that's not true. They own them all, but we also, since we're doing such a good business there, we actually had to bring some in that they don't own, that they are leasing. But they do own all the cars, all the original bunch.

THE COURT: And the others are your cars or is it different?

THE WITNESS: There's another C&D operation that we borrow them from and CSX cars that we borrow.

Q And Coastal pays if they have to use those cars, correct, they lease them?

A As part of the rate. The CSX ones, they would have to pay a fee. When they lease a car, they would have to pay something for them.

Q So once the loaded cars have been shipped out, they are ultimately delivered to their destination by New York and Atlantic Railroad or CSX?

A CSX.

Q Right, CSX. And Coastal is responsible for billing and collecting the fees?

A Correct.

Q And does New York and Atlantic Railroad have any involvement in the billing or collection process?

A No.

Q And, in fact, New York and Atlantic Railroad doesn't get any money for any of the services performed by Coastal at the facility, correct?
A We get the per-fee charge per car.
Q You get a usage fee, right?
A Yes, that's what that is about. They pay us for each car.
Q Well --
A But I -- I don't get a division of what they are getting.
Q Right. Their arrangement, they charge a loading fee, whatever it is, you don't know, but they charge it?
A Right.
Q And they are obligated to pay a usage fee to New York and Atlantic Railroad of $20 a car?
A Correct.
Q And that is separate and apart from their loading fee?
A Well, that's where they get the money.
Q They could get it anywhere. But they are obligated to pay you $20 a car; is that correct?
A Yes, that would be correct.
Q If you look at 3.02 of the agreement, it describes the use charge and it says, "Coastal shall pay the railroad for the use of the facility and in recognition of

the previous contributions to the construction of the facility by the parties a use fee of $20 per loaded rail car. The usage fee for each loaded car in excess of 1,200 in any contract year as determined by the anniversary of the effective date shall be reduced to $5." Do you see that?

A Yes.

Q Okay. The $20 -- withdrawn.

So the usage fee, according to the agreement, is for use of the facility and in recognition of the previous contributions made by New York and Atlantic Railroad?

A Yes.

Q And it's not tied to the loading fee?

A No, I guess it's not.

Q In fact, regardless of what the loading fee is, they've got to pay you $20 for every car they ship out of, correct?

A Correct.

Q And it's based on at least using the first year, in terms of the minimum requirements, the first year with a 1,200-car minimum requirement, correct, that Coastal was obligated to ship out?

A I guess it was. Let me look. (Perusing.)

THE COURT: We're spending a lot of time on this. I think I get the point. I don't know if there is

any more relevance to this area.
Q The point is, at $20 per car, if they haven't paid for the first 1,200 cars that came through, that is $24,000 they have to pay you on an annual basis?
A I guess.
Q That's the same as the rent was on the previous agreement, right?
A Yes?
Q And you, being New York and Atlantic Railroad, paid Coastal nothing for anything that they do in this entire process, right?
A No.
Q No, that's not right?
A No, we do not.
Q Now, with respect to the supervision by New York and Atlantic Railroad over the Coastal operations, you said there is nobody there on a full-time basis from New York and Atlantic Railroad, right?
A Correct.
Q When you say you yourself visit approximately two times a week, sometimes you go in, sometimes you just drive by?
A Correct.
Q There is no on-site supervisor from New York and Atlantic Railroad, right?

A Again, correct.
Q Okay. And New York and Atlantic Railroad has no control over Coastal's employees, right? Can't hire them, can't fire them, can't discipline them?
A No.
Q No, you can't?
A No, we can't. Well, the discipline part, if we see somebody doing something unsafe, again, we surely can.
Q You do tell Coastal?
A I do tell Coastal.
Q In terms of the method or the manner in which Coastal does the loading, the tools they use, New York and Atlantic Railroad doesn't get involved in it, correct?
A Correct.
Q And in terms of the maintenance of the facility and the maintenance of the tools, no responsibility of New York and Atlantic Railroad, correct?
A Correct.
Q And, in fact, even the maintenance of the tracks, which under the FRA you, New York and Atlantic Railroad has the responsibility for inspecting, right?
A Yes.
Q But if there is something wrong with the tracks at the facility, Coastal has to fix it, right?
A If it's inside the fence.

Q Now, I'll direct your attention to 4.01(D) of the agreement. Do you see that provision?
A Yes.
Q The first portion of that, entitled Article 4, Covenants Over Coastal. 4.01(D) states that Coastal shall at its sole cost and discretion obtain any applicable required permits, licenses, waivers, consents or other governmental authority required for it to operate the facility.
Do you see that?
A Yes.
Q And in this case, Coastal didn't obtain any permits from the Town of Babylon to operate or construct this facility, right?
A Correct.
Q And if Coastal was exempt from local regulations, they wouldn't have to obtain those permits, correct?
A Correct.
THE COURT: What is that, building permits?
MR. CLARK: Building and usage.
THE COURT: And usage?
MR. CLARK: Correct.
Q And 4.01(E) says, "Should railroad's operations be interrupted by any governmental agency, public authority or any entity authorized to do so, due to any deficiency

in Coastal's permits or as a result of Coastal's failure to obtain or comply with same, Coastal shall defend, indemnify and hold railroad harmless from any and all costs, including attorney's fees." Do you see that?

A Yes.

Q Are New York and Atlantic Railroad attorney's fees in this matter being paid for by Coastal?

A No.

Q And to date, there has been no interruption in New York and Atlantic Railroad's rail operations, correct?

A We have interruptions every day.

Q Well, with respect -- as it pertains to the freight from this site?

A Correct.

Q Now, isn't it true that under the terms of this agreement, Coastal is simply a contractor for New York and Atlantic Railroad?

A I don't see it that way. I think they are agents to operate the facility because they have the expertise to do so.

Q Okay. Could you just look at the first page of the agreement, under the Recitals portion, second last from the bottom. Could you just read that, if you would?

A Out loud?

Q Yes.

A "Whereas the services shall be limited to providing" --

Q No, I'm sorry, second from the bottom. That's the bottom.

A I'm sorry. "Whereas, the railroad desires to engage Coastal as railroad's contractor to operate the facility on railroad's behalf."

Q Okay. So, according to that portion of the agreement, Coastal is the contractor engaged in the operation the agreement?

THE COURT: There's an objection.

MR. LANE: Objection. Calls for a legal conclusion.

THE COURT: Sustained.

MR. CLARK: One more second, your Honor. I'm just about finished.

BY MR. CLARK:

Q Mr. Krebs, could you just look at what was previously marked as New York and Atlantic Railroad Exhibit 1, please. That's the home page?

A Yes.

Q Now, do you know how long New York and Atlantic Railroad has had this web site?

A I think from the very beginning.

Q From the very beginning, back in the '90s, late '90s?

A '97, if I remember right.
Q Are you familiar with the web site, check it? --
A Yes.
Q -- occasionally?
A Yes. I basically know everybody on it, so I don't have to check it.
Q In your New York and Atlantic Railroad 1, the home page, did you print it out?
A Did I purchase it?
Q No, print this out. Did you print this out?
A I don't remember if I did or not.
Q Do you see the date at the bottom, 5/12/2005?
A Yes.
Q Do you know if that was the date this was printed?
A I guess. I'm assuming that is what that is. I don't know.
Q Okay. I just direct your attention, then, to New York and Atlantic Railroad Exhibit 3, which is the facilities page from the web site.

Do you see that?

A Yes.
Q Do you have that in front of you?
A Number 3, yes.
Q Yes, 3.
A Yes.

Q Do you see the date at the bottom of that page?
A Yes.
Q 5/13/2005?
A Yes.
Q Did you print this page up or this portion up?
A I didn't.
Q Do you know where it was printed out on 5/13 and Exhibit 1 was printed out on 5/12/2005?
A I don't have any idea.
Q Exhibit 3 is where it lists all the affiliated facilities for New York and Atlantic Railroad, correct?
A Yes.
Q And right there at the top is Coastal Distribution, which you testified earlier you think is the biggest operation you have on Long Island now?
A It's the biggest one we have in the railroad.
Q Biggest one you have in the railroad.

Showing you what has been marked as Town Exhibit F for identification.

Will you review that document?

A Yes.
Q Does that appear to be the facility's page from the New York and Atlantic Railroad web site?
A Yes.
Q Do you see the date at the bottom of it?

A Yes.
Q 5/11/2005?
A Yes.
Q Do you see at the top where it has transload operations?
A Yes.
Q Is Coastal Distribution cited there as one of its transload operations?
A No.
Q Do you see on the last page of the three-page document, the third page, it just says at the top this page was last updated on July 16, 2004.
Do you see that?
A Yes.
Q Now, look back at Exhibit 3, New York and Atlantic Railroad Exhibit 3 --
A Yes.
Q -- the last page, page 3?
A Yes.
Q Do you see what it says at the bottom?
A Yes.
Q What does it say?
A It says http:\\www.anacostia.com, NYA facilities.
Q Mr. Krebs, I'll be more specific. The last part of the printed portion of the web site that appears there, do

you see what that says?

A Yes, this page was updated May 13, 2005.

Q So the facilities page of the New York and Atlantic Railroad web site was updated May 13, 2005 to include Coastal Distribution; is that correct?

A Well, it appears to be that, but I had nothing to do with that.

Q So your biggest operator on Long Island didn't even appear on your web site until six days ago; is that right?

A That's correct.

MR. CLARK: I have nothing further, your Honor.

THE COURT: Any other examination of this witness?

MR. CUTHBERTSON: No, your Honor.

THE COURT: Any questions, any further questions of this witness?

I have a question I want to ask Mr. Clark. What is the use you wish to seek?

MR. CLARK: The permit?

THE COURT: What is the permit you are seeking?

MR. CLARK: It's not informing use of the property.

THE COURT: It has been used forever as nonresidential property.

MR. CLARK: Well --

THE COURT: For the last 99 years.

MR. CLARK: For the last 99 years, it has been leased by the railroad. It hasn't been used as a transfer station.

THE WITNESS: Yes, it has.

THE COURT: Okay. Thank you.

Any further questions of this witness?

FURTHER RECROSS-EXAMINATION

BY MR. McHUGH:

Q To clear up some confusion, before Coastal took over that, New York and Atlantic Railroad handled telephone poles and some transformers, but on your cross-examination you said New York and Atlantic Railroad never transloaded on the site until Coastal came in.

How were the telephone poles and the transformers handled? If they weren't handled by the railroad, who handled them?

A Who came in, unloaded it.

Q You spotted the cars from the property and used it as a team track?

A Yes.

THE COURT: That term has been used before. If you can go through it with the witness, spotting a car.

Q Can you explain for everybody what spotting a car

means?
A Spotting a car means taking the car to the industry and placing it where it can be either loaded or unloaded,, and pulling a car is when you go and you take it back.
Q Would you explain what a team track is? Explain where the term comes from, so we can understand the history of it.
A Well, you probably know the history better than me.
Q Because I have grayer hair doesn't mean anything.
A The team track idea means that basically anybody can come up to a facility and unload, and the team idea was at least to have teams of horses, bringing in wagons, bringing partial loads in and consolidate them, and put them in the box car, or vice versa. It would be unloaded and hauled off to wherever it was going. But it was public. Anybody could get in there.
Q Is it correct in the history of the railroads, most stations had a team track for public delivery?
A Every station had a team track.
Q On the loading and the inspection of the cars set up by Coastal and with regard to basically the content of the car, have you ever received a complaint from anybody that the loading of the car was not something that was on the bill of lading, that something was in there that shouldn't have been in there?

A No.
Q You stated that you were building a locomotive shop at the present time. Is that correct?
MR. CLARK: Objection.
THE COURT: Overruled.
THE WITNESS: I can answer?
THE COURT: Yes.
THE WITNESS: Yes.
Q And are you building that with your own crews or did you have contractors to do that, sir?
A No, we have contractors do it.
Q Do those contractors bring their own tools?
A Yes.
Q And were those contractors responsible for the quality of their work?
A Yes.
Q Now, you indicated that Coastal owns a fleet of cars; is that correct?
A Yes.
Q And you also use CSX cars through their traffic?
A Yes.
Q Is it routine for a railroad to own cars to service its customers?
A Yes.
Q Does the New York and Atlantic own any cars, any

general service freight cars in the interchange service?
A Yes.
Q How many do you own, sir?
A I'm not really sure. There's like 200, or in that neighborhood, 180 or something like that. Actually, on a long-term lease, is what they are.
Q Could you tell us what per diem means, sir?
A Per diem is what you pay for a car. It's kindly known as car hire. What it is is the rate that railroads charge for cars while they are on other properties.
Q And just to make it quick and easy, is it true that railroads like to own cars so that their per deem charges are balanced?
A Yes.
Q So they are getting pretty much what they can?
A It's pretty much also a wash.
Q So what Coastal is doing is the same thing, using some CSX cars and they can't their own?
A Yes.
Q And that's part of the economics of business?
A Yes.
Q The gentleman from the Town pointed out it's Coastal's responsibility to fix the track, and you inspect it; is that correct?
A Well, that's not exactly correct. It's their

obligation to pay for it. If they didn't fix it, I would be the one that got hammered, and I would hammer them.

Q So, in other words, as for the world, you are responsible?

A Correct.

Q As between you guys, they are responsible (indicating); is that correct?

A That's correct.

Q Now, if you rented this land for nonrailroad use, would you be willing to settle for $24,000 a year?

A No.

MR. CLARK: Objection.

THE COURT: I'll let it stand. Overruled.

MR. McHUGH: No further questions.

THE COURT: Any further questions for this witness?

MR. CLARK: Yes, your Honor.

RECROSS-EXAMINATION

BY MR. CLARK:

Q The contractors that are working on your railroad repair facilities, they bring their own tools?

A Yes.

Q And they conduct their operations without general supervision by New York and Atlantic Railroad, correct?

A Actually, no. I'm there.

Q Okay. Are those contractors agents of New York and Atlantic Railroad?
A Actually, we have similar agreements with them for insurance.
Q For insurance?
A For insurance and for liability and indemnifying us if they get hurt on their property or do something wrong. We have similar agreements.
Q To say that you are not responsible for anything that happens to them; is that correct?
A That's correct.
Q And in terms of your knowledge of the use of this property, the Coastal property, how far back do you know -- withdrawn. For how long in your personal knowledge has this site been used for loading materials for railroads?
A From my personal knowledge?
Q Yes.
A When we took over in 1997. It was being used at that time and used ever since.

MR. CLARK: Okay. Nothing further, your Honor.

THE COURT: Anything further?

MR. McHUGH: One further question.

FURTHER RECROSS-EXAMINATION

BY MR. McHUGH:

Q Do you have a building permit for your locomotive repair shop?

Do you have a permit for your building locomotive repair shop?

A The answer is no.

MR. McHUGH: Nothing further.

THE COURT: Perhaps we can get the witness back. Did he leave?

MR. CUTHBERTSON: He did leave, your Honor.

THE COURT: Does plaintiff have any further witnesses?

MR. McHUGH: Yes. Mr. Rutigliano.

J O S E P H R U T I G L I A N O , having been first duly sworn by the Clerk of the Court, was examined and testified as follows:

THE COURT: Good afternoon.

THE CLERK: -- L-I-A-N-O?

THE WITNESS: Correct.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. McHUGH:

Q Good afternoon, Mr. Rutigliano.

A Good afternoon.

Q Could you tell us if you are presently employed, sir?

A Yes, I am.

Q What do you do?

A I'm a member of Coastal Distribution.

Q What is your role in Coastal Distribution?

A Managing member.

Q How long have you been with Coastal?

A Since 2001, its formation.

Q Were you present when it was formed?

A Yes.

Q Could you tell us why it was formed?

A Coastal Distribution was formed to better utilize the rail links between Upstate New York and Downstate.

Q Could you please tell us how that came about, sir?

A Back in 2000, Coastal Distribution was not formed, of course, but there was an individual, my associate, Mr. Martin Sternberg back in 2000 was contacted or called from representative of Canadian Pacific Rail. Canadian Pacific Rail at the time was working along with New York State DOT office of freight rail transportation and Mr. Jack Guinan.

At that time in 2000, Mr. Sternberg and I had met as acquaintances, and in a conversation it had come up regarding Canadian Pacific Rail looking to better utilize the rail links and New York State's push to use the rails better. Mr. Sternberg's experience at that time, I didn't know, but he created the Harlem River rail yards with the Gallisi group, which is how we got connected to Canadian Pacific.

Canadian Pacific was negotiating with New York State DOT to allow CSX, who had purchased the rights to the rail links coming down from upstate during Conrail, when CSX they reacquired these routes, and this main route was the New York City route and Canadian Pacific was not being able to track over that route.

So Canadian Pacific went to New York State and the Governor's office in an attempt to get that route or tracking rights over that route down to New York City.

That's it.

Q Why did Canadian Pacific seek you out?

A Because they wanted to see if there was any available -- anything that we could do to assist them in getting freight business down into the route, because the route was then opened to them, and CP realized that they did not have enough freight to put on the new route that the state basically asked another business to give a

competitor tracking rights over.
Q What did you do with regard to CP?
A We consulted them and advised them and ultimately took the position with them with regards to a rock quarry, Canadian Pacific owned a rock quarry in Fort Ann, New York, which is just north of Saratoga County, and they allowed that asset to be quarried and mined and that material to be loaded onto rail, exclusively onto rail, and that material would need to be shipped around the country or down to New York City, preferably using their rail lines.

So they basically pledged that asset into an arrangement with Coastal, a contract crusher, to get the material from upstate to downstate using their rail, thereby generating car volume and freight.
Q And were you successful in that endeavor, sir?
A We were quite successful. In 2001 we formed a company, Marty and myself, and brought that endeavor, which survives today.
Q Okay. Now, did there come a time that either you contacted the New York and Atlantic Railroad or they contacted you?
A Well, New York and Atlantic Railroad, of course, being the short line carrier, the terminating point from the CP stone that was the aggregate stone that was

terminated at New York and Atlantic Railroad. So they were always in the loop, being the short line.

Q So they were the delivering carrier?

A Yes.

Q All that stone you are talking about is coming onto geographic Long Island?

A Yes, we were able to help CP with the Long Island market. The consumption of Long Island reaches some five million tons a year. Thereby the market, we felt, was marketed.

Q So CP went to Fresh Pond and New York and Atlantic Railroad delivered it on Long Island?

A Correct, both are correct there, because the Long Island Rail Road ended up using Canadian Pacific stone, as did local businesses on Long Island, and they still continued to use it.

Q Okay. Now, let's go from -- how do we go from the stone traffic to Farmingdale?

A Well, the stone traffic and Farmingdale are very much related. The stone traffic came down. It still comes down today. Canadian Pacific delivers freight to New York and Atlantic Railroad, which is taken directly by the New York and Atlantic Railroad at the Fresh Pond yard.

The other portion is drayed or shoved over to a customer base on Long Island down in Yaphank. Both of

them are on the Yaphank border. One customer is Prima Asphalt, another customer is Apple Redimix Concrete.
Q So, this traffic is still moving?
A Yes, it is.
Q Is this traffic moved from the Farmingdale facility, the subject of this litigation?
A No, aggregate. Although the initial push to the Farmingdale facility is to have a stockpile of aggregate available for the local business within a two-and-a-half mile radius of Farmingdale, there is a million tons per year of aggregate consumed.
And to backtrack, with DOT, most of the aggregate purchased is purchased by DOT. They use it in roadways, so indirectly or directly it gets placed into a contract for DOT. That's why DOT was very interested in what we were attempting to do.
Q Let's get back to Farmingdale.
A I'm sorry.
Q Did there come a time when you had a conversation with the New York and Atlantic Railroad with regard to the operations of the Farmingdale rail yard?
A Yes, those conversations started back in 2001 or '2.
Q Okay. Who contacted whom about that particular idea?
A Coastal contacted New York and Atlantic, only after another piece of property in the area fell through that

DOT was actually sponsoring Coastal to go into.

Q Who spoke to whom at New York and Atlantic Railroad?

A At New York and Atlantic Railroad, if my memory serves me right, there was a gentleman by the name of Bridges or Bridgerd. Mr. Bridgerd was the equivalent of Fred Krebs, I believe the president, when we first started the dialogue.

Q And can you remember what the discussion was at the time?

A The discussion was an attempt to gain access to the piece of property in Farmingdale for a stone terminal basically linking Canadian Pacific Railway and the New York and Atlantic Railroad in sponsoring the stone terminal to get trucks off the Long Island Expressway.

Q And what happened with that idea?

A That idea, it continued and there's a component of it today that survives. But the stone, again, is a very difficult commodity to double handle. It's very heavy and you can't truck it very far with the competitiveness of the market. But it survives today.

Q Would you just take us through the evolution of the stone terminal to what we have today, or at the time of what we had until the stop work order issued?

A Coastal is still in the endeavor to get more rail freight and get billings for New York and Atlantic

Railroad, Canadian Pacific and CSX.

We ultimately -- the business goes out of Long Island through the Class 1 railroads, and we developed the terminal as it is today into a world class terminal by the fact that we have an enclosed area, a dry storage area that was not existing at the yard.

Q Let me stop you. Let's start over again.

A Go ahead.

Q Did there come a time when you talked about taking possession of that terminal from the New York and Atlantic Railroad?

A Yes, 2001 to 2002.

Q Okay. And did you sign a lease with them at that time?

A Yes, we entered into a lease in March of 2002 with New York and Atlantic Railroad.

Q And was there an obstacle to you taking possession of the property at this time?

A Yes, there was. Long Island Rail Road was reluctant. They were occupying the space inside the Y and they did not have money in their budget to move out. And they are occupying the Y. And that was a piece of property that is needed with the rest of the property.

Q Can you tell us what they were doing within that space inside the Y?

A Excepting delivery of ballast stations for their rail track maintenance, it was a transfer facility for materials delivered from the stations. There was some platform MSW and some stations C&D from track work that was loaded, containers on site there.

Q Okay. And how did that get resolved?

A Mr. Guinan stepped in from New York State DOT and basically brokered an arrangement by which Coastal and NYA, because of budgetary constraints, would pay for the move of Long Island Rail Road, and they moved that yard somewhere to Yaphank, I think. I'm sorry, Bayshore.

Q I show you a document that has been pre-marked as Exhibit 1 for identification, and I'll ask you if you can tell us what that is, sir.

A This is a response letter by Jack Guinan responding to a letter I sent him on April 26 asking him to intervene with the Long Island Rail Road and the New York and Atlantic Railroad.

Q And did there come a time when the lease was revised to reflect an agreement with the Long Island Rail Road?

A Yes, we modified the lease, I don't know, maybe sometime in September, I believe, and it reflected a way for Coastal to recoup some of its payment for the move.

Q Did there come a time when you determined that a modernization of the terminal was required in order to

address the need for the modern market?
A Yes, that was always contemplated. Again, with the stone move being contemplated at the yard, they were seeking to put in several hundred thousand dollars of conveyor systems to mechanize and handle the stone delivered to the yard, the way to do it, an efficient stone yard.
Q Did there come a time when you determined that you needed to erect a cover of some type in the facility?
A As we further looked at market potential, we realized Long Island is a very big consumer of construction products, plywood and sheet rock and items of that sort, and a very big exporter of the materials generated from the use of construction material, which is demolition or construction debris.
Q And approximately when did you come up with the plans for the present facility?
A The blueprinted plans were probably conceived sometime -- well, actually the consensual plans were conceived sometime back in April or May of '03, and it led to blueprints and drawings and engineering and surveying, probably sometime in August of '03.
Q And did you have any communications with the Town of Babylon during this process?
A Communications with the Town of Babylon and Joseph

Rutigliano and Coastal Distribution, because I had a business dealing with the Town of Babylon, maybe ten years ago, maybe fifteen years ago.

But from 2001 on forward, I've been in contact with the Town of Babylon, vis a vis letter writing, meeting. The supervisor, the current supervisor met with me when he was a councilman.

The issuing planning department gentleman, Mr. Bessimer, met with me when he was the commissioner of planning and development. I think that was in 2001. Various attorneys at meetings, regarding Coastal's plan to effectuate a distribution terminal of something in Babylon, when it was the stone idea, we vented that out and continued to vent out different ideas.

Q When the present idea was conceived of, did you take that to the Town?

A Yes.

Q Who did you speak to of the Town with respect to the present plans?

A One was Mr. Casserley. Another, his name slips my mind, on the top of my tongue, another building inspector.

THE COURT: Spell that, please.

THE WITNESS: C-A-S-S-E-R-L-E-Y, I believe. And various people. I think that at the time, Mr. Klusner, K-L-U-S-N-E-R, I believe.

Q What was the purpose of these meetings, sir?
A To discuss and vent out Coastal's entry into that property and what we planned to do on that property and how Coastal was going to handle stone. That was the main argument, the main discussion early on was the stone terminal at which various members were present.
Q And did you discuss the design of your building with them at all?
A The fact that we are erecting a structure, yes. The design was left to the architects. I know they had interaction with the Town.
Q And I show you what's been premarked as Plaintiff's Exhibit 2 for identification.
MR. McHUGH: First may I ask that Plaintiff's Exhibit 1 be admitted in evidence, your Honor.
THE COURT: Can we make these C for Coastal?
MR. McHUGH: Coastal 1 through C.
THE COURT: All the others are A.
MR. McHUGH: New York and Atlantic Railroad.
Q As to Exhibit 2, would you tell us what that is, sir?
A This is a letter from Oliver Wilhelm from the Town of Babylon to Mr. C-Y-B-U-L, Cybul & Cybul, then the architect that Coastal employed on the design of the facility.
Q And had you had any conversations that were similar

to this letter prior to the date of this letter?
A Yes. There was several, three of which I recall were different individuals, and again, I want to say Annunziata, but it is Franchesi.
I believe there is a building inspector, Franchesi, Mr. Casserley and Bessimer.
Q What discussions did you have with them?
A We were seeking the input from the Town as to what jurisdiction and what regulations the Town has over the property.
Q And what did they tell you with regard to that?
MR. CUTHBERTSON: Objection, your Honor. Hearsay as to what was said.
THE COURT: Overruled.
A Well, they said the Town of Babylon does not have any jurisdiction.
THE COURT: Specifically?
THE WITNESS: Very specific. Mr. Franchesi, on my last meeting sometime in August of '03, said what is it that you don't understand? The Town of Babylon doesn't have any jurisdiction over the Long Island Rail Road property.
And then what made me keep going back was the fact that our architects were from New Jersey and they were scratching their heads, saying, we need to submit

plans to a building department or we can't stamp the plans.

Ultimately, this letter was pasted on the cover sheet of the plans, so all the building contractors and the architects felt safe that this was the Town of Babylon's position with respect to this project.

Q Now, did you have any discussions during this period of time with Pinelawn Cemetery?

A Yes, my discussions with Pinelawn Cemetery date back to, I believe, late -- sometime in late '01 or early '02, when Coastal was first assessing the site, and meandering where -- to see if the site could meet the needs for the stone distribution.

Q At the time you first communicated with Pinelawn Cemetery, were you aware of the title of the land they were looking at?

A Not at all. I did not become aware of the title issue to the land until October '03, when -- in October of '03, mid-October Mr. Krebs let me know some issue had arose which I was totally blindsided by.

Q I will show you a document that has been pre-marked as Coastal 3 for identification, and ask you if you can identify that.

A Yes, Coastal 3 appears to be -- and I fully believe it is -- it's the renewal, a copy of the renewal of a

lease between the Metropolitan Transportation Authority and the Pinelawn Cemetery.

MR. CUTHBERTSON: Your Honor, at this point I would interpose an objection. The letter, whether there was a renewal of the lease or whether there wasn't, is the subject of a separate litigation and not relevant to this particular litigation.

THE COURT: All right. I'm not going to accept the witness' conclusion, if that is what you are concerned with, as far as the testimony. It sounds to me that that is a very substantial legal issue. Is that your sole concern?

MR. CUTHBERTSON: Yes, it is, your Honor.

THE COURT: I'll take his characterization. That issue isn't before the Court, I don't think.

MR. CUTHBERTSON: No, it's not.

MR. McHUGH: No, it's not, your Honor.

THE COURT: That's why I asked you that question at the outset. You don't take any unique position in this case as Pinelawn?

MR. CUTHBERTSON: Just the use of the property is illegal.

THE COURT: You stand in support and basically is the defendant's position.

MR. CUTHBERTSON: Yes, your Honor.

BY MR. McHUGH:
Q Mr. Rutigliano, can you tell us how you came to obtain this document?
A Okay. This document was presented to me at a meeting on site, I believe on 10/23 or 10/22, or maybe even -- it has to be after, 10/24. I had a meeting on site with representatives from Pinelawn Cemetery. The people present at that meeting was Mr. Locke, Mr. Mike Sheppa and Mr. Buzz Schwenk. The purpose of the meeting was to review what Coastal was planning to erect on the property. The plans and then the construction was just ready to commence at this time. And prior to having the meeting, I was aware of an issue and an outstanding letter that needed a signature, and I made a demand that prior to meeting, please conclude your business with the MTA, so our meeting would not affect any business you have going on with them.

So I was presented with a copy of this at my request, just to make sure we can speak freely and openly, and that the lease operation was taken care of.
Q And at that meeting did you explain your facility to them?
A Clearly. At that meeting, I reviewed blueprints. We were in the construction trailer. I reviewed blueprints with Mr. Locke, who was the son of the owner, I believe,

of the cemetery, Mr. Sheppa, who was the president of the cemetery operations, and Mr. Buzz Schwenk, who was acting as an advisor to the cemetery and an intermediary between me and the cemetery, going back from when Coastal first appeared on site.

There was some issues about a fence and a cleanup, and Mr. Schwenk, who unknown to me acted as a liaison. I met him during this process.

Q Now, when did you start construction of the facilities that are currently there?

A Well, I would go back to 2002, when we first arrived on the scene. The property was derelict, it was littered with abandoned vehicles, illegal dumps, and in 2002 we commenced a cleanup of the property to remove the debris, the illegally dumped debris.

We had to vacate some of the squatters, several squatters, parked trucks, somebody across the street that parked across, and equipment that was not used, an old rail repair guy.

We started to make the property rentable in 2002.

Q When did you start constructing something other than a fence?

A Other than the fence and the cleanup of the property, October of '03.

Q When did you start erecting the building?

A The actual superstructure in the building, which was a Butler type, delivered to the site on December 4. So December 4 we were completed with the foundation and the erection crew that unloaded the building off the trailer started unloading the steel.

Q What is a Butler?

A We use this term loosely. A three-sided, although it came out very nice, a three-sided shed that goes over rail tracks that were existing. So we were cautious to go over the rail tracks.

Q What is the purpose of the building?

A To house any freight that needs to be contained from the weather. Also to contain any dust from the C&D train-loading operation, and it makes the site much more operable than an open air site.

Up in the seasons here with snow and rain, we need to make sure we can serve a customer base properly.

MR. McHUGH: I'd like to move the admission of Exhibit 2 and 3 in evidence, your Honor.

THE COURT: Okay. Everything is in.

THE WITNESS: Everything?

MR. CUTHBERTSON: Your Honor, I will renew the objection based on relevance.

BY MR. McHUGH:

Q I will show you Coastal 4 for identification, and ask

you to identify that for us.
A Yes, this is a letter from Farrell, Fritz to Coastal, and this letter was received, I believe, on the 16th via overnight mail. And this was basically disputing the renewal that we relied on. And going forward to ask us to remove the structure that was being elected at this point.
I guess the main beams and the steel were in the air. I guess we were pretty well aware in the election and all the underground work was completed. So we were asked to remove the structures.
Q The third page of that letter, sir --
A Yes.
Q -- is Exhibit 2A?
A Yes.
Q -- to the defendants' exhibit, the Town's exhibits as well as the third page of that letter?
MR. CLARK: Just so the record is clear, 2A went in as New York and Atlantic Railroad, 2A.
THE COURT: I see. That's what it was.
MR. McHUGH: Sorry about that.
Q The difference is that 2A is in technicolor.
A Mine isn't.
Q Yours isn't. Okay. (Handing.)
Would you explain to everybody what section of

the leasehold Pinelawn is challenging your right to occupy?
A In the letter that was delivered on January 15, Pinelawn is asking us not to occupy the area designated by the red hash marks. It actually bifurcates or bisects the building.
Q If you do not have the right to use that red area, can you access the national railroad system at all?
A No, we cannot. Both switches that get us out onto the main line would be isolated in the red area, and Coastal would be limited to the northern portion which would render the tracks useless.
Q And did you take any action with regard to the Farrell, Fritz letter?
A Yes, immediately after receiving the Farrell, Fritz letter, I contacted Mr. Krebs and I contacted Ms. Mimi Fermin of the MTA.
Q And what, if anything, did the MTA say about this?
A The MTA said that they were handling it. It would be handled.
Q I show you what has been pre-marked as Plaintiff's Exhibit 5 in evidence, and I ask you if you can identify that for us.
A Yes. We're fast forwarding to the 29th, I believe. This is a stop work order. Actually, "Stop All Work

Immediately Order" issued by Mr. Tim Bessimer on 3/29/04. Tim Bessimer is a building inspector for the Town of Babylon, the former commissioner.

Q Well, tell us when you got this, sir.

A I received this on the 29th. It was served on Mr. Ed Mullen. Mr. Ed Mullen is Coastal's yard manager.

Q And you received it when?

A I received it 3/29/04, sometime after noon, because I know I was at lunch when it was served.

Q What did you do with regard to that, if anything?

A It was written contact building department immediately. I immediately got in the car and drove over to the building department. It was known to me. I've been there before.

Q Did you see anybody in the building department at that time?

A I believe I waited for Mr. Bessimer to come back. I beat him back to the building department and I waited for Mr. Bessimer, the issuing inspector, to come back.

Q And did you meet with Mr. Bessimer?

A Yes, I did. I met with Mr. Bessimer on 3/29/04.

Q What did you say to him and what did he say to you?

A "Tim, you can't be serious with a stop work order." He said, "I was told to serve it, just to get your attention."

MR. CLARK: Objection as to what Mr. Bessimer said.

THE COURT: Overruled.

Q You may continue.

A He said, "I was told as soon as you got here to get a Town attorney." At which time he left and he came back with -- I keep saying Altimari, A-L-T-A-R-A-R-I, is not correct. He's in Oyster Bay.

Q Did somebody come and speak to you?

A Frank, the attorney. I can't remember his last name. I apologize.

Q What did he say to you and what did you say to him?

A We had a conversation and basically it went as there's Pinelawn is pushing very hard as to ownership of the property, and we need to find out what is going on there, and Pinelawn says they own it. We need to have -- to find out what is going on. I then said, Frank -- and I referred to him as his last name -- can somebody tell me his last name?

MR. McHUGH: Alberti.

A Alberti, the Town attorney. I said, "Mr. Alberti, I have a letter from Mr. Casserley to our architects stating that the Town of Babylon doesn't have any jurisdiction."

Verbatim, "I heard about that letter, but I haven't seen it."

I said, "Here's a copy of it."

He said, "My boss will not be very happy."

MR. CLARK: Your Honor, I renew my objection with respect to anything Mr. Alberti said. Also hearsay.

THE COURT: If you take a look at the rule that generates this evidentiary hearing, you see the Court has all kinds of expressions with regard to hearsay. We don't have a jury here. If you want to go through the motion of an objection, I'll give you a standing objection.

MR. CLARK: That's fine, your Honor.

THE COURT: Just trying to get information.

MR. CLARK: I understand. I just want to protect the record.

THE COURT: All right.

BY MR. McHUGH:

Q I will show you what's been marked as Plaintiff's Exhibit 6, and ask you to identify that for us.

A Yes. This letter from Mr. Alberti resulted from our meeting on the 29th, right at the desk of Mr. Bessimer. We had it right at the desk side of Mr. Bessimer, and he actually wanted some clarification.

And Coastal then proceeded to ask them for some clarification of the stop work orders. Was it pertaining to stop all work or stop erection work? And then the stop work order was to stop the erecting of the building that

was ambiguous and we proceeded to respond in a letter form to Mr. Alberti, and we had a meeting. I think Mr. Krebs and I attended the meeting.

Q Now, when you left the meeting with the Town on the 29th, what was your understanding of the permit that you didn't have? What permit did you not have? Did he tell you?

A We did not have a building permit. Therefore, we should cease from the erection of the structure, which was 99 percent complete. The only thing missing was the trim, which we obliged, and waiting, I think, until we had the stay to complete.

Q Then what happened?

A It moved quickly. After speaking to the Town, corresponding with the Town, sometime during that week also, we were served, then, with a summons from Pinelawn Cemetery.

Q That's the action in Supreme Court, Suffolk County?

A Correct. It was Coastal Distribution, New York and Atlantic Railroad, Long Island Rail Road and MTA were sued by Pinelawn Cemetery and Farrell, Fritz, which represented them.

Q Now, what did -- what, if anything, did Coastal do with regard to the stop work order itself other than have the meeting with the Town attorney?

A We had a meeting with the Town attorney and then we were mulling over our options, and everyone, the attorneys involved came up with that we should appeal the stop work order to the ZBA, and we followed that course.

MR. McHUGH: Your Honor, I will offer Exhibit 7. It is read into the minutes of the August -- the September meeting of the Town zoning board. I will just offer that without a witness, your Honor, because this witness was not there, and I don't want to put a witness on just to offer it.

MR. CLARK: What is it?

THE COURT: Is this a Town record, interoffice memorandum, Town of Babylon, Supervisor Vallone to the chairman of the ZBA?

Does anyone want to be heard on this? I assume you produced it over in discovery.

MR. CLARK: No, it was read into the record. We have no objection, your Honor.

THE COURT: Good. Admitted as 7.

Q Now, did there come a time, sir, when the New York State Department of Environmental visited your facility?

A Yes, Coastal continued to do transloading of freight at the facility. The stop work order was to the erection of the building. So Coastal ceased the erection of the building, completed some scale work and track work up to

the site. We continued that on.

We were told not to stop that, because some of the track was disconnects from the main line, thereby rendering the yard inaccessible to Mr. Krebs and New York and Atlantic Railroad. We had some scale work to do. We completed that. During that time, we filed with the ZBA -- what is it called, to get a stay?

Q An appeal.

A Appeal with the ZBA to get a stay, and we commenced operations of our transloading.

Back to the DEC question, I lost my way.

Q When you started operating the transload section of your facility, did the DEC come to visit you?

A The DEC came down sometime in late July, early August. We were asked by the DEC if they could enter the site and view the operation.

Q And did you object to that?

A No, we obliged.

Q In fact, did you object to anyone entering the site during the operation?

A Never. The site is wide open. The gates are wide open. We're right on New Highway. Other than some fencing, so we're not unsightly, we're wide open.

Q Now, what did the DEC, other than drop in that day, what did they do?

A The DEC dropped in. An inspector from the DEC, his first name is Depak, D-E-P-A-K, last name I don't recall, dropped off a card, met with me in the office. He said, let's go out and look at the operation. By all means. Okay, thank you. We'll be calling you.

Q Did he inspect the operations?

A Yes, walked through, around the facility, had a few questions, and left a card and left.

Q And was the facility operating essentially the same way it was operating today?

A Yes, it was.

Q And let's get into that operation a little bit. With regard to the C&D, just the C&D, how does your facility operate?

A Just the C&D portion, basically Coastal accepts less than rail carload ships from local businesses. Most of our local businesses are transfer stations. They deliver them, the material to us after they process and have gone through it. Again, that represents 90 percent of Coastal's business, transfer station. They bring it to us after they process it and we facilitate the outbound shipment to Ohio. This material was going there via truck and rail. It's a cost-efficient alternative to them.

Q And the other 10 percent, the not transfer stations?

A The other 10 percent is representative of a

homogeneous load, a roofer, a roofing company, if a roof of a home was removed, it won't receive any benefit by going through a transfer station. A transfer station benefits by reducing the material, removing the recyclables and basically processing material. Coastal does not process material.

Q Now, a truck arrives at your facility, is that correct, by highway?

A A truck arrives by highway, some by highway, some by roadway, because we have many businesses in the area that doesn't need access to a highway, just by regular road.

Q So you are making a distinction between long distance and short distance?

A Yes, some customers need to use the LIE and some need to only make a left or right turn to come into our facility.

Q From the time a truck comes through the door or the gate to the time the truck leaves the gate, what happens?

A A vehicle enters the facility from the north, and in this diagram it actually is perfect. They would enter from the northernmost yellow portion. There's a gate, they will proceed over a scale at which time the whole vehicle, the gross weight is taken.

They will proceed to the area marked "New Building" drive around the new building, enter through the

side door, at which point a ticket will be viewed by a Coastal employee, and we can basically gauge the size of the vehicle which is captured, and we try to ballpark the weight of the material. Is it high density or low density material?

Q Why do you do that, sir?

A Because that becomes a factor in the loading. You like to get all the high density material in the bottom of the car to avoid the lean that Mr. Krebs spoke about.

Q And then the vehicle discharges its load. How does it do that?

A They are all self-discharging vehicles. Either they tilt up in the area or there is a walking floor or a live conveyor built. All self-discharging vehicles.

Q They discharge onto the floor of the building?

A They discharge onto an asphalt floor. The whole yard was asphalted, impermeable.

Q So it's basically just over a driveway?

A Yes, a three-sided structure. The whole front facing northwest on this drawing, where the word "new" is, is wide open. It's 150 foot wide by 150 foot long, and it comes over the tracks. This drawing is very good, because it shows how we come over the track, and the track goes right through the building.

Q Okay. Then the truck is discharged. What happens to

the truck after that?
A The truck is discharged, discharges his load, returns his body back to the driving position and he will proceed to an outbound scale.
Q Then he's weighed out?
A Weighed out. His load is documented as to the delivering company, point of origin.
Q Now, inside that shed, what do your employees do with that load at that point?
A At that point the material again is visually inspected to see if it is high density material or low density material. We'll visually inspect for nonpermissible material for the state of Ohio. We're obligated under the transportation contract with CSX not to have any material go into the state of Ohio that the state of Ohio will not accept.
Q There was some testimony about some mattresses. Please explain mattresses.
A These are definitions, from one state to another, from one county to another. Amongst this room -- a definition of a mattress falls in kind of a Neverland. Construction debris, it contained anything to be in a man-made structure.

In certain municipalities or areas of the country, a mattress in a structure when the structure goes

on fire or is knocked down is construction demolition debris. The state of Ohio have a big issue with mattresses, I don't know why, and they will not allow them in C&D material. So our receiving customer on the other end is very strict about having any mattresses delivered in the rail car.

Q And when you find a mattress coming out of a truck, what do you do?

A If it is spotted where we can grab it, it will go right back in the truck it came on, and if not, it will be placed back on the truck the next time he comes.

Q So you know who left it?

A You kind of put a laundry tag on it and everything goes back.

THE COURT: Does everything go to Ohio?

THE WITNESS: Yes, the customer receiving the material in Ohio is receiving it in Ohio, although they are planning to expand.

Q Now, as to the loading of the rail car, Mr. Krebs discussed this with you, can you tell us what the criteria are for loading the car?

A A rail car is basically a big container, almost 5,000 cubic feet, and they sit up quite high, about 13 feet off the track, and there was a learning curve for Coastal to keep the gravity low also opposed to listing to one side.

We reviewed that with our employees and we learned how to load it properly.

Q And you mentioned the heaviest and the lightest. How does that get played into this?

A The material, depending on the transfer station delivering the material to Coastal, the means of processing they employ and the manner which they extract recyclables, some customers, I found, I learned after visiting, they trommel the material and seine out the dirt portion or the fine portion.

Other customers pull out every brick and rock and kind of render it a lighter material, and some leave it in and run it over with a compaction type material, which is very dense.

The more they touch it, take out rocks, renders it lighter.

Q So when you have a combination of dense and light material, how do you go about loading the car?

A We keep all the dense material on the bottom and the lighter material at the top.

Q Now, there's been some comment about the fact you put stuff on the floor. Is there any way to load these cars properly without putting stuff on the floor?

A Impossible.

Q Now, you say that Mr. Depak, whatever his name was,

came back by and saw this operation as you described it?
A Yes.
Q And did you show him the contracts you had with the New York and Atlantic Railroad?
A Not in our initial meeting, no.
Q Did there come a time when you showed anyone from DEC the contracts?
A Yes.
Q When was that?
A About, I don't know, by mid-August I received a phone call from Mr. Anthony Cava. Mr. Cava is the solid waste coordinator for the region of New York State Department of Environmental Conservation that governs this region, or the region that Farmingdale is in. And Mr. Cava called and asked if we would arrange a meeting to go out and see him.
Q And did you go?
A Yes, a couple weeks later. He was on vacation. When he came back from vacation myself and Mr. Sternberg went out and met with Mr. Cava, Mr. Peter Scully, who is the commissioner of the region for the DEC, and Mr. Depak.
Q And did you show him the contract at that time?
A At that time that we had photographs and some limited documentation with us. We had a three-hour meeting for which Mr. Scully left for 45 minutes and left to Mr. Depak

and Cava.

After that I followed up with a letter and an informational package that he requested at that meeting.

Q Did that include the contracts?

A Yes.

Q I will show you what's been pre-marked as Coastal Exhibit 8 for identification. I ask you if you can identify that for us.

A Yes.

Q Can you tell us what that is?

A This is a response to our meeting and dialogue, our meeting, several meetings and dialogue from Mr. Cava at the region. And he cc'd Mr. Scully and, Mr. Schmidt and Mr. Crane.

Q Was that submitted to the Town of Babylon?

A Yes, this was submitted to the Town of Babylon probably three weeks or a month after getting to us.

Q That was submitted before the decision from the Town of Babylon?

A Yes, it was submitted before the decision, but the hearing had already been closed, and I had our attorneys contact the Town of Babylon attorneys several times, because I wanted to present this document in person to the Town attorney, and we were unsuccessful in getting a meeting, and I decided one day just to drive it over,

because prior to making a decision I wanted him to see this document.

THE COURT: I think there is an objection.

MR. CUTHBERTSON: Your Honor, we just object to the letter and its relevance as well. The determination that the DEC makes with respect to this facility is irrelevant to the Town's ability to regulate this under its own law as a transfer station, something that is not compatible as a residential use and as an illegal building.

THE COURT: Your objection is duly noted.

Q Mr. Rutigliano, we've been talking about C&D.

A Yes.

Q Is C&D the only thing that Coastal has handled at this facility?

A No.

THE COURT: Is this the only outgoing at this facility?

THE WITNESS: The only outbound shipments currently, yes.

BY MR. McHUGH:

Q I show you what's been pre-marked as Coastal Exhibit 9 for identification.

A Yes. We still have 7.

MR. McHUGH: 7 was moved in.

THE COURT: 7 is in.

MR. McHUGH: 7 is in.

Q Would you tell us -- I see each one of these exhibits is several pages. Go through each of these photographs.

A Starting from the top looking down, photograph of our main entrance.

When you go to the next photograph, that's the gantry crane that Mr. Krebs described. This is looking southward.

So if we turn this upside down, looking south toward towards the newly constructed shed, off to the left side is Pinelawn. Off to the right side is New Highway, and you are looking south towards St. Charles Cemetery and Republic airport.

The next photograph is an aerial shot, not really an aerial, I was up in a lift when I photographed it. What is important about this, it looks across New Highway and shows the lay of the land.

You have a concrete company right across the street called Midway Redimix, which was a customer of Coastal or is a customer. We accept aggregate stone, offloaded some aggregate last season, and then you have the Posillico Brothers asphalt brand, and they are a contaminated soil remediation business. It's quite an industrial area.

The next photograph is an aerial shot. Again, this was during the stop work period. This photograph was taken. I mean, I can see this was the gray trim on the building was not yet installed. I'm on the third photograph in the back, and there are some tiles in the photograph. We've not yet done the asphalt when we look at this photograph.

The next photograph is a closer-up photograph of the building. The asphalt again is not completed. I don't believe the trim has been installed yet around the main door. The next photograph is the same day as the photograph before it, except this one is looking from the south to the north.

To give you a lay of the land, I was up in a lift. Off to the left, again, is the Posillico property, and then you have the Midway Redimix, Coastal's trailer, and that concludes that pack of photographs.

Q Going to Exhibit 10, which is the next pack?

A Yes, Exhibit 10 is photographs -- we were unloading some sheet rock material for a local business called Marjam. They supply materials on Long Island.

MR. CLARK: Your Honor, we only have one pack of photos. I don't know if they were all kept together.

MR. McHUGH: It's all kept together.

THE WITNESS: Take the clip off and they are all

individually stapled. That pack is finished.

MR. CLARK: 10 starts where?

THE WITNESS: Marjam.

Q Can you tell us what is going on there?

A Okay, Coastal was unloading some sheet rock for a local business, Marjam. They shipped their sheet rock in and reremoved it off the cars, placed it on their trucks for delivery back to their warehouse.

Q As to the Marjam and the sheet rock, what is the relevance for building the sheet rock traffic?

A The sheet rock, we were storing some of it inside, whatever tracks they were there during the day, we loaded, and to get the rail cars out, we unloaded the remaining portion, placed it in the building, and then they took it out.

The next picture is showing the bundle, how the cars were unloaded. To give you a perspective, that's when Mr. Krebs said you can only unload one side of the car, it has a center spine on it. If you put it along the loading dock, you wouldn't be able to accept both sides.

Q In your facility, you could accept both sides?

A Yes, because you can get kind of around the cars.

Q I see the sheet rock is wrapped in something. Can this sheet rock be stored where the weather can get to it?

A Yes, it can be.

These, the three pictures --

Q Going to Exhibit 11?

A Exhibit 11. Exhibit 11, that's a Coastal piece of equipment there with that grapple type bucket on the end. We're unloading some ballast stone. The ballast stone was being used to build freight siding, a new customer that Mr. Krebs had gotten somewhere in the area, so we were unloading some stone. In the background you can see the Coastal C&D operation, that pile.

We unload the stone, drop it on the floor, and we pick it back up and put it in trucks for local shipment. That's the third picture, the material going into the trucks, the third and fourth picture. The third picture -- the fourth picture I selected because it showed both operations happening simultaneously. The trucks on the left are going through the building, getting loaded with C&D, and the facility is comfortable enough where we can have both operations going on at the same time, as you can see.

Q Also, a matter of the record, do you own any of this sheet rock?

A No, I don't own any of the sheet rock, no.

Q And do you own this ballast stone?

A No, I don't.

Q Let go to number 12.

A Number 12, again, is a local business, Macon services in Hicksville. These are taken on Saturday. Macon got a contract recently to build some bridges in Brooklyn. They will ultimately be installed in Brooklyn. But this is a local business that had a need to unload some of this very long sheet steel, so we obliged him by letting him come in on the siding, and he performed his own service because Coastal had not yet invested in this equipment, although we did. But with the uncertainty today, we're holding back on making more capital investments.

Q What uncertainty are you talking about?

A With the proceedings today, it's uncomfortable -- we have invested millions of dollars, and these pieces of equipment are a couple hundred thousand apiece. We need to invest more money to make the yard more comfortable, but I'm uncomfortable in signing more mortgage agreements, as my existence is threatened.

They unloaded some very large pieces of steel. They are the length of the car, 96 or 98-footers, so this is a business that is on the Island that is now using us and using our services. They never used rail before.

I'm up to Pack 13.

Q Pack 13?

A Okay. In Pack 13, this was a vehicle delivering material to the facility. This is on the C&D side in the

covered portion of the building. Just on the right side you can see the C&D pile. It's pretty low at this point. The truck is self-discharging, picks its side up to discharge the load.

As you can see in the upper left-hand side, that is a scale. You are reading the weight, which is important not to overload a rail car leaving the facility because they do automatically weigh and they are not transported in.

If a car is overweight, it will be kicked out. So we perform that, making sure the cars leave not only loaded properly but not overweight. So we weigh the car on the way out.

The next picture is our handling equipment. We have that boom on the left. It's an excavator, been adapted to work in this industry. We have elevated the cabs so the operator sees it properly, the material, and on the right side is a wheel loader which is no different than any other material handling loader in the industry.

On the next photograph, the third photograph, you can see the overhead dust suppression system. That is water vapor, on the yellow sticker is water vapor only. It comes out as a mist to keep the dust out. It will not become a nuisance. We keep the dust out.

Q Speaking of that, Mr. Rutigliano, have you received

any complaints from anybody concerning your creating a nuisance around the neighborhood?

A No, we've not received any nuisance complaints, noise complaints, dust complaints. We've not had any complaints other than the lawsuit from the neighbor, and that is regarding a lease issue. But as to the complaint of us being damaging or impacting anyone else's operation, no, we haven't.

Q The gentleman who was here before, your neighbor from across the street, has he ever come over to you and complained that you were in the neighborhood?

A No, Mr. Posillico has not come over to complain. No, he has not come over to complain.

The next packet, I think it is 14.

Q 14?

A 14 shows the unloading of these amazingly long poles, LIPA or LILCO used to, and now LIPA has a need for trees or poles that are 115 foot long. For some reason they don't conduct. They need to use this size of a pole. And we facilitate the unloading for them. The cars are delivered, as you can see on the left side, you have our cars, the C&D cars, and on the right side, we allow the pole companies to come in. They unload, pay a usage fee for the siding of the cars. They come in with their own equipment again. I don't know if Coastal would ever

purchase equipment like this. It is really single use equipment. We continue to let them come in.

But to provide the unloading service for them, I don't see that happening. They are pretty good at it. As you can see in the second picture, their own men, they pick the poles off, and in the third picture when they come in, they kind of take up a good portion of the yard, and we let them unload their freight.

Q And now we're up to 15.

A Up to 15. 15 is -- looks similar to Coastal's yard, but it's not. But this is actually a customer that Coastal is working very closely with. The purpose for this picture are the bricks that are unloaded there. This customer is Century Building Products. They are the sister company to Apple Redimix.

Apple Redimix, I testified, is a customer that sells stone or aggregate by rail. They were so intrigued by the rail, can we get brick in by rail, and we obliged, and from New York and Atlantic Railroad, and I'm currently working with them into putting siding in their yard in Babylon right on 27, Sunrise Highway at which they will accept this brick at their mason yard.

So that's why I put these photographs in here, just to show that this is basically two rail cars with brick which were coming onto Long Island by truck, and it

eliminates all of those trucks just to get it in by one or two rail cars.

Q And Coastal facilitated that move for New York and Atlantic Railroad?

A Yes. We also facilitated a move down to Pacific of brick, which survives today and is a great piece of billings that we brought to the Canadian Pacific, and they are enjoying it. It's several hundred carloads a year that get unloaded in Brooklyn, New York at the 65th Street rail yard right on the water by the Gowanus.

Q Now, where -- just talking about C&D now, as to all these things that weren't C&D, where did those customers come from, the ones with the inbound freight?

A The inbound freight came from some leads that we tracked down from the railroad. The railroad would get a call that somebody wants to ship onto Long Island, and the steel lead was a gentleman that came in off the street, said, I'm bidding on a contract, would you help us if we win it. And we said, by all means, you have access to the track.

On any given basis we need 24-hour notice because we need to make arrangements for New York and Atlantic Railroad to put the car in the right position, and we track down leads all day long from french fries, two cars a month, to some clay.

Another gentleman wants to bring in bags of clay, and we track down these leads and try to make it happen.

Q Has the stop work order had any effect on your ability to conduct business?

A It hasn't affected in a way I can't really let someone exchange their whole business to rely on rail and not let them know definitively I'll be here in six months. When they upset their trucking routes, I need to make sure I'm there or I wouldn't be doing him a good service or damage his business.

We have a scrap metal company that is banging on the door to come in, and I'm holding it off because it will require us to make an investment of about $400,000 of a special piece of magnetic equipment, and let his truck fleet to go to other customers, and once he comes on rail we need to serve him.

Q Can you tell us, since all of us are not in the business, we know what you are talking about, what about training arrangements?

A When you are building up a fleet there is a relationship between the shipper, the generator of the cargo and the trucking company. Once a trucker loses a dedicated haul, he goes to put that truck somewhere else. It's very difficult these days to get trucking, and once you have a good trucking arrangement, you try not to

damage it by not giving him his freight.

This steel company will displace probably seven tractor-trailers, owner/operators that currently haul steel back to Pennsylvania for him, and they will come up on the rail.

Q Has this happened with other customers, other customers who could not come to you because you could not give them assurances that you will be there?

A The steel one is very big. And the smaller customers, I let them know we'll do a few cars for you but I can't give you a long-term arrangement until I'm sure we'll be here long-term.

Q Have you had any discussions with major customers who are not presently using the yard who are interested?

A Again, the steel customer is a very large customer that will take up a considerable portion of our day.

Q There is some concern about the idea that your company will not be regulated by anybody because of this exemption. What is your understanding of your obligation with regard to creating a nuisance, complying with the zoning laws, safety regulations and complying with municipal law with regard to regulations and things like that?

A Just how I operate a company and how Marty and I conduct ourselves. The DEC clearly is the lead agency on

this type of operation. They are on Mr. Posillico's operation. On most operations that have to do with handling of material, dust conditions, odor violations and that sort.

The DEC is the main regulatory agency. As it comes to the Town of Babylon, we fully attempt to reach out to them, to have them come in and tell us what you would like to see. If we're doing something wrong, let us know.

The only visit I had from a Babylon inspector is the first -- it served this on the 29th, which is six months after commencement of construction, and the second time Mr. Klusner, Ron Klusner -- I don't know his title -- to ask if the Town of Babylon wanted to ship materials from their waste energy facility, would I allow them to ship some materials.

I called him Ron because I know him 15 years. Coastal is here and we're here to be good to Babylon and good to everyone.

Q I have call your attention to the last exhibit, the February 15th letter.

A Go ahead.

Q I ask you to look at last sentence of the first page of that letter and ask you what your interpretation of that letter is.

A The DEC retains -- this is what I mentioned before. The Department of Environmental Conservation clearly has jurisdiction over Coastal. Should we pose any air problems, noise problems, odor problems, as I'm sure the DOT or the Town's equivalent of the DOT, should we create traffic problems.

We're not -- we're fully cognizant that we need to keep traffic flowing and not have dust and not have vermin and odor, and I really think we do a good job of it. We got many compliments as to the site, how clean it has become, with respect to illegal dumping and squatter vehicles. We really created a diamond.

Q In your discussion with the Town on the 29th of March of 2004, was there any mention at all of you creating a nuisance or of being in violation of the building regulations with regard to fire, with regard to construction, with regard to anything?

A None at all. Again, this was -- when it was served, I was told, it was to get your attention. That day I said, you have my attention. Now, what they choose to do with it, the jury is still out. I don't know.

MR. McHUGH: Thank you. No further questions.

THE COURT: I think we'll take a break now. We'll resume in 15 minutes now. We have to make some plans for a court reporter tomorrow. For some reason

Friday is a busy day. I suspect we'll finish this witness today.

Mr. McHugh, you have any further witnesses this afternoon?

MR. McHUGH: No further witnesses.

THE COURT: What we might do is to work late. The only problem is you have your witness tomorrow.

MR. CUTHBERTSON: Four that are available outside and one available tomorrow morning.

THE COURT: Might I get a sense of how long they will take? By your representation, I thought they would rather short.

MR. CUTHBERTSON: The first witness would be 20 minutes to a half hour. The next witness, Mr. Posillico, I am thinking on the order of ten minutes. The other two witnesses, five to ten minutes each. The last witness ten minutes.

I don't want to be held to that number, but approximately that.

THE COURT: Thank you.

We'll take a 15-minute break.

(Recess taken.)

THE COURT: We'll start cross-examination.

MR. LANE: Your Honor, I guess this is a continuation of direct examination.

DIRECT EXAMINATION

BY MR. LANE:

Q Good afternoon. Earlier in your testimony you referred to a conversation with Mr. Klusner, who I understand is an employee of the Town of Babylon. And you said something to the effect that your services would be available to them.

Would you explain to me again, what did you say and what did he say?

A Mr. Klusner is somehow involved, and I know him many years with the Town, with the solid waste incinerator. And the incinerator produces a waste product that is incinerator ash, and he was alluding to the fact that we ship ash to the Town by rail. Ash is a by-product of incineration.

Q Did you understand if you would be asking if you could provide municipal solid waste services?

A I understood him to be asking about ash services, about ash.

Q Does New York and Atlantic Railroad prohibit you from handling municipal solid waste?

A Municipal solid waste is prohibited. It's prohibited

under the old Queensboro agreement and also the Class 1 railroads. Class 1 railroads, any MSW shipped out would be based on an intermodal move, that is, a containerized move, and that material will be containerized at another facility and placed on the rails.

We never have to cross this bridge with NYA, and it would be acceptable but not one we're contemplating. The facility right now is functioning pretty well with the freight we have.

THE COURT: So you agree with the testimony that it's no longer prohibited, but you are saying it has to be done in a certain secure way?

A In the years past, it was prohibited by the Queensboro agreement. You could not go through Queens with any MSW. Therefore, if you can't go through Queens, you can't get off Long Island.

New York City has worked out with Queens and all the railroads now agree that an intermodal move in a sealed container, leakproof, odorproof, would be the means of transportation. So that kind of took place with the Queensboro agreement.

Q Do you have facilities at the Farmingdale shed to load solid waste into these kind of containers?

A No, we don't. That would require a drainage system to capture the leachate, overhead odor systems. We do not

seek to get into that system. That's a business left best to others to package.

Q Earlier Mr. Krebs testified he had seen you taking metal out of the debris you were handling.

What was that?

A Occasionally. When I say that, along with the mattresses, a chunk of metal, a hot water heater that would come in the load is another nonpermissible type item. Also, we would remove a large piece of metal that might go through the bottom of the rail car, so we'd move a heavy chunk of rail track, depending where it came from.

When I say minimal, out of 265 rail cars processed at the facility during the month of March or April, I think maybe 40 cubic yards total between mattresses and metal were present. So it's 4,400 cubic feet times 265, they will come up with 40, which is probably --

Q So it's an incidental function?

A Yes. When you use the word incidental, Ohio's using the word incidental and I think we should use and alleviate this whole argument that we're having today.

Q Mr. Rutigliano, you received a stop work order issued by the Town of Babylon. What is your understanding of what that order requires you to do?

A I'll say initially, and initially being the day the stop order was presented up to and including two or three months later -- so we'll go from 3/29 to 6/29 -- I was under the impression and I was told, and I almost had it committed to writing on this from Mr. Bessimer, he was on his way over, it definitely pertained to the erection of the structure. It doesn't pertain to any transloading, track upgrading, asphalt nor drainage, and we continue to do those type of things.

Q Let me interrupt you. Did Mr. Bessimer tell you that?

A Yes, he did. It pertained to the erection of the structure.

Q When did he tell you that?

A The day he was at the side of the desk, and he confirmed that a week later on the phone, and he was going to pass by that afternoon to write it on the pink card. This copy, Plaintiff's 5, is a pink card, that's all it is, with handwriting on it.

And now as the documents start to go, I see new documents presented as I read that. It pertains to a cease and desist of all operation on the site. That was never contemplated by this order. It is now.

The order has metamorphosized something more stringent, which is the reason why I'm here today, and the

reason I asked my counsel to get us somewhere where we can get a resolution, because I'm nervous.

Q If you took down a structure there today, a shed that you erected, could you continue to perform transloading of C&D materials?

A Yes, we would be able to perform. It's being done right now on several railroads in New Jersey. It's being done right now in that manner in upstate New York.

It's not an operation that I would put Coastal's name on it. We would not be able to contain the dust, we would not be able to contain the operation, and quite frankly, I don't think I would operate -- my personal standards I wouldn't handle an operation like that. But the answer to your question, it is being done right now, there are several in New Jersey and upstate that are not covered, and functioning.

MR. LANE: I have no other questions. Thank you.

CROSS-EXAMINATION

BY MR. CUTHBERTSON:

Q Good afternoon, Mr. Rutigliano. My name is Mark Cuthbertson, and I represent Pinelawn Cemetery.

A Good afternoon.

Q I have a series of questions to ask you.

First, just as to your experience in specifically

C&D movement, moving the materials across the state.
Q When it comes to the contracts you negotiate for Coastal for construction and demolition, you know the process of negotiating the contracts. You've done that before, correct?
A Yes.
Q Okay. And you know how to make a profit for your business as well?
THE COURT: Counsel, let's get to the point.
MR. CUTHBERTSON: Your Honor, my point is that Mr. Rutigliano --
THE COURT: Your question.
BY MR. CUTHBERTSON:
Q And your partner, Mr. Sternberg, has experience as well in this area; is that correct?
A Yes, Mr. Sternberg actually created a rail yard, and it survives today, and it's a very successful operation.
Q Okay. I believe you testified that you have invested millions of dollars in the Farmingdale facility; is that correct?
A Millions of dollars, yes, with the equipment, the rail cars and the structures, on several different ways. One, of course, is a credit line, another is casual financing, GE, several creditors that we are responsible for, but it is several million dollars.

THE COURT: I don't question your right to intervene as an owner, but I will not hear duplicate arguments from the Town and from you.

MR. CUTHBERTSON: Okay, your Honor, and again --

THE COURT: And I will not hear duplicate cross-examination either.

MR. CUTHBERTSON: Again, with all due respect, your Honor, Mr. -- as you noted, Mr. Clark on behalf of the Town, and Pinelawn Cemetery have similar interests. We decided to split the workload here so we wouldn't duplicate.

THE COURT: Okay. Let's get to the point, all right?

MR. CUTHBERTSON: Okay, your Honor, but --

THE COURT: We're all finished with preliminaries.

MR. CUTHBERTSON: But I'd like to say the testimony from Mr. Krebs --

THE COURT: Tell me what the division is of examination that you've made in this case.

MR. CUTHBERTSON: I'm examining Mr. Rutigliano as to the operations at the site, control of the site. Mr. Clark crosses Mr. Krebs as to control of the site by New York and Atlantic Railroad. So I was going to ask Mr. Rutigliano about his operation and his understanding

Q And your employees work at the site, you have employees for Coastal?
A Correct.
Q Approximately how many?
A Fifteen.
Q And do they work at night?
A No. The site operates from Monday to Friday, 7 a.m. to 5 p.m. and Saturday, 7 to noon. We did that to limit the general business hours. If you can't get it done in those hours, we're not looking to work hard.
Q And do you pay worker compensation insurance?
A Yes, we do.
Q And you pay Social Security withholding for those employees?
A Yes, we do.
Q And do you pay for retirement benefits for your employees?
A Yes, our employees are represented by a union.
MR. McHUGH: Your Honor, this is beyond direct.
THE COURT: I'm sorry.
MR. McHUGH: Well beyond direct for this witness.
THE COURT: Yes, I will say it, and this is the last time I will say it, Mr. Cuthbertson, get to the point or this examination will be terminated.
MR. CUTHBERTSON: Well, in the interest of not

A Yes, they do.
Q Okay. They are there at the yard giving them directions?
A No, but on the phone they are exercising control over saying how we'll set the cars in the yard for that night and if we are getting service that night. Sometimes NYA will not be able to service us on the night, and they will tell Ed, maybe you want to bring your majority in in the morning, because I will not be getting this out until 10:30. It's daily.
Q So in that instance it is a scheduling issue?
A Scheduling issue.
Q Briefly going through the process, when the trucks come in to dump on the floor of the building, it's your Coastal employees who direct them how to do that, correct?
A Yes, but we probably guide them back. Is that what you mean? The driver of the vehicle is in control of the vehicle. We tell them to dump on the left or the right. That is guided by the foreman.
Q And there are no New York and Atlantic Railroad employees in the process?
A No, they do not back up the trucks.
Q As well as there is no New York and Atlantic Railroad employees involving loading the railways?
A No, they are not involving loading the railways.

and disposal and transportation by the yard or by the ton, depending on density of the material. The density is the key to us.

Q So what is the range there may be for the fee to load a rail car, the high and the low?

A The unit price, basically per yard. If the truck comes in and it's a heavy, dense material, it's $27 per cubic yard and tonnage based material, in the range of $57 per ton.

Q How would that equate to an individual rail car, an average-sized rail car?

A Averaged-sized rail car, depending on the density, can have anywhere between 70 and 100 tons.

Q Let's take, for instance, the -- to be quick and simple, you say 70-cubic-yard rail car?

A No, the rail cars are 4 400 cubic feet. Divide that by 27, you come up with the cubic yardage.

Q What would be the revenues on that particular rail car?

MR. McHUGH: Objection, your Honor.

THE COURT: Sustained.

Q Up until and including the trains being loaded, you bear all of the expense for that process, is that correct, to come full circle?

A Yes.

MR. CUTHBERTSON: Your Honor --

THE COURT: I'm having trouble understanding your position.

MR. CUTHBERTSON: Your Honor, the position really is a division of labor between counsel. The counsel agreed that they would cross-examine the alleged principal in this case.

THE COURT: I don't think you have any interest in this issue, do you?

MR. CUTHBERTSON: My client has an overall interest in the use of the property. Whether Coastal is an agent of New York and Atlantic is one of the key issues in this case and that's what my questions are directed at with Mr. Rutigliano.

THE COURT: What is so key about that to your client?

MR. CUTHBERTSON: To my client?

THE COURT: It doesn't matter what Coastal is, as I understand your case, that you are saying there is no lease here, right?

MR. CUTHBERTSON: They are purporting there is an agency agreement.

THE COURT: Are you saying there is no lease only as to the agent? Are you saying there is no lease as to the railroad? What is your position?

Mr. Clark and I are trying to prepare. The preliminary injunction came up quickly. His firm was retained at the time. I had a degree of knowledge about this case. We divided it -- we decided to divide the labor. He was going to cross-examine the principal, I was going to cross-examine the agent, and just tie up the questions between them that deal with day-to-day control of this facility.

THE COURT: I have to tell all of you, I've been sitting here now listening to testimony and reading briefs since I came in early this morning. I still can't figure out what this case is all about.

Proceed.

MR. CUTHBERTSON: Okay.

BY MR. CUTHBERTSON:

Q I think what I was saying is that you testified that there's no other way to load the C&D on the rail cars except by first putting it on the floor, and however you characterized it, dividing it into high density and lower density material?

A Mr. Cuthbertson, the cars are -- some of them are 13 foot, some are 17 foot up in the air. How do you propose to get this tractor-trailer that is pictured here, which is why I put it in here, there's a tractor-trailer here dumping a load. How do you propose we get it from the

to load this onto the rail car except by first putting it on the ground. I'm simply asking him questions with respect to that.

THE COURT: Do you think that is a relevant consideration for this hearing?

MR. CUTHBERTSON: Yes, I do, your Honor.

THE COURT: Why?

MR. CUTHBERTSON: Because one of the things we're looking at is whether this is transloading or sorting the materials at the site and whether there really is a necessity to sort.

THE COURT: What is wrong with sorting materials at the site according to Town law?

MR. CUTHBERTSON: When you were sorting materials, and I'll let Mr. Clark --

THE COURT: He should address it.

MR. CUTHBERTSON: It becomes a transfer station, your Honor.

THE COURT: In your opinion.

MR. CUTHBERTSON: My understanding of the Town transportation laws.

THE COURT: Mr. Clark, I think you'd better take over this case, because I don't like representations made about your case by this lawyer.

MR. CLARK: Well, your Honor --

come up with it from some of the Jersey operations. Why are they doing that? Because they don't have the luxury of a roof over their head, so they decided to contain the material into a hopper and then place it into the rail car.

Coastal, to go one step further, decided let's put the hopper over the pile as opposed to limiting ourselves. It's a much better way to control dust, to control the loading than in the hopper. When they are dumped into a hopper it is limited into this rug or carpeted area, 30 by 30, and filled up with heavy material. That's all they have. So this is a more efficient way of handling it.

Q But if it were to be dumped in a hopper, it wouldn't have to be dumped onto the floor, correct?

A The hopper being below grade or at grade or above grade?

Q Above grade, and the hopper drops into the rail.

A No, you are -- you can talk about a conveyor system.

MR. McHUGH: Your Honor, I would like to object to this entire line. If we are going to quibble over the details --

THE COURT: I don't understand. Is dropping C&D material on the floor a violation of Town law? Is that what you are trying to say.

sorted --

THE COURT: Processing, you mean picking out a piece of metal or a mattress?

MR. CLARK: Yes.

THE COURT: That's processing?

MR. CLARK: We certainly take the position they are doing more. The representation was made that transload is truck to rail, rail to truck. You put it on the floor, you go through it, take some things out, move it around, then you are just doing things beyond truck to rail.

THE COURT: So every municipality this process goes on to or every operation is subject to each local municipality, maybe a village on Long Island, in this case it happens to be a town, that each one of these municipalities can control that process and has jurisdiction over that process, even though it's part of a much, much larger interstate commerce --

MR. CLARK: Where it's being done by a nonretail carrier, absolutely. There is no exemption, whether it's a village, town, county. The only exemption --

THE COURT: Do you have a case that says that?

MR. CLARK: We've cited a number of them in our brief.

THE COURT: None of your cases hit the point.

make that determination.

THE COURT: They are making a determination in this case they have no interest.

MR. CLARK: Well, Coastal went to the DEC and said this is what they are doing, and they came up with that determination. I mean, you know --

THE COURT: What about the recent case from the Second Circuit with regard --

MR. CLARK: It's a railroad case.

THE COURT: Because it is a railroad case, you can't delegate testifying, despite what you're doing.

MR. CLARK: It's nondelegable. You can't say okay, we'll give you a nonretail carrier --

THE COURT: What case says it is a nondelegable?

MR. CLARK: The STB in the Hi Tech case, the STB, if you say they are under the federal law, the agency giving jurisdiction to interpret this has said you can't, unless they are owned or operated by a rail --

MR. McHUGH: Owned or controlled by a rail carrier, your Honor.

MR. CLARK: I'll take that. We win that case here. That has been the crux of the issue, and we put that in evidence through Mr. Krebs and Mr. Rutigliano, the nature of the relationship and what is going on at that site and who is controlling.

Also, to the exemption, we cannot forego that because that is, as you state, a national problem. We cannot have individual towns regulating railroads, and that's why the ICC Termination Act is as clear as it is. And the difficulty in the Hi Tech case they cite is that Canadian Pacific Railroad specifically said Hi Tech was not its agent, and that is completely different from here, to say the railroad is an agent and that is a joint venture.

THE COURT: I wasn't asking for argument on the merits of the case. I was asking if someone wants to talk about settling the case. If no one wants to, then that is the end of the proceedings today.

I'm totally befuddled by this case. Okay. See you tomorrow, 9:30.

MR. CLARK: Thank you, your Honor.

MR. LANE: Thank you, your Honor.

THE WITNESS: Thank you, your Honor.

(Whereupon, the proceedings were adjourned until May 20, 2005 at 10:00 a.m.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

COASTAL DISTRIBUTION, LLC, et al.,

Plaintiff,

-against-

THE TOWN OF BABYLON, et al.,

Defendant.

----------X

05-CV-02032 (ETB)

United States Courthouse
Brooklyn, New York

May 20, 2005
9:30 a.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE E. THOMAS BOYLE
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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Proceedings recorded by computerized stenography.
Transcript produced by CAT.

THE COURT: Before we get back to the actual testimony part of this hearing, I had meant to inquire what the status was of the stay in this case yesterday and I failed to do that.

MR. McHUGH: Your Honor, there was an agreement that the city would not try to enforce the stop work order pending this hearing.

THE COURT: Pending the hearing or pending the decision?

MR. McHUGH: For clarification, pending the hearing as to whether it would continue until the decision.

THE COURT: This hearing will end today. What is your understanding of the stay at that point?

MR. McHUGH: At the end of the hearing today, we would ask the stay be extended with agreement between counsel or it would be extended pending a decision.

THE COURT: Mr. Clark?

MR. CLARK: Mr. McHugh is correct. I think the agreement when we met initially on the Order to Show Cause was that we would stay pending the hearing. I think the town at this point would be amenable to extend it pending decision.

THE COURT: Until there is a decision on the motion?

MR. McHUGH: That's satisfactory.

THE COURT: That's what I was hoping was the understanding here.

DIRECT EXAMINATION

BY MR. CUTHBERTSON:

Q Morning, Mr. Posillico.

Where do you work?

A I work at 1610 New Highway and I have offices also adjacent at 1600 New Highway in Farmingdale, New York.

Q What do you do for a living?

A My training is engineering and I'm in the construction business, environmental business and development business.

Q Have you had occasion to observe the operations at the Coastal facility?

A Yes, I have.

Q How long have you made those observations?

A For the last three to four years.

Q And from where would you normally be able to make those observations?

A Usually pulling out of the entrance of 1610 New Highway or from the parking lot or the mezzanine of 1600 New Highway which is the building directly across from the building that was erected.

Q The building you spoke of, is it a two-story building?

A Yes, it is.

Q So can you see over the fence of the Coastal facility?

A Yes, I can.

Q What have you generally seen at the Coastal facility?

building, our tenants, are effected and it seems to be nobody is interested in what's coming in or where the material is coming from and that it's a transfer facility.

Q You have experience in the environmental field, is that correct?

A Yes, I do.

Q And what generally is your experience in that field?

A My background is civil engineering. I attended Clemson University and received a bachelor of science in civil engineering in 1984. I have an engineering degree for my professional engineering license. I have got certifications for handling radioactive materials as a manager and also qualified for haz mat materials. I have worked on air permits for New York State DEC, obtained -- actually, I currently have the only recycling permit for handling contaminated soils in New York State right now. I also have a beneficial use permit with New York State DEC for re handling of dredge soils and recycling dredge soils which I did a lot of research on. I currently have two permits for the DEC for recycling concrete and aggregate, one in Babylon, one in Westbury.

Q So you have experience running a waste facility?

A Yes, I do.

Q Do you have experience in transporting waste?

A Yes, I do. I have worked particularly bulk transport. I have worked New York harbor, Brooklyn Navy Yard transporting

hopper along the belt into the rail car and can be moved parallel to the rail car so the load could be equally distributed during the process. That's one method.

The other method, there is a facility, MHF, in New Jersey that's actually handling some of the waste from the Glen Cove project. They have a bottom-dump system where there is a building built over the top of the rail car, the truck pulls over -- actually, it's bridged over the rail car and dumps directly into the rail car in an enclosed building, again, self-contained, misting so there is no need to dump the material on the ground.

Q If materials are being sorted at the site, what type of hazards can that present?

A Well, number 1, you are breaking up -- you are breaking up debris and if it's undocumented debris, I'm in the construction business, and generally larger constructions projects are regulated, you have inspectors, you may have a government agency so there is generally a fair amount of oversight. Smaller projects are generally unregulated. There could be commingled waste, asbestos, lead, possibly, you know, other waste blended in and without some sort of mechanism for when you sort, how you sort, asbestos can become airborne, lead can become airborne and there could be medical waste.

I mean, it's a very tricky business and really the regulation process sets up parameters for control, permitting,

A See, a transfer facility is different than a transload. Transload basically is changing mode from one form to the other. A transfer is you are breaking down the material in different forms for metal to go to a metal recycler, wood to go hopefully to more of a wood recycler and concrete --

THE COURT: Do you hold a permit to do that?

THE WITNESS: Pardon?

THE COURT: Do you hold a permit to do that?

THE WITNESS: No. It's a very difficult permit to obtain; it's a 360 permit.

THE COURT: Is that state law or local law?

THE WITNESS: State law.

THE COURT: State DEC?

THE WITNESS: State DEC. It's a very difficult permit, requires air monitoring, ground water monitoring, recordkeeping, insurance, training. It's probably -- it's the holy grail of permits to obtain in New York State. And it is difficult because there is a lot of benchmarks to meet for public safety because the more unknown a substance has, the more undefinable a source is.

If you are taking aggregate from a mine say, aggregate or stone from a quarry, you know where it's coming from. If you are taking boxes of lumber or crates of lumber, you know where it's coming from. When you are taking demolition debris, there is a complete set of unknowns and the

A No, I have not.
Q You say you see no indicia of ground water monitoring. Have you seen -- have you examined the site? Have you come aboard the site and looked to see if there is any ground water monitoring there?
A No, I have not. But I have not seen any drill rigs to install a ground water monitoring well. A drill rig -- most environmental equipment that would be required to come on site, there is certain apparatus that usually go along with a van or truck that would indicate that it's a vehicle that contains apparatus for doing monitoring and I haven't seen that.
Q You say you are an engineer and you say there are better ways to load construction and demolition material on the train, is that correct?
A I said there are alternate ways of doing it.
Q Alternate ways of doing it?
A Yes.
Q How do you assure that the cars going stay upright if you are dumping the stuff out of the truck into the car which is what you seem to be recommending?
A Sorry, I didn't understand.
Q You are familiar with construction demolition debris?
A Yes, I am.
Q It has various weights?

there are contaminates, may have a pile for separating out the contaminates. They have a wide variety of input and wide variety of separation techniques which is a transfer station, that's correct.

Q But the object is to move the stuff out, is that correct, it comes in by truck and goes out by truck, is that correct?

A Transfer and transload, from my experience, are two different -- completely two different things. And this is, from everything I have heard, this is being called a transload facility which is the history of the site and now it's become a transfer facility as you are referring to.

Q It does have dust containing apparatus, does it not?

A It has some misting apparatus hanging from the ceiling; I have seen it working, I have seen it not working.

Q In any facility it only works when it needs to work, is that correct?

A I don't know when it needs to work here because I don't know what the level of hazards are or what that's been defined. I can't comment on that.

Q Have you ever been on the property, sir?

A No.

Q You are looking over the fence and your testimony is based on looking over the fence?

A I'm about 200 feet away and I have 20/20 eyesight.

Q Wonderful.

monitoring and oil water separators that is regulated and permitted by the Suffolk County Health Department.

Q Then you burn those on your site?

A Yes, we burn it on site.

Q Have you got an agreement with Pinelawn about your coming here today?

A No, I do not.

Q You came on your own?

A Yes, I did.

Q You didn't come pursuant to a subpoena?

A No, I did not.

MR. McHUGH: No further questions.

CROSS-EXAMINATION

BY MR. LANE:

Q Morning, Mr. Posillico.

You mentioned a couple of places where there was a different kind of technology to load rail cars. The first one you mentioned was a system that used a conveyor belt. Where is that located?

A I have seen it operating. In California. There is a web site. It's used basically for bulking for containers, for ship containers but it's also been used for rail in California. I believe it's Long Beach where it's being used.

Q This is one facility?

A This is one that I studied on the web site when I was

Q Let me ask you about the other facility, bridge or rail car?
A Yes.
Q Where is that?
A In New Jersey. I believe New Jersey. MHF's facility in New Jersey. That's a bottom dump. That's a bottom dump.
Q Have you personally observed that facility?
A I have seen videos on their web site.
Q So you haven't actually seen the facility?
A No, I haven't.
Q Do you know what they load there?
A All ranges of waste from radioactive waste to mixed waste from hazardous waste sites but it's -- again, mixed waste can contain really any sort of debris. That's pretty much their bulking facility where they take random debris and bulk it into rail cars.
Q Is that facility located in an urban area?
A I think it's fairly urban, I mean, I haven't been to the facility. It's in the metropolitan area.
Q So you don't know, right?
A Right.
Q Now, you mentioned that you have loaded materials on the New York Atlantic Railroad, is that right?
A Yes.
Q What were those materials?

which is a landfill located about five miles -- actually, probably less than five miles on 110, has certain restrictions on asbestos, friable asbestos, non-friable asbestos, carpets, things of that sort so that's one source.

Omni has -- which is another facility in Babylon, they have certain requirements. And then we also analyze -- obviously, it's economics. You pay -- generally you pay per ton. At 110 you pay per cubic yard. So materials that are -- where you are paying per ton, you want to see if you can bring lighter woods and materials of that sort to a facility.

Q Sounds like these materials you are describing are hazardous materials?

A No, this is C and D which is --

Q So you truck it?

A It gets trucked.

Q You arrange for the trucking?

A Or we could arrange for trucking, yes.

Q Aside from these two facilities that you described, how many other loading facilities are there in this country for C and D debris would you estimate?

A For C and D debris? I don't follow.

Q How many facilities for loading C and D debris into rail car?

A Direct into rail car? In the country?

Q In the country.

A In a small facility, transfer facility, probably by a pay loader or some sort of bucket because the economy of scale on a single small load isn't that -- if you are just doing bulk loading on a car-by-car basis, you would use a smaller piece of equipment. On a bulk-loading basis, if you are using one type of debris, you would use a bulk-type facility.

Q As I understand what you are saying then is in your view ordinarily C and D debris goes first to a transfer station before it's transloaded, is that correct?

A I don't know of any transload C and D facilities anywhere.

Q I'm asking if C and D material is ultimately going to be put in a rail car, does it ordinarily go to a transfer station before it goes to the rail car?

A First of all, I don't know of a transload facility, okay. I think you are asking -- I don't know where you are going with it but maybe you can restate the question.

Q In your experience, when C and D material is ultimately loaded into a rail car, before it gets to the rail car, does it ordinarily go to a transfer station first?

A To restate my answer, I'm not familiar of any facilities that have -- that go -- that receive material from a transfer station in this general area.

Q I see.

So in Long Island there is very little C and D

wouldn't it, to build a conveyor system, crusher, loading van or a bridge over a railroad track, wouldn't that cost capital dollars?

A Yes, it would.

Q Do you have any reason to think that the people operating the facility in Farmingdale aren't acting in their own economic best interests in the way they handle material?

A I'm not sure how they are operating, to be quite honest with you.

RECROSS-EXAMINATION

BY MR. McHUGH:

Q Are you familiar with how far this material is being moved these days in order to find a disposal facility?

A Yes, I am.

Q How far is that, sir?

A Could range from New Jersey to Pennsylvania to Ohio to Colorado.

Q Let's take Ohio, which is preferable to move, by rail or move by truck financially?

A For who?

Q If you are moving a load of C and D from Long Island to Ohio, which is cheaper, rail or truck?

A That depends upon the amount of moves required to get it from the point where it's being taken to its ultimate destination. It could be cheaper by truck depending on the

State rules and regulations, is the DEC the final arbiter of who gets to transport things and who doesn't?

A I don't know that to be 100 percent true.

Q But you are licensed by the DEC?

A I have -- I have licenses by the New York State DEC. Occasionally you are required to have federal licenses and federal permits in conjunction with state permits or even local permits. So depending upon the activity, you could have multiple layers of licensing required so not one in one case could be the ultimate.

MR. McHUGH: No further questions.

MR. CUTHBERTSON: No further questions, your Honor.

THE COURT: What kind of local licenses do you hold from the Town of Babylon with regard to waste?

THE WITNESS: Babylon, we don't have any regarding waste. We have Health Department and state with our waste permit.

THE COURT: Anything further?

MR. CUTHBERTSON: No, your Honor.

MR. CLARK: No, your Honor.

THE COURT: Thank you very much. You can step down. Call your next witness.

MR. CUTHBERTSON: I call John Ahearn.

J O H N A H E A R N,

having been first duly sworn was

A Many times.
Q Approximately how many times?
A Over a hundred times.
Q After you conducted the surveillance, did you have occasion to review the tapes?
A Yes, I did.
Q And you indicated you did surveillance on the 13th of May, correct?
A That's correct.
Q You also did surveillance on the 17th of May?
A That's true.
Q Did you take a videotape on that day?
A Yes, I did.
Q Did you review those videos?
A Yes.
THE COURT: We are talking about this video here?
MR. CUTHBERTSON: Sorry, your Honor. Yes.
Q I show you what's been marked for identification as Pinelawn Exhibit A and Pinelawn Exhibit B. I just ask you if you know what they are?
A Yes; these are the VHS copies I made of the original eight-millimeter tapes.
Q And after reviewing the videos, do they fairly and accurately depict the scene that you observed at the Coastal facility?

there are other appropriate portions of the tape that the Court should look at, I will have the original and just send me letter.

MR. LANE: Thank you, your Honor.

THE COURT: If you could identify those portions. Have you got them so we can read it into the record?

THE WITNESS: Yes, your Honor, I do.

THE COURT: Good.

(Videotape played)

THE COURT: Is this for the benefit of the Court or for you (indicating)?

MR. CUTHBERTSON: I will turn it.

THE COURT: You can have your witness point out anything, just have him get out of the witness stand.

THE WITNESS: I will fast forward.

MR. LANE: Do I have permission to have some of our people watch this?

THE COURT: Absolutely; come on up.

Just one minute until everybody gets up here.

If anyone wants, come into the well here.

THE WITNESS: Fast forward to 10:33 a.m.

THE COURT: What you are going to have to do is note for the record where were you and where you are going so we know what these relevant portions are. Can you do that?

THE WITNESS: I don't quite understand, your Honor.

MR. CUTHBERTSON: He is going to come quickly to the next portion and then this tape will be done, your Honor.

Q Now, in this portion, Mr. Ahearn, the clock indicates it's approximately 10:36 a.m.?

A Right.

Q And there is a load being dumped. What did you observe with respect to that load?

A At this time I saw the workers examining part of the load, in effect those black plastic bags, opening up one and moving some of it aside and not putting it in the general pile. Right now this worker is examining different bags.

Q Mr. Ahearn, in your observations, were the black plastic bags that are shown at 10:37 on the tape, were all of them picked out and put to the side?

A Not that I could observe completely. I saw at least this gentleman here carrying one over and then the machine moved them and I couldn't see exactly where they went from that point on (indicating). The machine moved them out of camera range.

THE COURT: Where were you when you were making these observations?

THE WITNESS: At this point I was on the roof of a building across the street from the facility.

THE COURT: Were all your observations through this telescopic lens?

A Yes.
Q Could you read what the lettering was on the container?
A Yes, I could, it was Mid-Island Salvage.
Q Could you see what was in the container?
A It appeared to be aluminum scrap.
Q And did there come a time when you saw what you believed to be aluminum scrap material placed in that container?
A Yes, there did.
Q Are you going to forward to the relevant portions?
A Yes. In another minute it will be at 11:58.

At 11:58 I observed this small machine loading some aluminum into this container (indicating).

Q So in the foreground at this point, Mr. Ahearn, there is a machine placing what you believe to be aluminum scrap into that container?
A That's correct.
Q At any point during your observations, did you -- let me -- withdrawn.

In the background there is a machine that is loading debris into the rail cars, do you see that?

A Yes.
Q At any point during your operations, did you see that machine picking from more than one pile and loading any given rail car?
A No, I didn't. I saw just one general pile, this machine

container in the tape you pointed out before, correct?
A That's correct.
Q At that point, did you learn what type of operation Mid-Island Salvage is?
A Yes, I did.
Q What type of operation is it?
A Mid-Island Salvage buys metal, primarily non-ferrous metal, which is aluminum, et cetera, et cetera, and bales it and sends it off.
Q Did you have occasion to take photographs when you were at the Mid-Island facility?
A Yes, I did.
Q I show you what's been marked as Pinelawn Cemetery B.
THE COURT: Everyone has seen these copies?
MR. CUTHBERTSON: Yes. Excuse me, Pinelawn B-1.
Q There are -- first of all, did you take this photograph?
A Yes, I did.
Q Does it fairly and accurately depict the scene at Mid-Island, the Mid-Island facility?
A It does.
MR. CUTHBERTSON: I move that into evidence.
THE COURT: Any objection?
MR. LANE: No.
THE COURT: Admitted.
(Pinelawn Exhibit B-1 in evidence.)

MR. CUTHBERTSON: No further questions.

DIRECT EXAMINATION

BY MR. CLARK:

Q Mr. Ahearn, during the course of your observations, did you notice whether there was dust emanating from the facility?

A Yes, there was.

Q And would that be depicted on the video if we were to watch the entire video?

A Yes; no doubt it would be.

Q Did you notice whether there were any mechanisms in place to attempt to control the dust?

A One worker had a hose that he occasionally sprayed the pile down with.

Q Anything other than that?

A No.

Q From where you were observing the site, could you tell where the water runoff went to from the hose?

A No. Actually, I couldn't see, the pile took up most of the floor actually at that point. Possibly someplace directly underneath the pile.

Q The hose was being directed onto the pile.

A Onto the pile, yes.

MR. CLARK: Nothing further.

CROSS-EXAMINATION

BY MR. LANE:

MR. CUTHBERTSON: Just if I may, for the record, the first tape, Exhibit A, was from the 13th.

THE COURT: Would you please sit down.

Continue.

Q The tape we just viewed then was from May 13, is that right?

A No, from May 17.

Q The 17th?

A The 17th.

Q May 13 was the first day you were there?

A That's right.

Q Have we seen the tape -- do you have the tape from May 13?

A Yes, we do.

Q Would you produce it for us?

MR. CUTHBERTSON: It was played as Exhibit A.

THE COURT: The second one was B. The first one was A.

Q So those two tapes are all the tapes that you took on both days, A and B, is that correct?

A No, no, not correct.

Q There is more videotape?

A Right.

Q What happened to that videotape?

A We have the tape.

THE WITNESS: There is a copy of one of these tapes (indicating).
THE COURT: You have tapes that are not in front of you?
THE WITNESS: Yes.
THE COURT: For what dates?
THE WITNESS: The earlier part of the 17th.
THE COURT: Do you want those?
MR. LANE: Yes, I would.
THE COURT: I'm going to direct they be turned over by the defendant.
MR. CUTHBERTSON: Yes, your Honor. There wasn't anything really more relevant.
THE COURT: I will be glad to reopen the hearing.
THE WITNESS: These originals tapes are 100 percent of everything right here (indicating).
THE COURT: Thank you.
Q How long were you there on May 13?
A May 13. Let me check my records. I actually arrived early in the morning but I didn't begin videotaping for logistical reasons until later in the morning.
Q How long did you stay there on the 13?
A Until they stopped operation at 3:00.
THE COURT: Is there a building you were in when you were making these tapes?

Q Do you know what happened to the bags after you stopped videotaping them?
A No. They were removed out of my sight except for the one bag that he physically carried over and put in a different container.
Q What was that other container he put it in?
A I have no idea. I only could see a corner of the container.
Q When you were videotaping, we saw a view of the opening of that building but the building opening is actually much wider than that, isn't it?
A No. That's the full view. At different parts I would have zoomed in but in some shots, you could see the full view.
Q But while you were there, you couldn't see the full extent of the building?
A No.
Q So that picture when you zoom in, it does not show what's happening outside the field of view of the camera?
A No. At times, of course not.
Q Now, did you stay around to see what happened to those plastic bags after you observed them while you were videotaping?
A No. As I said, they were removed out of my sight.
Q But you didn't stay at night, you didn't ask anybody what happened, you took no steps to find out what was in that or

A I didn't see men check all the bags.
Q You saw a man check the bags?
A Yes.
Q Did you know what that man's responsibilities are?
A I have no idea.
Q You don't know what they were doing?
A No.
Q You do know they looked in the bags?
A Yes.
Q Open them up and looked in them?
A Yes.
Q Now, in all the tape you took, you are telling us here today that what you showed on that screen is the only part of that tape that was deemed relevant to this proceeding?
A That wasn't my choice.
Q For the rest of the time you were there, trucks came in, dumped their stuff on the ground, it was loaded into the railroad cars, just routine stuff?
A Yes.
Q For hours on end, is that correct?
A Yes.
Q Now, you went to this scrap buyer, is that correct?
A Pardon me?
Q You went to Mid-Island scrap metal?
A Yes, I did.

the surveillance down the road. The whole surveillance wasn't taken from the roof. At some points when it was advantageous I moved down to New Highway, north, and shot through the window -- excuse me, the door which shows the whole facility. At any time I could by eye observe the whole facility even though the camera had a specific job to do at one particular place.

Q I show you, sir, what's been marked Plaintiff's 2-A for identification. Would you put an X on this, sir, at approximately the location from which you took these videos?

THE COURT: I think that's in evidence, is it not?

MR. McHUGH: It is in evidence. I will readmit it with the X.

A I can't exactly read what this says here.

Q This is -- Mr. Posillico's facilities are over here, exactly where, I don't know but this is the building and this is where you apparently were across the highway so just put an X where you think you were.

A (Complying)

Q You are sure about that?

A Would you like me to put the other Xs where I was.

Q All I'm interested in is where you took the pictures from.

A I took them also from here (indicating).

Q Is any of that video in here?

southern corner of the building?
A Yes, I can. I can see the railroad cars, et cetera, all the way down.
Q They are -- so this would be the western side of the building is where the railroad cars is -- eastern side?
A Actually south side.
Q Railroad cars were south side?
A Yes.
Q I understand that's north (indicating). If that's north, the railroad cars are on the east side of the building, northeast --
A Actually, the railroad cars start off -- they go along a curve. They start on the east/west track and as they go through the building, they turn north and end up in a northerly position so it's actually a segment of a circle.
Q But in any case, sir, can you see the portion of the building that is inside this red spot?
A Yes. There is another photograph, another exhibit, where I show you a picture of the other door over here (indicating).
Q Where did you take that picture from?
A From the roof right here (indicating).
Q You took from that roof?
A Yes.
Q From there you still can't see that corner?
A I can see that corner, inside that corner.

how many trucks.
Q Was it several?
A Several, yes.
Q Going pretty much continuously while you were there?
A I can't also quantify pretty much continuous. They weren't on a line, if that's what you mean.
Q So there was no line out on the street?
A There were trucks waiting once. Occasionally there were two trucks there at the same time.
Q But in all that time, you saw one bunch of bags and you saw a few pieces of aluminum, that's it, that's all you thought important enough to show us?
A Yes.

MR. McHUGH: No further questions, your Honor.

Your Honor, I would like to reserve to recall the witness should we find something else on the tape.

THE COURT: Yes. You are going to turn over all the tapes that you took on that day.

THE WITNESS: Yes.

REDIRECT EXAMINATION
BY MR. CUTHBERTSON:
Q I show the witness what's been marked as Pinelawn Exhibit D.

THE COURT: This is in evidence already too?

MR. CUTHBERTSON: I didn't believe I introduced it

up to the roof, is that correct?
A It appears to be, yes.
Q And it's one pile?
A Yes.
MR. CUTHBERTSON: No further questions, your Honor.
THE COURT: Any further questions of this witness?
RECROSS-EXAMINATION
BY MR. McHUGH:
Q This is one pile that's depicted in this photograph, is that correct?
A As far as I could see.
Q Do you know what this stuff --
A Actually, this is the corner of the building that you were referring to a little while ago and asked me if I could see in it. This is a picture of that corner of the building. This is a different door than the first door. I have no idea what it's comprised of, the pile, no.
Q Were Coastal's gates open while you were there?
A Yes.
Q Did you go inside the facility?
A I went -- I went to the entrance. I went no further than the entrance.
Q Did you ask anybody any questions?
A No.
Q So you didn't go up and ask anybody what's going on here?

MR. CLARK: I do understand. Obviously from the town's perspective, one of the issues is whether or not the Zoning Board's findings were preclusive in this matter. So the supporting documentation -- I mean the decision has been produced as part of the motion for preliminary injunction, obviously it's before the Court but the record --

THE COURT: This is all plaintiffs' witnesses that you are introducing their testimony?

MR. CLARK: It's not all plaintiffs' witnesses but it's people --

THE COURT: Are there any representatives of the town who testified?

MR. CLARK: No, it was the town Zoning Board who was hearing the testimony.

THE COURT: I will accept whatever you stipulated to put in evidence. That's fine.

You are saying this is on the issue of preemption?

MR. CLARK: Well, the issue that was litigated at the zoning board was the same issue that's been presented before your Honor. Plaintiffs took the position at the Zoning Board that they were preempted under federal law and that was found to be not the case by the Zoning Board, then they came here to Federal Court.

So our argument with respect to the preemption is not so much that it's preemption but that the Zoning Board's

we do that.

THE COURT: You can talk to the court reporter and I will leave it to you to work out unless you want to do it right now on the record, any schedule you want with regard to the briefing.

MR. LANE: We will try to work it out and bring it to you only if we have a problem.

MR. CLARK: I don't anticipate a problem on that.

THE COURT: Okay.

Anybody want to add anything at this point?

Anybody want to talk settlement in this case?

MR. CLARK: I don't have authority to do so.

THE COURT: Okay.

Decision is reserved.

MR. CLARK: Thank you.

THE COURT: Make sure I have a complete set of the exhibits.

MR. CLARK: Yes, your Honor.

(The matter was concluded.)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Coastal Distribution

Town of Babylon

EXHIBIT AND WITNESS LIST

CASE NUMBER: 05-CV-2032 (JS) (ETB)

PRESIDING USDJ/USMJ	PLAINTIFF'S ATTORNEY	DEFENDANT'S ATTORNEY
E. Thomas Boyle	James F. Gaughran, Ronald A. Lane, John F. McHugh	Jonathan S. Gaynin, Mark Cumbertson, James P. Clark, Howard Miller
HEARING/TRIAL DATE 5/19/05	COURT REPORTER/ESR Owen Wick	COURTROOM DEPUTY L. Lundy

PTF. NO.	DFT. NO.	DATE OFFERED	MARKED	ADMITTED	DESCRIPTION OF EXHIBITS* AND WITNESSES	FROM TIME	TO TIME
✓		5/19/05			re-cross, Town/witness/sworn/Fred L. Krebs/testifies		
✓		5/19/05			Coastal Direct/witness/Joseph Retigliano/sworn/testifies		
D1		5/19/05	✓	✓	Response letter dtd May 29, 2002		
CD2		5/19/05	✓	✓	Town of Babylon letter August 8, 2003		
CD3		5/19/05	✓	✓	Pine lawn lease renewal October 23, 2003		
CD4		5/19/05	✓	✓	Farrell Fritz letter Jan 15, 2004		
CD5		5/19/05	✓	✓	Stop work Order March 29, 2004		
CD6		5/19/05	✓	✓	Town Attorney letter March 31, 2004		
CD7		5/19/05	✓	✓	Memorandum Steve Bellone, Supervision Sept. 9, 2004		
D8		5/19/05	✓	✓	DEC Response to Meeting letter Feb. 15, 2005		
CD9		5/19/05	✓	✓	Photographs		
CD10		5/19/05	✓	✓	Photographs		
CD11		5/19/05	✓	✓	Photographs		
CD12		5/19/05	✓	✓	Photographs		
CD13		5/19/05	✓	✓	Photographs		
CD14		5/19/05	✓	✓	Photographs		
CD15		5/19/05	✓	✓	Photographs		
✓		5/19/05			NYA Cross/witness/sworn/Joseph Retigliano/testifies		

*INCLUDE A NOTATION AS TO THE LOCATION OF ANY EXHIBIT NOT HELD WITH THE CASE FILE OR NOT AVAILABLE BECAUSE OF SIZE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Coastal Distribution

v.

Town of Babylon

EXHIBIT AND WITNESS LIST

CASE NUMBER: 05-cv-2032 (ETB)

PRESIDING USDJ/USMJ	PLAINTIFF'S ATTORNEY	DEFENDANT'S ATTORNEY
E. Thomas Boyle	James F. Gaughan, Ronald A. Lane, John F. McHugh	Jonathan S. Caspin, Mark Cuthbertson, James P. Clark, Howard Miller
HEARING/TRIAL DATE 5/20/05	COURT REPORTER/ESR Stephanie Druxel	COURTROOM DEPUTY L. Lundy

TP. NO.	DFT. NO.	DATE OFFERED	MARKED	ADMITTED	DESCRIPTION OF EXHIBITS* AND WITNESSES	FROM TIME	TO TIME
	✓	5/20/05			Plaintiff's Rebuttal witness sworn John Ahearn testifies		
✓		5/20/05			Coastal Re-Cross witness sworn John Ahearn testifies		

*JDE A NOTATION AS TO THE LOCATION OF ANY EXHIBIT NOT HELD WITH THE CASE FILE OR NOT AVAILABLE BECAUSE OF SIZE

Hicksville, NY
Speonk, NY
Yaphank, NY

Operations Began
May 1997

[Anacostia & Pacific Home | New York & Atlantic]

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This page last updated on May 30, 2003

TRANSFER AGREEMENT
BETWEEN
THE LONG ISLAND RAIL ROAD COMPANY
AND
SOUTHERN EMPIRE STATE RAILROAD COMPANY

This Transfer Agreement is made as of this 18th day of November, 1996, by and between THE LONG ISLAND RAIL ROAD COMPANY, a New York State public benefit corporation, Jamaica Station, Jamaica, New York 11435, (including its successors, the "LIRR") and SOUTHERN EMPIRE STATE RAILROAD COMPANY, a Delaware corporation, (including its successors and permitted assigns, the "Freight Operator").

WITNESSETH:

WHEREAS, the LIRR owns and operates rail freight facilities serving a diversified customer base in the Long Island region;

WHEREAS, the LIRR issued a Request for Proposals ("RFP") for privatization of its freight services;

WHEREAS, Anacostia & Pacific Company, Inc., in contemplation of establishing a Freight Operator, submitted a proposal,

WHEREAS, the Freight Operator submitted a proposal in response to the RFP and a final proposal in response to the LIRR's Request for Best and Final Offers (collectively the "Proposals"); and

WHEREAS, this transaction is intended and should be construed as the LIRR entirely ceasing its operations

1.1.3 This Agreement contains the entire understanding between the Freight Operator and the LIRR with respect to the Freight Operations. The parties are not bound by any written or oral statement or representation which is not expressly part of this Agreement. Any waivers, modifications or changes to this Agreement shall not be binding on either party unless set forth in a writing duly executed by both the Freight Operator and the LIRR.

1.1.4 (a) This Agreement is binding upon the Freight Operator upon its execution, but shall be null and void ab initio if (i) the LIRR fails to satisfy the requirements of clause (b)(i) within sixty (60) days of the Freight Operator's execution of this Agreement or such greater period as the Freight Operator, in its sole discretion, shall determine or (ii) the Freight Operator fails to satisfy the requirements of clause (b)(ii) within sixty (60) days of the LIRR's execution of this Agreement or such greater period as the LIRR, in its sole discretion, shall determine.

(b) The later of the dates on which the following requirements are satisfied shall be deemed the "Effective Date":

(i) The LIRR obtains the approval of the Board of Directors of the MTA and thereafter executes this Agreement; or

1996. For purposes of this Article 1.1.6 the expiration of any contract by its terms, including, without limitation, any cancellation by a party other than the LIRR, shall not, nor shall the effects thereof, constitute or be considered as a contributing factor to a material adverse change, provided that the failure to commence, or the termination prior to the Commencement Date, of the contract for movement of excavated rock in the volume [redacted] deemed a material adverse change for purposes of this Article. In the event of a material adverse change, this Agreement shall be deemed terminated and the Concession Fee shall be promptly refunded.

1.2 Definitions

1.2.1 Unless otherwise noted, the following definitions shall apply throughout this Agreement:

1.2.2 "AAR" means the Association of American Railroads.

1.2.3 "AAR Office Manual" means the Office Manual of the AAR Interchange Rules, adopted by the AAR, Operations and Maintenance Department, Technical Services Division; as amended from time to time.

1.2.4 "Abatement Period" means, (a) for any Annual Fee Period two separate periods of at least ten consecutive days; provided that for purposes of this clause (a) if the second of such periods straddles two Annual Fee Periods such period shall nevertheless

1.2.27 "Freight Premises" means the real property, including the right-of-way, tracks, appurtenances, buildings, facilities, other physical plants, and improvements thereto used by the Freight Operator pursuant to this Agreement. Freight Premises shall include only the properties identified in Exhibit 1 hereto and all Sidetracks.

1.2.28 "Freight Rolling Stock" means Rolling Stock under the control of or operated by the Freight Operator.

1.2.29 "Freight Switch" means a rail switch and other track components connecting Joint Use Premises with Freight Premises that is used to switch Freight Rolling Stock from and to Joint Use Premises and Freight Premises.

1.2.30 "Hazardous Material" means (i) "hazardous substance" as defined under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601 et seq., and any regulations promulgated thereunder, each as it may be in effect from time to time, (ii) "hazardous materials" as defined under the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801 et seq., and any regulations promulgated thereunder, each as it may be in effect from time to time, (iii) "hazardous waste" as defined under New York Environmental Conservation Law Section 27-0901 et seq., and any regulations promulgated thereunder, each as it may be in effect from time to time, (iv) "hazardous substance" as defined under the Clean Water Act, 33 U.S.C. Section 1321 et seq., and any regulations promulgated thereunder, each as it may be

1.2.46 "Rolling Stock" means a railroad car, locomotive, caboose, intermodel car, inspection car, passenger coach, cab car, bogie, wrecking equipment, work equipment and any other form of equipment with wheels operated on railroad track. Each of the foregoing will constitute a "unit" of Rolling Stock (it being understood that, with respect to any multiplatform car, each platform shall be considered a "unit").

1.2.47 "Sidetrack" means all track on the Freight Premises side of a Clearance Point of a Freight Switch that is used for switching freight cars and equipment to and from freight customer facilities or Team Track.

1.2.48 "STB" means the United States Surface Transportation Board or any successor agency performing the same or similar functions.

1.2.49 "Switch Maintenance Fee" is defined in Article 4.1.1(b) hereof.

1.2.50 "Team Track" means a rail facility, included in the Freight Premises, that is available for use by multiple rail customers for loading and unloading merchandise from Freight Rolling Stock. The Team Tracks are identified on Exhibit 1 hereof.

1.2.51 "Trackage Fee" is defined in Article 4.1.1(a) hereof.

1.3 All adjustments for inflation contained in this Agreement shall be based on the Indices of Railroad Material Prices and Wage Rates for Eastern Class I

(b) The Freight Operator's safety record based on the average annual FRA-reportable accidents per 200,000 man hours or, if unavailable, other comparable measure, for the three (3) year period preceding the date of the Renewal Notice is equal to or better than the national industry average for Class C freight railroads for the same period or in the event that a national industry average for Class C freight railroads is not ascertainable such other comparable index as may be available. For purposes of this clause, accidents caused primarily by the LIRR shall be excluded from the Freight Operator's safety record; provided that such accident has been previously determined to be caused primarily by the LIRR.

(c) The annual average of freight carload volume (measured in terms of loaded "units" of Rolling Stock consisting of railroad cars and intermodel cars) transported in the Freight Operations for the three (3) year period preceding the date of the Renewal Notice shall be at least 24,474 carloads, or the percentage increase of the carload volume for the twelve calendar months preceding the Commencement Date to the carload volume for the twelve calendar months preceding the Renewal Date shall be more than 125% of the percentage increase achieved by the Eastern Class I Railroads for the corresponding periods; provided that if no such statistic is available

2.2.3 Notwithstanding any provisions herein, nothing shall prevent the parties from negotiating any renewals for a term no greater than ten (10) years.

ARTICLE 3: GRANT OF RIGHTS TO USE

3.1 Right to Operate and Use

3.1.1 The Freight Operator shall have the exclusive right to use the Freight Premises and the Joint Use Premises to conduct Freight Operations in accordance with the provisions of this Agreement.

3.1.2 The Freight Operator shall have the exclusive right to manage, direct and control the Freight Premises; provided, that the Freight Operator shall not enter into any contracts, leases or other agreements which extend past the Initial Expiration Date or, if the Agreement is extended, such other applicable termination date, without the LIRR's prior written consent.

3.1.3 The Freight Operator may, at its sole risk and expense, construct or relocate freight-related facilities and infrastructures (such as transloading facilities, shops, team tracks, yards, sidings, etc.) within the Freight Premises, subject to prior review and approval by the LIRR of the Freight Operator's plans, which approval will not unreasonably be withheld; provided that such approval shall be deemed to be granted if the LIRR has not objected to such construction within 45 days of notice thereof. All

to the City of New York Department of General Services commencing on September 1, 1992 pursuant to a Purchase Option Agreement dated August 26, 1992, are not moved from the area by rail as required by Section 5 of the Terms and Conditions of that Agreement, except due to force majeure, the LIRR shall, at the request of the Freight Operator, promptly use good faith efforts to negotiate the "significantly higher compensation" referred to in said Section 5 and shall promptly pay to the Freight Operator from the additional compensation, if any, received the lesser of (i) the full amount of such additional compensation, if any, or (ii) 50% of the difference between $5.4 million and the revenues collected by the Freight Operator for movement of such material.

3.3 Limitations on Grant

3.3.1 The Freight Operator's right to conduct Freight Operations over the Joint Use Premises is subject to the LIRR's management, direction, dispatching, operation and control as set forth in this Agreement.

3.3.2 The grant of rights in Article 3.1 specifically excludes all of the following:

(a) Any right to control, direct or interfere with the LIRR's Passenger Operations on the Operating Premises or the Passenger Premises.

any such encroachments within 30 days after the Commencement Date; provided, however, that the Freight Operator (at its own expense) may on the LIRR's behalf take lawful action to remove any such occupancy which was not granted or approved by the LIRR or its predecessors in title. At the Freight Operator's request the LIRR, to the extent applicable, shall, at the expense of the Freight Operator, cooperate with the Freight Operator in connection therewith.

(e) Any right to use or permit others to use the Freight Premises for purposes not directly related to Freight Operations. Without limiting the generality of the foregoing, the Freight Operator shall not use or permit the use of the Operating Premises for:

(i) Tenancies not directly related to the Freight Operations;

(ii) Utility right-of-way or crossings, including electrical and telephone wires, fiber optic cables and pipelines of any kind (unless such utility is installed for the benefit of the Freight Operator or a permitted subtenant, with the prior permission of the LIRR); and

(iii) Advertising or billboards of any kind and signage not directly related to the Freight Operations.

shippers or others directly involved in the furtherance of Freight Operations on the Freight Premises (other than any such lease or license that has the effect, individually or taken together with all other leases or licenses, of causing all or a substantial portion of the Freight Operations to be conducted directly by any person or entity other than the Freight Operator), which shall be subordinate and subject to the terms and conditions of this Agreement. The LIRR shall receive prior written notice of any and all such agreements. Such leases and licenses, if any, shall provide for insurance and indemnification of the LIRR and its affiliates (including any government or governmental agency) to the same extent as provided under this Agreement. Such leases and licenses, if any, shall not relieve the Freight Operator of any obligations or duties imposed on it by this Agreement.

(g) Any use of the name The Long Island Rail Road Company or LIRR or any name derived therefrom or confusingly similar thereto, without the prior written consent of the LIRR; provided that the Freight Operator may use any other name with the words "the", "railroad" or "company". The Freight Operator agrees not to hold itself out as (a) having a common identity with the LIRR or any of its affiliates (including any government or governmental agency) or (b) acting as the LIRR's agent.

reconstruction and rehabilitation project. In such event, the Freight Operator will be entitled to receive from the LIRR damages as described in the next sentence. Damages means 50% of the revenues received during the twelve months preceding delivery of the aforementioned notice from customers that can no longer be served by rail due to such project multiplied by twice the number of years and fractional portions thereof of such period of interference.. In addition, the LIRR shall, without duplication, indemnify the Freight Operator for any Loss or Damage in connection therewith. If the Freight Operator resumes Freight Operations after completion of this construction project, the Freight Operator shall be subject to certain scheduling limitations as to joint use to be agreed upon in writing. The LIRR shall use reasonable efforts to have the project work performed in a manner to minimize disruptions to the Freight Operations.

3.3.5 The following provisions apply to a portion of the Freight Premises known as Yard A and described more fully in Exhibit 5 hereto:

(a) The LIRR reserves the right to take exclusive possession of part or all of Yard A in the event it is needed to be used as part of the Passenger Operations, for expansion of Passenger Operations, or for any regional transportation plan. Subject to the last paragraph of this Article 3.3.5, the LIRR shall only exercise this right upon not less than six months prior

the preceding sentence. In addition, to the extent the Freight Operator has made any Capital Improvements to Yard A, the Freight Operator shall receive from the LIRR the unamortized cost of such improvements; provided that such amortization shall be based on a useful life of seven years.

The foregoing provisions of this Article 3.3.5 shall not apply to the property identified in Exhibit 14, which property the LIRR shall be allowed to take any time after the Commencement Date without any compensation to the Freight Operator.

3.3.6 After giving notice of proposed construction under any provision of this Section 3.3, LIRR representatives shall meet with Freight Operator representatives to review the details of the construction project, including but not limited to work plans and schedules. If the construction project, in Freight Operator's sole opinion, requires flagmen or other personnel for safety or operational considerations, Freight Operator will assign personnel to the project at LIRR's sole expense.

3.3.7 The LIRR may, in respect of the Freight Premises, have its own systematic and periodic program of environmental auditing or a documented, systematic practice regarding its due diligence in preventing, detecting or correcting violations as defined in the Environmental Protection Agency Policy regarding

building. Notwithstanding the foregoing, (i) LIRR shall be solely responsible for the maintenance and security of the basement communications room in the LIC Freight Building, and (ii) LIRR shall indemnify and hold harmless the Freight Operator for all Loss and Damage arising out of or in connection with the use of the basement communications room (except to the extent caused by the gross negligence, recklessness or willful or wanton misconduct of the Freight Operator).

3.3.9 The LIRR retains the right of access to and exclusive use of the property identified in Exhibit 15 that is located underneath the 21st Street Bridge and extends westward into the culvert between the concrete walls, Tracks 1 through 8 (identified in Exhibit 14 of the Transfer Agreement) in Yard A and the ground storage area in Maspeth Yard (Exhibit 16) from April 1997 through December 1998. The LIRR retains the right of access to these facilities for its own personnel and such contractor(s) as may be designated by the LIRR and where necessary, using LIRR crews and equipment. The Freight Operator will also make available to LIRR the western portion of the salt track in Arch Street Yard and Track 5 in Maspeth (identified in Exhibit 15, which is not part of the Freight Premises), on an as-needed basis as determined by LIRR for loading and unloading cars of Company Traffic consistent with the need of the Freight Operator. Movement of LIRR crews and equipment within Yard A, the Arch Street Yard and Maspeth Yard will be coordinated by the Freight Operator. Notwithstanding the foregoing, (i) LIRR

3.5 Reversion of Freight Premises to the LIRR Under Certain Circumstances

3.5.1 The Freight Operator may, by written notice to the LIRR, designate a portion or portions of the Freight Premises as being unnecessary in connection with the Freight Operations. At the option of the LIRR, such portions of the Freight Premises may revert to the LIRR's control and become a part of the Passenger Premises upon 30 days prior written notice to the Freight Operator; provided however, that (i) if any such portion that reverts to the LIRR includes any part of the right-of-way or an appurtenance associated with any tracks in the Freight Premises, such portion that reverts to the LIRR shall also include such tracks and (ii) in no event shall there revert to the LIRR any tracks or facilities that are only accessible through the Freight Premises. If the LIRR does not elect to have any such portion revert to its control (i) such portion shall remain as part of the Freight Premises and (ii) with respect to any such portion which is only accessible through the Freight Premises, the Freight Operator, with the consent of the LIRR (which consent shall not be unreasonably withheld), may remove and sell the rail and associated track materials thereon in accordance with Article 3.6.5(iii).

3.5.2 At any time during the notice period described in Article 3.5.1 hereof, the Freight Operator may reclaim such portion or portions of the Freight Premises by withdrawing the designation described in

within the Freight Premises, provided, that the net proceeds from any sale shall be shared equally by the Freight Operator and the LIRR; (ii) the Freight Operator may replace any part of the Freight Premises with parts of equal or greater quality and the proceeds from the sale of such replaced parts shall accrue to the Freight Operator; and (iii) net profits, if any, from the sale of any materials with the consent of the LIRR pursuant to Article 3.5.1 hereof shall be shared equally by the Freight Operator and the LIRR.

3.7 Freight Switches

3.7.1 Exhibit 6 hereto sets forth a list of Active Freight Switches, all of which have been classified as either Category A, Category B or Category C Freight Switches. Except as set forth below, the classification of a Freight Switch shall not change prior to the termination of this Agreement, including any Extension Period.

3.7.2 All Category C Freight Switches existing on the Effective Date shall automatically become Category B Freight Switches eighteen (18) months after the Commencement Date, for all purposes under this Agreement, including for purposes of Article 4.1.1(b) hereof.

3.7.3 Any Freight Switch that, after the Commencement Date, is (i) installed, including by way of replacement (other than when replacing a Category A Switch, which

Operator shall make such request in writing to the LIRR, and follow the procedures outlined in Exhibit 8 hereto.

3.7.7 (a) The LIRR shall replace or rehabilitate, at its cost, any Category A Freight Switch that is in need of replacement or rehabilitation upon request of the Freight Operator or if the LIRR elects to replace or rehabilitate such Freight Switch.

(b) The LIRR shall replace or rehabilitate, at the Freight Operator's cost, any Category B or Category C Freight Switch that is, or is estimated to be within one (1) year of the date of notice set forth in this Article 3.7.7, in need of replacement or rehabilitation, provided that (i) the LIRR has furnished to the Freight Operator written notice that includes the cost of and schedule for such replacement or rehabilitation at least 120 days prior to the proposed date of initiating such replacement or rehabilitation (provided, that the LIRR shall not be obligated to furnish such notice in emergencies which affect the safety of Passenger Operations on the Joint Use Premises) and (ii) within 60 days after receipt of such notice, the Freight Operator has not notified the LIRR in writing that such Freight Switch should be deactivated rather than replaced or rehabilitated. Upon receipt of any such notice requesting deactivation, the LIRR may, but shall not be obligated to, deactivate the relevant Freight Switch immediately. Nothing set forth in this clause (b) shall preclude the LIRR from replacing or

20.15.2 The LIRR hereby represents and warrants to the Freight Operator that the grant of rights and other assets by the LIRR to the Freight Operator provides the Freight Operator with sufficient rights to conduct the Freight Operations in a manner substantially similar to that conducted by the LIRR on the Effective Date, subject to the expiration of customer and other contracts that do not extend past the Commencement Date and subject to the requirements of Article 15.3 hereof.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement in duplicate and have caused their corporate seals to be hereunto affixed the day and year first written below.

THE LONG ISLAND RAIL ROAD COMPANY

By: _____
Thomas F. Prendergast
President

Date: 12/19/96

SOUTHERN EMPIRE STATE RAILROAD COMPANY

By: _____

Print Name: R.C. McCaffrey Jr.

Title: President

Date: 15 November 1996

EXHIBIT 2
MTA/LONG ISLAND RAIL ROAD
JOINT USE PREMISES

1. **Branches: Primarily Passenger Operations with Freight Operating Concession**
   - a. Main Line, Jamaica to Greenport
   - b. Montauk Branch, between Montauk and L.I. City Passenger Yard
   - c. Port Jefferson Branch, Hicksville to Port Jefferson
   - d. Central Branch, "B" Tower to Babylon
   - e. Hempstead Branch, between Queens and Garden City Interlockings
   - f. West Hempstead Branch, Valley to WM
   - g. Montauk Cut-off

2. **Yard and Team Tracks: Primarily Passenger Operations with Freight Operating Concession**
   - a. Port Jefferson
   - b. Montauk
   - c. Queens Village
   - d. Speonk
   - e. Hicksville
   - f. Patchogue
   - g. Sayville
   - h. Richmond Hill
   - i. Southhold
   - j. Pinneaire north side

3. **Bridges**
   - a. Cabin "M" Bride
   - b. "DB" Bridge

		dock/ramp
Maspeth, NY	15	paved, stor
Richmond Hill, NY	8	paved
Queens Village, NY	15	gravel driv
Hicksville, NY	25	paved
Islip, NY	1	paved
Sayville, NY	2	gravel driv
Speonk, NY	4	paved
Southampton, NY	2	gravel driv
Bridgehampton, NY	2	pit track
Port Jefferson, NY	4	paved
Medford, NY	4	dock/ramp

Yaphank Team Track

Yaphank, NY	4	gravel driv
Riverhead, NY	2	gravel driv
Mattituck, NY	1	gravel driv
Southold, NY	2	gravel driv

Public Warehouse / Cold Storage Facilities:	***Capabilities:***	***Commod***
ELM Global Logistics 50 Emjay Blvd. Brentwood, NY 11717 PH: (631) 233-3200 FAX: (631) 435-0837	360,000 s. ft. climate controlled; cross-dock, trucking/distribution; computerized inventory; web-access to inventory/EDI; short and long term storage; 10 car indoor rail spur	paper/pulp food produ bulk commoditi packaged g
Conservative Express 1600 New Highway Farmingdale, NY PH: (631) 254-2442 FAX: (631) 254-2420	dry, bulk, cold storage, truck delivery, cross-docking	paper/pulp lumber, dr bulk, packa goods
Cold Storage of Nassau Westbury, NY PH: (516) 333-4466 FAX: (516) 333-5457	food grade cold storage	food produ produce, fi foods

FILE COPY

LEASE AGREEMENT
(FARMINGDALE)

THIS LEASE, made as of December 16, 1999, between THE NEW YORK & ATLANTIC RAILWAY, whose mailing address is 68-01 Otto Road, Glendale, New York, 11385, hereinafter referred to as Lessor, and BULK INTERMODAL DISTRIBUTION SERVICES, INC. (marketed as CSX TRANSFLO), whose address is 550 Water Street, Jacksonville, FL 32202, hereinafter referred to as Lessee:

WITNESSETH: That, for and in consideration of the rents hereinafter agreed to be paid by Lessee, and of the covenants and agreements herein to be kept and performed by Lessee, Lessor hereby demises and leases unto Lessee solely, certain land and trackage, the use and operation of which was granted to Lessor under the terms of that certain Transfer Agreement between The Long Island Railroad Company and Lessor (under its prior name "Southern Empire State Railroad Company"), dated November 18, 1996, as amended by the First Amendment to Transfer Agreement, dated May 6, 1997, the Second Amendment to Transfer Agreement, dated August 31, 1998 (the "Transfer Agreement"), referred to hereinafter as the "Premises", located at Farmingdale, Suffolk County, New York, as shown on Lessor's Drawing attached hereto as Exhibit "A", and described as follows:

> Being a parcel of land containing approximately 2 acres together with the track located thereon, located east of New Highway and north of the Long Island Railroad tracks, and being part of the property commonly known as the Farmingdale Yard.

1. USE:

1.1 Lessee shall use and occupy the Premises solely for the purpose of operating a transportation terminal and for product, material and equipment storage, distribution and warehousing. Lessee's rights under this Lease shall be subject to the terms and restrictions of the non-redacted sections of the Transfer Agreement attached hereto as Exhibit B ("Transfer Agreement Restrictions"), which are incorporated herein and made a part hereof.

1.2 Without limiting the foregoing, each of the reservations, conditions and restrictions applicable to Lessor's use and operation of the Premises under the Transfer Agreement Restrictions shall be equally applicable to Lessee's use of the Premises under the terms of this Agreement.

2. RENTS:

2.1 Lessee shall yield and pay to Lessor as Rental the sum of ONE U.S. Dollar ($1.00) payable annually in advance from the effective date hereof.

EXHIBIT
NYA 4

7. PERMITS, ORDINANCES, REGULATIONS, ETC.:

7.1 Lessee, at Lessee's sole cost and expense, shall secure all necessary permits, letters or certificates of approval from any governmental authority having jurisdiction over the Premises or Lessee's use thereof.

8. MAINTENANCE:

8.1 Lessee, at its sole cost and expense, will maintain the Premises.

9. ENVIRONMENTAL:

9.1 During the first thirty (30) days following the execution of this Agreement, Lessee or its agent may, at Lessee's sole cost and expense, conduct a Phase I environmental assessment of the Premises; provided, that such assessment does not include any borings, soil sampling or other such activities, and that the results of such assessment are provided to Lessor. Following completion of the Phase I assessment and the delivery of the results to Lessor, Lessee may make a written request to Lessor for permission to perform a Phase II environmental assessment on the Premises. Lessor will grant or deny such request, in its sole discretion, within five (5) days of its receipt of such written request. If Lessor grants such request, Lessee or its agent may, at Lessee's sole cost and expense, perform a Phase II environmental assessment of the Premises; provided, that: (i) Lessor, at its sole cost and expense, may accompany and observe Lessee or its agent in performing such assessment; (ii) the results of such assessment are provided to Lessor; and (iii) such assessment is completed no more than sixty (60) days after the execution of this Agreement. If Lessor denies permission for Lessee or its agent to perform a Phase II assessment in accordance with this section 9.1, Lessee may terminate this Agreement.

9.2 Subject to the provisions of section 9.3 hereof, Lessor shall not be responsible for, and Lessee shall forever defend, indemnify and hold harmless Lessor, LIRR and their respective shareholders, directors, officials, officers, agents, representatives and employees from and against, any and all liabilities, claims, demands, penalties, fines, settlements, damages, costs, expenses and judgments of whatever kind or nature, known or unknown, contingent or otherwise arising out of, or in any way related to, the presence, storage, transportation, disposal, release or threatened release of any Hazardous Materials (as hereinafter defined) over, under, in, on, from or affecting the Premises or any persons, real property, personal property, or natural substances thereon or affected thereby, which presence, storage, transportation, disposal, release, or threatened release is attributable to actions or omissions that occur on the Premises during the term of this Lease, unless and except where such presence, storage, transportation, disposal, release or threatened release arises from or in connection with the willful misconduct of Lessor or LIRR. For purposes of this paragraph, "Hazardous Materials" means (i) any "hazardous waste" as defined under the Resource Conservation and Recovery Act, 42 U.S.C. Section 9601 et. seq., (ii) "hazardous substance" as defined under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601 et seq., (iii) "hazardous materials" as defined in 49 C.F.R. § 173.2, (iv) 'hazardous waste" as defined under New York

response action or follow up measures at Lessee's expense. In such an event, Lessee shall remain liable to Lessor and LIRR for all Loss or damage caused by the release.

10. INSURANCE:

10.1 Prior to commencement of occupation or use of the Premises, Lessee shall procure, and shall also maintain during continuance of this Lease, at its sole cost and expense, the insurance set forth below:

(a) New York State Worker's Compensation & Employers Liability Insurance or Federal Employer's Liability Act ("FELA") Coverage – as required by law. FELA coverage may be self-insured with proof of financial competency;

(b) Commercial General Liability Insurance providing limits of $3,000,000 per occurrence with an annual aggregate of no less than $6,000,000 and including the following coverages: Bodily Injury or Death; Property Damage; Independent Contractors Coverage; Personal Injury; Contractual Liability; Products & Completed Operations; Broad Form Property Damage; Sudden & Accidental (caused by seepage, pollution and contamination). Any contractual liability exclusion, applicable to work to be performed within 50 feet of railroad tracks, must be voided. "Additional Insured" endorsement shall name: the Lessor, LIRR and the New York State Metropolitan Transportation Authority and its affiliates and subsidiaries or any successor agency (the "MTA"). Lessee shall be permitted to self insure up to $500,000 subject to annual delivery to Lessor of a certificate of Lessee's chief financial officer certifying as to the Lessee's ability to satisfy such deductible; and

(c) Property Insurance, covering the property owned by Lessor or the LIRR and in the Lessee's care, custody and control, in an amount equal to the replacement cost, of like kind or quality, thereof, insuring against risk of loss. The policy should provide for a limit of no less than $6,000,000, subject to a deductible of no more than $500,000. Said policy must be endorsed to include the Lessor, LIRR and the MTA as additional insureds.

10.2 All insurance must be written in a form by an insurer reasonably satisfactory to the Lessor and LIRR. Lessee shall furnish to the Lessor, at least fourteen (14) days prior to the commencement of operations under this Lease, certificates of insurance evidencing the policies listed in section 10.1(a)-(c) hereof, using the Railroad Insurance Certificate form. These policies must provide that thirty (30) days' advance notification will be given in writing to Lessor and LIRR in the event of any material change, a failure to renew, or cancellation of any policy. All certificates of insurance submitted to Lessor under this section 10.2 shall be submitted by Lessor to LIRR for approval under the terms of the Transfer Agreement. If LIRR demands insurance coverage in addition to that evidenced by the submitted certificates, Lessee shall obtain such coverage and provide certificates of said coverage to Lessor prior to commencement of operations under this Lease.

10.3 In addition to the specific requirements of this section 10, if Lessee requires any insurance from any of its invitees or contractors, of any nature, it shall require that Lessor and LIRR be an additional insured on such policies.

(d) if Lessee fails to comply in any material respect with any applicable federal, state or local regulations relating to safety or Hazardous Materials, which failure(s), singly or in the aggregate, cause a significant hazard or danger to the public or the employees or property of Lessor or LIRR.

12.2 In the event of any default of Lessee, where such default continues for a period of thirty (30) days after notice thereof by Lessor to Lessee or, if such performance cannot be reasonably accomplished within such thirty-day period, Lessee does not in good faith, commence such performance within such thirty-day period or does not diligently proceed therewith to completion, then Lessor may terminate the Lease by written notice to this effect subject, in all cases, to the Lessee's obligation to pay any sums owning under the terms of this Lease.

13. NO WAIVER:

13.1 No waiver by either party of any breach of the other party's obligations or agreements herein shall be a waiver of any subsequent breach or of any obligation or agreement, nor shall any forbearance by either party to a remedy for any breach by the other party be a waiver by that party of any rights with respect to such or any subsequent breach. No failure by Lessor to bill Lessee for any amounts due under this Lease shall be deemed or construed as a waiver of the right of Lessor to collect such sums from Lessee.

14. NOTICES:

14.1 Every notice, approval, consent, or other communication desired or required under this Lease shall be effective only if the same shall be in writing and sent postage prepaid by registered or certified mail (or a similar mail or express service available at the time), directed to the other party at its address indicated on the first page of this Lease for Lessor, addressed to its President, and for the Lessee addressed to its General Manager – HIDS, or such other address as either party may designate by notice given from time to time in accordance with this Section.

15. BINDING ON SUCCESSORS:

15.1 The covenants and agreements herein contained shall inure to the benefit of and be binding upon the successors and permitted assigns of the parties hereto.

16. RECORDATION:

16.1 This instrument is not to be recorded by any party and recordation shall not constitute notice for any legal effect.

16.2 However, in the event of recordation, all costs, charges, stamps and/or taxes, however styled or assessed, necessary to place this Lease or a Memorandum of this Lease (and any subsequent Release or Memorandum of Release) upon record shall be borne solely by Lessor.

Notwithstanding the foregoing, Lessee shall not be responsible for and will not indemnify Lessor or LIRR from and against any claims or liability arising out of or in connection with the sole negligence or sole willful misconduct of Lessor or LIRR.

19.2 Subject to the provisions of section 9.2 hereof, Lessor hereby assumes, releases, and agrees to protect, save harmless, defend and indemnify Lessee from and against all claims and liability when caused by, arising out of or resulting in any manner from gross negligence or willful misconduct of Lessor.

20. USE OF TRUCK SCALE

20.1 Lessee shall have exclusive and uninterrupted use of the Lessor's truck scale located on the Premises, twenty-four (24) hours per day during the term of the lease.

21. TERMINATION:

21.1 Notwithstanding any other provisions contained herein, this Lease shall terminate upon the termination of the Transfer Agreement for any reason. Lessee shall have no claim or cause of action against Lessor or LIRR and hereby releases Lessor and LIRR from all claims and liability arising out of or resulting in any manner from any such termination.

22. ENCUMBERANCES:

22.1 The Lessee shall not create, suffer or otherwise permit any lien or encumbrance to be filed against any or all of the Premises, including without limitation, mechanic's or materialmen's liens, security interests for loans or other obligations, taxes, fees or assessments, or encumbrances of any other nature. In the event that any such encumbrance(s) are assessed against the Premises, Lessee shall cause said encumbrance(s) to be discharged of record within thirty (30) days after the date of filing.

23. MISCELLANEOUS:

23.1 This Lease is executed by all parties under current interpretation of any and all applicable federal, state, county, municipal, or other local statute, ordinance, or law. Further, each and every separate division (paragraph, clause, item, term, condition, covenant or agreement) herein contained shall have independent and severable status from each other separate division, or combination thereof, for the determination of legality, so that if any separate division herein is determined to be unconstitutional, illegal, violative of trade or commerce, in contravention of public policy, void, voidable, invalid or unenforceable for any reason, that separate division shall be treated as a nullity, but such holding or determination shall have no effect upon the validity or enforceability of each and every other separate division herein contained, or any other combination thereof.

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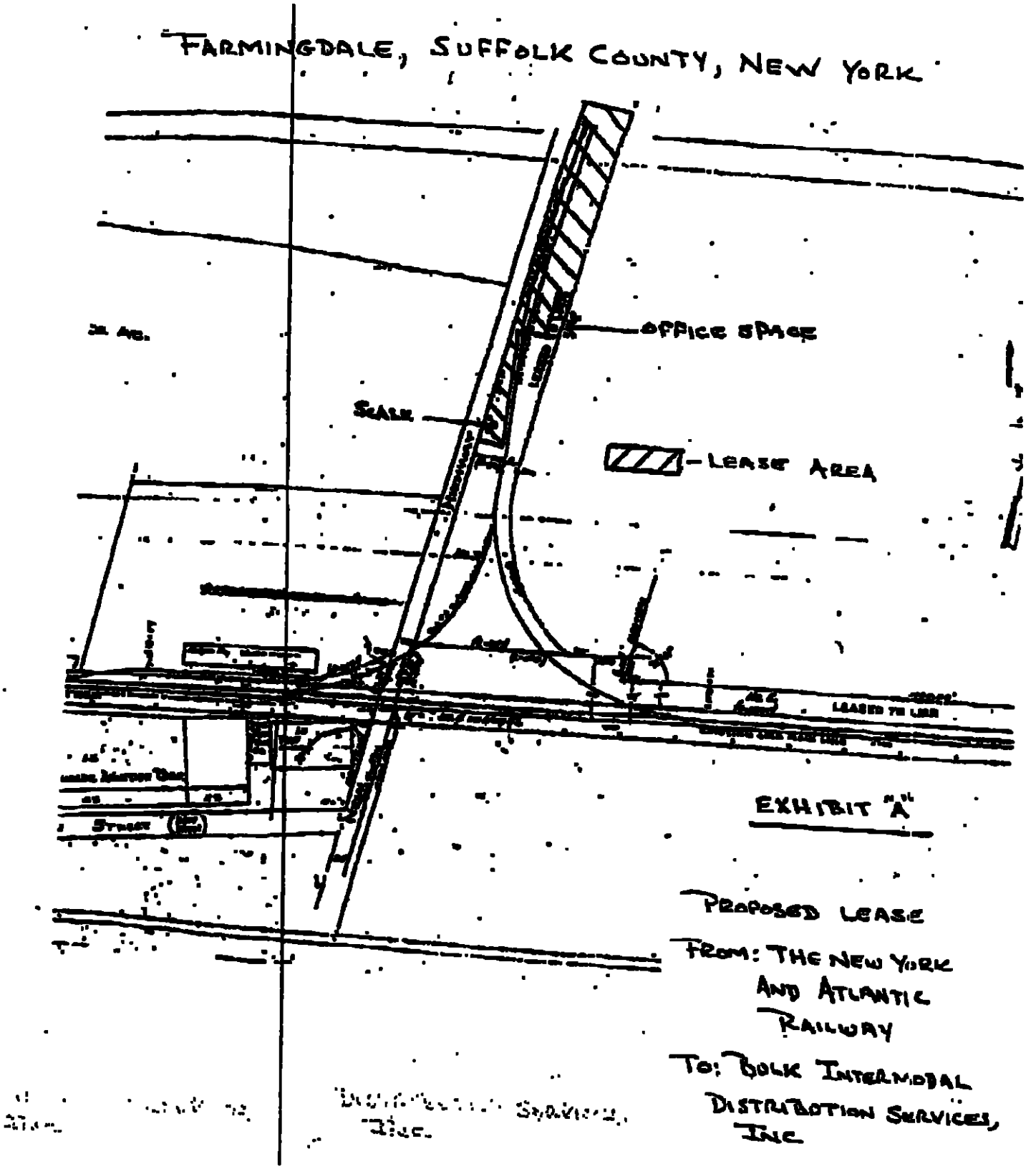
FARMINGDALE, SUFFOLK COUNTY, NEW YORK
OFFICE SPACE
SCALE
LEASE AREA
EXHIBIT "A"
PROPOSED LEASE
FROM: THE NEW YORK AND ATLANTIC RAILWAY
TO: BULK INTERMODAL DISTRIBUTION SERVICES, INC

3. TERM:

3.1 This Lease shall become effective the date first written above, and shall continue in effect for one (1) year unless and until terminated by written notice as hereafter provided (the "Initial Term").

3.2 Lessee shall have an option to renew this lease for four (4) additional one (1) year terms (each a "Renewal Term"); provided, however, that Lessee shall not have a renewal option in the event that it handles less than four hundred (400) loaded rail cars on the Premises for purpose of transload during the Initial Term, or during any Renewal Term thereafter. For purposes of this section 3.2 the number of cars to be counted for an articulated unit shall be determined by the AAR Car Type code as defined in the UMLER Specification Manual. The second numeric in the Car Type Code covering codes "Q" and "S" will be the factor in determining the car count for an articulated unit. By way of example, AAR Car Type code "S566" would equate to five (5) car count as these type cars have five (5) wells capable of handling forty-foot (40") to fifty-foot (50") containers in each well, while a single unit of roadtrailer equipment (or compatible bimodal freight handling equipment) shall count as one-half (1/2) of a car. Lessee may exercise its renewal option by providing written notice of exercise no later than ninety (90) days prior to expiration of the Initial Term or current Renewal Term, as applicable. The rental of each of the four (4) Renewal Terms shall be one U.S. Dollar ($1.00).

4. RIGHT OF INGRESS AND EGRESS:

4.1 Subject to *force majeure* events, Lessor shall provide to Lessee ingress to and egress from the Premises via Lessor's adjacent property, twenty-four (24) hours each day during the term of this Lease.

5. UTILITIES, SERVICES:

5.1 Lessee, at its sole cost and expense, shall arrange for and obtain electricity and other utility services necessary for its use of the Premises.

6. IMPROVEMENTS:

6.1 Subject to the provisions of section 6.2 hereof, Lessee, at its sole cost and expense will construct and thereafter maintain any improvement upon the Premises, including, but not limited to, parking, buildings, new trackage, realignment or removal of existing trackage and relocation of primary access to the Premises. Upon the expiration or earlier termination of this Lease, Lessee shall leave all improvements upon the Premises.

6.2 Lessee shall not make any improvements or alterations to the Premises except with the prior written consent of Lessor and The Long Island Rail Road Company ("LIRR"). Lessee shall not affix any advertisement, notice or sign in, to, or on the Premises, other than those required by law or directional (locational signs related to the Lessee's business) without first obtaining the specific written consent and authorization of Lessor and LIRR.

9.3 Lessee shall not be responsible for, and Lessor shall forever defend, indemnify and hold harmless Lessee, its shareholders, directors, officials, officers, agents, representatives and employees from and against any and all liabilities, claims, demands, penalties, fines, settlements, damages, costs, expenses and judgments of whatever kind or nature, that arise from the presence, storage, transportation, disposal, release or threatened release of any Hazardous Materials over, under, in, on, from or affecting the Premises or any persons, real property, personal property, or natural substances thereon or affected thereby, which presence, storage, transportation, disposal, release, or threatened release is attributable to any actions or omissions of Lessor that occurred on the Premises prior to the date of this Lease, except if and to the extent that any such liabilities, claims, etc. arose out of the wrongful acts or omissions of Lessee or any of its employees, guests, invitees, contractors, subcontractors, representatives or agents.

9.4 Provided that Lessee: (i) obtains the prior written consent of Lessor; and (ii) complies with all applicable laws, rules and regulations governing the transportation of Hazardous Materials, Lessee may transport or permit to be transported Hazardous Materials over the Premises.

9.5 (a) In the event of any release of Hazardous Materials occurring on any part of the Premises, and regardless of the cause of such release, Lessee at its sole expense, shall immediately:

(i) make any and all reports required by federal, state or local authorities;

(ii) advise both the owner/shipper and Lessor of the Hazardous Materials released and their location; and

(iii) Arrange for and perform or cause the performance of any appropriate response action in connection with any release of Hazardous Materials from the Premises (including without limitation post-response testing and reporting), in accordance with all federal, state, or local laws, rule or regulations.

(b) Lessor and/or LIRR may have representatives at the scene of any such release to observe and provide information and recommendations concerning any response action effort, and may perform such post-response testing as it may deem reasonably necessary to test the adequacy of the response action.

(c) If Lessee fails to undertake an appropriate response action on the Premises or to undertake prompt and appropriate follow-up measures, and if any such failure impacts Lessor's freight operations, LIRR's passenger operations, or violates federal, state or local laws, rules or regulations, then Lessor or LIRR may perform, or cause to be performed, any necessary response action or follow up measures at Lessee's expense. In such an event, Lessee shall remain liable to Lessor and LIRR for all Loss or damage caused by the release.

10.4 Notwithstanding the provisions of sections 10.1 – 10.3 hereof, in the event that Lessee's insurance retentions are in excess of the applicable amounts of insurance required under this section 10, and Lessee provides evidence of its financial resources and/or financial support from its corporate parent, CSX Corporation, proving, in Lessor's sole discretion, that Lessee is capable of meeting its obligations under this section 10, then Lessee shall be deemed to have satisfied such obligations.

10.5 In the event that the scope and amount of insurance required by LIRR under the Transfer Agreement is modified or amended for any reason, Lessor reserves the right to modify and amend the scope and amount of insurance required under this section 10.

11. CONDEMNATION:

11.1 In the event of the condemnation, appropriation or taking over for public or quasi-public use of the Premises, in whole or in part, by any competent authority empowered to do so, renders the Premises impossible or impractical for Lessee's use, of which fact Lessee shall be the sole judge, then Lessee may terminate this Lease as from the date of the taking over by such competent authority by giving written notice to that effect to the Lessor at any time prior to such date. Lessee shall have no claim against the Lessor or against any competent authority for the value represented by the unexpired term of the Lease. The Premises shall be deemed impossible or impractical for Lessee's use if all or substantially all of the Premises have been taken or if the untaken portion cannot be practically and economically used or converted for use by Lessee for the purpose permitted by this Lease.

11.2 In the event of a condemnation as contemplated in section 11.1 hereof, Lessee shall have no claim or right to any portion of any award or settlement provided by the condemning party.

12. DEFAULT:

12.1 Lessee shall be considered in default under the provisions of the Lease in the following cases:

(a) if Lessee shall violate any of the provisions of the Lease providing for the payment of the Rental;

(b) if Lessee shall become insolvent, make an authorized assignment of a substantial portion of its property for the benefit of its creditors in general, be adjudicated in bankruptcy or wound-up, take or attempt to take benefit of any law in respect of insolvency or bankruptcy, or if a receiver or a trustee is appointed for the property of the Lessee or for any part thereof;

(c) if Lessee shall be in default in fulfilling any of the covenants and conditions of the Lease; or

17. ASSIGNMENT AND SUBLETTING:

17.1 Lessee may not, at any time, give, transfer or otherwise assign the Lease, or sublet the Premises, in whole or in part, directly or indirectly, without the written and specific consent of the Lessor and LIRR.

17.2 Notwithstanding any assignment or sublease, the Lessee shall always remain principally responsible for the fulfillment of its obligations hereunder.

18. FORCE MAJEURE:

18.1 In the event that either party is unable to perform any specific duty and/or responsibility as stated in this Lease due to or as a result of one or more of the following causes: Act of God, including, but not limited to, floods, storms, earthquakes, hurricanes, tornadoes, snow storms or other severe weather or climatic conditions; Act of public enemy, war, blockade, insurrection, riot, vandalism or sabotage, fire, accident, wreck, derailment, washout or explosion, strike, lockout or labor dispute, then such duty and/or responsibility shall be suspended, but only insofar as those specific duties and/or responsibilities are affected by such disability and only for the duration of such disability.

18.2 The party experiencing the disability will send written notice to the other party to this Lease, stating, the location and nature of such disability. This notice shall be sent within ten (10) days of the beginning of the disability. Written notice shall also be sent within ten (10) days of the end of such disability period.

19. LIABILITY INDEMNITY:

19.1 Subject to the provisions of Section 9.3 hereof, Lessee hereby assumes, releases and agrees to protect, save harmless, defend and indemnify Lessor and LIRR, respectively, from and against all claims and liability caused by, arising out of or resulting in any manner from the condition, existence, use or occupancy of the Premises and any adjoining lands used by Lessee during the term of this Agreement, including but not limited to:

(A) All loss and damage to any property whatsoever, including property of Lessor, LIRR and of all other persons whomsoever placed or stored upon Premises and upon any temporary usage areas(s), and the loss of or interference with any use or service thereof;

(B) All loss and damage on account of injury to or death of any person whomsoever, including but not limited to employees and patrons of the parties hereto and all other persons whomsoever on the Premises and upon such temporary usage area(s); and

(C) All consequential loss or damage occurring off the Premises but arising from acts or events on the Premises.

IN WITNESS WHEREOF, the parties hereto have caused this Lease to be executed, in duplicate, as of the day and year first above written.

WITNESSES:

NEW YORK & ATLANTIC RAILWAY

Name: BRUCE A. LIEBERMAN

Title: CHAIRMAN & CEO

WITNESSES:

BULK INTERMODAL DISTRIBUTION SERVICES, INC.

Name: JOHN SCHELTON

Title: PRES. BIDS INC.

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LEASE AGREEMENT: FARMINGDALE – 1 - ADDENDUM

March 22, 2002

Mr. Joseph Rutigliano
Mr. Martin Sternberg
Coastal Distribution, LLC.
30 A Glen Street
Glen Cove, New York 11542

Dear Joe and Marty:

As you now realize, the Long Island Rail Road (LIRR) is occupying a portion of the Premises that New York & Atlantic Railway Company (NYA) intends to lease to Coastal Distribution, LLC (Lessee) in Farmingdale, NY (Premises) as more specifically stated in Lease Agreement FARMINGDALE –1 (Agreement). NYA feels that the LIRR has no right to occupy this portion of the Premises and is going to pursue dialogue with the LIRR to force LIRR to vacate this portion of the Premises. It is understood between NYA and Lessee that signing the Agreement will help Lessee in their efforts to market the Premises and will serve as an important document for NYA to present to LIRR in our upcoming dialogue. NYA is agreeable to signing the Agreement with Coastal under two conditions:

1) Lessee agrees that it shall not hold NYA responsible in any way should LIRR not vacate the Premises in a way that allows Lessee to begin to operate, including the possibility of legal action against NYA. Further, Lessee shall not make any commitments to their clientele that, should the Premises not be utilized by Lessee, would force Lessee's clientele to seek legal action against NYA.

2) Lessee agrees that ninety (90) days after the signing date of the Agreement, if Lessee has still not affected a Commencement Date, the Agreement shall terminate immediately.

All back rent shall be reimbursed to Lessee by NYA should LIRR not vacate Premises in a timely manner and therefore causes Agreement to terminate as more specifically stated in section 2) herein.

AGREED AND ACCEPTED:

Lessee
Coastal Distribution, LLC.
30 A Glen Street
Glen Cove, New York 11542
Tel. 516-676-3700

By: _____ Date 3/22/02

Lessor
New York & Atlantic Railway Co.
68-01 Otto Road
Glendale, New York 11385
Tel. 718-497-3023

By: _____ Date 3/22/02

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and all claims and liability caused by, arising out of or resulting in any manner from the condition, existence, use or occupancy of the Premises and any adjoining lands used by Lessee during the term of this agreement, including but not limited to:

I. All loss and damage to any property whatsoever, including property of NYA, MTA, LIRR and of all other persons whomsoever placed or stored upon Premises and upon any temporary usage area(s), and the loss of interference with any use or service thereof;

II. All loss and damage on account of injury to or death of any person whomsoever, including but not limited to employees and patrons of the parties hereto and all other persons whomsoever on the Premises and upon such temporary usage area(s); and

III. All consequential loss or damage occurring off the Premises but arising from acts or events on the Premises.

Notwithstanding the foregoing, Lessee shall not be responsible for and will not indemnify NYA, MTA or LIRR from and against any claims or liability arising out of or in connection with the gross negligence or gross willful misconduct of NYA MTA or LIRR.

6. Required Insurance. Lessee shall maintain the following types of insurance with insurance carriers having a current A.M Best rating of not less than A-VIII, in the amounts provided for below and otherwise in form and substance acceptable to NYA:

I. Comprehensive General Liability Insurance with minimum limit per any one occurrence of $5,000,000. All exclusions as relating to Railroad Right of Way must be deleted from the policy. If this is not the case, then insurance as set forth in Section 6.IV shall be provided by the lessee.

II. Automobile Liability Insurance (covering owned, hired and non-owned vehicles) in minimum limits of $2,000,000 for injury to or death of any one person, of $5,000,000 for injury to or death of more than one person in any one accident, of $5,000,000 for damage to property in any one accident.

III. Workers Compensation Insurance in an amount not less than required by The State of New York and as follows:

Coverage A – Statutory Policy form

Coverage B – Employer's Liability

- Bodily Injury by Accident: $1,000,000 each accident
- Bodily Injury by Disease: $1,000,000 each employee & Policy Limit

IV. Railroad Protective Liability Insurance in the amount of at least $10,000,000. The form shall be on an occurrence basis and be executed in favor of NYA as a named insured.

the Agreement. However, Lessee shall have been given fifteen (15) days written notice to cure violations as prescribed in section C.12 hereof.

II. Lessee shall have the right to cancel this agreement on sixty (60) days written notice.

III. NYA shall have the right to cancel this agreement on sixty (60) days written notice provided the railcar volume commitments as stated in section C.3.I hereof are not met.

14. Effective Date. This Agreement shall not become effective until Lessee has returned a signed copy of this Agreement, furnished evidence of insurance as specified in section C 6 hereof, and submitted payment of Two Thousand and xx/100 Dollars ($2,000.00) to NYA for the first month's rent. All subsequent monthly rent is due on the first day of every month. Lessee shall have a ten-day grace period for payment of rent.

A-525

7/2002

Coastal

LEASE AGREEMENT: FARMINGDALE - 1

THIS LEASE AGREEMENT ("Agreement") made and entered into this 11 day of July, 2002, by and between New York & Atlantic Railway Co., hereafter referred to as "NYA" and Coastal Distribution, LLC. (and any of its agents, licensees and/or assignees), hereafter referred to as "Lessee".

A. Premises. NYA hereby agrees to let and Lessee hereby agrees to hire of NYA certain property located at Farmingdale Team Yard (PW) as more particularly described by the drawing attached hereto as Exhibit A (the "Premises"), for Lessee's exclusive use, at the rate and for the term set forth herein.

B. NYA Warranties. NYA warrants it is the owner (or agent for the owner) of the Premises, that it is fully authorized to enter into this agreement and has the right to grant Lessee the use of the Premises and each and all of the rights herein granted. It is agreed to by the Lessee the rights conveyed by this lease are subject to, and limited by, the rights conferred to NYA by the Transfer Agreement between the Long Island Rail Road and NYA.

C. Agreements. It is mutually agreed by and between the parties hereto as follows:

1. Rent / Rebates. The rate for Lessee's use of the Premises as provided herein shall be [redacted] per month, payable in advance, as provided in section C.14 hereof. The NYA and Lessee hereby agree to the following payment/rebate arrangement regarding the movement of LIRR material from the premises:

   a. Lessee will make [redacted] in funds available to NYA

   NYA will contribute the following to achieve a [redacted] payment to Lessee, which is equal to one-half of total funds required.

   b. NYA will add [redacted] to figure in "1-a" above, and submit funds to the LIRR in the amount of [redacted].
   c. NYA will rebate Lessee in the amount of [redacted] per rail car shipped where "Coastal Distribution", or affiliates as specified, show as consignee, at the station of Farmingdale, NY. This rebate will remain in effect until the amount of [redacted] has been apportioned to the Lessee. The term of this rebate shall not exceed three years from the effective date.
   d. NYA will reduce the rent on premises for the first twenty-four months of the agreement, to the amount of [redacted] per month. The security payment made by Lessee for the previously cancelled contract will be applied as the payment for September 2004 rent.

2. Improvements. Lessee shall have the right to make improvements to the premises. All investments, made by Lessee, including pavement, lighting, fencing, security of any kind, etc. shall be at the sole expense of Lessee with no reimbursement of any kind.

3. Term. This Agreement shall remain in effect for five (5) years from the date when the first railcar consigned to Lessee is brought to the Premises (the "Commencement Date"). The Agreement shall terminate five (5) years after the Commencement Date ("Termination Date"). The initial term of the volume commitment of the Agreement shall begin on the Commencement Date and shall end exactly one year later (i.e. if the Commencement Date is on August 1st, 2002, then the initial term shall end on August 1st, 2003). Each term following the initial term shall begin on the anniversary of the Commencement Date and

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the case, then insurance as set forth in Section 6.IV shall be provided by the lessee.

II. Automobile Liability Insurance (covering owned, hired and non-owned vehicles) in minimum limits of $2,000,000 for injury to or death of any one person, of $5,000,000 for injury to or death of more than one person in any one accident, of $5,000,000 for damage to property in any one accident.

III. Workers Compensation Insurance in an amount not less than required by The State of New York and as follows:

Coverage A – Statutory Policy form

Coverage B – Employer's Liability

- Bodily Injury by Accident: $1,000,000 each accident
- Bodily Injury by Disease: $1,000,000 each employee & Policy Limit

IV. Railroad Protective Liability Insurance in the amount of at least $10,000,000. The form shall be on an occurrence basis and be executed in favor of NYA as a named insured.

V. Lessee and all of its insurer(s) agree to waive subrogation (including without limitation Worker's Compensation) against NYA, LIRR, MTA, their agents and employees, which waiver(s) by insurer(s) shall also be expressed and evidenced in the certificates of insurance (including without limitation Worker's Compensation).

VI. All of Lessee's insurance shall be primary insurance with respect to the additional insured and will not participate with any other available insurance (and upon NYA's request Lessee's certificates of insurance shall reflect the foregoing primary aspect). All deductibles shall require written consent of NYA. All of Lessee's insurance of any type shall be from insurer(s) approved by NYA. Failure by NYA to object to the lack or contents of any of the certificate(s) or coverage(s) to be provided by Lessee shall not serve to waive or limit NYA's rights or remedies nor to eliminate or effect Lessee's obligations, waivers or liabilities under this contract.

Lessee shall furnish NYA Certificates of Insurance; in duplicate, evidencing all required insurance to be in full force and effect and that the same will not be canceled without at least thirty (30) days advance written notice by insurance Company to NYA. The New York and Atlantic Railway, the Metropolitan Transit Authority and the Long Island Rail Road shall be shown as additional insured.

7. Condition of Premises. NYA does not warrant the condition of its property, equipment and facilities for any purpose. Lessee assumes the risk of using the Premises for any purpose, and accepts all conditions and defects present thereon, or associated therewith.

8. Removal of Improvements. At the end of the project, Lessee shall have the right to remove all of its structures and other material and equipment from said premises at the sole cost and expense of Lessee if they so desire; provided, that removal of such structures and other material and equipment will not damage the Premises in any way.

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AGREED AND ACCEPTED:

Lessee
Coastal Distribution, LLC.
30 A Glen Street
Glen Cove, New York 11542
Tel. 516-676-3700

By: _____
Joseph Ruvig Cmo

DATED: July 11, 2002

Lessor
New York & Atlantic Railway Co.
68-01 Otto Road
Glendale, New York 11385
Tel. 718-497-3023

By: _____

Check Payable To:
New York & Atlantic Railway Co.
Accounting Office
53 West Jackson Boulevard, Suite 335
Chicago, IL 60604
Fed. I.D.#: 13-3926500

DATED: July 11, 2002

A-531

TRANSLOAD FACILITY OPERATIONS AGREEMENT

This TRANSLOAD FACILITY OPERATIONS AGREEMENT, effective as of August 5-6, 2004, is made and entered into by and between New York & Atlantic Railway Company ("Railroad"), and Coastal Distribution, LLC, a limited liability company of the State of New York ("Coastal").

RECITALS

WHEREAS, RAILROAD is a common carrier by rail conducting freight operations over certain tracks and facilities of The Long Island Rail Road Company pursuant to a Transfer Agreement dated November 18, 1996 (the "Transfer Agreement") that permits RAILROAD to lease or license certain properties for use in furtherance of freight operations; and

WHEREAS, RAILROAD and COASTAL are parties to a Lease agreement dated July 11, 2002 (the"Lease") providing for the lease of a yard and transloading facility ("the Facility") at the Farmingdale (P.W.) Rail Yard, located in Babylon, New York (the "Yard"); and

WHEREAS, the parties desire to cancel the Lease and modify their relationship in accordance with the following agreement; and

WHEREAS, RAILROAD desires to continue to offer and provide transloading and rail transportation services via carload to certain railroad customers ("Customers") at the Facility in conjunction with RAILROAD's rail line and the interstate railroad network; and

WHEREAS, COASTAL desires to continue to operate the Facility for and on behalf of RAILROAD; and

WHEREAS, RAILROAD desires to engage COASTAL as RAILROAD's contractor, to operate the Facility on RAILROAD's behalf; and

WHEREAS, the services shall be limited to providing transloading services between rail and truck for such non-hazardous freight, as may be agreed upon as provided herein, such freight being referred to generally as "Commodities" in this agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the representations, warranties, covenants and agreements set forth in this Agreement:

EXHIBIT
NYA 8

establish rules related to safety and train operation which are consistent with industry norms or which are mandated by law or regulation. RAILROAD and COASTAL will jointly determine all such other rules as will apply to the operation of the facility, such rules will be to assure the efficient operation of the facility and will be designed to minimize adverse impacts on neighbors. Further, Costal shall comply with any and all applicable governmental health, safety and environmental rules or regulations.

(c) COASTAL shall, at its sole cost, acquire or provide any additional loading equipment (not owned by RAILROAD) reasonably necessary for the efficient handling of material and conducting transloading operations at the Facility and Yard. COASTAL shall clearly identify all such equipment as COASTAL equipment. All such equipment will comply with all applicable regulations. COASTAL will have the right to install and remove such equipment as the market may dictate, subject to the approval of RAILROAD (and LIRR to the extent required under the Transfer Agreement).

(d) COASTAL may market the Facility and the services of RAILROAD available by use of the Facility. COASTAL shall obtain RAILROAD's advance written approval of all written materials, including brochures and other marketing material used by COASTAL in marketing RAILROAD's transload and transportation services related to the Facility. Unless RAILROAD otherwise provides to the contrary, any such marketing material and any signage located inside or outside of the Yard shall prominently indicate RAILROAD's name and/or logo.

1.06. Railcars: Unless otherwise agreed by the parties hereto in writing:

(a) COASTAL will provide railcars to be used for any movement of construction and demolition debris or other long-term, repeat Commodity shipments from the Facility. Such railcars must be in good condition and provide appropriate protection to maintain the quality of their lading. Railcars provided by COASTAL and used under this Agreement will be subject to prior approval of RAILROAD, which approval shall not be unreasonably withheld. COASTAL equipment will not earn per-diem while on RAILROAD. COASTAL will provide maintenance for such equipment except that, as necessary to provide running repairs, RAILROAD may repair en route and bill COASTAL in accordance with current Association of American Railroads (AAR) Rules or COASTAL's own repair standards.

(c) Equipment Compliance: All railcars used to transport the Commodities pursuant to this Agreement shall comply with AAR and American National Standard Institute (ISO) specifications, as well as all applicable laws, rules and regulations. It shall be the responsibility of the party providing the equipment in any case to assure such compliance.

(d) Supplemental Equipment: If COASTAL'S need for railcars exceeds its own supply, RAILROAD will, upon request, use its reasonable best efforts to obtain suitable railcars on such terms as may be applicable to such equipment, but at the sole cost of COASTAL. RAILROAD will provide equipment for all non-regular

another railroad for interchange. To the extent that COASTAL enters into any agreement with a Customer for disposition of Commodities after transportation of the Commodities by RAILROAD, COASTAL shall not do so as an agent of RAILROAD and shall indemnify, defend and hold the RAILROAD harmless from any claims or liability arising out of COASTAL's activities on its own behalf. For the purpose of monitoring compliance with this agreement, COASTAL shall provide RAILROAD, upon request, a copy of any contract it or any Customer enters into with a destination landfill or treatment site prior to shipping Commodities to that landfill or treatment site.

1.10. Commodity and Analysis Reports: If requested, COASTAL shall provide RAILROAD with a copy of any commodities analysis report that is required to be submitted to any federal, state or local agency or to the operator of any destination disposal sites.

1.11. Incidents: In the event of an incident during transportation over RAILROAD's lines under this Agreement, which involves a release of the Commodities, RAILROAD shall immediately notify COASTAL, and each party shall take immediate action.

(a) In any such incident where the release was caused by an act or omission of RAILROAD, the expenses of cleanup shall be the obligation of RAILROAD under the terms of this Agreement, and COASTAL shall, upon request of RAILROAD and to extent it is authorized by law and regulation:

(1) provide containers for loading of Commodities and accept for disposal Commodities being disposed of by RAILROAD as a result of the cleanup ("RAILROAD's Cleanup Waste"), subject to the parties' mutual agreement on the cost of disposal for RAILROAD's cleanup waste to the extent the net tonnage of that waste exceeds the net tonnage of the original Commodities; and

(2) credit against RAILROAD's disposal costs for RAILROAD's Cleanup Waste any monies already collectible by COASTAL from other parties for the original disposal of the Commodities involved in the incident.

(b) In any such incident where the release was caused by an act or omission of COASTAL, the expenses of cleanup shall be the obligation of COASTAL under the terms of this Agreement, and RAILROAD shall, upon request of COASTAL and to the extent it is authorized by law and regulation:

(1) transport the Commodities being disposed of by COASTAL as a result of the cleanup ("COASTAL's Cleanup Waste"); and

(2) credit against COASTAL's transportation costs for COASTAL's Cleanup Waste any monies already payable by COASTAL to RAILROAD for the original transportation of the Commodities involved in the incident.

1.12. RAILROAD Use. COASTAL acknowledges that RAILROAD may use the tracks and other yard facilities from time to time for railroad purposes so long as that use does not unreasonably interfere with Coastal's operation.

ARTICLE III –LOADING AND USAGE FEES

3.01. Rates and Charges. For and as its sole compensation for performing the transloading services, COASTAL shall be entitled to charge a Loading Fee ("Loading Fee") for such services, which fee shall be in addition to the rail freight transportation charge otherwise payable to RAILROAD for loaded freight car movements.

3.02 Use Charge: COASTAL shall pay to RAILROAD, for the use of the Facility and in recognition of the previous contributions to construction of the Facility by the parties, a usage fee (the "Usage Fee") of twenty dollars ($20) per loaded rail car (inbound or outbound). The Usage Fee for each loaded car in excess of 1,200 in any contract year (as determined by the anniversary of the effective date) shall be reduced to five dollars ($5).

3.03 Payment. Usage Fees payable to RAILROAD under this agreement shall be paid as provided in Section 2.02 above.

3.04 Discrepancies: Any discrepancy in billing or charges provided for under this agreement shall be reconciled between the parties. Any claim for adjustment or correction of charges paid, collected or remitted shall be made in writing by the party making the claim and delivered to other party within six (6) months of the date upon which the charge was paid, collected or remitted or shall be deemed waived. Any such claim shall be resolved pursuant to Section 7.03.

ARTICLE IV – COVENANTS OF COASTAL

4.01. Use of the Facility. During the term of this Agreement, COASTAL agrees and covenants as follows:

(a) COASTAL shall use the Facility only for the transfer of Commodities between trucks and railcars transported by RAILROAD.

(b) COASTAL shall access the Facility using only RAILROAD's primary access route off New Highway and shall not load or unload railcars outside the Facility.

(c) COASTAL may not allow other persons to operate the Facility without the prior written permission of RAILROAD which permission may be withheld for any reason.

(d) COASTAL shall, at its sole cost and expense, obtain any applicable required permits, licenses, waivers, consents or other governmental authority required for it to operate the Facility. Any costs incurred by RAILROAD in the process of obtaining any permits or operating authority for COASTAL will be paid by COASTAL, provided however COASTAL will not be responsible for any legal fees incurred by RAILROAD in reviewing submissions made by COASTAL or costs incurred by RAILROAD in obtaining any additional permits, authority or exemptions in the name of RAILROAD.

(c) COASTAL shall not permit any liens to encumber the Facility for any labor or material furnished in connection with any work performed or claimed to have been performed in or about the Facility.

(d) If the Facility is destroyed or damaged so it is unfit to be used for the purposes existing prior to COASTAL'S occupancy, COASTAL will be responsible for returning the Facility to that condition which existed on July 11, 2002.

4.03. Insurance. Coastal shall maintain the following types of insurance with insurance carriers having a current AM Best rating of not less than A-VIII, in the amounts provided for below and otherwise in form and substance acceptable to RAILROAD:

(a) Comprehensive General Liability Insurance with minimum limit per any one occurence of $5,000,000. All exclusions as relating to Railroad Right of Way must be deleted from the policy, if this is not the case, then insurance as set forth in Section 4.03(d) shall be provided by COASTAL.

(b) Automobile Liability Insurance (covering owned, hired and non-owned vehicles) in minimum limits of $2,000,000 for injury to or death of any one person, of $5,000,000 for injury to or death of more than one person in any one accident, of $5,000,000 for damage to property in any one accident.

(c) Workers Compensation Insurance in an amount not less than required by The State of New York and as follows:

Coverage A – Statutory Policy form

Coverage B – Employer's Liability

- Bodily injury by Accident: $1,000,000 each accident
- Bodily Injury by Disease: $1,000,000 each employee & Policy Limit

(d) Railroad Protective Liability Insurance in the amount of at least $10,000,000. The form shall be on an occurrence basis and be executed in favor of RAILROAD as a named insured. Costal and all of its insurer(s) agree to waive subrogation (including without limitation Worker's Compensation) against RAILROAD, LIRR, MTA, their agents and employees, which waiver(s) by insurer(s) shall also be expressed and evidenced in the certificates of insurance (including without limitation Worker's Compensation).

(e) All of Coastal's insurance shall be primary insurance with respect to the additional insured and will not participate with any other available insurance (and upon RAILROAD"S request Coastal's certificates of insurance shall reflect the foregoing primary aspect). All deductibles shall require written consent of RAILROAD. All of COASTAL'S insurance of any type shall be from insurer(s) approved by RAILROAD. Failure by RAILROAD to object to the lack or contents of any of the certificate(s) or coverage(s) to be provided by Coastal shall

5.04 Dangerous or Unlawful Condition: Notwithstanding section 5.03 above, should any condition be created by COASTAL on the Facility that creates or contributes to a dangerous condition or results in RAILROAD or COASTAL being cited for a violation of any federal, state or local law, rule, ordinance or regulation regulating health, safety or the environment or which could result in conviction of a crime, misdemeanor or violation, RAILROAD, in its sole and absolute discretion, may immediately limit COASTAL's rights under this Agreement to prohibit the activity giving rise to such safety or environmental hazard or violation pending a final determination of the facts or of liability. However, to the extent that any such citation is not made against RAILROAD (i.e. is made against COASTAL alone) or does not relate to an immediate dangerous human health or safety condition, RAILROAD shall not have the right to terminate the activity until there is a non-appealable finding by the agency or the court with applicable jurisdiction, so long as (i) COASTAL is contesting the rule, regulation, citation or charge in good faith; and (ii) COASTAL and RAILROAD are legally able to continue to operate the Facility under the terms of this Agreement.

5.05 Coastal Termination. COASTAL shall have the right to terminate this agreement on sixty (60) days written notice to RAILROAD.

5.06 Effect of Termination. Upon termination COASTAL shall cease using the Facility and shall immediately remove its personal property there from. Except for termination by reason of breach, upon termination, the parties' obligations to each other shall immediately cease and, except for money then currently due and owing, and the indemnification rights provided herein, the parties' financial obligations to the other shall cease.

ARTICLE VI –INDEMNIFICATION

6.01. Indemnification. Coastal hereby assumes, releases and agrees to protect, save harmless, defend and indemnify RAILROAD, the Metropolitan Transit Authority and Long Island Rail Road Company, and their respective officers, shareholders, directors, employees, agents and assigns from and against any and all claims and liability caused by, arising out of or resulting in any manner from the condition, existence, use or occupancy of the Premises by COASTAL during the term of this agreement, including but not limited to:

(a) All loss and damage to any property whatsoever, including the Facility, the property of NY&A, MTA, LIRR and of all other persons whomsoever placed or stored at the Facility and including the loss or interference with any use or service thereof;

(b) All loss and damage on account of injury to or death of any person whomsoever, including but not limited to employees and patrons of the parties hereto and all other persons whomsoever on or around the Facility; and

(c) All consequential loss or damage occurring off the Facility premises but arising from acts or events on or around the Facility.

Notwithstanding the foregoing, COASTAL shall not be responsible for and will not indemnify RAILROAD, Metropolitan Transit Authority or Long Island Rail Road Company from and against any claims or liability arising out of or in connection with their own gross negligence or gross willful misconduct.

With a copy to:

Ronald A. Lane, Esq.
Fletcher and Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2875
312-252-1500
Fax: 312-252-2400

7.03 Arbitration. Any controversy or claim arising out of or relating to this Agreement or the breach thereof, other than disputes which are within the exclusive jurisdiction of the Surface Transportation Board, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules (including the Emergency Interim Relief Procedures), and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Notwithstanding the foregoing, the parties hereto shall first use commercially reasonable efforts to settle any dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of ten (10) days, then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration as provided herein. The arbitrator shall be selected by the parties. In the event that they are unable to agree on the selection of an arbitrator within ten (10) days, the parties or their attorneys may request the American Arbitration Association to appoint the arbitrator. Prior to the commencement of hearings, the arbitrator shall provide an oath or undertaking of impartiality. The place of arbitration shall be New York, New York. Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under this Agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the arbitration. The award shall be made within two (2) months of the filing of the notice of intention to arbitrate (demand), and the arbitrator shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by mutual written agreement of the parties. The prevailing party shall be entitled to an award of reasonable attorney fees. The determination as to which party, if any, is the prevailing party and whether and how much in attorney's fees shall be awarded will be made by the arbitrator.

7.04 Assignment. This Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. Neither this Agreement nor any of the rights, interests or obligations hereunder may be assigned by COASTAL without the prior written consent of RAILROAD, which consent will not be unreasonably withheld. A Change of Control shall be deemed an assignment for the purposes

A-545

FT NYA 9500

NEW YORK & ATLANTIC RAILWAY COMPANY

FREIGHT TARIFF NYA 9500

COMMODITY FREIGHT TARIFF

BETWEEN

NEW YORK & ATLANTIC RAILWAY COMPANY

STATIONS

This tariff is also applicable on interstate traffic, except where expressly provided to the contrary in connection with particular items.

ISSUED: January 27, 2003 **EFFECTIVE: February 17, 2003**

ISSUED BY

Joel Torres
Director of Marketing
New York & Atlantic Railway Co.
68-01 Otto Road
Glendale, NY 11385

(The provisions published herein, if effective, will not result in an effect on the quality of the human environment.)

EXHIBIT
Identification
NYA 9

FREIGHT TARIFF NYA 9500

SECTION 3

RATES
(Rates in US dollars and cents per car)

ITEM 100
(Applies to Cars other than Box Cars)

BETWEEN Fresh Pond, NY and Bay Ridge, NY

STCC	Commodity	AND (See Section 2) Group 1 (New York City)	Group 2 (Long Island)
01 X	Farm Products	550.00	575.00
08 X	Forest Products	780 00	800.00
11 X	Coal	700.00	725 00
14 X	Non Metallic Minerals	600.00	650 00
20 X	Food or Kindred Products	600.00	625 00
24 X	Lumber / Wood Products	780.00	800.00
26 X	Pulp / Paper	685 00	715.00
28 X	Chemicals	950.00	1,015.00
29 X	Petroleum Products	950.00	1,015.00
32 X	Brick / Concrete / Clay	550.00	575.00
33 X	Metal	550.00	575 00
34 X	Fabricated Metal	600.00	625 00
35 X	Machinery	750 00	780 00
36 X	Electrical Machinery	890 00	920 00
37 X	Transportation Equipment	650.00	680 00
40 X	Waste and Scrap	575.00	625.00
41 X	Misc. Freight	575.00	625.00
42 X	Ret. Shipping Devices	625.00	670 00
48 X	Hazardous Waste	800.00	825.00
49 X	Hazardous Materials	890 00	920.00

NOTE 1: Rates published herein will only apply in the absence of through commodity rates.

NOTE 2: Rates contained herein may be used in conjunction with other rates to construct through charges. Rates published herein will be assessed and billed separately by NYA as provided for in Freight Accounting Rule 11

NOTE 3 Rates do not apply when special handling or dimensional traffic is involved. Shipments requiring special equipment such as heavy duty flat cars are also excluded from this tariff.

SECTION 4

RATES
(Rates in US dollars and cents per car)

ITEM 200
(Applies to Box Cars)

BETWEEN: Fresh Pond, NY and Bay Ridge, NY

STCC	Commodity	AND (See Section 2) Group 1 (New York City)	Group 2 (Long Island)
01 X	Farm Products	565.00	600 00
08 X	Forest Products	565.00	600.00
11 X	Coal	600.00	625.00
14 X	Non Metallic Minerals	580.00	610 00
20 X	Food or Kindred Products	575.00	625 00
24 X	Lumber / Wood Products	650.00	750 00
26 X	Pulp / Paper	695 00	715.00
28 X	Chemicals	575.00	620.00
29 X	Petroleum Products	800.00	845 00
32 X	Brick / Concrete / Clay	500 00	525 00
33 X	Metal	550 00	575 00
34 X	Fabricated Metal	600.00	625 00
35 X	Machinery	750 00	780 00
36 X	Electrical Machinery	890 00	920.00
37 X	Transportation Equipment	650 00	680 00
40 X	Waste and Scrap	575.00	625.00
41 X	Misc. Freight	575 00	625 00
42 X	Ret. Shipping Devices	625.00	675 00
48 X	Hazardous Waste	810.00	835 00
49 X	Hazardous Materials	900.00	925.00

NOTE 1: Rates published herein will only apply in the absence of through commodity rates.

NOTE 2: Rates contained herein may be used in conjunction with other rates to construct through charges. Rates published herein will be assessed and billed separately by NYA as provided for in Freight Accounting Rule 11.

NOTE 3. Rates do not apply when special handling or dimensional traffic is involved. Shipments requiring special equipment such as heavy duty flat cars are also excluded from this tariff.

For explanation of terms and explanation of abbreviations and reference marks, see last page of tariff.

A-549

NEW YORK & ATLANTIC RAILWAY

April 4, 2004

EXHIBIT
NYA 10

Mr. Frank J. Alberti
Senior Asst. Town Attorney
Town of Babylon
200 East Sunrise Hwy.
Lindenhurst, NY 11757

Dear Mr. Alberti:

It has been brought to my attention by Mr. Joseph Rutigliano of Coastal Distribution, LLC that there may be some concerns about the truck to railroad "transload" site that is being constructed in the New York & Atlantic Railway Co. railroad yard located at 1633 New Highway in Farmingdale, NY. To clear up any misconception, since April 1997 this site has been under the jurisdiction and control of the New York & Atlantic Railway Co. (NYA) by authorization of the "Transfer Agreement" between NYA and Long Island Rail Road (LIRR). The transfer of this exclusive authority to be in charge of the rail freight operation on Long Island was forced by the Governor's Office in an effort to remove trucks from the highways and return freight to the rails. Since being granted the freight operation authority, NYA has removed over 625,000 trucks from Long Island highways. Additionally, NYA and its customers have sustained thousands of top quality jobs in the area.

Since NYA has been in control of the railroad and specifically the Farmingdale site, we have used it, and continue to use it as a public transload facility as a rail to truck transload center for a number of different customers and products, including lumber, scrap metal, plastic pellets and recycled plastic, as well as many other commodities. For at least one hundred years prior to the NYA / LIRR agreement, the site was under LIRR jurisdiction and control. During the entire aforementioned period, the site has been used exclusively as a railroad yard and/or transload facility, including at one point when the LIRR used the site as a "Piggy Back" or truck trailer to rail operation.

Additionally, NYA granted Coastal Distribution the right to make improvements to and operate the property in an agreement penned in July 2002. Since that time, Coastal's upgrading has not only been significant, but beyond reproach. The facility is cleaner, safer, more productive and much better maintained then it has ever been in the past. Without a doubt it is the unparalleled facility on the NYA, not only in professionalism, productivity, entrepreneurial spirit and customer service, but also in community service with its unmatched contributions to make better the quality of life on Long Island by removing thousands of truck from the highways as was mandated by the Governor's Office.

Tel. 718-497-3023 68-01 Otto Road, Glendale, NY 11385 Fax. 718-497-3384

LEASE AGREEMENT: FARMINGDALE - 1

THIS LEASE AGREEMENT ("Agreement") made and entered into this 11 day of July, 2002, by and between New York & Atlantic Railway Co., hereafter referred to as "NYA" and Coastal Distribution, L.L.C. (and any of its agents, licensees and/or assignees), hereafter referred to as "Lessee".

A. Premises. NYA hereby agrees to let and Lessee hereby agrees to hire of NYA certain property located at Farmingdale Team Yard (FW) as more particularly described by the drawing attached hereto as Exhibit A (the "Premises"), for Lessee's exclusive use, at the rate and for the term set forth herein.

B. NYA Warranties. NYA warrants it is the owner (or agent for the owner) of the Premises, that it is fully authorized to enter into this agreement and has the right to grant Lessee the use of the Premises and each and all of the rights herein granted. It is agreed to by the Lessee the rights conveyed by this lease are subject to, and limited by, the rights conferred to NYA by the Transfer Agreement between the Long Island Rail Road and NYA.

C. Agreements. It is mutually agreed by and between the parties hereto as follows:

1. Rent / Rebates. The rate for Lessee's use of the Premises as provided herein shall be $2,000.00 per month, payable in advance, as provided in section C.14 hereof. The NYA and Lessee hereby agree to the following payment/rebate arrangement regarding the movement of LIRR material from the premises:

   a. Lessee will make $115,000 in funds available to NYA

   NYA will contribute the following to achieve a $66,000 payment to Lessee, which is equal to one-half of total funds required.

   b. NYA will add $15,000 to figure in "1-a" above, and submit funds to the LIRR in the amount of $130,000.
   c. NYA will rebate Lessee in the amount of $10 per rail car shipped whose "Coastal Distribution", or affiliate as specified, show as consignee, at the station of Farmingdale, NY. This rebate will remain in effect until the amount of $26,000 has been apportioned to the Lessee. The term of this rebate shall not exceed three years from the effective date.
   d. NYA will reduce the rent on premises for the first twenty-four months of the agreement, to the amount of $1000 per month. The security payment made by Lessee for the previously cancelled contract will be applied as the payment for September 2004 rent.

2. Improvements. Lessee shall have the right to make improvements to the premises. All investments, made by Lessee, including pavement, lighting, fencing, security of any kind, etc. shall be at the sole expense of Lessee with no reimbursement of any kind.

3. Term. This Agreement shall remain in effect for five (5) years from the date when the first railcar consigned to Lessee is brought to the Premises (the "Commencement Date"). The Agreement shall terminate five (5) years after the Commencement Date ("Termination Date"). The initial term of the volume commitment of the Agreement shall begin on the Commencement Date and shall end exactly one year later (i.e. if the Commencement Date is on August 1st, 2002, then the initial term shall end on August 1st, 2003). Each term following the initial term shall begin on the anniversary of the Commencement Date and

EXHIBIT Town B

the case, then Insurance as set forth in Section 6.IV shall be provided by the lessee.

II. Automobile Liability Insurance (covering owned, hired and non-owned vehicles) in minimum limits of $2,000,000 for injury to or death of any one person, of $5,000,000 for injury to or death of more than one person in any one accident, of $5,000,000 for damage to property in any one accident.

III. Workers Compensation Insurance in an amount not less than required by The State of New York and as follows:

Coverage A – Statutory Policy form

Coverage B – Employer's Liability

- Bodily Injury by Accident: $1,000,000 each accident
- Bodily Injury by Disease: $1,000,000 each employee & Policy Limit

IV. Railroad Protective Liability Insurance in the amount of at least $10,000,000. The form shall be on an occurrence basis and be executed in favor of NYA as a named insured.

V. Lessee and all of its insurer(s) agree to waive subrogation (including without limitation Worker's Compensation) against NYA, LIRR, MTA, their agents and employees, which waiver(s) by insurer(s) shall also be expressed and evidenced in the certificates of insurance (including without limitation Worker's Compensation).

VI. All of Lessee's insurance shall be primary insurance with respect to the additional insured and will not participate with any other available insurance (and upon NYA's request Lessee's certificates of insurance shall reflect the foregoing primary aspect). All deductibles shall require written consent of NYA. All of Lessee's insurance of any type shall be from insurer(s) approved by NYA. Failure by NYA to object to the lack or contents of any of the certificate(s) or coverage(s) to be provided by Lessee shall not serve to waive or limit NYA's rights or remedies nor to eliminate or effect Lessee's obligations, waivers or liabilities under this contract.

Lessee shall furnish NYA Certificates of Insurance, in duplicate, evidencing all required insurance to be in full force and effect and that the same will not be canceled without at least thirty (30) days advance written notice by insurance Company to NYA. The New York and Atlantic Railway, the Metropolitan Transit Authority and the Long Island Rail Road shall be shown as additional insured.

7. Condition of Premises. NYA does not warrant the condition of its property, equipment and facilities for any purpose. Lessee assumes the risk of using the Premises for any purpose, and accepts all conditions and defects present thereon, or associated therewith.

8. Removal of Improvements. At the end of the project, Lessee shall have the right to remove all of its structures and other material and equipment from said premises at the sole cost and expense of Lessee if they so desire; provided, that removal of such structures and other material and equipment will not damage the Premises in any way.

AGREED AND ACCEPTED:

Lessee
Coastal Distribution, LLC.
30 A Glen Street
Glen Cove, New York 11542
Tel. 516-676-3700

By: [signature] NP
Joseph Ruvig Gano

DATED: July 11, 2002

Lessor
New York & Atlantic Railway Co.
68-01 Otto Road
Glendale, New York 11385
Tel. 718-497-3023

By: [signature]

Check Payable To:
New York & Atlantic Railway Co.
Accounting Office
53 West Jackson Boulevard, Suite 335
Chicago, IL 60604
Fed. I.D.#: 13-3926500

DATED: July 11, 2002

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RECITALS

WHEREAS, RAILROAD is a common carrier by rail conducting freight operations over certain tracks and facilities of The Long Island Rail Road Company pursuant to a Transfer Agreement dated November 18, 1996 (the "Transfer Agreement") that permits RAILROAD to lease or license certain properties for use in furtherance of freight operations; and

WHEREAS, RAILROAD and COASTAL are parties to a Lease agreement dated July 11, 2002 (the"Lease") providing for the lease of a yard and transloading facility ("the Facility") at the Farmingdale (P.W.) Rail Yard, located in Babylon, New York (the "Yard"); and

WHEREAS, the parties desire to cancel the Lease and modify their relationship in accordance with the following agreement; and

WHEREAS, RAILROAD desires to continue to offer and provide transloading and rail transportation services via carload to certain railroad customers ("Customers") at the Facility in conjunction with RAILROAD's rail line and the interstate railroad network; and

WHEREAS, COASTAL desires to continue to operate the Facility for and on behalf of RAILROAD; and

WHEREAS, RAILROAD desires to engage COASTAL as RAILROAD's contractor, to operate the Facility on RAILROAD's behalf; and

WHEREAS, the services shall be limited to providing transloading services between rail and truck for such non-hazardous freight, as may be agreed upon as provided herein, such freight being referred to generally as "Commodities" in this agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the representations, warranties, covenants and agreements set forth in this Agreement:

establish rules related to safety and train operation which are consistent with industry norms or which are mandated by law or regulation. RAILROAD and COASTAL will jointly determine all such other rules as will apply to the operation of the facility, such rules will be to assure the efficient operation of the facility and will be designed to minimize adverse impacts on neighbors. Further, Costal shall comply with any and all applicable governmental health, safety and environmental rules or regulations.

(c) COASTAL shall, at its sole cost, acquire or provide any additional loading equipment (not owned by RAILROAD) reasonably necessary for the efficient handling of material and conducting transloading operations at the Facility and Yard. COASTAL shall clearly identify all such equipment as COASTAL equipment. All such equipment will comply with all applicable regulations. COASTAL will have the right to install and remove such equipment as the market may dictate, subject to the approval of RAILROAD (and LIRR to the extent required under the Transfer Agreement).

(d) COASTAL may market the Facility and the services of RAILROAD available by use of the Facility. COASTAL shall obtain RAILROAD's advance written approval of all written materials, including brochures and other marketing material used by COASTAL in marketing RAILROAD's transload and transportation services related to the Facility. Unless RAILROAD otherwise provides to the contrary, any such marketing material and any signage located inside or outside of the Yard shall prominently indicate RAILROAD's name and/or logo.

1.06. Railcars: Unless otherwise agreed by the parties hereto in writing:

(a) COASTAL will provide railcars to be used for any movement of construction and demolition debris or other long-term, repeat Commodity shipments from the Facility. Such railcars must be in good condition and provide appropriate protection to maintain the quality of their lading. Railcars provided by COASTAL and used under this Agreement will be subject to prior approval of RAILROAD, which approval shall not be unreasonably withheld. COASTAL equipment will not earn per-diem while on RAILROAD. COASTAL will provide maintenance for such equipment except that, as necessary to provide running repairs, RAILROAD may repair en route and bill COASTAL in accordance with current Association of American Railroads (AAR) Rules or COASTAL's own repair standards.

(c) Equipment Compliance: All railcars used to transport the Commodities pursuant to this Agreement shall comply with AAR and American National Standard Institute (ISO) specifications, as well as all applicable laws, rules and regulations. It shall be the responsibility of the party providing the equipment in any case to assure such compliance.

(d) Supplemental Equipment: If COASTAL'S need for railcars exceeds its own supply, RAILROAD will, upon request, use its reasonable best efforts to obtain suitable railcars on such terms as may be applicable to such equipment, but at the sole cost of COASTAL. RAILROAD will provide equipment for all non-regular

another railroad for interchange. To the extent that COASTAL enters into any agreement with a Customer for disposition of Commodities after transportation of the Commodities by RAILROAD, COASTAL shall not do so as an agent of RAILROAD and shall indemnify, defend and hold the RAILROAD harmless from any claims or liability arising out of COASTAL's activities on its own behalf. For the purpose of monitoring compliance with this agreement, COASTAL shall provide RAILROAD, upon request, a copy of any contract it or any Customer enters into with a destination landfill or treatment site prior to shipping Commodities to that landfill or treatment site.

1.10. Commodity and Analysis Reports: If requested, COASTAL shall provide RAILROAD with a copy of any commodities analysis report that is required to be submitted to any federal, state or local agency or to the operator of any destination disposal sites.

1.11. Incidents: In the event of an incident during transportation over RAILROAD's lines under this Agreement, which involves a release of the Commodities, RAILROAD shall immediately notify COASTAL, and each party shall take immediate action.

(a) In any such incident where the release was caused by an act or omission of RAILROAD, the expenses of cleanup shall be the obligation of RAILROAD under the terms of this Agreement, and COASTAL shall, upon request of RAILROAD and to extent it is authorized by law and regulation:

(1) provide containers for loading of Commodities and accept for disposal Commodities being disposed of by RAILROAD as a result of the cleanup ("RAILROAD's Cleanup Waste"), subject to the parties' mutual agreement on the cost of disposal for RAILROAD's cleanup waste to the extent the net tonnage of that waste exceeds the net tonnage of the original Commodities; and

(2) credit against RAILROAD's disposal costs for RAILROAD's Cleanup Waste any monies already collectible by COASTAL from other parties for the original disposal of the Commodities involved in the incident.

(b) In any such incident where the release was caused by an act or omission of COASTAL, the expenses of cleanup shall be the obligation of COASTAL under the terms of this Agreement, and RAILROAD shall, upon request of COASTAL and to the extent it is authorized by law and regulation:

(1) transport the Commodities being disposed of by COASTAL as a result of the cleanup ("COASTAL's Cleanup Waste"); and

(2) credit against COASTAL's transportation costs for COASTAL's Cleanup Waste any monies already payable by COASTAL to RAILROAD for the original transportation of the Commodities involved in the incident.

1.12. RAILROAD Use. COASTAL acknowledges that RAILROAD may use the tracks and other yard facilities from time to time for railroad purposes so long as that use does not unreasonably interfere with Coastal's operation.

ARTICLE III – LOADING AND USAGE FEES

3.01. Rates and Charges. For and as its sole compensation for performing the transloading services, COASTAL shall be entitled to charge a Loading Fee ("Loading Fee") for such services, which fee shall be in addition to the rail freight transportation charge otherwise payable to RAILROAD for loaded freight car movements.

3.02 Use Charge: COASTAL shall pay to RAILROAD, for the use of the Facility and in recognition of the previous contributions to construction of the Facility by the parties, a usage fee (the "Usage Fee") of twenty dollars ($20) per loaded rail car (inbound or outbound). The Usage Fee for each loaded car in excess of 1,200 in any contract year (as determined by the anniversary of the effective date) shall be reduced to five dollars ($5).

3.03 Payment. Usage Fees payable to RAILROAD under this agreement shall be paid as provided in Section 2.02 above.

3.04 Discrepancies: Any discrepancy in billing or charges provided for under this agreement shall be reconciled between the parties. Any claim for adjustment or correction of charges paid, collected or remitted shall be made in writing by the party making the claim and delivered to other party within six (6) months of the date upon which the charge was paid, collected or remitted or shall be deemed waived. Any such claim shall be resolved pursuant to Section 7.03.

ARTICLE IV – COVENANTS OF COASTAL

4.01. Use of the Facility. During the term of this Agreement, COASTAL agrees and covenants as follows:

(a) COASTAL shall use the Facility only for the transfer of Commodities between trucks and railcars transported by RAILROAD.

(b) COASTAL shall access the Facility using only RAILROAD's primary access route off New Highway and shall not load or unload railcars outside the Facility.

(c) COASTAL may not allow other persons to operate the Facility without the prior written permission of RAILROAD which permission may be withheld for any reason.

(d) COASTAL shall, at its sole cost and expense, obtain any applicable required permits, licenses, waivers, consents or other governmental authority required for it to operate the Facility. Any costs incurred by RAILROAD in the process of obtaining any permits or operating authority for COASTAL will be paid by COASTAL, provided however COASTAL will not be responsible for any legal fees incurred by RAILROAD in reviewing submissions made by COASTAL or costs incurred by RAILROAD in obtaining any additional permits, authority or exemptions in the name of RAILROAD.

(c) COASTAL shall not permit any liens to encumber the Facility for any labor or material furnished in connection with any work performed or claimed to have been performed in or about the Facility.

(d) If the Facility is destroyed or damaged so it is unfit to be used for the purposes existing prior to COASTAL'S occupancy, COASTAL will be responsible for returning the Facility to that condition which existed on July 11, 2002.

4.03. Insurance. Coastal shall maintain the following types of insurance with insurance carriers having a current AM Best rating of not less than A-VIII, in the amounts provided for below and otherwise in form and substance acceptable to RAILROAD:

(a) Comprehensive General Liability Insurance with minimum limit per any one occurrence of $5,000,000. All exclusions as relating to Railroad Right of Way must be deleted from the policy, if this is not the case, then insurance as set forth in Section 4.03(d) shall be provided by COASTAL.

(b) Automobile Liability Insurance (covering owned, hired and non-owned vehicles) in minimum limits of $2,000,000 for injury to or death of any one person, of $5,000,000 for injury to or death of more than one person in any one accident, of $5,000,000 for damage to property in any one accident.

(c) Workers Compensation Insurance in an amount not less than required by The State of New York and as follows:

Coverage A – Statutory Policy form

Coverage B – Employer's Liability

- Bodily injury by Accident: $1,000,000 each accident
- Bodily Injury by Disease: $1,000,000 each employee & Policy Limit

(d) Railroad Protective Liability Insurance in the amount of at least $10,000,000. The form shall be on an occurrence basis and be executed in favor of RAILROAD as a named insured. Costal and all of its insurer(s) agree to waive subrogation (including without limitation Worker's Compensation) against RAILROAD, LIRR, MTA, their agents and employees, which waiver(s) by insurer(s) shall also be expressed and evidenced in the certificates of insurance (including without limitation Worker's Compensation).

(e) All of Coastal's insurance shall be primary insurance with respect to the additional insured and will not participate with any other available insurance (and upon RAILROAD"S request Coastal's certificates of insurance shall reflect the foregoing primary aspect). All deductibles shall require written consent of RAILROAD. All of COASTAL'S insurance of any type shall be from insurer(s) approved by RAILROAD. Failure by RAILROAD to object to the lack or contents of any of the certificate(s) or coverage(s) to be provided by Coastal shall

5.04 Dangerous or Unlawful Condition: Notwithstanding section 5.03 above, should any condition be created by COASTAL on the Facility that creates or contributes to a dangerous condition or results in RAILROAD or COASTAL being cited for a violation of any federal, state or local law, rule, ordinance or regulation regulating health, safety or the environment or which could result in conviction of a crime, misdemeanor or violation, RAILROAD, in its sole and absolute discretion, may immediately limit COASTAL's rights under this Agreement to prohibit the activity giving rise to such safety or environmental hazard or violation pending a final determination of the facts or of liability. However, to the extent that any such citation is not made against RAILROAD (i.e. is made against COASTAL alone) or does not relate to an immediate dangerous human health or safety condition, RAILROAD shall not have the right to terminate the activity until there is a non-appealable finding by the agency or the court with applicable jurisdiction, so long as (i) COASTAL is contesting the rule, regulation, citation or charge in good faith; and (ii) COASTAL and RAILROAD are legally able to continue to operate the Facility under the terms of this Agreement.

5.05 Coastal Termination. COASTAL shall have the right to terminate this agreement on sixty (60) days written notice to RAILROAD.

5.06 Effect of Termination. Upon termination COASTAL shall cease using the Facility and shall immediately remove its personal property there from. Except for termination by reason of breach, upon termination, the parties' obligations to each other shall immediately cease and, except for money then currently due and owing, and the indemnification rights provided herein, the parties' financial obligations to the other shall cease.

ARTICLE VI –INDEMNIFICATION

6.01. Indemnification. Coastal hereby assumes, releases and agrees to protect, save harmless, defend and indemnify RAILROAD, the Metropolitan Transit Authority and Long Island Rail Road Company, and their respective officers, shareholders, directors, employees, agents and assigns from and against any and all claims and liability caused by, arising out of or resulting in any manner from the condition, existence, use or occupancy of the Premises by COASTAL during the term of this agreement, including but not limited to:

(a) All loss and damage to any property whatsoever, including the Facility, the property of NY&A, MTA, LIRR and of all other persons whomsoever placed or stored at the Facility and including the loss or interference with any use or service thereof;

(b) All loss and damage on account of injury to or death of any person whomsoever, including but not limited to employees and patrons of the parties hereto and all other persons whomsoever on or around the Facility; and

(c) All consequential loss or damage occurring off the Facility premises but arising from acts or events on or around the Facility.

Notwithstanding the foregoing, COASTAL shall not be responsible for and will not indemnify RAILROAD, Metropolitan Transit Authority or Long Island Rail Road Company from and against any claims or liability arising out of or in connection with their own gross negligence or gross willful misconduct.

With a copy to:

Ronald A. Lane, Esq.
Fletcher and Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2875
312-252-1500
Fax: 312-252-2400

7.03 Arbitration. Any controversy or claim arising out of or relating to this Agreement or the breach thereof, other than disputes which are within the exclusive jurisdiction of the Surface Transportation Board, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules (including the Emergency Interim Relief Procedures), and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Notwithstanding the foregoing, the parties hereto shall first use commercially reasonable efforts to settle any dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of ten (10) days, then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration as provided herein. The arbitrator shall be selected by the parties. In the event that they are unable to agree on the selection of an arbitrator within ten (10) days, the parties or their attorneys may request the American Arbitration Association to appoint the arbitrator. Prior to the commencement of hearings, the arbitrator shall provide an oath or undertaking of impartiality. The place of arbitration shall be New York, New York. Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under this Agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the arbitration. The award shall be made within two (2) months of the filing of the notice of intention to arbitrate (demand), and the arbitrator shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by mutual written agreement of the parties. The prevailing party shall be entitled to an award of reasonable attorney fees. The determination as to which party, if any, is the prevailing party and whether and how much in attorney's fees shall be awarded will be made by the arbitrator.

7.04 Assignment. This Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. Neither this Agreement nor any of the rights, interests or obligations hereunder may be assigned by COASTAL without the prior written consent of RAILROAD, which consent will not be unreasonably withheld. A Change of Control shall be deemed an assignment for the purposes

[redacted]

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

COASTAL DISTRIBUTION, LLC

By: _____

Its: Member

Date 8/5/04

NEW YORK & ATLANTIC RAILROAD CO. INC.

By: _____

Its: PRESIDENT

Date: 8/5/04

Queens Village, NY	15	gravel driv
Hicksville, NY	25	paved
Islip, NY	1	paved
Sayville, NY	2	gravel driv
Speonk, NY	4	paved
Southampton, NY	2	gravel driv
Bridgehampton, NY	2	pit track
Port Jefferson, NY	4	paved
Medford, NY	4	dock/ramp

Yaphank Team Track

Yaphank, NY	4	gravel driv
Riverhead, NY	2	gravel driv
Mattituck, NY	1	gravel driv
Southold, NY	2	gravel driv

Public Warehouse / Cold Storage Facilities:	***Capabilities:***	***Commod***
ELM Global Logistics 50 Emjay Blvd. Brentwood, NY 11717 PH: (631) 233-3200 FAX: (631) 435-0837	360,000 s. ft. climate controlled; cross-dock, trucking/distribution; computerized inventory; web-access to inventory/EDI; short and long term storage; 10 car indoor rail spur	paper/pulp food prodt bulk commodit packaged g
Conservative Express 1600 New Highway Farmingdale, NY PH: (631) 254-2442 FAX: (631) 254-2420	dry, bulk, cold storage, truck delivery, cross-docking	paper/pulp lumber, dr bulk, pack goods
Cold Storage of Nassau Westbury, NY PH: (516) 333-4466 FAX: (516) 333-5457	food grade cold storage	food prodt produce, fi foods

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 3507

PETITION OF THE TOWN OF BABYLON AND PINELAWN CEMETARY FOR A DECLARATORY ORDER

219846

RESPONSE OF NEW YORK & ATLANTIC RAILROAD CO. AND COSTAL DISTRIBUITION LLC.

RESPONDENT'S EXHIBITS

ENTERED
Office of Proceedings
JUL 25 2007
Part of
Public Record

ENTERED
Office of Proceedings
JUL 25 2007
Part of
Public Record

Exhibit B
Vol. 2

06-0981-cv(L), 06-0989-cv(CON)

United States Court of Appeals

for the

Second Circuit

COASTAL DISTRIBUTION, LLC, THE NEW YORK AND ATLANTIC RAILWAY COMPANY,

Plaintiffs-Appellees,

– v –

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON, PINELAWN CEMETERY,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JOINT APPENDIX
Volume II of II (Pages A-575–A-1250)

BOND, SCHOENECK & KING, PLLC
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(516) 267-6300

DUANE MORRIS LLP
Attorneys for Defendant-Appellant Pinelawn Cemetery
380 Lexington Avenue
New York, New York 10168
(212) 692-1000

(For Continuation of Appearances See Inside Cover)

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Attorney for Plaintiff-Appellee
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(212) 483-0875

FLETCHER & SIPPEL LLC
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The New York and Atlantic
Railway Company
29 North Wacker Drive, Suite 920
Chicago, Illinois 60606
(312) 252-1500

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY,

Plaintiffs,

-against

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON and PINELAWN CEMETERY,

Defendants.

----------x

DOCKET NO.:
05-CV-2032 (JS)(ETB)

DEFENDANTS', THE TOWN OF BABYLON THE TOWN OF BABYLON BOARD OF ZONING APPEALS, AND PETER CASSERLY, RETURN

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4) Full Disclosure Affidavit dated April 27, 2004.

5) TOBEQRA Short Environmental Assessment Form dated April 27, 2004.

6) Endorsement of long term leaseholder New York and Atlantic Railway Corp. dated April 23, 2004.

7) Endorsement of long term leaseholder executed by the Director of Real Estate of the Metropolitan Transportation Authority of the Long Island Railroad Company dated May 18, 2004.

8) Notice of Appeal dated April, 2004 to Zoning Board of Appeals, Town of Babylon with attached Stop Work Order dated March 29, 2004.

9) Amended Notice of Appeal dated May 27, 2004 to Zoning Board of Appeals, Town of Babylon with attached Stop Work Order dated March 29, 2004.

10) Letter dated June 1, 2004 to Dennis Cohen, Town Attorney, Town of Babylon from Forchelli, Curto, Schwatz, Mineo, Carlino & Cohn, LLP

11) Letter dated June 9, 2004 to Town of Babylon Zoning Board of Appeals from James F. Gaughran, Esq.

12) Letter dated June 18, 2004 to Hon. Louis D'Amaro Chairman, and Members of the Board of Zoning Appeals, Town of Babylon from Farrel Fritz, P.C.

13) Letter dated June 28, 2004 to Hon. Louis D'Amaro, Chairman and Members of the Board of Zoning Appeals from James F. Gaughran, Esq.

14) Interoffice Memorandum dated August 13, 2004 to Louis D'Amaro, Chairman, Board of Appeals from Lindsay P. Henry, Councilman.

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Exhibit #1

A-578

THE PUBLIC HEARING OF THE ZONING BOARD OF APPEALS
OF THE TOWN OF BABYLON, HELD IN THE TOWN HALL,
200 EAST SUNRISE HIGHWAY, NORTH LINDENHURST, NEW YORK
THURSDAY, SEPTEMBER 9, 2004

PRESENT: LOUIS D'AMARO, CHAIRMAN
THOMAS C. YOUNG, VICE-CHAIRMAN
GWENDOLYN L. BROWN
MICHAEL KANE
BURTON KOZA
DENISE KRETZ
THOMAS WEINSCHENK

RACHAEL SCELFO, COUNSEL TO THE BOARD
JOSEPH GUARINI, DEC
GENINE RIGNEY, RECORDING SECRETARY

Chairman D'Amaro called the meeting to order and the Pledge of Allegiance to the Flag was recited.

Mr. D'Amaro explained the procedure in which each calendar listing would be heard. He stated that each applicant will hand in the affidavit of posting, proceed to the podium, and give their name and address.

Mr. D'Amaro will then read into the record certain items contained in the file. The applicant will then make his/her presentation. The Board will ask that questions they deem appropriate. The public will be asked to comment.

Mr. D'Amaro stated that anyone who wants to speak on the application to come forward and give their name and address. In order to avoid any adversarial situations, all comments should be directed to the Board and not to the audience.

Mr. D'Amaro further stated everyone would the afforded the opportunity to speak.

7:30 p.m.

15. Application #04-267 of Coastal Distribution, LLC, 1633 New Hwy., E. Farmingdale, NY. Permission for relief in the form of vacating an d annulling a Stop Work Order issued by Building Inspector Bessemer on or about 3-25-04. Property located on the northeast corner of New Hway. & Conklin St., E. Farmingdale, NY.
SCTM#0100-35-2-2
Zoning District: Residence A Zone

1. **LETTER: From James F. Gaughran, Esq.; RE: 04-267 of Coastal Distribution, LLC; opposing John Armentano's letter (#15 of tonight's agenda).**

8. **LETTER: From Vinny Rodda, Property Manager, Farmingdale Properties, LLC, RE: 04-267 of Coastal Distribution, LLC; opposing application (#15 on tonight's hearing).**
9. **LETTER: From John M. Armentano, Attny., RE: 04-267 of Coastal Distribution, LLC; submitting research on application (#15 on tonight's hearing).**
10. **LETTER: From John M. Armentano, Attny., RE: 04-267 of Coastal Distribution, LLC; submitting Memorandum of Law in oppostion to application (#15 on tonight's hearing).**

Chairman D'Amaro stated the last application to be heard this evening is number 04-267. It is the application of Costal Distribution, LLC and this property is located in East Farmingdale and it seeks permission for relief of the form of vacating and annulling a stop work order issued by the building inspector Bessemer on or about March 25, 2004. Mr. Goren, good evening.

MR. GOREN: Mr. Chairman, members of the Board, good evening. James Goren, 191 New York Avenue, Huntington, New York, attorney for the applicant.

CHAIRMAN D'AMARO: Okay, welcome to the Zoning Board. And Mr. Goren have you submitted the affidavit of posting?

MR. GOREN: Yes, I did. I filed it the other day.

CHAIRMAN D'AMARO: Okay. Thank you and also did you receive and review the comments made available.

MR. GOREN: Uh, I received and reviewed a comment from Suffolk County Planning Department, but I also received for review a letter and two other documents, one of which appears to be a legal memorandum so I (inaudible) have not had as much time as I would like to to review.

CHAIRMAN D'AMARO: Alright what I'm going to do is read whatever we have into the record. While I'm doing that if there's anything I come across that you do not have let us know, we'll be happy to make the copy available to you. Alright for the record, uh, we've received a Department of Environmental Control memorandum which is dated September 8, 2004, uh, we've received correspondence from Suffolk County dated August 23, 2004, advising that the, uh, this application is not within the jurisdiction of the Suffolk County Planning Commission. In addition we've received correspondence from Mr. Goren, which is dated June 28, 2004, uh, advising the Board that uh, he would be responding to uh, any opposition during the course of this hearing. Additionally we have for the record a notice of appeal, submitted by Costal Distribution LLC, and uh, that is dated April of 2004 signed by Joseph Rutigliano. In addition we have an amended notice of appeal dated May 27, 2004 again signed by Martin Sternberg, member of the LLC applicant. Okay and folks just bear with me, I need to get all of this into the record and then we'll proceed. In addition, okay we've received a copy of a site plan or survey- Denise do you have this? I don't I don't know who draw this or what its dated. (inaudible) Alright, there's no indication on who it was drawn by or when. We'll get

back to that. We also have a copy of the tax map indicating the property in question, in addition the board has received and will be considering the Town of Babylon 205,000 foot radius map submitted by the engineering division of the Town. Okay additionally we have a site plan drawn by Siebel and Siebel architects and uh, that is dated August 15, 2003. And the Board has received a letter, a copy of a letter in opposition submitted by John M. Armentano of Farrell Fritz P.C. That letter is dated June 18, 2004. A second letter by Mr. Armentano, John M. Armentano, of Farrell Fritz P.C. dated September 9, 2004, submitting various print-outs from a Lexus-Nexus search. And attached as exhibits to that correspondence are the following: a Newsday article dated March 5, 1997, a Newsday article dated November 13, 1996, a Newsday article dated February 4, 1994, a Long Island Business News article dated November 1, 2002, a Long Island Business News article dated November 15, 2002, a Times Union Albany, New York article dated March 15, 2004, and the Times Union article dated July 8, 2004. Further, the Board has received correspondence from John M. Armentano dated September 9, 2004, which is transmitting to the Board a memorandum of law in opposition to the applicants appeal. Also, correspondence has been received from Farmingdale Properties, LLC, in opposition to the application. That letter is dated September 9, 2004. And we also have an inter-office memorandum from Supervisor Steve Bellone which is dated September 9, 2004. And as is our custom with any, uh, elected official from the Town I'm going to read this into the record. And it reads as follows. It says it's addressed to Louis D'Amaro, Chairman, Zoning Board of Appeals. In referenced to the above mentioned application (inaudible) the Board of Appeals to annul and vacate the stop work order issued by Building Inspector Tim Bessemer on or about March 29, 2004 on property located 1633 New Highway, East Farmingdale, New York. I respectfully request, excuse me, the board to uphold the stop work order. It is my understanding that the stop work order was issued to Costal Distribution LLC, to prevent Costal from completing a building on the premises without obtaining a building permit. It is my further understanding that despite the issuance of this stop work order, Costal completed the building in violation of the stop work order and without obtaining any permits from the Town of Babylon. I have been advised that Costal challenges the issuance of the stop work order based on a provision in the Public Authorities Law which provides that the Town does not have authority over any facilities of the Metropolitan Transit Authority or MTA, or any of its activities or operations except if such facilities are devoted to purposes other than transportation or transit. I have been advised that since filing this subject application, Costal has commenced operating a transfer station on the premises without applying for or obtaining any permits from the Town of Babylon and in violation of Article 22 of the Babylon Town Code. As you know the Town of Babylon restricts transfer stations to industrial zone properties, and only with a special exception permit granted by the Board of Appeals. The operation of a transfer station involves but is not limited to the dumping and processing of solid waste on the premises. The obvious adverse impact of such an operation include but are not limited to odor, excessive noise, environmental impacts, dusts, etc. Clearly, the State Legislature did not intend to (inaudible) private businesses, that circumvent the local municipalities right to protect the quality of life for of its residents, and businesses through Furthermore, the premises are not located within an industrial zone. In fact, the premises are located in (inaudible) any other (inaudible) transit station (inaudible) anywhere in the Town of Babylon, including (inaudible)property owned (inaudible) associated with the operation of the transit station the town (inaudible) Article 22 of the town code. (Inaudible) for your convenience Coastal's operation of a transfer station (inaudible) area that has not been conducive to the operation of a transit station (inaudible)negative impact on all businesses and property

owners in close proximity to the subject transfer station. (Inaudible) by the Town of Babylon. Therefore, I urge the board of appeal to deny Coastal's attempt to circumvent the Babylon (inaudible) so that the town may continue in its efforts to enforce its code and prevent the operation of (inaudible).Thank you (inaudible).Attached to that memorandum is a (inaudible) copy of Article 22 (inaudible).Is there anything (inaudible).

MR. GAUGHN: There are documents which I believe I may have copies that belong to this board so I'm going to need to get copies, 'cause I've seen all the documents and have been able to peruse them during your other hearings but I would like to get copies of all the documents.

A VOICE: (Inaudible.)

MR. GAUHN: Yeah. Yes.

THE CHAIRMAN: (Inaudible.)

A VOICE: (Inaudible). We have several copies of a full set of (inaudible) prepared by Sibel & Sibel, architects, October 3rd (inaudible).

THE CHAIRMAN: All right. (Inaudible).

MR. GAUHN: Yes. Well, unfortunately, I have a lot of additional exhibits to give you and I could begin. The first would be a memorandum of law with a variety of exhibits, which, you know, I thought that since this involves some significant legal issues it would be best to present this to you. So I'll present that now.

THE CHAIRMAN: Sure.

MR. GAUGHN: I am joined this evening by John F. McHugh, Esquire, who will also be testifying. He is an expert in dealing with both federal and state railroad legal issues and exemptions, so I would like to submit also his legal credentials. And I have a bunch of photos, which the description is actually put on the folder. So would you like me to mark them as an exhibit number as I introduce them?

THE CHAIRMAN: You don't need to mark them.

MR. GAUGHN: Okay.

THE CHAIRMAN: We'll mark them when we receive them.

MR. GAUGHN: Okay. There are one, two, three, four, five, six, seven, eight photos of the subject site. Then I would like to submit a letter from the applicant's engineer, Sibel & Sibel and it's dated September 8, 2004. And then we have a report from Galley Engineering concerning some of the impacts of the site, which is right here. I have real estate expert testimony consisting of an affidavit from John J. Breslin, Jr., who we believe will be here later to testify, but I have his affidavit and report.

CHAIRMAN D'AMARO: Ok, that's fine.

MR. GAUGHN: A letter dated March 31, 2004 from Frank J. Alberti (phonetic), Senior Assistant Town Attorney; a response letter dated April 4, 2004 to Mr. Alberti from Coastal Distribution.

VOICES: (Inaudible).

MR. GAUGHN: And finally, a response letter also dated April 4, 2004 to Mr. Alberti from New York and Atlantic Railway. Sorry about all that, but I'm ready to proceed, Mr. Chairman.

THE CHAIRMAN: Please, go ahead.

MR. GAUGHN: Okay. I represent Coastal Distribution and the other applicants Coastal, as an agent of New York and Atlantic Railroad, operates a transload facility for railroad freight purposes at New Highway in East Farmingdale. The site is located on the east side of New Highway just north of the railroad tracks. Specifically, they move freight between trucks and railway cars. There's a rail spur, a Y spur on the property which connects to the Long Island Railroad tracks. The activity has existed on this site for 100 years. This application is an appeal of a stop work order that was issued by Tim Bessemer, the building inspection – inspector for the town concerning the construction of a building on the subject property by my client. The basis of our appeal is that this railroad transloading facility property is exempt from local zoning under both federal and state laws. Tonight we will offer testimony to detail these legal exemptions and that testimony is actually going to be presented by Mr. McHugh. We will also explain the activity at the site to make it clear that the activity that is occurring there will continue to occur there, is in conformance with the exemptions that we are entitled to. Also testifying tonight will be Fred Krebs, the president of New York and Atlantic Railroad who will provide a history of the site and discuss the current use. Martin Sternberg, who is a partner of Coastal Distribution, LLC, will be available and will answer some questions and will also make some comments. Richard Galley of Galley Engineering has reviewed emissions and some issues concerning impact on the site and he's presented a report. He's also available to testify, although we may see how the night goes. You may just, you know, want to take his report and answer questions, but we'll leave that up to you. And John Breslin, our real estate expert, is hopefully going to be here soon. I know it's late and we know that there's some significant issues that have to be addressed tonight and we know that there's some opposition I'm sure going to take some time. And, by the way, we have a copy of the memorandum of law we've prepared for Mr. Armentano and 'cause I've been talking to the town attorney, it was my understanding that probably there'd be a submission of a memorandum of law. And we would get one from them and then, I would assume, we would have or request, perhaps, the opportunity to respond since the memorandum of law I read tonight was pretty detailed and I'm sure Mr. Armentano is going to want to look at what we have submitted. The property is owned by Pinelawn Cemetery but since 1904 it has been leased to the Long Island Railroad which, as you know, is now owned by the MTA. The original lease was for 19 -- was for 99 years, executed in 1904, and it has been effectively renewed for an additional 99-year term. There has been litigation over that. It's ongoing in the memorandum of law. One of the exhibits we give you are arguments, but, more significantly, I believe we also give you a decision on a preliminary injunction motion that was issued recently by Justice Costello which pretty definitively determines that our 99-year lease for the entire

property, both parcels in question, is valid. And he also rules that our exemption under the public authorities law is also valid and that we were exempt from the zoning laws of the Town of Babylon. Since 1996 the Long Island Railroad has subleased the property to New York and Atlantic Railroad who operate freight services for the Long Island Railroad. And since 2002 Coastal Distribution has operated this site as an appointed agent of New York and Atlantic Railroad. The various leases and agreements concerning this you will see in Exhibits B and C note that the 1996 agreement is actually called Southern Empire State Railroad Company. That confused me when I first read it, but that was the old name for New York and Atlantic Railroad, so I'll just point that to your attention as you're thumbing through it. The operations at the site have essentially been the same since 1904. 1904, obviously, they were using horses and wagons. Today we're using vehicles. But trucks and vehicles, other vehicles, basically enter off of New Highway and either load material or unload material on and off railroad cars. The railroad spur comes in right off the main track of the Long Island Railroad and there's also now a building there where the tracks for the spur also enter and leave. And, of course, the materials then go and travel back and forth over the Long Island Railroad. In 2003, as an agent of New York and Atlantic and with the approval of the MTA and New York and Atlantic, a building was constructed on the site so that materials could be loaded and unloaded protected from the weather and other elements. This, of course, reduces dust and noise and also provides better service for the customers. In order to stay competitive it was really essential for them to construct a building of this type, which is what you would have today for a more modern transloading facility without the horses. Also, they have liability to their customers who are, you know, transloading material back and forth. Their customers are -- they are doing this as an agent for the railroad. That will be explained, of course, by Mr. McHugh. Prior to the construction of the building the plans were submitted to the MTA. The MTA has the jurisdiction over this property and they have reviewed the plans. They go out looking at the site, looking at the construction, looking at the completion and they have approved this building as safe. The plans were also submitted at the same time as a courtesy to the Town of Babylon and, again, also one of the letters in there is from our architects which are assuring you that the building is safe. In response to our submission of the plans to the Town of Babylon -- I should say the initial response from the Town of Babylon was a letter issued by Commissioner Peter Casserly which is Exhibit E in your memorandum of law which is significant because in the letter Mr. Castley clearly states that the town does not have any jurisdiction over the subject property and was not going to review the building plans. Sometime subsequent to that the town received a complaint from the attorney for Pinelawn Cemetery alleging that the property would be being used for purposes other than transloading for the crushing materials and selling building materials and other materials on the site. We're here tonight to assure you that that is not the case. This was also addressed in response to the town. Actually, Frank Alberti sent the letter to us expressing these concerns and complaints that they had received both a letter from Mr. Krebs from New York and Atlantic and a letter from Mr. Bitigliano from Coastal. It was also made clear that it was only being used as a transloading facility, it would not be used for any of the activities that were alleged.

CHAIRMAN D'AMARO: What type of facility?

MR. GAUGHN: It says transloading facility, transloading. Basically taking – just taking the materials from the trucks, putting on railroad cars, loading it onto the tracks to send to New York and other places and vice versa, materials coming out from the city

and from eastern Long Island and coming into the site and being transferred onto automotive vehicles, mostly trucks for the area. Also, to assure this board I presented as Exhibit C in here a fairly new agreement which is the transload facility operations agreement that exists between Coastal and New York and Atlantic which details exactly Coastal's control over the use of the property -- I'm sorry, New York and Atlantic's control over the use of the property and Coastal's obligations to make sure that they are only involved in transloading activities. If Coastal were to do anything as alleged in the letter *in terms of selling materials, crushing materials, anything other than transloading,* they would be in violation of their agreement with New York and Atlantic. They would be evicted and they would be put out of business at this site.

CHAIRMAN D'AMARO: What exhibit was that again?

MR. GAUGHN: That is -- I believe it's Exhibit C.

CHAIRMAN D'AMARO: (Inaudible.) What kind of materials would be transloaded?

MR. GAUGHN: Would you like me to break and have Mr. Sternberg come up?

CHAIRMAN D'AMARO: No, that's ok.

MR. GAUGHN: I mean, I'd rather have him address it because he's there every day and he could detail everything he's seen. I could tell you what I've seen, but he can detail that for you. (Inaudible) bring up -- that's the first -- that issue we address. Okay. I've discussed the litigation.

THE CHAIRMAN: Mr. Goren, what exhibit was the preliminary injunction?

MR. GAUGHN: I'm sorry?

THE CHAIRMAN: Preliminary injunctions.

MR. GAUGHN: The preliminary injunction, Exhibit F. So I think at this time, if the board would permit me, I would like to present John McHugh, Esquire, who will discuss the statutory exemptions under federal and state law.

THE CHAIRMAN: Certainly. Sir, Good evening and welcome.

MR. McHUGH: Thank you. And I --

THE CHAIRMAN: Please state your full name and address.

MR. McHUGH: It's John F. McHugh. And my address is 6 Water Street, New York, New York 10004.

THE CHAIRMAN: Ok, Mr. McHugh, welcome and you are an attorney?

MR. McHUGH: I am an attorney, yes. And I --

THE CHAIRMAN: Welcome to Babylon.

MR. McHUGH: Why, thank you. And I appreciate the time that you gentlemen are taking. My mother was president of a planning board in New Jersey so I know what you're going through. And we apologize for the size of the record here, but we do have a significant and serious issue and it's a national issue. I was -- I have been a transportation advisor for Congressman Madler of New York for almost 20 years now and I was involved in negotiating the ICT Termination Act which is the act in which the federal government took all control over railroads from all other authority and gave it to the Service Transportation Board. And that's where we are. And I will tell you that we had serious problems with that. So I know exactly what congress was trying to do because I didn't want to redo it. And what they wanted to do was to avoid exactly what we have here, where we have a local interest that wants to interfere with a national program. The national problem we are facing is that we have seen a substantial increase in the movement of freight and transportation generally, but the movement of freight in this country for the last 25 or 30 years, most of that freight has been moved on the highway. The railroad system has been somewhat idle. It is increasing now, but not much. The idea of the ICT Termination Act was to give the railroads a substantial advantage over their competition which we could not do any other way because there was no way we could get the gas taxes up to the point where the trucks were paying a fair share of the cost of the highway system. I drove out here tonight. It took me two hours to drive out here from my office in Manhattan. That is the problem. We are expecting between a 20- and 80-percent increase in freight traffic in the next 25 years. And, folks, on the Long Island Expressway, even with the two new lanes, when they're finished, there's no room for it. Now, the railroad industry because of 100 years of overregulation is impoverished. Even the best railroads have downsized down to the point where they have a single track running between point A and point B and most of them have sold off their yards. And one of the things they have done is they have chopped off sidings. The Long Island Railroad, when it was run by the MTA, chopped off sidings right, left and center. So industries do not have the ability to take freight off of a railroad car in their own facility, except in a few cases particularly out here where when the MTA did run the freight service itself they actually encouraged people to go to the highway in order to get the freight off. I worked for a long time with the Long Island Freight Users Association that was fighting tooth and nail to keep freight on the Long Island Railroad. And they were -- it was a losing operation. So what do we have? We have too many trucks on the road. We have a literal tidal wave of freight traffic we are expecting in the next 20 years and we have absolutely no place to put it. So what was the solution? The solution was that we have to get private capital into the railroad industry to provide what we call reload centers. Now, when I started on the railroads back in 1959, back when most you guys probably weren't born, a team track was a rare thing. Most people had sidings. But a team track was a place where somebody who didn't have a siding could bring a truck in and load or unload a boxcar at a public facility. The definition of a common carrier includes team track service. A common carrier in the railroad industry has a federal franchise and that is a right to provide freight service and an obligation to provide freight service and that's a very important part here. In this area, in particular, because New York City was always served, it was -- New York City has always been a huge collection, small places, small businesses. The average employer in New York City has always been about 35 people. So -- but we were talking about garment shops and things like that. A tremendous amount of carting stuff to the side of a boxcar and loading the boxcar was done in New York City, so an awful lot of common carrier law with regard to team tracks involved New York City and particularly the fruit business. But the common carrier's obligation is

to bring the cargo here and deliver it to a customer. Whether that customer has a siding or does not have a siding, it must deliver it to the customer. If the person does not have a siding the railroad must deliver it to a point where it is available to the customer, to wit, the team track. Now, this facility has been used as a team track since 1904 and the continuation of that use is mandated by law. Now, the common carrier obligation actually penetrates all legal obligations right down to the landowner. Believe it or not, when Pinelawn Cemetery in 1904 leased its land to the Long Island Railroad for railroad purposes it became a common carrier. It has the same obligation that Coastal has. It must provide service to the customer who comes to the railroad and wants service. Now, I see in the brief that was submitted by Pinelawn that they say that the -- Coastal cannot be there because the MTA's primary responsibility was to do commuters and, therefore, anything other than commuters is not within its primary responsibility. That is absolutely incorrect. The Long Island Railroad was one of the first trunk line railroads in the United States. It's been handling freight and passengers since the 1840s. It is one of the only railroads in the United States that still has its original name, the Long Island Railroad. It was originally the railroad to go from New York to Boston. That's how you went. There was a float in the middle from Greenport to Rhode Island, but it was a through route. It is in the passenger business and the freight business. The only reason it's divided now is because a few years ago, to do a little consultant's report, we leased the freight business to the New York and Atlantic for the purpose -- the same purpose we're trying to get capital into the main railroad industry that somebody who is better able to do it do it and to increase freight traffic. And they've gone from about 9,000 cars a year to about 19,000 cars, you know --

MR. ARMENTANO: You said 9,000 to 19,000, correct?

MR. GAUGHN: Yes.

MR. McHUGH: Yeah. So they have done exactly what they were supposed to do. But they still can't reach the customer and they also do not have the capital to do everything. They have to make deals with people like Coastal. Now, I also see some of my history in here. I see a High Tech case cited by Pinelawnas a reason why you have jurisdiction. In High Tech we had a company that was in the -- the waste reloading business that just leased property from the Canadian Pacific Railroad in Newark, New Jersey. And that's all it did. It had a lease and it was loading its own railroad cars in their yard. And the Service Transportation Board held that that was not covered. Now, there was an appeal of that that was dropped for business purposes. That case was before the office of proceedings, not by the full board and so it's -- whether it is going to be the law at the end of the day we don't know because the act is a little bit vague on what they mean. The act says, without regard to ownership a facility that just loads and unloads railroad cars is supposed to be exempt. The office of proceedings disagreed. There has been no ruling by the full board. There is a case out of Massachusetts where there was a lumber -- a steel fabricating company that leased property from a railroad. The railroad went in and opposed an application to have the city ordinance applied to it but the fabricator didn't and so on that incomplete record -- but the board held the fabricator because it was actually a manufacturing facility, not a reload facility, was within the local jurisdiction. That's not what we have here. Here you have a company that was essentially retained by the Long Island Railroad to do the Long Island Railroad's work for it. The Long Island Railroad must serve customers. It has a team track. It doesn't have the resources to develop the machinery it needs to do it efficiently so they have Coastal

doing it. Coastal has all the obligations that the Long Island Railroad had that the New York and Atlantic acquired and now Coastal has. It must provide common carrier service to anybody who wants it, as long as the railroad is authorized to handle it. So that is its obligation. As the application of federal law, it is since Givens (phonetic) versus – I understand there are some lawyers on the board, but if you went to constitutional law class you'll remember Givens versus Ogden (phonetic) was when Justice Marshall said, you know, the federal government has absolute jurisdiction over interstate commerce. And it was a New York State case. But at any rate, since that time that has been the rule. And here you have a – the ICC Termination Act removed all jurisdiction over railroad activities from actually anybody, including federal agencies, other than the Service Transportation Board. So this property, because it is an active railroad operation and it is being done as an agent of the New York and Atlantic Railroad, which is a federally – that's a federal franchise, the board has no jurisdiction. But, as is always the case, the operator is going to try to accommodate the town as much as possible. So the problem here was they did – they did present their plans at some time and were told that because the town did not think it had jurisdiction due to New York State law, which also applied to this property, that there was no review. If, however, the town wishes to review and make comments and if the comments have to do with safety or something like that, then the board would tolerate basically requiring the railroad to comply. But the railroad cannot ask for a license. It cannot submit plans for approval because you don't have the authority to do that. You have the authority to make suggestions. And if they have to do with health and safety, those suggestions will be complied with provided they do not unreasonably interfere with the operation. But the operation is common carriage. So you cannot exclude a product or freight that's been offered there as long as it's lawful freight. So the – you have a complicated problem. But the general rule is, you don't have jurisdiction with regard to this particular issue. Now, here you have a stop order that was issued because they didn't have a permit. They are not allowed to ask for a permit because federal – they do have a permit. It's called their franchise from the Service Transportation Board. And the Service Transportation Board zealously guards that jurisdiction because congress has assigned it that responsibility. And now you have any questions?

MR. YOUNG: If you follow those tracks down about eight miles east and there's a large amount of commercial development opposed in the Babylon Huntington area, if someone along your railroad right of way decides, well, this would be a great place for me to have a (inaudible) and bring in all kinds of materials. We could have jurisdiction over that?

MR. McHUGH: If it was a nonrailroad.

MR. YOUNG: If that same person were to say, hey, lease my land and we'll put in a siding facility for trucking and a railroad that we would lose all jurisdiction?

MR. McHUGH: Could happen that way. If the railroad is looking for a site, and, of course, sites to basically connect with the commerce of the area are hard to come by. If the railroad goes out and leases or purchases a piece of land and builds a reload facility on that land you would not have jurisdiction over that, even –

MR. YOUNG: (Inaudible) you're saying the railroads objective is to take as much trucking off of the roads as possible on the long haul.

MR. McHUGH: Right.

MR. YOUNG: So that one of the railroad's objections now for following those lines out. How many of these can we expect now to pop up along the right-of-way?

MR. McHUGH: Well, it's hard to say how many would pop up. The question, of course, is how successful will they be because, of course, it's a matter of business judgment as to where somebody's going to put something. But the goal is that you do need terminals because the railroad operating in a corn field doesn't do anybody any good. It has to have a place where the freight can get off onto the highway, unless, of course, you can build a siding into a factory.

MR. YOUNG: The railroad must have a model in this kind of -- in this kind of a populated area is there models saying every 30 miles, 20 miles?

MR. McHUGH: I don't believe that the industry has reached the point of determinnng how frequently they need these things. These are relatively new. They have been experimented with over the last ten years. They've been found to be quite successful. But I think that they -- you are going to see more of them. Exactly how they're going to occur is for the future to tell us.

MR. YOUNG: Is there an are that they have become more common in than this area that we can look at, see what (inaudible).

MR. McHUGH: Reload centers? Well, there's -- there is a successful one in Patterson, New Jersey, an old railroad yard there. It's the Getty Avenue yard. That is a yard where they used to have a team track. It's quite similar. It used to be just a team track and now it is a reload center for plastic pellets. That would be one you can look at. There is one in The Bronx at the Hunts Point Market which it used to be another team track that is being used to unload flour for Entenmann's Bakery over here on Long Island. So there are models around. I believe the New York and Atlantic has something similar in –

A VOICE: (Inaudible).

MR. McHUGH: Mr. Krebs actually can tell you, 'cause his company has developed one, I think, in Queens. So these are now -- but as much as these things may cause a local problem, every railroad car that they handle takes seven trucks off the road in two directions and that is a tremendous benefit, generally.

MR. YOUNG: But it also adds a truck to a local area that didn't have it in the past?

MR. McHUGH: Not necessarily, because you're talking about basically commercial areas which -- and sometimes it may not have had it at that block but it was two blocks away. I mean, right now, we're talking about a difference of, like, two miles from the Long Island Expressway to where it is and we're also in a commercial area. Yes, there is always going to be a semi hot spot, but you're talking about a hot spot with regard to trucks going two to five miles as opposed to trucks going 600 to 1,000 miles. So the way

congress looked at this thing with regard to Interstate Commerce Transfer Termination Act was we have to look at the big picture. We want to reduce truck mileage. The trucks are beating our highway system to sand. At that time, if you remember, about the time this was done, Route 80 all the way across Pennsylvania and across most of Ohio was basically one huge pothole.

MR. YOUNG: I've taken Route 80 out to the south bend a couple of times a year and its still a pothole.

MR. McHUGH: Yeah. I mean, so --

A VOICE: (Inaudible.)

MR. McHUGH: But that's because you're running 82,000-pound trucks at high speed in all weather and the roads aren't built for it. And the railroad can handle those weights. I mean, a railroad car can handle, essentially, six to seven truckloads in one railroad car without doing any damage whatsoever and not one penny of it comes out of the public --

MR. YOUNG: But what I'm concerned about is there is no space or distance between our commercial and our residential areas on Long Island.

MR. McHUGH: Yes.

MR. YOUNG: So as to what is the affect if this -- if

MR. McHUGH: Yes.

MR. YOUNG: --we're looking at one being developed in Farmingdale and one being developed in Deer Park and one in Islip.

MR. McHUGH: Yeah. There's also no space, however --

A VOICE: (Inaudible).

MR. McHUGH: Yeah. Well, there's also no space between the Long Island Expressway and residential areas and those people are getting hit with the effects of not having these facilities. These facilities -- I mean, as these facilities are built, I mean, there's -- there was a tremendous amount of activity in the Cleveland area. They're in the merger of the acquisition of Conrail by Norfolk Southern and CSX because they took two railroads and they split them in half somewhat awkwardly and they created a big X in Ohio and there was a tremendous amount of resistance there to the added traffic. And the board just required the railroads to put up buffers. And these -- the same kind of buffer that goes up along a highway, they put up along the railroads in Ohio to -- so there is something that can be done and there is an accommodation that can be made and petitions can be made to the board to deal with these things. And if, indeed -- but in the case you gave where they have -- they're putting up a new facility, if they're laying new track into a new facility that has to go to the board. If that goes to the board then there is an environmental review. So in that --

A VOICE: (Inaudible.)

MR. McHUGH: The Service Transportation Board in Washington. It has an environmental office. And if you are going to build new railroad track, in other words, a substantial amount of railroad track, particularly if you're not the railroad itself, if you're going to form a new railroad operation and you are not the railroad itself, you must take that petition to the board and they must do an environmental review which is either a full EIS, if it's a big operation, or, at least, an environmental statement where they go over all of this. And in those reviews they do put in the accommodations that have to be made to prevent too much local damage. But the over -- the issue you have tonight is in this particular case where you have an existing railroad basically just using an existing facility for a historical purpose, there would be no jurisdiction.

MR. WEINSCHENK: Um, so basically a couple of pointers when Pinelawn signed this agreement in 1904 they essentially gave a lease, a perpetual lease to the Long Island Railroad to this property.

MR. McHUGH: Just about.

A VOICE: They have no --

MR. McHUGH: Yeah.

A VOICE: They can renegotiate the terms and what they can't -

MR. McHUGH: They can't pull -- they can't pull the function, yeah. Even if the lease had -- essentially, there's an argument whether the lease --

CHAIRMAN D'AMARO: Was that understood in 1904 or --

MR. McHUGH: Probably not.

CHAIRMAN D'AMARO. Probably not.

MR. McHUGH: Probably not. I mean, there's been a lot of time since 1904 and there's been a lot of law that's come down since 19 -- there's a great case just during World War II when there was a trustee trying to kick a thing called the Hoboken Shore Railroad out of a leased property in New Jersey. And the supreme court said, you know, it really doesn't matter whether the company that's going out of business does it or a -- the owner of the land does it, somebody's got to provide the common carrier service. So once it's a common carrier it's a common carrier. So they signed a lease and they're sort of stuck with it.

MR. WEINSCHENK: I have a friend who owns a factory in Deer Park that has a vacant spur behind it, their factory. Can they just open up that spur and there's nothing that the Town of Islip can --

MR. McHUGH: No.

A VOICE: --do about it?

MR. GAUGHN: They're not the railroad.

A VOICE: They're not –

MR. McHUGH: The spur – the spur is a private piece of property. That's a different story, okay. You see, it wasn't – the spur was simply to serve that one industry.

CHAIRMAN D'AMARO: But this is an existing spur that had no advantage –

MR. McHUGH: Well, it's still –

CHAIRMAN D'AMARO: Can it be interpreted as–

MR. McHUGH: Dependent on who owned it. If the railroad owns the spur then it would be within the railroad system. If the factory owns the spur it's private property and it is not within the railroad system. It can be brought into the railroad system but only with the permission of the Service Transportation Board. And if they wanted to do something unusual there, there would be an environmental review. But the environ – even if that case, though, if it was to be a railroad facility the environmental review would be before the Service Transportation Board. But it is under EPA and it would be a substantial review. It takes some time and you'd go through the same steps there that you'd go through at the local community level.

CHAIRMAN D'AMARO: Thank you.

MR. McHUGH: Okay.

CHAIRMAN D'AMARO: Are there any other questions from the board for Mr. Mchugh? Sir, I had a question. I just want to try and clarify in my own mind just to take a moment. The town's position, not this board, but the Town of Babylon's position on issuing a stop work order is that the town obviously does have jurisdiction over the site and a building permit was required in order to construct a building there and you've come in and very eloquently tried to explain how it says railroad functioning, forgive my use of words but I'm going to put it in the best words I have, a railroad function is exempt from local jurisdiction –

MR. McHUGH: That's right.

CHAIRMAN D'AMARO: – state and federal law.

MR. McHUGH: Under – under federal law.

CHAIRMAN D'AMARO: Under federal law?

MR. McHUGH: Federal law. The state law I'll let other people talk about, okay?

CHAIRMAN D'AMARO: So the position is that when the MTA acquired an interest in this property by way of a long term the MTA's in charge under the federal law to take

on the same responsibilities as or as charged with the responsibilities of a common carrier.

MR. McHUGH: Absolutely, absolutely.

CHAIRMAN D'AMARO: If the MTA then chooses to delegate some part of that operation or its operation to a private entity, a private entity then also gets the benefit as an agent of the railroad of the same exemptions.

MR. McHUGH: That's right.

CHAIRMAN D'AMARO: Ok.

MR. McHUGH: Yes. But, of course, if you're going to delegate your responsibility, in other words, if the MTA wants to transfer its common carrier obligation to somebody like New York and Atlantic --

CHAIRMAN D'AMARO: Right.

MR. McHUGH: It must go to the board, get approval to do that, which it did.

CHAIRMAN D'AMARO: All right. So that -- that was then done by agreement to New York and Atlantic Railroad?

MR. McHUGH: That's correct.

CHAIRMAN D'AMARO: Ok.

MR. McHUGH: Or actually, it was -- the name may have been different at the time but it succeeded, okay?

CHAIRMAN D'AMARO: (Inaudible) the New York and Atlantic Railroad then, in turn, delegates down to the applicant, in this case, Coastal --

MR. McHUGH: Right.

CHAIRMAN D'AMARO: -- with the same veil of coming under Federal Law

MR. McHUGH: That's right, because they're -- all they're doing is they're loading and unloading cars for the New York and Atlantic Railroad, which the New York and Atlantic has an obligation to do within its franchise. So they just -- they basically delegated the responsibility to another operator.

CHAIRMAN D'AMARO: Ok so going down then to with the Coastal's use of the property (inaudible).

MR. McHUGH: Right.

CHAIRMAN D'AMARO: Is there a use that Coastal as an operator could engage in that would remove a succession of a local jurisdiction?

MR. McHUGH: Well, not under the existing operating agreement. Under the existing operating agreement Coastal -- the operating agreement says that Coastal must fulfill the common carrier obligations, in other words, take any freight that's offered and, basically, if a car arrives they have to unload it and deliver the cargo. Coastal is not allowed to own any of the cargo that it's handling. It's a common carrier, not a warehouse. So under those -- and it has to basically make sure that there's access to the street because that's what they're -- that's part of the charter is you must have access to the street because, otherwise, the horse and buggy couldn't get there. So that's all they're allowed to do on that premises. And they are also under the complete control. There's a huge clause in there that says they're under the complete control in all things of the New York and Atlantic Railroad.

CHAIRMAN D'AMARO: Okay. But let's say that the operator decides to go beyond the scope of what's permitted under this agreement, what happens?

MR. McHUGH: Well, then there's a fight between the railroad and the operator because the -- you have to realize, railroad land is rare. And railroad does not want somebody doing something on their land which is not railroad because that's just business they're not getting. So the -- you have the interest of the long -- of the New York and Atlantic are to maximize the throughput on that land for freight going on and off the railroad and that's why it says the only thing you're going to do on that land is you're going to load and unload cars that are coming or going by the New York and Atlantic Railroad.

CHAIRMAN D'AMARO: Let me ask you another way, are you aware of any situation where an operator went beyond the scope of what was permitted as far as the railroad was concerned so what happened?

MR. McHUGH: I haven't heard of that happening. I've seen situations like High Tech, for instance, where there was just the lease and the -- so even though that was what was permitted there because it wasn't under the control of the railroad, it was deemed not to be within the exemption. There's a case in Florida which the gentleman has cited with regard to the Florida East Coast Railroad where an aggregate distributor leased land from the railroad but he was using the land as an aggregate distribution center for his own product. He owned the product and was distributing it in his trucks to his customers. That's not exempt. The case in Massachusetts where a steel fabrication operation was bringing in steel, unloading it, welding it together and shipping it off to various places in Massachusetts was deemed not. So if your common carriage is just moving other people's goods from point A to point B and it includes loading and unloading cars, if you go outside of common carriage and you do something like manufacture or you're storing stuff on the property for long periods of time. Now, there is a slight bit of storages within common carriage because railroad cars are much bigger than trucks. So you unload a railroad car, you're likely to have four times or five times what the truck can handle. So for the time it takes -- and commonly stuff is put on the ground and picked up and put on the truck and -- because cars cost money so you want to get rid of them, and the railroad doesn't want to pay per diem on the cars so they'll release the cars and the stuff will be sitting there. But the truck keeps coming. It picks that stuff up and just -- for instance, in New York we had huge warehouses. The stuff would come in in the warehouses and it was -- the common carriage obligation required us to hold it until the

trucks could pick it all up, which was sometimes a couple of days. And it's the same concept as free time on a boxcar. You have three days to unload a boxcar or, at least, you did when I was on the railroad a long time ago. So –

CHAIRMAN D'AMARO: All right. So the -- do you have any actual knowledge yourself maybe your not the right person to address this but let me know, do you have any actual knowledge of the activity conducted by the operator on site?

MR. McHUGH: I'll let them talk about it. I'm here on theory –

CHAIRMAN D'AMARO: Okay.

MR. McHUGH: -- not practice.

CHAIRMAN D'AMARO: So in other words, just to clarify so I understand it as well. Really what you have here is a delegation down the line to the operator of a railroad function..

MR. McHUGH: Railroad function with –

CHAIRMAN D'AMARO And as long as the delegation is done properly and –

MR. McHUGH: Yes.

CHAIRMAN D'AMARO: -- the operator operates within the scope of the delegated authority it retains the exemption from the local jurisdiction.

MR. McHUGH: That's correct. That's correct. But I will tell you, with regard to the products that are being handled –

CHAIRMAN D'AMARO: I'm sorry?

MR. McHUGH: With regard to whatever is being handled there, as long as it's legal it's within the common carrier obligation. So they have a problem because if it's offered they've got to handle it as long as they have the ability to do it.

CHAIRMAN D'AMARO: All right. Now, another question I have is, is there a definition of what goods fall within the exemption and which do not? Is there any limitation or definitions as to what can be transported and what cannot?

MR. McHUGH: Not really. There is -- there is an act for -- Hazardous Material Transportation Act. And it isn't that you can't handle it. If it's deemed to be a hazardous material you have to have a license to handle it. The New York and Atlantic has that license. Now, designating something as a hazardous material is done by the Secretary of Transportation. So there is a list of things that you need a specific license because you have to be able -- you have to know what you're doing.

CHAIRMAN D'AMARO: Well, what I was looking for more of just approaching from the Town's perspective because that is the issue here is there -- is there some type of

material or goods that would be subject to be – that would be transported that would not -- that would remove the exemption?

MR. McHUGH: Nothing would remove the exemption. Some things might fall under the Hazardous Material Transportation Act, but it would not remove the exemption.

CHAIRMAN D'AMARO: For instance, and I'm just thinking out loud here -- does the statute define what can be carried as, let's say, freight that has an actual definition on it.

MR. McHUGH: Freight had a definition in the good old days as something of value, okay? So it just had to have a value. But the courts had sort of defined that out of existence. So it no longer -- so now pretty much everything that can be carried is deemed to be freight because -- and largely because waste, which we -- you know, is the hot topic most of the time, has to be carried. And it's --

CHAIRMAN D'AMARO: Let me ask you this, say if the operator was transporting, loading and unloading freight, whatever that freight may be, in which the operator itself doesn't own but an affiliated company owned or which the operator had a prior agreement with the other providers of the freight and had an interest in it would that then cross the line so to speak?

MR. McHUGH: Well, that issue has not really raised -- as far as I know, it hasn't come up. But I would say that if it's a separate company -- I mean, we -- unfortunately in this country we protect corporations and so if it's a separate corporation it would probably still be okay. It's just that the operator of the facility has to do the common carrier work. If there's another affiliated company, whether it has common stockholders and stuff like that, it probably would not have any effect on that operation as long as it was separate and distinct. I can give you an example of something now that there's been a case recently where an awful lot of railroads got in trouble because they leased fiber optic lines, okay? And they have a lot of railroads and one of the issues here, of course, is this is a lease, not fee simple so they're saying you don't have jurisdiction because this is a leasing, not the landowner. Well, that would be true of most railroads because most railroads live on what we call easements, railroad easements. A railroad easement is not fee simple. You do not own that land. You just have a right to run a railroad on that land. When a lot of railroads leased their land for fiber optic easements thinking they had the right to do it they ran into all kinds of trouble because they don't have the right to do that. A fiber optic easement has nothing to do with the railroad. Now, back in the good old days you may remember all the telegraph lines that were along the railroads. Well, in those days Western Union was using those poles, so were some telephone companies, so were some other people. But on all those poles was also the railroads own telegraph system. So the rule is, if you do it and you have surplus capacity you can lease it out to other people for other purposes but the principal purpose has to be your own communications. So back in those days the railroad had its own telegraph lines and they could have Western Union riding along with them and you didn't violate your easement. But if you do -- just do something completely different -- now, if they were to do something completely different than the railroad business, then the exemption wouldn't apply but it would have to be completely different and not even arguably the same.

CHAIRMAN D'AMARO: If the building that was constructed on this site were used not only for the storage, contemporary storage of freight, they were used for another purpose, any other purpose.

MR. McHUGH: A dance hall?

CHAIRMAN D'AMARO: What's that?

MR. McHUGH: A dance hall? There might -- yeah.

CHAIRMAN D'AMARO: Well my question is at that point would, in your opinion, would the building then come under the jurisdiction of the Town?

MR. McHUGH: Yes. I will tell you that many of the railroads I represent own large plots of land in downtown districts, okay? Where the land has been leased to a bank to build a bank it is not exempt. Where the land is a railroad station it is exempt, and I guess that's the line. If it's a railroad function, it's a railroad function. If it's something completely different; if you're just leasing your land to somebody else for a completely commercial purpose and that particular use is not exempt. And you can -- you can go all through the Midwest of the United States. You'll find towns that are built almost entirely on railroad land. The zoning laws apply except to the railroad.

CHAIRMAN D'AMARO: Right, because its not a railroad function.

MR. McHUGH: It's not a railroad function.

CHAIRMAN D'AMARO: So if there's a railroad function in a nonrailroad function (inaudible) taking place are you aware in cases --

MR. McHUGH: Well, if you have a --

CHAIRMAN D'AMARO: What would happen in that instance?

MR. McHUGH: If you have, for instance, a lot of places where, for instance, railroad stations are -- you know, there's an agency at one end and a real estate office at the other end I, frankly, don't know how that would cut, but the station is generally considered to be exempt. And if the real estate office is just supporting the station, in that case you can make the argument there's no way to keep the agent there without the revenue from the real estate office. So, I mean, it really -- I mean, you're starting to get to the edges of the law and there aren't that many cases on that because it really doesn't come up that often. But the general rule is, if the railroad just owns the land and is being leased out or it's been -- well, it's been leased out for a totally nonrailroad purpose it certainly would not be exempt, and I think that's what the High Tech case says.

CHAIRMAN D'AMARO: Okay. Are there any other questions for Mr. McHugh? Alright, thank you for your testimony.

MR. McHUGH: Well, I thank you for your patience.

MR. GAUGHN: Thank you, Mr. McHugh. I'd now like to call Fred Krebs, the president of the New York and Atlantic Railroad.

CHAIRMAN D'AMARO: Good evening Mr. Krebs and welcome. Please state your name and address for the record.

MR. KREBS: My name's Fred Krebs. My home address?

CHAIRMAN D'AMARO: Please.

MR. KREBS: 9 Ray Court, Melville, New York 11747.

CHAIRMAN D'AMARO: Mr. Krebs, welcome to the zoning board. Please raise your right hand.

MR. KREBS: Thank you.

CHAIRMAN D'AMARO: Do you swear to tell the truth, the whole truth and nothing but the truth?

MR. KREBS: Yes, I do.

CHAIRMAN D'AMARO: Mr. Gauhn, go ahead please.

MR. GAUGHN: Okay. Mr. Krebs, would you just -- (inaudible) it's getting late, briefly describe the history of the site, the operations of the site, what's permitted and also discuss what is not permitted, because I know that is of concern to this board.

MR. KREBS: Well, basically the site is permitted to transload materials and it doesn't designate what materials from truck to rail or from rail to truck. The site's been used in the past, and while Coastal has been there, for lumber, plastic, recycled plastic pellets, recyclable metals, aluminum, steel and virgin plastic. We actually had a customer who -- that -- they would come in and transload the plastic out of covered hoppers into their facility and take it back to their plant and make sacks and wheelchair wheels and all sorts of things. Basically, I -- I had a prepared statement that I was going to read to you. However, having two lawyers go in front of me they basically covered everything, except for a few things. And there's a few things I do need to tell you about. One is, it's New York and Atlantic Railway. And even though that doesn't seem very important, that is the name of the company that is registered with the Federal Railroad Administration and with the Service Transportation Board. We had -- we had to go through a process to take over this piece of property. It went through a bid process through the state and our holding company won the bid and then we had to actually apply to the Federal Railroad Administration and submit documents to the Service Transportation Board for us to do this because of the importance of being a railroad. And we actually had to be declared a railroad. And our employees become railroad employees which means that we actually have to pay Railroad Retirement Act, we don't have Social Security, we're under Railroad Retirement Act, we don't have Workman's Comp, for example, we're self-insured. Our private insurance takes care of our companies. So railroads, in many cases, are a lot different than your typical business. And I wanted to bring that out. The other thing is that the site has literally been used as a transload for -- for over 100 years. And I know

they already talked about this, but before Coastal came we did a lot of different products there and we actually were to deal with one of our trunk lines that we interchange with where they were an agent for us off of their main track and they brought product to us and we had a special deal that the customers could get a special rate. But the whole point was, is that it was a transload station. That was the important thing, a reload facility that was available for virtually anybody that would come and use it. And since then we met with Coastal. We worked out a deal where they became our agent and we have been able to build a facility that we built. One other thing I would like to say is that when we did this we did -- I made this very clear to Coastal, that make sure that you notify the Town of Babylon what you're doing. And we made a point of doing that and that's when we got the letter from the Town of Babylon -- Babylon that said that they had no jurisdiction, which I knew that's what we would get when we did it, but we did it anyway to make sure the town was aware of what we were doing. And that's basically all I have to say about it. We're -- we are a railroad, New York Atlantic is. By the way, the similar questions you ask about the facility, let me give you a little bit of history also about NYA. One of the other things that we -- the reason that we came here is because the freight was dropping rapidly on Long Island. It was all going to the LIE. And the point that Mr. McHugh brought up about the trucks -- everybody's been on the LIE at 2:00 in the morning, well, for that matter, 2:00 in the afternoon, and the trucks had just literally taken it over. Well; the reason is because freight dropped from around 50 to 70,000 carloads, that's rail carloads, and that was a smaller car than we have nowadays. But it dropped from about 50 to 70,000 carloads down to 9,300 carloads the first year we took over. That's not much. This year we will do over 19,000 carloads. So in a seven-year period we have over doubled the business. And we have done it by having some transload stations that one -- the one we've done with Coastal. We have two of them in Queens, one in Maspeth and one in Long Island City and both of them had been very successful. But that's kind of the history of the railroad. Does anybody have any questions about what we've been doing or what we intend to do?

CHAIRMAN D'AMARO: So NYA has been operating in this site for how long?

MR. KREBS: Since May 12th of 1997. We actually signed the agreement in November of '96 and then we -- the operation began May 12th. There was some -- some training issues that had to be resolved before we could do it.

CHAIRMAN D'AMARO: Ok and your agreement with the operation limits the operators to transload?

MR KREBS. Yeah. It has to be -- we have to get a freight from their -- from any service they provide. We have to. The -- if we don't -- we actually have an obligation to the Long Island Railroad that we have to pay them if we don't use the property for free. So we have no pieces of property that we have ever leased out for anybody. We have no agreements with anybody that allows them to use our property, unless they are -- they are a freight hauler or an agent freight hauler for us. In this case, they're our agent freight hauler.

CHAIRMAN D'AMARO: And does your company have any policing, for lack of a better word, policing mechanisms that the agreement is not being violated?

MR. KREBS: Oh, sure. We – one is, we have a minimum requirement that they have to ship so many cars. So if they don't make that requirement right there they can get in trouble. And it escalates every year, I think, for the first five years. That's one of the ways we watch. The other thing is, we have a system where we'll do an audit on them and – I'm not sure what this agreement is, but I think that 98 percent or 99 percent of the agreement has to be – has to go from truck to rail. The – occasionally they can bring in a car of lumber or something, you know, one truck every once in a while, but that would be it. It's – it is very – it is – it is very explicit that they have to produce freight for us.

CHAIRMAN D'AMARO: How long has your agreement with the operators be in effect with the Long Island Railroad – 1997?

MR. GAUHN: Coastal.

MR. KREBS: With the Long Island Railroad?

CHAIRMAN D'AMARO: No. With –

MR. KREBS: No. With Coastal I think we did it in 2002, wasn't it, or 2001?

MR. GAUHN: (Inaudible) 2002.

MR. KREBS: January, February 2002, I think.

CHAIRMAN D'AMARO: I don't need the exact date. So prior to that and since '97 it was NYA operating the site itself?

MR. KREBS: Yes. We did it ourselves.

CHAIRMAN D'AMARO: For transloading.

MR. KREBS: Right. And what – we used it as a team track then and people came in from all around. We had a couple plastic guys. We had a couple scrap people, a lumberyard, and they would come in and unload themselves. It was -- it wasn't very efficient, to be honest about it.

CHAIRMAN D'AMARO: What again is the name of the oversite Board in the federal government?

MR. KREBS: Service Transportation Board.

CHAIRMAN D'AMARO: (Inaudible) during the period since May 12, 1997 did the Service Transportation Board ever question how the site was being used?

MR. KREBS: No, no. When they approved the – our application to them to take over from the Long Island Railroad, they basically approved the system is what they did. We had to supply them with the transfer agreement which describes all of the pieces of property we have, some of which are freight only properties, and some of which are joint properties with the Long Island Railroad. This happens to be a freight only property. But we – they looked at the big picture. Now, one other thing I do want to correct, it sounded

like they said that the team track came right off the Long Island Railroad main line and technically that's not true. There's what we call the long siding which comes off the main line and then the team track comes off the long siding. So it's a little -- not quite what they said it was. That's the only thing they said wrong (inaudible).

CHAIRMAN D'AMARO: Do you have -- do you have any actual knowledge as to the day-to-day operations of the site?

MR. KREBS: Actually, I do because I go out there quite a bit. I've been out there a number of times. For one thing, I live just right up the street from the -- you know, right off of Bagatelle and so I -- I actually sometimes going to work I'll go by that way. And we have a job that starts at Pine Aire, a couple jobs, actually, that start out at Pine Aire. And one of those jobs is actually the one that services the Coastal facility. And so I'll go out and see that job lots of times in the morning. When I do I go by the facility and see what they're doing, make sure everything's nice and clean and neat, which it always is.

CHAIRMAN D'AMARO: All right. So can you -- and I appreciate your patience with this but can you just educate us as to a typical day or day-to-day, what exactly is happening on site and what's being transported?

MR. KREBS: Well, on that particular site what they're doing is, they're -- they're bringing in construction demolition debris and they're taking it off the trucks and putting it into the cars. They weigh the car because we have a weight limit.

CHAIRMAN D'AMARO: I'm sorry, it's demolition debris --

MR. KREBS: Yeah, con --

CHAIRMAN D'AMARO: -- off of trucks?

MR. KREBS: Yes.

CHAIRMAN D'AMARO: And being loaded onto railroad cars.

MR. KREBS: And it goes -- and is loaded into rail cars.

CHAIRMAN D'AMARO: And just give me a brief description of demolition debris.

MR. KREBS: It -- it's -- it has a technical definition that Marty will have to give you, but basically it's everything that's not trash. It cannot have any MSW in it. It's got to be what they call clean debris. It has to have -- municipal solid waste, it can have none of that in there. It can only be the concrete, the wood. There's obviously some dirt in it. If there's a mattress in it they have to pull the mattress out. And the landfills, by the way, in Ohio were very, very strict about it because they get -- their tipping fee is rated on whether it's MSW or CND and they get a lot more money for MSW than they do CND. So if you're saying it's CND it better be CND. And I've actually witnessed that -- I gotta tell ya, the operation is really good. They actually sort out the metal from -- from -- from the CND and they take out anything that would be MSW and do not allow it in the car. I mean, they're very good about that.

CHAIRMAN D'AMARO: So the MSD, municipal solid waste –

MR. KREBS: Right, MSW.

CHAIRMAN D'AMARO: MSW. That is the type of material that is prohibited from being transported?

MR. KREBS: No. No, I didn't say that. It's prohibited from being transported to a CND landfill. And they're going to CND landfills in Ohio so they cannot have any MSW in there. We don't haul any MSW out of there. We don't have –

CHAIRMAN D'AMARO: Let me ask you this: Just getting back to the day-to- day operation, if – if a pile of debris comes in or several truck loads of debris and goes into the building or on site, goes through the sorting process you just described and start to pull out some municipal solid waste or a mattress as you suggested –

MR. KREBS: Yeah.

CHAIRMAN D'AMARO: -- what can happen to the items that are prohibited or are not allowed to go further into the cars? What happens to that?

MR. KREBS: Well, actually, Marty needs to address that.

MR. GAUGHN: I think we're getting more into issues, I think, with (inaudible).

MR. KREBS: Yeah.

MR. GAUGHN: Probably better equipped to ask –

MR. KREBS: Yeah. I just know they do it. I've seen them do it. I don't know what they do (inaudible). I know it doesn't go in the car.

CHAIRMAN D'AMARO: All right. Then I don't believe I have any other questions from the board for Mr. Krebbs. Other than the measuring of volume they're required to send out and, in fact, you happen to go by there is there any formal monitoring on the site? Are there required someone from your company certain number of days a week or hours or observations? How do you know or keep track or prevent anything going in there that shouldn't be going in there?

MR. KREBS: Well –

CHAIRMAN D'AMARO: Any activity going on that shouldn't be going on?

MR. KREBS: I'm not sure exactly what you're asking me. As long as it goes out by rail it's -- it's -- produces a rail car for us, it's within our agreement. If –

CHAIRMAN D'AMARO: But what I'm saying is you have delegated your duty, you're the railroad.

MR. KREBS: Right.

CHAIRMAN D'AMARO: To this contract – whatever you—agent.

MR. KREBS: Right, agent.

CHAIRMAN D'AMARO: What you want is that agent to get so much volume out of that place that's part of their lease they have to have so much volume go through there how do you monitor what's going through there and what's happening day-to-day? Does someone from your company physically –

MR. KREBS: Well –

CHAIRMAN D'AMARO: – go there on a regular basis?

MR. KREBS: Well, we don't necessarily have to go there. Every car they get comes by us. I mean, we have to pick up every inbound rail car and take it to them and every outbound rail car we have to – we go in with our locomotives, pull it out. And every one of them has to be – they're inspected by our train crews, they're inspected by our car department. They're obviously registered. That's how we get paid for them.

CHAIRMAN D'AMARO: So every car that goes out of there do you have someone, not the agent, but someone from the railroad inspect what's in that car?

MR. KREBS: No. I didn't say they inspected what was in – we see every car. To be honest with you, if they put a bunch of MSW at the bottom of a car I – I would not know it, if they hid it. I'm just not going to know it, but the landfill would know it. And I can tell you right now that they would stop them immediately.

ME. YOUNG: Okay. Would the same thing be true if any other activity was going on on that site you would have no way of knowing?

MR. KREBS: Oh, sure – yeah, we would. We have crews go in there every day that – you would see any other activity that was going on. I go by there at least once a week. Other people from our company drop by. You would see an activity. I mean, you gotta –

MR. YOUNG: Bit is any of that a regulated inspection? Is any of that something that's done on a regular – it sounds like what you're saying is kind of – I live nearby, so I kind of peak in the occasionally.

MR. KREBS: That is exactly what I'm describing.

A VOICE: (Inaudible.)

MR. KREBS: But I'm also –

MR. YOUNG: (Inaudible) but the next guy to hold your position may not live nearby.

MR. KREBS: That could be. But we –

CHAIRMAN D'AMARO: Don't take that personally.

MR. KREBS: Pardon me?

CHAIRMAN D'AMARO: When you're the head of a much larger Railroad.

MR. KANE: We gave him a promotion.

MR. KREBS: Thank you. That could be, and that's true. But the train crews, every -- they always are going in there. We're always going there with operational questions or issues, inspecting cars. There is somebody that is always looking at the operation. And if they were hauling lumber in and out by truck, for example, you could not do that and not be seen. It just -- it's impossible.

MR. YOUNG: really my question is is there someone who you have to look for that and report it back to you?

MR. KREBS: No, there isn't. There isn't -- other than through normal -- well, yes. It's -- well, the agreement says that the yard shall be subject to supervisoral authority of the railroad's general manager at Glendale which is our train master or actually is a director of transportation. That -- that is in the agreement. We tell them that. But the fact of the matter is, that the train crews have got an obligation that they have to look at the cars, inspect them for safety devices, that the load is put in properly. We can't pull cars that have shifted loads or anything like that. They would -- they would be our eyes and ears right there. Then the car has to go over, you know, our entire railroad system. It gets inspected by another train crew. It comes into the yard, gets inspected by the car department. That's how we would see anything that was strange in a car.

CHAIRMAN D'AMARO: Maybe I'm not getting this right. I'm not particularly talking about what's going out of the cars. I'm talking about how you might monitor anything else that might be going on the site.

MR. KREBS: And that's what I'm saying, though. But the train crews come in there and, I guarantee you, if they saw lumber or some of the -- and I'm not sure what you think they would be moving in and out of there, but you couldn't just move it without sitting there sometime or other You know, it would be seen. The way the operation is set up, it has a flow to it. And if they started piling lumber up -- like, for example, the other day we unloaded, what was it, five lumber cars or six or whatever it was, and the lumber sat there for a little while and then was delivered over -- the guy came and picked it up. But the crews even asked me about that. They said, well, how come they got lumber in there, 'cause that was their first two carloads or first five carloads.

CHAIRMAN D'AMARO: Am I to understand the purpose of this site, trucks that this, is going to take of the roads and everything else solely trucks that would be carrying demolition material.

MR. KREBS: No. No, that's not.

MR. GAUGHN: We'll discuss the other materials.

MR. KREBS: Yeah. There's other materials, but that's one of the things they're hauling out of there.

CHAIRMAN D'AMARO: All right. I was getting the impression from the way you were presenting it that's what this site's doing.

MR. KREBS: That –

CHAIRMAN D'AMARO: And nothing else?

MR. KREBS: No. That's not -- well, just like I said, the other day when we did five carloads of lumber.

CHAIRMAN D'AMARO: What percentage of the material going through are just demolition material?

MR. KREBS: I don't know.

MR. GAUGHN: Mr. Sternberg will answer that.

CHAIRMAN D'AMARO: Okay.

MR. KREBS: I don't know. I've never checked it, 'cause I -- because I -- according to my agreement, I don't really care what the percentage is, as long as it's all rail. That's all I care about.

CHAIRMAN D'AMARO: All right. Thank you.

A VOICE: Thank you, sir.

MR. KREBS: Thank you.

CHAIRMAN D'AMARO: I'm sorry, one more quick question.

MR. KREBS: Yes, sir.

A WEINSCHENK: Mr. young raises a good point that if the town has no jurisdiction and the state has no jurisdiction at all and the state has no jurisdiction at all and the feds are in Washington and they couldn't care less about the middle of Long Island, who is -- you have no government oversight on a -- on a daily, weekly, monthly, yearly –

MR. KREBS: Well, no.

MR. WEINSCHENK: -- basis?

MR. KREBS: No. I didn't say the feds didn't care. What I said was, the STB, when they approved the railroad franchise that they improved the package. We also are inspected by the Federal Railroad Administration. We're inspected by their track department. We're inspected by their operating department. We're inspected by their

HazMat people. And those inspections minimal are every two weeks. They have actually been to this site. They go – they go to our customer sites because – to make sure the operation is safe. And so – and when we go with them, by the way, we would be – I mean, when they go there we have to accompany them, the Federal Railroad Administration. They always come to us and say, hey, we're on the property, let's go look at something. But no, that's – the feds do care. But what I'm saying is they don't care about every carload. They look at the operation as a whole, but they – it does get inspected.

MR. WEINSCHENK: Do they care that the tracks are in good shape?

MR. KREBS: That are – yes.

MR. WEINSCHENK: They care that the cars are in good operating condition?

MR. KREBS: Yes.

MR. WEINSCHENK: And -- but they don't really care what's going in and out of this facility.

MR. KREBS: Well, I guess -- I don't know if I'd say they don't care, but –

MR. WEINSCHENK: They don't inspect for that?

MR. KREBS: But they don't inspect for that.

MR. WEINSCHENK: (Inaudible.)

MR. KREBS: Unless –

MR. WEINSCHENK: That's your responsibility.

MR. KREBS: Unless it was a hazardous material, then obviously the HAZMAT guy would inspect it –

MR. WEINSCHENK: (Inaudible.)

MR. KREBS: -- because we have the record.

MR. WEINSCHENK: (Inaudible) the Patriot Act or something would be on top of it.

MR. KREBS: Well, that was even actually before that. Even before that the –

A VOICE: (Inaudible.)

MR. KREBS: You had to do certain things with hazardous material.

MR. WEINSCHENK: Thank you.

CHAIRMAN D'AMARO: Mr. Krebs, just one last question. Just based on your experience in running and operating the railway, would you consider it a railroad function to sort the waste as opposed to simply loading and unloading it?

MR. KREBS: Yeah, it is.

CHAIRMAN D'AMARO: Would you consider that a railroad function?

MR. KREBS: Sure, because it would contaminate the car. If a mattress went in to one of those carloads it would contaminate -- it would jeopardize my ability to take it to that landfill out in Ohio. It's absolutely a function.

CHAIRMAN D'AMARO: As opposed to the sorting of material being done further upstream or downstream in opposed in other words, you're operating the railroad functions on site.

MR. KREBS: Right.

CHAIRMAN D'AMARO: Only you're looking -- these cars are going only to a particular location and we know that in advance but yet what's being brought to the site is not required to be the materials to the final destination so there's another investigation step where another sorting facility has to take place.

MR. KREBS: Yeah.

MR. GAUHN: You can also respond.

MR. KREBS: But it still is a function. It's part of the load.

A VOICE: All right.

MR. KREBS: That happens with lumber when they unload the lumber.

A VOICE: (Inaudible.)

MR. KREBS: Yeah.

CHAIRMAN D'AMARO: And the reason for the questions you know, it's just, you know, again, the issue for this board is whether or not the town has jurisdiction to even issue the stop work order obviously that does turn on activities and what's happening on the site and that's why I'm asking these questions. And if you're not the person to answer them that's fine. All right. Mr. Krebs, thank you very much.

MR. KREBS: All right.

CHAIRMAN D'AMARO: I appreciate your patience.

MR. GAUGHN: Okay. Thank you very much, Mr. Krebs. I'd now like to ask Martin Sternberg to come up who is partner in Coastal Distributions.

MR. STERNBERG: Good evening, gentlemen.

CHAIRMAN D'AMARO: Good evening.

MR. STERNBERG: Martin Sternberg. I reside at 8 Woods Crossing, Brookville, New York.

CHAIRMAN D'AMARO: Mr. Sternberg, welcome to the zoning board.

MR. STERNBERG: Thank you.

CHAIRMAN D'AMARO: Raise your hand. Do you swear to tell the truth, the whole truth and nothing but the truth?

MR. STERNBERG: I do.

CHAIRMAN D'AMARO: And once again welcome, and just what is your capacity with Costal?

MR. STERNBERG: I am one of the 21 principals. I'm a member of the LLC.

CHAIRMAN D'AMARO: Ok, great. Mr. Gaughn, please go ahead.

MR. GAUGHN: Yes. Mr. Sternberg, I would like you to address the specific questions, particularly the questions that were asked Mr. Krebs. But before we get into that, I just want to ask you, you have listened to the testimony of Mr. McHugh and Mr. Krebs and myself and basically the testimony, especially the discussion of the operations. Essentially is everything we stated true?

MR. STERNBERG: Essentially, everything is true. I'd like to critique it a little more as to the actual operation at the site, which I'll do so.

MR. GAUGHN: Okay. Why don't you start and I'll ask you more questions.

MR. STERNBERG: Firstly, let me say that the operation that is ongoing at this time is ruled over and the police officers are myself, my partner Joseph Fertigliano and our foreman, Ed Mullen. One of us is always at the site. The materials coming in and going out are normally highly regulated in one respect or another. Materials coming in, such as sheet rock that is wrapped in plastic that we take off now for (inaudible) is -- cannot be wet. So that material goes into the building and then it's loaded on their trucks. Hopefully, most of the time they're able to do that within a two-day period. LIPA comes in with 100-foot long telephone poles that, I believe, come from the State of Washington and they off-load there saving LIPA quite a bit of money. We have recently -- since we opened three weeks ago and put out signage, we've been in contact with a company that wants to bring in frozen foods, a lumber company, a distributor, not a lumberyard but a major distributor. We also will initiate and start doing plastic pellets again, both the recycled and pellets that are coming in. We do ship out to CND. CND is a product that Long Island generates tremendous amounts due to the housing boom. That CND comes in and if there are items within the CND that are not allowed to go and be transported to the State of Ohio which is ruled over by Department of Health in the State of Ohio and

they have an agent at the site every day watching each car as it's off-loading, that item, such as a mattress, is taken out of the load and either put back onto the truck that deposited it or if we didn't see it at that moment there is a special container on the side in which that material is put into and then brought to an incinerator or class one landfill. And we are the police officers that do that every day. And as the agent for New York Atlantic, that's our responsibility and we take that very seriously. A

VOICE: All right (inaudible).

MR. STERNBERG: Let me also say, you had questioned, I believe, Mr. Koza, as far as -- I don't know, are you Mr. Young?

MR. YOUNG: Yes.

MR. STERNBERG: I'm sorry. One, two, three. Okay.

A VOICE: (Inaudible.)

MR. STERNBERG: Okay. You had questioned other transload facilities. Presently, Pilgrim State is being looked at as a possibility of a very large intermodal facility, which would be a fabulous thing for Long Island. We attempted to do some work with (inaudible) out in Riverhead and, in fact, I believe funding was granted to put in an upgrade track into Calverton and that process is going on. So, if you can imagine, if we don't -- we're not even worried about the boroughs, The Bronx, Queens, in which trucks travel through to get to Long Island. Just Long Island itself out to Calverton, the Long Island Expressway, if we can do that by rail and energize building out in Suffolk County at the east end we cut out a tremendous amount of trucking. So that was our initial input into going into this business and I think we've been in a short period of time since 2001 very successful.

MR. YOUNG: You mentioned Pilgrim State, that's what I was referring to, proposals to build a large Tanger Outlet just south of there. Theres proposals in Huntington for many thousands of residential, multiple residence units there and very large commercial development. This would be pretty much right in the middle of that.

MR. STERNBERG: Well, I --

MR. YOUNG: With -- first of all, is that something -- that's not railroad property there now; is that correct?

MR. STERNBERG: I can't speak to that. But that -- that's a proposal that I think has been put forth and, I don't know, Mr. Krebs may be able to answer that, whether or not it's railroad property or not.

MR. KREBS: Actually, the Pilgrim State piece of property that you're talking about, it was -- there was 135 acres, I believe.

CHAIRMAN D'AMARO: Mr. Krebbs, I just need to interrupt you, if you're going to speak please--

MR. KREBS: Oh, I'm sorry.

CHAIRMAN D'AMARO: --because we're recording.

MR. KREBS: There's 135 acres that was cut out of the Pilgrim State Hospital when the state sold it. And that was set aside for a transload, an intermodal center. The -- there's an -- a railroad easement that comes off the main line that goes back to the site that is in effect, and that's how you would get back to the site. And there's actually an easement on the site that surrounds the piece of property. And that's how they were going to get back to that piece of land. But it's on an easement basis is how the thing's gonna work. But it is -- it is land cut out from the state property that has been set aside and they're doing the EIS on it right now.

MR. YOUNG: Alright so then this is probably roughly about eight miles, 10 miles at the most east of the site that you have now?

MR. KREBS: I'm not sure what the distance is. It's --

A VOICE: (Inaudible.)

MR. KREBS: Probably eight to 10 miles, right.

MR. YOUNG: At most so now this site -- and this would be coming off in Commack Road --

MR. KREBS: No. Actually, that's one of the problems with Pilgrim. The way that they decided Pilgrim's going to go and the way -- the reason they're doing the EIS is that they are actually going to make the Sagtikos access to Pilgrim. They are going to --

MR. YOUNG: All right. But the Sagtikos (inaudible) doesn't take trucks.

MR. KREBS: I know. But that's what I'm saying, they are going to make the Sagtikos the access. They're going to raise the bridges, do whatever it takes to get the Sagtikos off the Long Island Expressway to Pilgrim State if Pilgrim ever opens up. They actually didn't want 'em to go on Commack Road and that's the reason they were going to do that. That's one of the big delays, because just to get that done is a $50 million project just to get to Pilgrim. But that piece of property has been set aside. I gotta be honest with ya, I think they've waited too long and I think it could be lost if somebody doesn't do something fairly quickly. But the other issue is, that's not exactly the same kind of site. They -- they are basically putting that site in as an intermodal site, which means trailers. They want that as a trailer-on-train facility. That's what the big push is for that site. It's not for lumber transload. It's not for plastic transload. It's not for CND transload. It's not for basically any of this stuff that Marty and Joseph want to do. It is an intermodal facility.

CHAIRMAN D'AMARO: That's not the Commack line of the railroad also?

MR. KREBS: Well, it's on the main line, Long Island Railroad main line.

A VOICE: (Inaudible.)

MR. KREBS: We actually have a spur that goes back there now that we use about halfway back on that easement I was telling you about that we actually have rights to and we use it now for storing of cars. And that's where we started our crew. It's right on the other side of Deer Park, the track is.

CHAIRMAN D'AMARO: Right so that would be coming off the Commack line, I'm sorry the Ronkonkoma line?

MR. KREBS: Well, right. It's -- the Long Island Railroad refers to it as the main line. That's what we're on in Farmingdale, too.

CHAIRMAN D'AMARO: Ok, yeah. Ok.

MR. KREBS: It's referred to as the main line.

MR. YOUNG: So then we can't anticipate if the railroad purpose is putting these things right down in the middle of Long Island, right down that (inaudible) every ten miles would be an ideal situation for the railroad.

MR. KREBS: Well, actually, no, that's not the case. The one that we have at Farmingdale is a private enterprise. The one that is going at Pilgrim is a state project and the one that is at -- at Calverton is a state project. There is no plan whatsoever between Pilgrim and Calverton for any sites, none. The -- those are -- those are -- we're talking about hundred -- hundreds of millions of dollars that are going to have to go into these sites and that's why they're state sites. They're the only ones that have enough money. The -- what we've got here is --

MR. YOUNG: So then you're talking about three sites that you're envisioning to ease the highways from the trucks and whatnot and you're going to take two of them, put them in the Town of Babylon about eight miles apart, next one's some thirty miles away to service everyone else.

MR. YOUNG: No. We're -- but we're not doing that. If the -- the state is working on that project. (Inaudible) have anything to do with it.

MR. YOUNG: The same purpose?

MR. KREBS: Well, no, they really don't. That's what I'm saying. The Pilgrim site is an intermodal site. It is a trailer. It is trailers going onto flat cars. That's the whole purpose of the Pilgrim site. We don't do any of that, none of that at Farmingdale. Ours is strictly carload, which I might add is substantially more efficient than piggyback. Everybody gets all exited about piggyback service. But the fact of the matter is, when you see a trailer going down the road you've taken one trailer off the LIE. If you see a boxcar going down the road you've taken three and a half trailers off the LIE going one way and three and a half going the other way. And it's not the most efficient thing. I am not an advocate of intermodal. I am an advocate of freight, bulk freight, which is what -- exactly what we're doing at Farmingdale. It's more efficient. It's more bang for the buck.

MR. YOUNG: All right. So Atlantic -- New York and Atlantic Railway and Coastal are not part of that type of operation?

MR. STERNBERG: No.

A VOICE: (Inaudible.)

A VOICE: The MTA would be the only common factor in the three.

MR. KREBS: Yes. What would happen is -- as Mr. McHugh brought up, is that we would have the obligation to give them service. It would be basically the state or whoever they would get to operate this facility would come to us and say, okay, we have -- we are connecting an intermodal site to you, give us service. And I have the obligation that I have to -- now, he has to pay me and if -- and I have to give him a reasonable fee. He can actually object to my fee if it's too much, but I have to give him service. And that's what's going to happen at those two facilities. Matter of fact, it's already state money that was allocated to repair the track at the Calverton site. There's no private money whatsoever in that.

CHAIRMAN D'AMARO: Ok then, just as I said, to my understanding if this comes in it's serving a public purpose all operations and all of this land would be off the tax roll is that correct? The MTA is exempt I assume?

MR. STERNBERG: MTA is a tax exempt entity, yes.

MR. KREBS: Right. The Farmingdale is. I couldn't answer the question for Farmingdale.

MR. STERNBERG: But MTA is MTA.

MR. KREBS: But MTA is, yes. But I can't tell you what'll happen.

CHAIRMAN D'AMARO: (Inaudible) the theory behind all of this is it's a public benefit to everyone is what you're saying?

A VOICE: Go ahead.

A VOICE: Okay.

CHAIRMAN D'AMARO: (Inaudible) State of Ohio take some of this stuff their loads are inspected by Ohio or respected by the --

MR. STERNBERG: Health departments, State of Ohio.

CHAIRMAN D'AMARO: Yes. Does the Suffolk County Health Department have any right to inspect what's coming into the Farmingdale site?

MR. STERNBERG: Certainly they can.

CHAIRMAN D'AMARO: Have they ever?

MR. STERNBERG: I don't believe I've seen the health department there, no.

CHAIRMAN D'AMARO: Okay. Mr. Sternberg, going back to this board's, the jurisdiction issue, I just want to – I think as the operator you are probably in the best position to tell us on a day-to-day basis how the operations are conducted there. Could you give us just a typical example?

MR. STERNBERG: We are open presently – we've only been in operation approximately three weeks. Prior to that we – in 2003 had done brought in very limited amounts of materials, such as lumber, plastics and so on until the facility was built. In the last three weeks we've been open five days a week from 7 to 5. We've accepted CND, which we transload into rail cars that are outbound and we have accepted material such as wipers, poles and sheet rock and some lumber for inbound. We expect to presently start speaking to the local commercial entities that need the services or are looking for cheaper rates to bring their either finished products to Long Island or raw products.

MR. YOUNG: What percentage of CND is your business? How much goes out there?

MR. STERNBERG: Right now predominantly CND is the major portion, but given that we could not commit ourselves to any other commercial entity until we got under way the entities that I discussed are going to New York Atlantic and will be discussing with their marketing manager rates structured to bring that material in. And they have called me. I have given them the people to speak to at NYA and they're doing so.

MR. KANE: On the C&D – I have a business. I have, you know, construction business I have a bunch of C&D, I have a truck come in and I can just come to you and dump?

MR. STERNBERG: No. Presently we are only taking materials that go through transfer stations where it's presorted and we have a very clear understanding with these transfer stations as to what we will accept and not accept. We're not taking individuals that may have a truckload or just an unauthorized truck of material, no.

MR. KANE. You're dealing with just strictly transfer stations?

MR. STERNBERG: We're not a transfer station at all.

MR. KANE: No, not you but you're dealing with the transfer stations, that's where the materials are coming from?

MR. STERNBERG: Yes. Yes, that's correct.

MR. KANE: Do you have plans to do any other way transfer stations?

MR. STERNBERG: Our business plan at this time -- oh, excuse me, any other?

ME. KANE: In other words, would you ever do business where an individual can dump a truckload of stuff or is it always going to be through a transfer station.

MR. STERNBERG: Presently our business plan is to deal strictly through transfer stations because they do all the sorting. They do a lot of the work for us. And -- and we feel that's the self-serving, the most economical way and the safest way to have material come in.

MR. KANE: So they come and they dump their load from the transfer station and then you load that onto a rail car?

MR. STERNBERG: That's correct.

CHAIRMAN D'AMARO: Mr. Sternberg, can you describe what sorting is done on site and how it's conducted?

MR. STERNBERG: We're not doing any sorting on site. The material is placed on the floor, we pick it up and put it in the rail cars. What -- we're doing that, we're visually looking or materials that we know Ohio will not take which would be things -- there are many things, but, of course, liquids, 55-gallon drums, sofas, bedding, tires, and the list goes on and on, as I had said before. Any of that material that we see, we extract it. It goes back onto the truck that delivered it if we see it at that moment. If not, here are containers there to take that type of material which then is transported to an incinerator and disposed of.

CHAIRMAN D'AMARO: Is there a fee charged for that type of service?

MR. STERNBERG: There's a fee charged, yes.

CHAIRMAN D'AMARO: There is, ok, so in effect you have no choice but to do some sorting on the property because you can't permit certain materials to get through.

MR. STERNBERG: Well, we're -- no, we're not sorting. We're only extracting that material which is not allowed to be transported and then we hope to catch the truck that disposed of it, which we normally do. I think we have sent in three weeks two containers to an incinerator. I don't -- I don't even know if it was two containers.

CHAIRMAN D'AMARO: At some point you would have to dispose whatever was extracted out?

MR. STERNBERG: Yes.

CHAIRMAN D'AMARO: And you have to get rid of that?

MR. STERNBERG: Yes.

CHAIRMAN D'AMARO: Does Coastal have any interests in any of the providers of materials to be transported?

MR. STERNBERG: No, we do not.

CHAIRMAN D'AMARO: Is the cost of disposing of unwanted material after it is extracted, is that is absorbed by your company or is that passed onto the provider?

MR. STERNBERG: Passed onto the provider.

CHAIRMAN D'AMARO: And is that normally then disposed of at transport offsite by trucks owned by Coastal or how do you get rid of that? I'm just curious.

MR. STERNBERG: We have a company -- and the name eludes me for the moment – that takes that material and brings it to the landfill or incinerator and presents us with a bill. We keep a tracking record of it.

CHAIRMAN D'AMARO: In your agreements with the providers of material, does this specify what materials can be brought to the site?

MR. STERNBERG: Yes, absolutely.

CHAIRMAN D'AMARO: Give me an example of what it can provide.

MR. STERNBERG: What can be brought? Any and all materials that are -- that originate from a construction site or a demolition site so that we can accept, give you an idea, some rugs and things like that. We cannot accept roles of rugs from a rug warehouse and dispose of it. But if the rug is part of the home that's being demolished, they will accept that. They will accept anything that has to do with the demolition of that structure.

CHAIRMAN D'AMARO: All right, and on site for any extracted material. Do you have any type of treating process for extracted material that's not going onto the railroad cars?

MR. STERNBERG: Do we have any facility to treat –

CHAIRMAN D'AMARO: Yeah.

MR. STERNBERG: -- materials that are not going?

CHAIRMAN D'AMARO: Correct.

MR. STERNBERG: In -- what type of materials would that be?

CHAIRMAN D'AMARO: Anything that's not permitted to go to Ohio.

MR. STERNBERG: Well, the only recourse we have is to place it back on the truck that it came from –

CHAIRMAN D'AMARO: Right you said -

MR. STERNBERG: -- or put it in a special container that goes –

CHAIRMAN D'AMARO: It is treated in any way before it leaves your site.

MR. STERNBERG: No. It's put -- containerized and taken to the landfill. But we have not seen any 55-gallon drums of fluid or -- because it comes preprocessed from a transfer station. And if they want to enjoy the transload operation that we're operating then they conform to exactly what we will take and not take.

CHAIRMAN D'AMARO: And when you -- entered your operating agreement with New York and Atlantic Railway approximately two years ago?

MR. STERNBERG: Yes.

CHAIRMAN D'AMARO: And at that time how were you confident that the activity you were going to conduct or propose to conduct was falling within the railroad or railroad functions definition.

MR. STERNBERG: We initially – we initially had a business plan to lease the property and to bring in certain products that we would purchase and then resell. We, in speaking with -- well, we initially started with a piece of property that is across from the airport that the DOT, Department of Transportation, owned and had many meetings with Jack Gainen (phonetic) from Department of Transportation in Albany. And the business plan was to bring down aggregate and sell aggregate to the concrete and to the asphalt companies on Long Island. The DOT in Albany was very concerned about the amount of very, very heavy trucks coming out of upper Westchester over the Tappan Zee Bridge which has now been totally destroyed and is going to cost X millions to either rebuild it or replace it. And their emphasis was to cut down on these extremely heavy trucks and to incentivize the New York area to use rail in the transport of aggregate, which we've done and done successfully. However, the business plan changed in that that aggregate is delivered directly to the user and the user has the facilities to accept what we call bottom-dump aggregate cars and that's how that material is delivered. And none of that material aggregate comes to Farmingdale. We don't have the facility to off-load it and we are not purchasing it to be resold from Farmingdale. So the -- in sitting with counsel and with New York Atlantic, New York Atlantic and their counsel advised us that they must have complete control over our operation in every aspect. And we said, with the exception of materials that are shipped direct to the user that does not come through Farmingdale, that parcel, specifically, we would come under your total jurisdiction and become an agent and work for you as the agent in Farmingdale.

CHAIRMAN D'AMARO: So, just so if I understand that, there are other aspects of other businesses that are involved with actually own the material being transported?

MR. STERNBERG: Only in the one other aspect and that's aggregate that – actually Canadian Pacific Railway owns the quarry. Another company upstate in Fort Ann does the quarrying, the crushing of rock to specific sizes that are ordered. And we accept the delivery, the transportation cost and it goes to the user. We additionally supply Long Island Railroad with all their ballast stone. And ballast stone is the stone you see between the railroad ties. And they use quite a bit of that annually and we have saved them quite a bit of money.

CHAIRMAN D'AMARO: Okay. Are there any further questions at this time from the board. Mr. Sternberg, thank you.

MR. GAUHN: I'd just like to just -- I just wanted to have a couple of questions 'cause I wanted him to get to your questions first before (inaudible) make it quicker. Just to make it absolutely clear for this board and for the record, okay, regardless of, you know, maybe in the plans or thoughts you might have had in the past you are not using or do not intend to use this property for any sales of your own material, correct?

MR. STERNBERG: That's correct. There are no sales. We do not own any product that comes through that transload facility.

MR. GAUGHN: All right. And you're not crushing materials or doing anything, other than transloading the materials that are owned by other people?

MR. STERNBERG: That's correct.

MR. GAUGHN: (Inaudible.)

MR. STERNBERG: That's correct.

MR. GAUGHN: Okay. Thank you, Mr. Sternberg.

CHAIRMAN D'AMARO: Alright Mr. Goren just a couple of other quick questions.

MR. GAUGHN: I have one more – I expect two more people, but okay.

CHAIRMAN D'AMARO: You responded to Mr. Kanes question previously--you are only currently, as part as your operation, accepting materials from other transfer stations and I assume then that transfer station that's where the bulk of the sorting and all that's taking place. Is it on a hypothetical level could this location ultimately become a transfer station, as well, under your agreement with the MTA or with New York and Atlantic?

MR. STERNBERG: No. It would never become a transfer station and it never will become a transfer station.

CHAIRMAN D'AMARO: Would that be prohibited by your agreement?

MR. STERNBERG: Yes, absolutely.

MR. KREBS: Excuse me. That is prohibit -- we are not going to have a transfer station on that piece of property, okay.

CHAIRMAN D'AMARO: And is there any, under that same agreement that it's governed by a contractial relationship that the operator has what the railroad right away, can you now accept municipal solid waste?

MR. STERNBERG: No, we cannot. Do we or can we?

CHAIRMAN D'AMARO: Well, no. The question is, are you permitted under the agreement that you have with the New York Atlantic to accept municipal solid waste?

MR. STERNBERG: It's my understanding, and I have not looked into it because I don't have those intentions, it's my understanding if New York Atlantic Railway approves solid waste to go through there that it could be done. But they have absolutely defined that it would not -- that would not happen and it will not be allowed. So that exempts it and that's the end of it. We're just -- it's not going to happen.

CHAIRMAN D'AMARO: Ok so it's something that, if circumstances change, it could happen in the future but it's not happening now and it's not permitted under your present agreement.

MR. STERNBERG: It would not be Coastal's decision. We could not make that decision. It's exempt from that property right now by New York Atlantic. I don't know what would change their mind, but it's not our -- it's not our decision. And myself, personally, I will tell you I don't care to handle municipal solid waste. I'm just not going to do it, so --

CHAIRMAN D'AMARO: All right.

MR. STERNBERG: I don't know what their decision may be.

CHAIRMAN D'AMARO: If those circumstances were changed would you still believe that that operation would also fall under the railroad exemption?

MR. STERNBERG: It's my understanding with regard to the railroad exemption, if New York Atlantic is permitted to ship an item, no matter what item it is, and they -- in the regulatory world that they live in, if they are allowed to do it they can do it.

CHAIRMAN D'AMARO: A transfer station would be more than shipping, it would be sorting and that kind of thing- treating.

MR STERNBERG: Yeah. We would not -- we're not equipped to do that, nor do we want to be -- I mean, it's not something we would do.

CHAIRMAN D'AMARO: I'm just asking you a question.

MR. STERNBERG: Yeah. No, thank you. We don't care to do that.

MR. KREBS: Excuse me. I've got to tell you, there's not going to be a transfer station on that piece of property. What would be allowed is if -- if MSW came from a transfer station somewhere else in a sealed container we would allow that to happen but it would have to be negotiated. It's not in this agreement. But there will never be a transfer station on that piece of property. We cannot put a transfer station on our property.

CHAIRMAN D'AMARO: Why is that?

MR. KREBS: Because Long Island Railroad won't let us. We have an agreement with them that we won't have a transfer station, a DOS transfer station on our property. But an intermodal facility is a different issue, but there will never be a transfer station on that piece of property.

CHAIRMAN D'AMARO: Why do you know why the Long Island Railroad prohibits that?

MR. KREBS: Well, when the whole thing started, when the New York Atlantic was actually put into effect there was some rumors that went around that the reason that we came in to business was to haul MSW. And there was a lot of anxiety about us hauling MSW. And the fact of the matter is, we have been in business for over seven years and we've never hauled a car of MSW and we've increased the business from 9,300 carloads to 19,000 carloads. And one of the reasons that they put in this no transfer on our property is because of this anxiety and it made people feel better. But we will not have a transfer station on our property. That's just the end of it. Transload, sealed container, that's a different issue. You know, we're talking about doing that in Maspeth right now, but not a transfer station.

CHAIRMAN D'AMARO: Ok and my last question for Mr. Sternberg is, are you aware when your first targeted this site I believe it's zoned residential. Were you aware of that?

MR. STERNBERG: No, we were not aware of that.

CHAIRMAN D'AMARO: Did anyone investigate any zoning issues at all? I know that the plan had been submitted to the town at one point.

MR. STERNBERG: No. We -- we submitted all our documentation to the MTA through New York Atlantic for the construction and also to the town. In fact, when the town looked up the records they informed us that the MTA owned the property. We had no knowledge until the lease -- the 99-year lease, my luck, came up the month that I started to go into business. But that is the first time we had knowledge that Pinelawn owned the property and that the MTA had a 99-year lease. The town, in whatever records, showed MTA as the owner. So nobody had any knowledge, other than MTA and Pinelawn, certainly not even New York Atlantic. They didn't know.

CHAIRMAN D'AMARO: Okay. Very good. Thank you. Thank you, sir. I appreciate it.

MR. STERNBERG: Thank you.

CHAIRMAN D'AMARO: Okay?

MR. GAUHN: Yes, thank you. Again, just for the record, in addition to, you know, the exemptions that we state that we're entitled to, this is not a new use for this property. This use has existed here for 100 years. The only thing that is different is the fact that there is a building. The use of this property is a transloading facility for railroad purposes by the Long Island Railroad, and subsequent agents of the railroad has existed here for one -- you know, for actually a little bit over 100 years. Okay? If I could now (inaudible) your indulgence ask Mr. John Breslin as a real estate expert to come forward.

MR. BRESLIN: Good evening, Mr. Chairman, members of the board. My name is John Breslin. I'm the principal and president of Breslin Appraisal Company with offices at 44 Elm Street in Huntington. I was engaged on behalf of Coastal to make a study of

this property and the surrounding land uses to give an opinion with respect to the appropriateness of this land use on that property.

CHAIRMAN D'AMARO: Okay. Mr. Breslin, welcome please raise your right hand, do you swear tell the truth, the whole truth and nothing but the truth?

MR. BRESLIN: Yes, I do.

CHAIRMAN D'AMARO: Welcome back and go ahead please.

MR. BRESLIN: Thanks. In connection with that study, I was given information with respect to the use of the property by the applicant, prior use of the property by the railroad, obviously made a physical inspection of the property in the immediately surrounding area and reduced my findings to an affidavit-type report 'cause I wasn't expected to be able to be here for this hearing 'cause I was in Huntington. Since I am now here, the testimony that's in the report, briefly, the property that's the subject of the application has been described, I'm sure, as a relatively narrow strip of land that extends along the larger cemetery property that surrounds it. The parcel is along the railroad tracks extending from the intersection of Conklin eastward to Pinelawn Road and then comes around and goes north along New Highway. The land uses, as pointed out in my report, especially to the west side of Pinelawn Road, with the exception of the cemetery property, are all industrial in nature. And specifically, with respect to the parcels immediately opposite the subject property on New Highway there are a variety of different types of heavy industrial uses, such as an asphalt plant, JD Posillico's yard, a bus depot, some concrete plants and a variety of other different types of industrial uses. It's not uncommon to find these types of industrial uses in and around railroad tracks, that those types of uses historically both in this town, as well as other towns, are typically found in and around railroad uses. This use is essentially a different type of railroad transfer facility than that use that's existed on the property for many, many years. However, this property has been used in that manner, it's my understanding, for a very long time. The continuation of that use, I think, is certainly consistent with the development pattern of the industrial uses that surround it, more specifically on the New Highway side, on the -- you have the Airport Plaza Shopping Center a little bit to the west, the airport, of course, to the south. You have St. Charles Cemetery to the south on the corner opposite the subject. You have their maintenance building and facility and then the cemetery itself as you move further to the east. So, in my opinion, the use of this property is consistent with the industrial uses that surround it. You also have similar situations as you move along Pinelawn Road which is east of the subject to the north into the Town of Huntington where opposite the national cemetery on the east side of Pinelawn Road you have a variety of different industrial uses along the west side bordering that property. You also have industrial uses bordering the cemetery properties adjacent to the subject to the north. If you go north on New Highway past the subject property there begins, once again, on the east side of New Highway some industrial uses. As you get to Central Avenue and you go east, those uses along the south side of Central which abut the cemetery lands to the south are all industrial in nature. So the existence of the industrial uses in this community is very consistent (inaudible) consistent with those that are around it. So, in my opinion, by allowing it to continue on this property, it's consistent with the development pattern. It's not going to have any adverse impact on real property values. The characteristics and the impacts on real property values have been

established by the existing development pattern in the area and this, in my opinion, is not going to alter it. I'll be happy to answer any questions.

CHAIRMAN D'AMARO: Okay. Thank you very much, Mr. Breslin. Are there any questions (inaudible) Mr. Breslin?

MR. BRESLIN: Thank you very much.

CHAIRMAN D'AMARO: Appreciate it as always.

MR. GAUGHN: Thank you very much, Mr. Breslin. In the interest of time, Mr. Richard Galley's report as our engineer which details a review he's done particularly concerning dust and emissions and, you know, not only at the site but also some of the industrial businesses that Mr. Breslin just discussed, if it's all right with you we will, you know, just submit that report and save you a summary from him, unless you would like that or unless you have any specific questions that you would like to ask of him at this time.

CHAIRMAN D'AMARO: I think that's fine.

MR. GAUGHN: Okay. Then at this point, unless you have any other questions, I will conclude, other than asking for the opportunity to respond to any comments made subsequent.

CHAIRMAN D'AMARO: Okay. Mr. Gaughn, thank you very much.

MR. GAUGHN: Thank you.

CHAIRMAN D'AMARO: (Inaudible) at this time if there's anyone else here who would like to be heard (inaudible).

MR. DELMONICO: Good evening.

A VOICE: Good evening, name and address please.

MR. DELMONICO: Michael Delmonico (phonetic) and 1630 New Highway. I'm right across the street.

CHAIRMAN D'AMARO: Okay. Mr. Delmarco, welcome to the zoning board. Please raise your right hand. Do you swear to tell the truth, the whole truth and nothing but the truth?

MR. DELMONICO: Yes, I do.

CHAIRMAN D'AMARO: Go ahead, sir.

MR. DELMONICO: I've been there for about eight years. We took over the property across the street. I owned a concrete plant next to JD Posillico and I'm right across the street from Coastal. In the last eight years I seen, you know, different people come in and different messes. When they took over the place I was a little apprehensive because I

said I know there might be a traffic problem or, you know, because it's a very busy road. What they did, which is pretty impressive, they took -- it's like getting a history lesson tonight 'cause I think it was pretty amazing. They get -- they only let trucks enter one direction on the road. This way they don't bulk the traffic by the rail -- you know, by the railroad track. And as far as the rail, the railroad cars, when they leave, sometime I get there 2, 3:00 in the morning and these things are -- that's when they leave. So they're really not hampering, you know, during the day, anybody, you know, to take care of any problem with traffic. You know, every week they have at least twice a week guys come in, clean up the road from one end to the other. So, you know, for me being a neighbor across the street, I'm pretty impressed. If you saw the operation you'd probably be impressed, too. It's just something, you know, you look and right away when someone moves in you think it's going to be a problem. But if you look at how they run the operation, you know, it's very clean and orderly. So I figured just, you know, my two cents, if it's worth anything. All right?

CHAIRMAN D'AMARO: Thank you.

MR. DELMONICO: Thank you.

CHAIRMAN D'AMARO: I appreciate your testimony. Is there anyone else who like to speak on this application.

MR. SCHNEIDER: How you doing? I'm Kurt Schneider from GE Modular Space. We're on Conklin Avenue in Farmingdale. And I'm here to express the concerns that –

CHAIRMAN D'AMARO: Mr. Schneider, if you'd be kind enough to state your address for the record.

MR. SCHNEIDER: 967 Conklin Street, Farmingdale.

CHAIRMAN D'AMARO: Oh, I'm sorry (inaudible). And also please raise your right hand. Do you swear to tell the truth, the whole truth and nothing but the truth?

MR. SCHNEIDER: Yes, I do.

CHAIRMAN D'AMARO: Go ahead.

MR. SCHNEIDER: I'm here to express the concerns that we've had with mostly from our drivers and our salespeople. We have a drop lot which is right by 1610 New Highway. And New Highway's a narrow road. It's kind of small and there's a lot of traffic going in and out of there. And usually during the hours of, you know, in the morning and in the afternoon when people are coming home from work and traveling back and forth, there's times where our salespeople are either going in with some customers to show them some units or our drivers are transporting some units. And, I mean, it's nice the way they set it up with the fence and everything, but it just seems like it's prohibiting traffic from passing. And we've got a safety concern with traffic actually building up a little bit and especially by the railroad. So that's one of my major concerns, not only as the branch manager and the safety for our drivers but also as just somebody that works in the area and is commuting in the area. So we've got a concern as far as the

additional traffic with the additional trucks that are going in there. I'm not in there as often, but these concerns have been expressed by my drivers and our salespeople, so it's just something that I wanted to voice to you, express to you. And also, we -- they did mention also about having a lot of dust in the area due to the operation that's going on there and also, I guess, as far as the image of these trucks going in and out all the time as far as business -- bringing people into the Town of Babylon and trying to create more business for us.

A VOICE: All right.

A VOICE: (Inaudible.)

MR. SCHNEIDER: GE Modular Space; we rent and lease the mobile and modular buildings.

A VOICE: (Inaudible.)

MR. SCHNEIDER: Thank you.

CHAIRMAN D'AMARO: Thank you Mr. Schneider we appreciate your comments. Is there anyone else who would like to speak on this application. Anyone at all who would like to speak on this application. Ok for the record there is no further response. Sir did you want to say something? Yeah- go ahead- step up- absolutely.

MR. ARMENTANO: (Inaudible) thank you. John Armentano; I'm an attorney with Farrell Fritz in Uniondale and Melville and we represent the owner of the property, that's Pinelawn Cemetery.

CHAIRMAN D'AMARO: Okay. Mr. Armentano, welcome to the zoning board.

MR. ARMENTANO: Thank you very much.

CHAIRMAN D'AMARO: And please go ahead.

MR. ARMENTANO: Thank you. You have our brief concerning the narrow issue that's before this court -- this board, rather. The only issue is whether there's a preemption by the state law. We've been treated to dissertation on federal law and federal jurisdiction, et cetera, but when you read the application and the public notice it only deals with the Public Authorities Law, whether the Public Authorities Law preempts the town's jurisdiction. At the threshold I would like to say that point one in our brief deals with your jurisdiction. And it's always difficult to stand before a board or a court and say you don't have jurisdiction or you don't have power. The code specifically requires, and it says -- and it is a requirement that the owner of the property sign a consent form for this application. Pinelawn did not sign a consent form. That's undisputed. Coastal signs itself as long-term lessee. They cross out on one form that they're the owner. They don't cross it out on the other form. But, in fact, above the line where the gentleman signed he signed as an owner. Well, they're not the owner and I think they've conceded that tonight and they admit that. They have -- they had a lease in 1904. They had a lease on another parcel in 1905. There are two leases on this parcel. You didn't hear that tonight. These two leases deal with this property where this building that we call the offending

building is sitting. And, again, we do not consent and, frankly, without the consent of the owner I don't think that you can proceed into the remainder of the application. Now, we have two leases here and that will be discussed by a gentleman that we present from a title company and by one of my partners who plotted this lease out on the site plan. We will show that the building is on a lease that was renewed and it sits on another parcel that was not renewed. This is very important, particularly in light of your requirement that the owner have to sign. Now, why does the owner have to sign? Well, we're not talking about the usual faces that come before a board of this type, the special permits, the day-to-day variances, the more complex variances where the owner is really interested in the property. It's his property. He is asking you, please vary the code for me because I want to do something and that's the decision that you have to make. Here we have the owner who is vigorously fighting this both in the supreme court and in this board, and the reason couldn't be more apparent than what you heard here tonight. They're on our property, or at least one piece of it, and they claim to you we are exempt from all regulation, we can do what we want, when we want, 24 hours a day, 25 hours a day, we can take anybody in, we can ship -- you hear about our current plan. You hear what we're -- we're doing now. You don't hear what the future is going to bring. I think you touched on it a little bit when you said can you have a transfer station here. Well, the answer is, well, under the agreement as it exists now we can't. We all know agreements can get amended on the back of a paper bag if two people sign it and it's valid. You can amend these agreements if they prohibit anything, and I haven't seen the agreement. The only thing I've seen is, in the lawsuit we got -- through our discovery process we got a lease. It's called a lease, not an operating agreement, a lease to Coastal, not an operating agreement. So they're leasing to Coastal. You could restrict things. You can unrestrict things. But bottomline is, nobody polices anything here. You have to rely on the good faith of the applicant. You have to rely on the good faith of Mr. Krebs and his department, and I'm not impugning that at all. But there is no policing here. You have no control. You can't even send a building inspector there. That's what they tell you. You can't send a code enforcement person there. That's what they're telling you. Now, let's get back to the owner for a brief minute. They can take hazardous waste. You heard them say that. They can take garbage if they amend their agreement. You heard them say that. They can ship in and ship out. One thing you didn't hear is, who pays Coastal? How do make their money? Who pays them? Is it the railroad? Is it the shipper? Like other situations that we put in our brief, they are a profit-making organization or they wouldn't be here. They're here to make money, and there's nothing wrong with that. Make it legally, make it properly in the town and nobody complains. As the owner, we're now faced with the specter of anything goes here. And you know what that means as far as liability is concerned. You all own property. The owner is responsible for everything eventually. The owner always gets sued. DEC can enforce hazardous waste situations here or can they? We didn't hear that they have a DEC permit for their construction demolition debris. We didn't hear that. Do they need it? I think they do. Are they going to come in and say now, we don't need -- MTA doesn't even have to go to the DEC sister state agencies. Is that what they're going to tell us? I don't know. But as the owner we have more fear tonight at this time after we heard their testimony than when we walked in here. They have put on a very pointed presentation. You've asked them very incisive questions. You're getting to the point. And when they get -- when you get close to a point, well, that's not our current plan, that's not our agreement. Yeah, maybe we could do it and -- well, if everybody agrees, if we put the garbage in containers, if we do all of these things, then it'll be okay. Well, they're taking trucks off the road. How many trucks are they taking off the road? Trucks are coming in and trucks are going out to their plant.

It's increasing the traffic tremendously on New Highway. That's a problem. It's not a big road. It's not a major road and it's a very crowded road. I've been on it. I'm sure you've all been on it. Well, I go back to the owner. The owner is liable. The owner has all kinds of potential -- I say potential liability here. And that's why your code says before you even consider something you want to know -- be sure the owner is aboard because it's the owner's property. Well, the owner is not aboard. The owner has never been aboard. The owner's in the supreme court. Yes, we lost a preliminary injunction motion, but you know how those motions are. You have to go very quickly into court. And if had some of the testimony that we heard -- had here into the courthouse I'm not so sure that Judge Costello would have ruled the way he -- the way he ruled, that we wouldn't have a preliminary injunction. We're still going to trial there. And in that case -- and it's -- it's Appendix A or 1 in our brief, the MTA and the Long Island Railroad make the following statement under oath, so on page 6 they deny the allegations of the complaint, that's the general lawyer's talk about denying allegations, except they admit -- and this is pretty clear, they admit that Coastal is a private company that is independent, independent of the MTA and the LIRR. That's official court papers in this case that Judge Costello ruled on and it's in our -- it's in our brief as, I guess it's Appendix Number 1.

CHAIRMAN D'AMARO: Mr. Armentano can't you be a private individual company and still be an agent.

MR. ARMENTANO: Well, in a way you can, but that assumes all kinds of control, regulation and things of that nature.

CHAIRMAN D'AMARO: Isn't that what's happening here.

MR. ARMENTANO: I haven't seen this documentation at all. And, as I said, principals and agents move very closely with the flow. They can change an agreement, as I said, on the back of a paper bag. They're admitting -- the MTA and the Long Island Railroad are washing their hands in this. That's what they're doing in these papers. They're pushing it all to Coastal. They're pushing it all to whoever else is involved. Now, I'm going to be brief because we have two very brief witnesses, but I don't want to take too much time. Mr. Gaughn gave the impression that Judge Costello ruled that the lease is valid. That's the second lease I was talking about. He doesn't say that in there. He says that has to go down the road to trial. And he didn't rule that the town didn't have jurisdiction, either. He said that, too, has to go off to trial because this is a preliminary injunction and those that are familiar with the processes, this is a quick proceeding in court. And we are to move quickly here because they were building this building. They were putting this thing up. They were starting to work there. We had to move very fast. And, as I said, if we had some of the information then that we have now I'm not so sure that the result would be the same. We've heard a lot of what's happened, what's been going on there since 1904. Well, I don't think we have any witnesses here who can tell us that of their personal knowledge. They don't know what was going on here from 1904. We're trying to find out, though, in the lawsuit because we've -- we have asked the MTA and the Long Island Railroad to give us their manifest, to give us the cars that have gone in and out of this yard for a period of time. That's very important. We want to see what was really going on because this is a sudden operation. This is -- now we have a big building, we have the ability to separate waste, we send it to Ohio. You could very easily get garbage in here which would be sent the same way, a railroad car someplace, if they amend their agreement. And I'm not so sure their agreement forbids it, by the way. They

say the MTA approved it as safe. We didn't know that. We didn't know the MTA had any inspections here. We don't know what approvals they have. Have they submitted any documentation from the MTA or anybody else that this is safe? You're dealing with railroad cars, you're dealing with payloaders, you're dealing with heavy equipment, you're dealing with construction, you're dealing with people who are working here. I don't know if there's been any safety inspections. I don't know if there's been any fire inspections. These are questions that we hear happened but we don't have the proof that it happened. We don't have the proof that somebody actually did inspect. And if they did, what standards did they use? Did they use standards that Babylon accepts or did they use whatever standards they happened to impose? These are the kind of issues that we have to deal with. Then we have Mr. McHugh who gave us a very interesting dissertation. The problem I find with Mr. McHugh's testimony, if you will, is he's got an ax to grind. He wants to see more railroads, and that's fine. That's not what the law did, though. That's not what the federal decisions that we've attached here say. These are very restrictive decisions They try to pooh-pooh our decisions. But they're there in black and white. One of them even deals with CND debris and how that is for the profit of the operator and not for the railroad. Again, who pays Coastal? I think it's a good question. Now, this is a commuter line. Why do I say that? Because the state legislature told us that and we've developed that in our brief. The MTA statute, the creation of this MTA public authority says it's for commuter transportation over and over and over again. There was one decision here in district court of Suffolk County that breaks it down pretty well, as well, and that's in our brief. Now, Mr. McHugh wants to see this transportation, and that might be a good idea. That's not what the MTA was created for. And I think you have to look at the legislation that creates the MTA and that's the legislation that they have before you on this application. It's not the federal application. We put that in our brief anticipating that they might put something in there on that. So we felt that we should put something in and we obtained these cases. They're not criticized by the other side. They're pooh-poohed as they don't apply. Of course they don't want them to apply, 'cause if they did apply they'd have to go home. Also, there's been so much delivered to you tonight that we don't -- that we haven't seen, that we haven't had an opportunity to give you some input on. We would like to have this file made available to us. Mr. Gaughn gave me some papers. I don't know that we've got them all that were submitted and we would like, obviously, some time to digest these things in light of the testimony and to give you some input. And we're going to ask for that at the end. I want to stress strongly in addition to your threshold of jurisdiction that the owner didn't sign it and that there's a real purpose behind a statute like that, because the owner is where the buck stops. The buck stops here. That's what the -- a lot of our laws say. And a lot of the hazardous waste and a lot of the potentially biowaste could be shipped here. They've told you, we can do anything. The only thing that we can't do is what we agree among ourselves that we can't do. But if we ship it and we use your cars you're going to see amendments here. You have to be very careful with this at the threshold. Any indication that this is acceptable, in my view, to the legislature, not even to this board, to the legislature, under the Public Authorities Law is wrong. It talks about commuters. It doesn't talk about shipping, it doesn't talk about Long Island Expressway, it doesn't talk about trucks on and off the Expressway. It doesn't talk about that. And the reason it doesn't talk about it is the Long Island Railroad was close to being defunct, if not defunct. The MTA was created by the state. They took it over. They said we've got to keep the commuters afloat and that's what they did. And when you read the statute it's in plain English. You don't have to be a judge, you don't have to be a lawyer. It's very simple. Commuter means commuter in the state law. Owner means owner in your law.

Doesn't mean lessee. It doesn't mean lessee for 100 years, lessee for 50 years. It means owner, the one who's ultimately liable. That's where the buck stops. What I'm going to do now is -- oh, and now Mr. Breslin. Mr. Breslin's a real estate appraiser and he made his opinion known, this is not going to affect values, et cetera. That's -- that's a fine opinion that should be advanced perhaps in a zoning case, whether a zone should be changed, whether there's a SEQRA, whether there should be a comprehensive (inaudible) -- that's not what we're dealing with here. We're dealing with railroad use. Is it exempt or isn't it exempt? A very, very narrow issue. And I think you all have read some of these papers, at least the ones you had before tonight, and you can see where the issues are. And speaking of SEQRA, we all know about SEQRA. It's terrific. Some people love it, some people hate it, some people curse it. We all have to live with it. And it does have a very good function. The court of appeal said SEQRA is an alarm bell. You know what that means? It rings an alarm to a board like yourselves and to the MTA. The MTA, I believe, is bound by SEQRA. Did they do a SEQRA on their agreements? Town of Babylon has an agreement with an outside entity. They have to do a SEQRA on it. It's probably a negative declaration but they still have to go through the process to ring the alarm bell, is there a problem? That's what SEQRA's there for. It alerts the board. Can the MTA do a SEQRA? We haven't heard that. I would think not. Long Island Railroad, well, forget them. The MTA is the entity that's involved. I don't think they did a SEQRA. Does the DEC know what's going on here? Do they know that they've admitted tonight we do construction and demolition debris and that's most of our work? Do they know that? Is there a permit required? There's so many unanswered questions. We will provide some of these answers if we have the opportunity to submit additional details to you and we're going to ask for some time to do that. But don't forget SEQRA. You do it on your applications. The town board is always doing it. Did they do it on this type of operation which they put in the middle of a residential (inaudible) property? Did they do that? I don't think they did. And I don't think anybody's going to be able to say they did because I'd like to see it if they did. They haven't told us. I assume they didn't do it because if they had a SEQRA they would have been saying what a great job they did on SEQRA, and they didn't.

CHAIRMAN D'AMARO: Mr. Armentano, let me just ask you, we're not here tonight to determine if SEQRA applies at this point not at this proceeding as you know, but what I'd like to ask you, putting the issue aside of this board's jurisdiction, based on owner consent.

MR. ARMENTANO: Yes.

CHAIRMAN D'AMARO: Putting that issue aside for a moment, what's really at issue here is the town building inspector issued to stop work order -

MR. ARMENTANO: Yes.

CHAIRMAN D'AMARO: And what's the narrow issue is you stated before this board is whether or not the town inspector had the authority, jurisdiction to do that.

MR. ARMENTANO: Yes.

CHAIRMAN D'AMARO: Can you tell me why you believe that the town inspector would think that he did have the authority.

MR. ARMENTANO: Yes. This – for all the reasons that we've said, I think they come before the jurisdiction of this board. Also, the court of appeals has said very clearly in the Monroe County Airport case up in, I think, Syracuse, that governmental purposes don't have to have municipal approval, proprietary purposes do. If you're in it for money as a profit-making operation, that's proprietary. That requires municipal approval. There is no –

CHAIRMAN D'AMARO: Well is that the test –

MR. ARMENTANO: Yes.

CHAIRMAN D'AMARO: Whether or not it's for profit is that the ultimate test is a proprietary as opposed to govern mental (inaudible)?

MR. ARMENTANO: In my mind it is, yes, that if there's a profit-making – profit motive here and it's a private company, which they admit they're (inaudible) unconnected

CHAIRMAN D'AMARO: It's not based on the use itself—putting aside the issue of whether or not it's for profit.

MR. ARMENTANO: It's a question of balance. What is the balance of what they're doing and what's the balance to the town, to the local permitting authority? Does the town have a real interest here which would override any governmental authority or proprietary authority? They kind of blend them in. They – what is the interest? And this is a change because before this case, which is about 10, 12 years old, there was a bright line difference. This is governmental, this is proprietary. Now it's a little more cloudy and it says you have to analyze everything. Well, from what we've heard here tonight, we can do anything any time we want provided we agree to the derogation of the town's entire power. I think the balance shifts like this in favor of the town, that this is definitely proprietary.

CHAIRMAN D'AMARO: So, for instance, if the agreement provided for the operator to be providing commuter railway service that would perhaps not be subjected to the town's jurisdiction?

MR. ARMENTANO: That's correct.

CHAIRMAN D'AMARO: But transporting construction debris for profit, in your opinion would?

MR. ARMENTANO: Absolutely, yes.

CHAIRMAN D'AMARO: That's based on the Monroe case?

MR. ARMENTANO: Yes. It's cited in our brief. It's quoted in our brief. And there's one other case, I think it's the Juerta (phonetic) case, there was an upstate case that that –

CHAIRMAN D'AMARO: Is it also –

MR. ARMENTANO: Pretty much agrees with.

CHAIRMAN D'AMARO: -- assuming that it's someone determined that such a use that's happening presently on the site is a railroad use.

MR. ARMENTANO: Yes.

CHAIRMAN D'AMARO: Just assuming that for a moment, I know that's not your position.

MR. ARMENTANO: Right.

CHAIRMAN D'AMARO: Just assuming that--

MR. ARMENTANO: In my view, that doesn't necessarily make it exempt.

CHAIRMAN D'AMARO: Okay. Fair enough.

MR. ARMENTANO: But we'll assume that.

CHAIRMAN D'AMARO: Assuming that, Is it also your position that the railroad purpose in this case is commuter service only? Therefore these parties can enter in any agreements that they want to but it's not involving a commuter service. It's simply not a railroad function for exemption purposes?

MR. ARMENTANO: It doesn't come under the exemption of the MTA Act, which is what they're relying on, because that act is very, very specific towards commuters. It says so in the introduction, in the intent of the legislature.

CHAIRMAN D'AMARO: So for lack of a better way you cannot delegate a function which you don't have in the first place.

MR. ARMENTANO: Precisely.

CHAIRMAN D'AMARO: So really –

MR. ARMENTANO: That's right.

CHAIRMAN D'AMARO: -- what you're claiming boiling this down to really, is just a private leasing agreement with a for profit operation taking place and it –

MR. ARMENTANO: Right.

CHAIRMAN D'AMARO: Really doesn't involve delegated railroad functions.

MR. ARMENTANO: You can ship one by railroad. I'll give you the cars, you pay me. Fairly simple.

CHAIRMAN D'AMARO: And that's under state law? You would say, under the state governing statues?

MR. ARMENTANO: Yes. Under the MTA statute I'd say they're very limited to commuter. And if you want to use a broader measure of the Monroe County case (inaudible) the proprietary which, as I said, is homogenized a little more now, if you want to use that, the balance tilts tremendously, in my view, in favor of the town from a safety point of view, from an aesthetic point of view, from every point of view that you can have. And what we're going to present now, unless anybody has a question, is a gentleman from a title company to explain these leases that I said are two leases and the analysis -- then we're going to have an analysis of these leases and it's going to show that the building straddles a parcel that was renewed. The first lease was renewed but the second one was not. And that's one of the main issues in the court proceeding, as well, if you can imagine.

CHAIRMAN D'AMARO: All right, but just relate that to the issue that's here this evening no-- I'm mean if--

MR. ARMENTANO: They would have their building on property that they have -- that they, A, don't own, and, B, don't lease, part of it.

MR. YOUNG: Ok so let me ask question? When we're speaking a jurisdiction you're saying that we do not have jurisdiction because you or your client did not sign a consent for application to come before this board?

MR. ARMENTANO: Yes. And that's required by your code.

MR. YOUNG: Ok but then you're also saying that the building inspector had jurisdiction to issue a stop order.

MR. ARMENTANO: Yes.

MR. YOUNG: Is it a remedy for someone who was issued a stop order by an action official in his interpretation of the law, is it their remedy—one of their remedy allowable to them to come to this board, determine whether he had the authority to do that or not?

MR. ARMENTANO: That's the remedy, provided they comply with the code requirements of this -- what this board requires in terms of its jurisdiction. You asked for a consent of the owner because you want the owner before you so you could -- if you're going to impose covenants on the property, if you're going to impose conditions on the use, things of that nature, you need the owner.

MR. YOUNG: But you appear to be saying you don't have the owner but you're saying we should enforce the action of the building inspector.

MR. ARMENTANO: Yes, you should, because –

MR. YOUNG: Well then we have to have jurisdiction to do that don't we?

MR. ARMENTANO: No. You say -- if you say you have no jurisdiction then you don't proceed any further. The stop work order is extant, if you will. It's outstanding. They're under a stop work order. There's no stay because the stay only comes into play when the application is filed with you. And if the owner's consent isn't there to file it with the application there's no stay so then they would be in violation of the stop work order with no remedy at this board. Whether they could go to court on an Article 78 proceeding to challenge the building inspector is another issue or whether they have no remedy is another issue. But the fact of the matter is, this board is foreclosed. I'm not saying that you should have no jurisdiction but go get them anyway. I'm not saying that. I'm saying, if you find you have jurisdiction over my argument then we make the other arguments. However, what I'm saying is that there is no jurisdiction here. This board should say no jurisdiction, the owner hasn't complied with -- hasn't signed, stop work order is in existence. And that's it.

CHAIRMAN D'AMARO: I'm confused here, basically you're saying the board doesn't have jurisdiction, building department does.

MR. ARMENTANO: Yes, that's correct.

CHAIRMAN D'AMARO: Okay.

MR. ARMENTANO: Yes. And if they say, well, we have no remedy, well, maybe they do, maybe they don't.

CHAIRMAN D'AMARO: The only efficiency in this board having it is that we don't have the owner's permission.

MR. ARMENTANO: Right.

CHAIRMAN D'AMARO: We have the owner's permission, not the lessee's permission.

MR. ARMENTANO: Right.

CHAIRMAN D'AMARO: Then we can go forward, you're saying?

MR. ARMENTANO: Yes.

CHAIRMAN D'AMARO: We can't because we don't have the owners permission.

MR. ARMENTANO: Yes. But if you do we make the other arguments. And we've footnoted that in the brief, that after that first point that's an if you find jurisdiction.

CHAIRMAN D'AMARO: And it will take six or seven years to get through all this stuff.

MR. ARMENTANO: We haven't submitted the rest of ours yet.

CHAIRMAN D'AMARO: I don't necessarily agree with the fact that whether--that this board doesn't have jurisdiction but that's another issue.

MR. ARMENTANO: Yes. Well, it's your code. I'm sure you've had other situations. I'm sure you haven't had –

CHAIRMAN D'AMARO: Well, you know, it just seems inconsistent--

MR. ARMENTANO: I don't know of anywhere there was no -- where there was no owner's consent, but –

CHAIRMAN D'AMARO: Yeah, it just seems coherently unfair that a stop work order can be issued and the remedy is not-- there's no way to appeal that with in the towns jurisdiction. It just doesn't seem--

MR. ARMENTANO: But they – there may be a remedy in the courts.

CHAIRMAN D'AMARO: Yeah, that's true

MR. ARMENTANO: Yeah, there may be. I don't go one way or another. I haven't looked into that. There might be.

CHAIRMAN D'AMARO: And I'm not sure that the appeal of a stop work order necessarily falls under requirements in our codes as opposed to state law. Thereby, I'm not sure if you actually heed the owners consent to appeal stop work order. That's an issue we'll take a look at.

MR. ARMENTANO: Right, your code doesn't relate to the state law at all. Okay. What's this?

CHAIRMAN D'AMARO: (Inaudible.)

MR. ARMENTANO: Why don't you just tell them what you did and put forth the diagram showing –

CHAIRMAN D'AMARO: All right, sir good evening.

MR. TREUBER: Good morning, ladies and gentlemen.

A VOICE: (Inaudible.)

CHAIRMAN D'AMARO: Welcome. Please state your name and address.

MR. TREUBER: William Treuber, T-R-E-U-B-E-R, Hills Park Claims, Smithtown, New York.

CHAIRMAN D'AMARO: Welcome please raise your right hand. Do you swear to tell the truth, the whole truth and nothing but the truth?

MR. TREUBER: I do.

CHAIRMAN D'AMARO: Okay, and please go ahead.

MR. TREUBER: I was requested to do a search on properties which, I guess, were commonly known as Pinelawn Cemetery. And there are three tax lots involved in this, tax lots being numbers 1.2, 1.3 and 2 and the search –

CHAIRMAN D'AMARO: Mr. Treuber, if I could just interrupt you preliminarily, in just tell us what capacity you're here.

MR. TREUBER: I happen to be president of First New York Title Agency. I've been involved in the title business, per se, for 18 years. Previous to that I've done real estate and worked with real estate developments and through the course of quite a number of years I have either been involved with, reviewed or closed in excess of 50,000 parcels of property, both residential and commercial. I have testified in supreme court, Nassau, Suffolk and have been declared an expert witness, as well as testifying before zoning boards and town boards.

CHAIRMAN D'AMARO: Okay.

MR. TREUBER: The nature of the search, the property was conveyed to Pinelawn, was really at that time Oak Grove Cemetery Association by a deed dated March 11, 1901, was recorded March 16th. At some time in 1902 there was an order of the supreme court which changed Oak Grove Cemetery Association into Pinelawn Cemetery so, therefore, as a successor by merger Pinelawn Cemetery is the owner of the premises. I prepared a bit of a visual aid, which if I may present to you, it may be a little easier to follow.

CHAIRMAN D'AMARO: Go ahead--there your go. Thank you

MR. TREUBER: You follow, there's a pretty large area in yellow which is the total area we searched on Pinelawn Cemetery. In the lower right-hand corner which is the southeast corner of the premises, it should be outlined in blue, that property is owned by the Long Island Railroad which is leased to Pinelawn Cemetery. A number of years ago there was an eminent domain proceeding which foreclosed a very small area, I guess it was used for some kind of electrical conduits. The eminent domain proceeding was only to foreclose a leasehold interest since the Long Island Railroad still retains a fee interest. Toward the left portion of the diagram which is the southwest portion of the premises you will see that there is a delineation in the lower portion of the more southerly portion of orange and a more westerly, northwesterly portion, I guess it would be green, one being parcel entitled 1A, one being parcel entitled 1B. Parcel 1A, fee interest being in Pinelawn Cemetery was a lease by Pinelawn Cemetery to the Long Island Railroad. That lease was dated November 1, 1905, was recorded February 26, 1906. By the terms of the lease that lease expires October 31, 2004. We have found as of August 10th that there were no additional renewals or any other documents on record. Unfortunately, we couldn't bring it further to date because over the last several days the county computers were down so that was the last date that we had. The orange portion that you see which I labeled parcel 1B was also leased by Pinelawn Cemetery to the Long Island Railroad and that lease was dated August 30, 1904, recorded September 9, 1904. The lease by its terms expired August 29, 2003. Once again, we have found no renewal of that lease. We have found no other leases of record on that property. I have (inaudible) and pages. I don't know if you need any of that information. I also have the original documents which we

pulled out of the county clerk's office in longhand form as -- if you need exhibits to what I just testified.

MR. YOUNG: Does the original leases contain any provision in them that said and renewal had to be recorded?

MR. TREUBER: No, sir. Almost -- in my reading of the three leases, they're almost mirror images of each other with he exceptions, obviously, of dates. I think the important and critical point and, obviously the leases will speak for themselves, but in my interpretation of it is that the critical lease is the one that is, like, expired in August of last year which relates to parcel 1B. There was also a lease which expired for the property that was leased by the Long Island Railroad to Pinelawn which expired the same time. Both of those leases had to be renewed at least 90 days prior to the termination of the lease. All three leases were for a period of 99 years. They would execute new leases similar in all respects, except that the renewal was to run for another 99 years and they had to be renewed and the terminology is (inaudible) three months prior to the renewal period And there were no renewal that we found of record.

MR. YOUNG: All right, but that does not establish that there was no relief.

MR. TREUBER: That is absolutely --

MR. YOUNG: Your testimony is only that these leases were recorded?

MR. TREUBER: My testimony, sir, is that the leases were recorded and the content of those leases. You're correct, we found none of the leases. That does not mean that leases were not renewed. You're absolutely correct. However, any -- any leases that would be put on record would have a priority because New York State being a (inaudible) jurisdiction to any of those leases. That's it. Court battle it at that point.

CHAIRMAN D'AMARO: Right. The lease need not to be recorded to be enforced; is that correct?

MR. TREUBER: Leases do not have to be recorded to be enforceable, but there are very strict interpretations of case law regarding the validity of leases being performed within periods of time, that's correct.

CHAIRMAN D'AMARO: Did you happen to read the preliminary injunction language that address the lease renewal?

MR. TREUBER: In relationship to the litigation that exists?

CHAIRMAN D'AMARO: Yeah.

MR. TREUBER: No, sir.

CHAIRMAN D'AMARO: I just want to read this to you and get your opinion on this, this is written by--

MR. TREUBER: The one by Judge Costello?

CHAIRMAN D'AMARO: Yeah., exhibit F on the applicants exhibit, brief rather, and it says Pinelawn's further argument concerning the untimeliness of Long Island Railroad's renewal of the August 1904 lease is also unpersuasive. The letter agreement containing Pinelawn's concurrent renewal refers unequivocally in a hand written addendum to the august 1904 leases. If the (inaudible) waiver or stop does not prevent Pinelawn from disavowing its consent is likely that equity would intervene to relieve Long Island Railroad of the consequences untimely notice to renew—and I understand that these are issues that are not (inaudible) an issue that's been ultimately determined yet but I just like to get your opinion.

MR. TREUBER: One man's opinion. There are appellate courts going from there.

CHAIRMAN D'AMARO: Yeah, well, that's true.

MR. TREUBER: I – you refer to a statement that Justice Costello said just before the untimely renewal where a court of equity could intervene, I disagree with that statement.

CHAIRMAN D'AMARO: Have you seen this?

MR. TREUBER: I read the letter.

CHAIRMAN D'AMARO: The letter agreement.

MR. TREUBER: And that is what I disagree with. I disagree with that letter.

CHAIRMAN D'AMARO: You've read the letter agreement?

CHAIRMAN D'AMARO: The letter agreement does, in fact, refer to the 1904 lease?

MR. TREUBER: Oh, of course It refers to the lease.

CHAIRMAN D'AMARO: Is it the wrong lease?

MR. TREUBER: I'm sorry, sir?

CHAIRMAN D'AMARO: Is it the wrong lease that it's referring to? Or is it not a renewal?

MR. TREUBER: Well –

A VOICE: (Inaudible.)

MR. ARMENTANO: We're going to have testimony on that. You're free to inquire of this witness but we're going to have testimony on that precise question.

CHAIRMAN D'AMARO: (Inaudible.)

MR. TREUBER: In my opinion, the letter, if I recall the terminology, second – I think it's the second paragraph that refers to the August lease of 1904, says that the author of the letter, which I believe is the MTA, reinstates the lease of August 30, 1904. If I am the tenant and if I defaulted under the terms of my lease I have no authority to reinstate that lease. The only thing I can do is request a reinstatement. But there is no authority of a tenant to reinstate a lease that is expired. And that is why I disagree with Justice Costello. I think what they're asking to do or what they are saying is that they are reinstating the lease between the Long Island Railroad, MTA and Pinelawn for the parcel to the east.

CHAIRMAN D'AMARO: Ok, it looks like the judge says, that there was a concurrence in what was deemed in offer to renew that lease.

MR. TREUBER: Well, if the lease did expire and I want to renew it, I have to concur with the statement of the author of the letter saying, you're right, maybe I didn't renew my lease with you so I think – I think that's where the concurrence came.

CHAIRMAN D'AMARO: Thank you very much.

MR. TREUBER: Thank you.

CHAIRMAN D'AMARO: Any questions for Mr. Treuber at this point? Thank you, sir.

A VOICE: Thank you.

MR. KILIAN: Good evening. My name is Phillip Kilian, K-I-L-I-A-N; 45 Lloyd Lane, Huntington, New York. I'm a member of the firm of Farrell Fritz, attorneys for the Pinelawn Cemetery.

CHAIRMAN D'AMARO: Okay. Mr. Kilian, welcome and please go ahead.

MR. KILIAN: In January of this year, 2004, we were requested by Pinelawn to examine the Wellwood lease which I believe is the lease that you have marked in blue and to examine one of the leases on New Highway which is parcel 1A, lease dated November 1, 1905. And what we found is this: The Wellwood lease was dated August 30, 1904, ran for a term of 99 years and contained a right of renewal for another 99 years. That is the parcel which is at the southeast corner, is not involved here and involves or involved at one point in time in 1990 – 1986 condemnation of a portion of that property for construction of an electric substation to allow the electrification of the Ronkonkoma line. We also examined a lease dated November 1, 1905 which is shown in green on your sketch and runs along the westerly side of Pinelawn Cemetery. That was also for a period of 99 years and had a provision for the renewal for another 99 years. It also became apparent that there was a third lease also dated October 30, 1904 which was for the very southwest corner of the Long Island Railroad tracks and New Highway. And the building on which Mr. Sternberg and his partner have constructed this hanger-like building is sitting astraddle both of those lots. Now, in May 19 – May 28, 2003 Jonathan Gainen (phonetic), general counsel for Pinelawn on behalf of Pinelawn, renewed the Wellwood-New Highway lease by letter which I believe is incorporated in the exhibits that you have. And at that point in time that renewed the blue portion with the exception

of the substation and that blue portion has been used for many years by Pinelawn as a buffer to the Long Island Railroad, that is, planning buffer. The Long Island Railroad in a letter of October 17, 2003 coming many months after Mr. Gainen's letter, which is a letter that the (inaudible) Justice Costello refers to, does two things: One, it contains the election of the railroad to extend the blue -- the green portion, parcel 1A which is the northerly most portion of that property, and it also contains some language which I believe has considerable meaning when you read it in conjunction with Mr. Gainen's letter of May 28th. Mr. Gainen's letter of May 28th in pertinent part says, we are attorneys for Pinelawn Cemetery. Pinelawn Cemetery hereby exercises its right to renew for the period of 99 years. The lease (the original lease) entered into on October 30, 1904 between the Long Island Railroad Company, party of the first part, Pinelawn Cemetery, party of the second part. A copy of the original lease is enclosed. This provided in the original lease Pinelawn Cemetery will submit for execution by the Metropolitan Transportation Authority, the Long Island Railroad to a new lease in all respects similar to the original lease, except the new lease shall have a term of 99 years commencing August 30, 2003, terminating August 29, 2102. As such, a lease was prepared and submitted to the Long Island Railroad by me in 2004. The letter of October 17th on which the applicant relies is brief. It says, on behalf of the Long Island Railroad we are hereby exercising its option to renew the above- referenced lease dated November 1, 1905 for an additional 99 years That's the upper portion, the so-called green portion. It then also says, we are also hereby agreeing to reinstate and extend the lease dated August 30, 1904 for 99 years more through July 31, 2102. Please have an authorized party concur by signing below and return one copy of this letter, so and so forth. In my mind, what that refers to and an ordinary reading of it would be that the MTA or the railroad is concurring to the renewal by Pinelawn of the Wellwood lease, has nothing to do or having nothing to do with the orange portion which is parcel 1B. And, in fact, in October of 2003 Pinelawn was unaware of the fact that there was a third lease. And it could not consent to the renewal of a lease of which it had no knowledge. The plain ordinary reading of this is, in my mind, very plain and apparent, blunt, unvarnished, very clear. So that, in sum and substance, is the effect of the lease and I'm of the professional conclusion -- have the professional conclusion that the railroad has no lease on parcel 1B and to this day the railroad has not submitted a renewal or an attempted renewal of that parcel and, indeed, at this point in time might even be in violation of the rule against perpetuities. That is my professional opinion and if there are any questions I'd be happy to try to answer them.

CHAIRMAN D'AMARO: Was the lease for parcel 1A and 1B green and orange?

MR. KILIAN: The green and orange, right.

CHAIRMAN D'AMARO: Were those leases of the same date?

MR. KILIAN: No, they did not. The green lease, the upper lease was November 1, 1905. The orange lease is August 30, 1904, the same date as the blue Wellwood lease. And, as a matter of fact, the documents were so poor in their -- in their reproduction that -- and they were handwritten leases, that it took a great deal of interpretation. You really had to work at trying to figure out what was involved. A casual examination would not do it.

CHAIRMAN D'AMARO: Okay. Are any questions from the board for Mr. Kilian. Alright if not Mr. Kilian thank you?

A VOICE: Thank you.

MR. KILIAN: Thank you very much for your testimony, we appreciate it.

MR. ARMENTANO: (Inaudible.)

A VOICE: (Inaudible.)

MR. SCEPPA: Well, it's almost good morning.

CHAIRMAN D'AMARO: Well, we have ten minutes of tape left so-

MR. SCEPPA: So I'll try to be brief. My name is Mike Sceppa; I'm vice president, Pinelawn Cemetery, 1 Pinelawn Road, Pinelawn.

CHAIRMAN D'AMARO: Can you please spell your last name for the record.

MR. SCEPPA: S-C-E-P-P, as in Peter, A.

CHAIRMAN D'AMARO: Mr. Sceppa welcome, would you please raise your right hand. Do you swear to tell the truth, the whole truth and nothing but the truth?

MR. SCEPPA: I do.

CHAIRMAN D'AMARO: Go ahead, sir

MR. SCEPPA: All right. I'd like to present these maps, if I may. These maps represent –

CHAIRMAN D'AMARO: Alright, I need you at the podium because we're recording the proceedings

MR. SCEPPA: These maps represent the burial sites that run adjacent to the subject property. I'm going to need to bring these to you, so could you –

CHAIRMAN D'AMARO: So why don't you pass them up.

MR. SCEPPA: Okay.

A VOICE: You want me to hold it?

MR. SCEPPA: Yeah. I think just in terms of an explanation, if I may.

CHAIRMAN D'AMARO: Well, I'll tell you what you can do, sir, to make it easier for you. If you want to come up that's fine just bring the microphone with you because ultimately if we need a transcript we need to—no, no, that's the right one, yeah that one.

A VOICE: You take this.

MR. SCEPPA: Thank you. Pardon me?

CHAIRMAN D'AMARO: That's just for recording.

MR. SCEPPA: I understand. This map here is sort of an overall map that where you see numbers 3, 4, 5, 6, those are gardens, areas that were set up and plotted for burials.

CHAIRMAN D'AMARO: Ok

MR. SCEPPA: These are more detailed maps of those areas. Where you see 3, this is a detail of 3. Where you see 6, this is a detail of 6. And these are larger maps (inaudible), 5 and 4. The subject property is right here (indicating).

A VOICE: (Inaudible) want to take that back (inaudible).

A VOICE: Yeah.

MR. SCEPPA: This – these are photographs, to give you a perspective of the buildings, the building that's located on the property from the perspective of where these graves are located. All right Very briefly, there are 3,000 people buried in that area (inaudible) grave that's marked as a burial. They're represented by next-to-kin family that come and visit there every day. Now, we talked about the rights of the owner. We've talked about the rights of the railroad. But we have to worry about the rights of the next to kin, the loved ones that come and visit their parents, their children, their wives and their husbands. What are we going to do? 3,000 people. There are another 16,000 people entombed a little further away all in that section. 100,000 people visit there. Who's going to speak to them? Cemetery can't. You can't. Who? Any questions?

A VOICE: (Inaudible.)

MR. SCEPPA: Thank you.

CHAIRMAN D'AMARO: Ok is there anything else you'd like to add?

MR. SCEPPA: Excuse me?

CHAIRMAN D'AMARO: Anything else you'd like to add at this time?

MR. SCEPPA: Thank you.

CHAIRMAN D'AMARO: Thank you very much, Mr. Sceppa.

MR. ARMENTANO: That's all we have, Mr. Chairman, members of the board. As I said, we'd like to take a more careful look at the mountains of documents Mr.Goren has submitted and submit a hill in return or at least a letter (inaudible) you keep the record open (inaudible).

CHAIRMAN D'AMARO: What I'd like to propose is I think that it would be only fair to both sides are requesting an opportunity to kind of review the exhibits and respond- but I do want to keep a short time constraint on that. So I think that what we can do is leave the record open for a week and give you and opportunity to kind of digest some of that and respond. You don't have to submit lengthy briefs- I think you've accomplished that but certainly if you want to submit point by point and in reviewing the others exhibits you can do that.

A VOICE: (Inaudible.)

MR. GAUGHN: Now, would we have a – I'm sorry. Would we have an opportunity to reply to the brief that he's going to submit?

CHAIRMAN D'AMARO: Well, I think as long as we can do it within the two week period, I'm going to propose to the two of you that whatever submissions came into the board if you would also submit them to one another. Is that a acceptable procedure?

MR. GAUGHN: Okay. Okay.

MR. ARMENTANO: (Inaudible.)

CHAIRMAN D'AMARO: I mean the alternative to that , well the alternative to it is that you could just submit to the zoning board but then you'd have to come down and see what's come in and what's not, that kind of thing.

MR. GAUGHN: Right.

A VOICE: (Inaudible.)

MR. GAUGHN: So we'll submit to each other within two weeks and then take another week to submit to you?

CHAIRMAN D'AMARO: As a professional courtesy, it takes time.

MR. GAUHN: Okay. You want to give a date certain for that maybe or maybe -- why don't we consult with the town attorney and work out the schedule, so move on here.

CHAIRMAN D'AMARO: Why don't we do this, why don't we say we'd like to have all submissions into the board two weeks from receipt and what you're timing is back and forth you can consult with Ms. Scelfo and Mr. Cohen and work out the timeline.

MR. GAUHN: We'll consult with (inaudible).

A VOICE: (Inaudible.)

MR. GAUHN: Okay. Very good.

A VOICE: All right (inaudible).

MR. GAUGHN: No. I gave you the memorandum. But the exhibits after that memorandum, they -- you know, they have copies of here. Yeah, yeah. I was –

A VOICE: (Inaudible.)

MR. GAUGHN: Yeah.

CHAIRMAN D'AMARO: Anything that's been submitted this evening is certainly available.

MR. GAUGHN: We're going to require that, as well the things Mr. Armentano submitted.

CHAIRMAN D'AMARO: Absolutely, now before we break, I just want to ask- Mr. Goren, it's usually after there's some opposition to an application, is there anything else you'd like to add in conclusion.

MR. GAUGHN: Very quickly, because it's just couple of things we have to respond to. I'm going to ask (inaudible) quickly with knowledge that the tape is running out of room and that I will go quickly.

MR. McHUGH: I think we have 30 seconds to tape, but I'll try and be in that. I heard an awful lot tonight.

CHAIRMAN D'AMARO: Just identify your self for the record.

MR. McHUGH: John McHugh again from 6 Water Street in Manhattan. We've heard a lot tonight about leases and other things. The issue here is whether the town building inspector had the right to issue a stop work order, and that is completely trumped by federal law. He did not. This is a railroad operation and that is pretty much it. And the -- this is a subject matter jurisdiction issue. It does not matter whether the papers were defective. The fact of the matter is, the law is that congress has taken this jurisdiction away and unfortunately what some of the things, some of the comments that were made here are correct. There are -- and that's one reason (inaudible) Madler and I opposed some aspects of this law. But we didn't win that. It is in the law. And there are holes in the law. That means there are some things that are not regulated and that is something that congress has to deal with. You can't, the courts can't even So I'm -- we're stuck with that and we thank you very much. It's very late and you've been very patient. Thank you.

CHAIRMAN D'AMARO: Thank you, Mr. McHugh

MR. GAUHN: Just very quickly, I'm not going to respond in detail to all the legal arguments about the lease because I think basically that's before the court and before Justice Costello. I think his opinion reads for itself and, of course, as you know, a preliminary injunction motion, you have to prove the likelihood of winning on the merits in order for you to obtain that and, clearly, in the language Justice Costello uses he doesn't feel that they will win on the merits. I just want to say on the one point I agree with Mr. Armentano on the presentation, Mr. Breslin and also Mr. Galley, his report, we did not need to do that for this type of an application. But just like we didn't need to

submit, we felt, the plans to the Town of Babylon, we did it out of a courtesy to this board to give you an overall idea of the site and what was going on on that site. On the issue of consent, there is a court of appeals decision, zoning board of appeals of the Town of Celina and, actually, it's View National Reporter System -- it's -- it says, the matter of Antonio (inaudible) appellates -- I'm sorry -- versus the zoning board of appeals to the Town of Celina. It makes it very clear this involved a Mobil gas station.

A VOICE: (Inaudible.)

MR. GAUGHN: That is very clear that a tenant has the right to submit an application under these circumstances and I will submit that to you. We did bring up the fact that there were two leases, mentioned it, it is in there. I think that is clear. Also, yes, the former lease that existed between Coastal and New York and Atlantic has been voided and that was replaced with, in effect, that agency agreement. And, you know, certainly -- finally, on the issue of the cemetery, you know, this site (inaudible) has existed next to this cemetery and other cemeteries for over 100 years. It has always co-existed since 1965. I've been going by and watching this activity when I visit my grandfather on the other side at St. Charles, so I really don't see how that is an issue. And finally, I want to state, this use has been going on for 100 years. We're not here to discuss whether or not we have the right to this use. Despite the exemptions, we've been going on here for 100 years using this property. This isn't new for this purpose. Yes, what's new is a building. It's more modern, it's dealing with today's standards and it's also helping to reduce the impact (inaudible), but, again, this has been going on here for 100 years. And I very much thank you for your attention and your time.

CHAIRMAN D'AMARO: All right. Thank you, Mr. Gaughn. Ladies and Gentlemen, thank you very much for everybody's patients and coming down. All the testimony will be considered and the board is going to reserve decision. The record will remain open for a period of two weeks for further legal points and briefs to come in and the decision is reserved. Thank you.

A VOICE: Thank you.

A VOICE: (Inaudible.)

Exhibit #2

Application #04-267 of Coastal Distribution, LLC, 1633 New Hwy., E. Farmingdale, NY. Permission for relief in the form of vacating and annulling a Stop Work Order issued by Building Inspector Bessemer on or about 3-25-04 (continuation of prior hearing for submission of new evidence only):

Property located on the northeast corner of New Hway. & Conklin St., E. Farmingdale, NY.
SCTM#0100-35-2-2
Zoning District: Residence A Zone

APPEARED: James Goren, Attorney for applicant
191 New York Avenue, Huntington, NY

Mr. D'Amaro stated this is a continued hearing, the purpose of the hearing is not to go over any testimony that was previously submitted, but rather for any new evidence or testimony that the applicant or any interested party would like to submit. I would like to go over the background, after the hearing had been closed from the first occasion, the Board did receive some affidavits which were rejected by the Board, but we felt to avoid even the appearance of having taken something in that would not be appropriate for the Board to do without communicating to the other side or any other interested party as well as the public, we felt it would be appropriate in the Boards discretion to continue the hearing on public notice to give everyone an opportunity to come down and continue with the record.

Mr. Goren stated its my understanding that this has been reopened, we concluded our testimony on September 9th. I was not aware that there was an opportunity for us to present new evidence, I thought it was just an opportunity for an opponent to present new evidence. We have no new evidence to present tonight, we refer you to the record. My clients are operating a railroad transporting facility, they are an agent for New York-Atlantic Railroad and it is an activity that Federal law recognizes as exempt as it relates to the Town's jurisdiction. There is a venue where the Town or any interested parties could go to if they feel that my clients operation as a transporting facility is either not a trans-loading facility or perhaps somebody might feel that part of its operation isn't a trans-loading facility and doesn't meet the exemption. There is the Federal Surface Transportation Board in Washington, D C. that is the venue where one would go, there is a reason for this because, while my client has the utmost respect for this Board and the work that you do, if every Zoning Board or Municipal Board could determine where railroad facilities could be sited and not sited we wouldn't have a railroad. That is why Congress exempted this type of facilities and activities. I think rail transportation is still an important part of our infrastructure in this country. I will rest on that on that. Has there been anything new that has been submitted into the record since the last hearing other than some letters from myself and the Chair and the attorneys.

Mr. D'Amaro stated other than some correspondence that went to procedure to my knowledge there has been nothing else added to the record. Even though you are standing on the record previously submitted at the prior hearing, this

Zoning Board has always felt, in the interest of fairness if there was even a hint that something had come into the record that was inappropriate or should not have been submitted or however it was viewed it is better to err on the side of the public hearing aspect of the application. Re-publish, re-notice invite everyone down and Mr. Goren I'm going to also offer to you, that should some testimony

proceed here this evening that you feel a need to respond to, you are welcome to do so.

Mr. Goren asked at this point, there have been no complaints or anything that has been filed that is part of any record.

Mr. D'Amaro responded no and in fact we will indicate on the record as of the beginning of this continued hearing the record will only be what was previously submitted, and we will incorporate those proceedings into these proceedings as well for the sake of overkill.

APPEARED: Mark Cuthbertson, representing Pinelawn
434 New York Avenue, Huntington, NY

Mr. Cuthbertson stated I would like to comment on what Mr. Goren said about Federal pre-emption. What he is saying about going to the Surface Transportation Board presupposes that his client is a rail carrier. We dispute that on the facts and on the law. In order to go the Surface Transportation Board and complain, you should be complaining about a rail carrier, we don't believe that Coastal is a rail carrier, for that reason our grievances don't lie. I want to preview the testimony that you are going to hear tonight, to give you a little roadmap of what is to come. We have 4 witnesses tonight the first is Michael Posicillico he is a neighbor of the Coastal facility at 1600 New Highway, he is also a civil engineer, and the president of Blue Water Environmental, they specialize in environmental cleanup and he has extensive knowledge of Environmental Law. As part of his testimony he is going to testify as to the direct observations that he makes at the Coastal site. Next you will hear from James Murphy, President of Sutton Associates, they are a Private Investigation firm, he is a former Special Agent with the FBI, he will testify to the effect that the majority of construction and debris that is coming to this site during the surveillance that he performed is coming from locations in New York City and not from locations on Long Island. You will also hear from James Flores, he performed a surveillance before the last hearing and he confirms a lot of what Mr. Murphy will be testifying to. Last you'll hear from Harry Jordan, he is an expert on Federal Railroad pre-emption, he has 40 years in the field, he previously worked for the ICC which was the predecessor to the Surface Transportation Board and you may recall the Surface Transportation Board regulates railroads, he has an extensive knowledge having worked in the transportation for over 40 years. He will testify, that Coastal does not qualify for Federal pre-emption based on fact and law, he will base his conclusions on a very recent case. A case that came out within 5 days of the hearing, a third circuit case that is identical on the facts the case which was referenced, we talked about it at the last hearing, but it was a district court case at this point it was a full record on appeal, the decision of the district court that an

identical facility does not qualify for Federal preemption was affirmed by the Third Circuit Court of Appeals making 3 different entities that have looked at a similar set of facts, the Surface Transportation Board had a look at this facility, the District Court in New Jersey had a look at this facility and the Third Circuit Court of Appeals looked at a similar facility and said there was no Federal Preemption

on those facts. Just briefly two things, last time we were here Mr. McCue talked about the public policy underlying railroads and preemption, the fact is he basically said to you despite the environmental impact there was nothing you could do, Federal Law preempted, there is no environmental review of this situation and in order for this important public policy to be carried out and for us to take trucks off the road on Long Island that this facility would have to stand, and they qualify for a Federal exemption. It turns out based on our investigation, that they are not just taking trucks off the road, they are bringing trucks from New York City from the 5 boroughs construction and demolition materials into the Town of Babylon. From what they submitted Mr. McCue said if you have a rail car that is from 6 to 7 truck loads that could fit in that rail car. When you do the math at a bare minimum Coastal is required to fill 3200 rail cars in the 4th year of their agreement. They are contractually bound by New York Atlantic Railroad to fill those rail cars. Then New York Atlantic in turn is bound by the MTA to make sure that happens. If you do the math 3200 rail cars up to 6 truckloads there you are talking about 19,000 trucks that need to come in to this facility each year, that is a minimum. That is 150 truck trips per business day. They made the case for taking trucks off the road, you remember when they talked to you about the notion that we need to take trucks off the road there are more accidents, it damages the infrastructure, traffic congestion, they made the case why trucks should come off the road and they are bringing trucks to the Town of Babylon. I am fortunate to sit on the 110 Task Force with Supervisor Bellone and Councilman Horsley, that is an entity that is a bi-town entity, Babylon and Huntington and it is committed to looking at ways to keep what we have in terms of economic development and to make sure that the 110 corridor stays that way. The biggest challenge that we have is traffic. Can you imagine what this is going to do to traffic in the area. Our expert Mr. Jordan found out something very interesting, he looked at the file in the Surface Transportation Board when New York Atlantic made their application, and there was public comment on it, and the fact of the matter is,

Mr. D'Amaro asked is the applicant here this evening?

Mr. Cuthbertson responded no let me be clear New York Atlantic which is the, they claim is an agent, which we believe is not, they had to go to the Surface Transportation Board, there was a chance for people to comment, and here is a comment that came out of that application and what it is is the Borough of Queens lobbied such that a transfer station such as this can't be located in Queens by New York Atlantic Railroad. One of the reasons, why the garbage is coming here to Babylon, from Queens is because the Borough of Queens made this agreement with New York Atlantic that it can't have a trans-load facility in Queens and that is stated in this Press Release. Lastly, the issue of this so

called agency agreement, it's tremendously disingenuous, a month before the last hearing they had a lease, they broke the lease and entered into a new agreement to say they are no longer a tenant, they are an agent. An agent is a person who by agreement has a relationship with a principal and he represents that person, the essential element in an agency relationship is control, the principal maintains control. New York Atlantic should be maintaining control if

they are truly principal and Coastal is the agent. They don't control them, its very clear when you look their agreement and when you look at their relationship that they don't control. Paragraph 1.05 of that agreement says "that New York Atlantic's responsibility and liability for the cars and their contents bound to or from the facility and when the cars are uncoupled from New York Atlantic's locomotive at the facility and the railroad's responsibility, New York Atlantic's responsibility and liability is resumed when the cars are coupled to the locomotives" does that sound like control to you. They have no control once they are uncoupled from the locomotive, New York Atlantic by their own contract has no control. New York Atlantic doesn't even maintain the tracks. Paragraph 1.07 says that Coastal has to maintain the tracks. Another paragraph in the agreement says Coastal acknowledges that New York Atlantic may use the tracks and other yard facilities from time to time for other rail road purposes so long as that use does not unreasonable interfere with Coastal's operation. The list goes on and on there are other provisions. The millions of dollars they spent on this airplane hangar building they are able to take it when they leave, its theirs when they go. Does that sound like an agent? Not to me. You heard from New York Atlantic's president and he stated specifically on the record things that I think that don't indicate that there is control of this facility. When he was asked if prohibited materials were brought to the site he deferred and said Coastal's representative would have to answer that. He was asked what percentage of the material's are construction and demolition materials and he replied "I don't know, I really don't care what the percentage is as long as its all rail that's what I care about." Lastly the issue I would emphasize with you is money, when you talk about control don't you talk about money, what's the flow of the money, here Coastal made all of the investment, Coastal gets all of the real money under the agreement and that is clear. When you are an agent you get a percentage, you're not getting the whole of the money like Coastal gets under this agreement.

APPEARED: Michael Poscillico
1600 New Highway, Farmingdale, NY

Mr. Poscillico was duly sworn.

Mr. Poscillico stated from my experience as the manager I have seen the transformation of this area over many years that has been historically used as a trans-load facility. I hear that word trans-load my experience as president of Blue Water Environmental which we have conducted environmental remediation work and large civil work in the metropolitan area is that trans-load, because we have done some work with New York Atlantic, actually just completed a first phase project in Hicksville for GTE, Sylvania hauling 80,000 tons of radioactive material out of the Town of Oyster Bay through the Hicksville facility yard, is that trans-

load generally means you take material from one mode and move it to another mode, and the rule of waste hauling is it never hits the ground. So when I saw waste hitting the ground as it does every day across the street, I assumed that somehow this entity has gone through the long arduous process of obtaining a 360 permit for transfer. We have also conducted work with volumes of dreg spoils, hauling those spoils from barge to truck using machines where we take material from the barge and place it on the truck. Trans-load material does not

hit the ground, and from my knowledge of Federal Law is that is a permitted transfer and whether it is a rail or barge the intent is to keep trucks off the road, to keep the efficiency up and cost down for the taxpayers. When the material hits the ground it raises the bar of concern of ground water contamination, methods and means of traffic it becomes a whole different type of animal from my experience not an animal but of managing materials. From what I observed there and understanding trucking is that the numbers that Mr. Flannigan referred to are accurate, that over time the waste flow in New York City easily could represent 3200 cars a year, because there is no place to take the material other than, all the local landfills are shut down. The material has to go somewhere we don't have real good solutions for recycling as a practical matter. So the material that I have observed there some sort of demolition material being dumped. I have also managed 2 recycling facilities, one in the Town of Babylon one in Westbury where we take recycled concrete and road material so I know what the difference between that type of debris which we recycle and trash which would be regular garbage and c & d which you get from building demolition and mixed waste from building demolition. I'm also aware that mixed demolition that comes from buildings sometimes can contain materials such as asbestos depending upon the procedure can contain lead and those materials are of concern. I am an opponent of this application I think there is a process that the local agencies put you through. From my understanding this would permit me under similar circumstances because we have a rail spur on our facility, if we were able to arrange an arrangement with the MTA then we could become an agent and we could use our facility at 1600 to perform the same service. I think that would be very concerning for Babylon and other places.

Mr. Cuthbertson asked what do you observe on a daily basis, what goes on across the street at the Coastal site?

Mr. D'Amaro asked before you answer that question, tell us the frequency of your observation?

Mr. Poscillico responded about 3 or 4 days a week, I'm there early in the morning usually 7 a.m. I usually leave about 6 p.m. I see trucks, generally tractor trailer trucks, they bring material in they dump the material on a pad inside the building, I see either a bobcat or pay loaders pushing the material around, as a contractor I would tell you that generally we don't like to handle things more than once so if there wasn't a reason to sort or examine the best thing would be to just put it on the rail car. I would assume there is some sort of observation going on.

Mr. D'Amaro asked but not going directly from a carrier right onto the rail?

Mr. Poscillico responded no. Those type of units are called inter-modal containers there are facilities in New Jersey, they take material that goes in to an inter-modal container and then directly loaded on to the rail car.

Mr. Weinschenk asked how many trucks a day are you observing?

Mr. Poscillico responded moderately active now, I don't believe its at 150 trucks a day, its about 6 to 7 per hour.

APPEARED: James Murphy
325 Duffy Avenue, Hicksville, NY

Mr. Murphy was duly sworn.

Mr. Murphy stated I am a qualifying officer for Sutton Associates, it is a licensed and bonded Private Investigation firm, I come before you with about 38 years of investigative experience, the last 20 in the private sector prior to that I was working with the FBI. In September I was called and asked if we would take a look at Costal Distributors and determine 2 things, one was the materials that were being brought to the site were they construction and demolition materials; and the second was where were they coming from, a transfer station and was that transfer station located on Long Island. Our surveillance was only a 4 day surveillance it started on September 17 on a Friday and we wrapped it up on the following Wednesday. Our observations were very telling. The names I'll mention to you Metropolitan Transfer Station is located in the Bronx County; AJ Recycling is located in the Bronx County; Regal Recycling is located Jamaica, NY; City Recycling is located in Brooklyn, NY and Reality Roofing is in Mineola, in Nassau County. Our observation in that short period of time the first day took us with some trucks from AJ Recycling leaving Coastal and going to Metropolitan Transfer. The following Monday, we put people at Coastal Distributors to see who was coming and people at Metropolitan Transfer in the Bronx County to see what was leaving there. At 5:30 A.M. we observed 2 tractor trailers from AJ Recycling leaving the Metropolitan Transfer station in the Bronx and coming directly to Coastal Distributors and left there at 5:30 and arrived at 6:10. A little later that morning around 10:00 we observed a truck coming from Metropolitan Transfer going to an AJ facility in the Bronx. What we observed was that truck being loaded with debris and it was construction debris, and leaving that location and coming directly to Coastal Distributors. Clearly they were not transfer locations, clearly they were not on Long Island. It was material being brought from New York City to Long Island The second observation we had on the same day had to do with Reality Roofing in Mineola, Reality Roofing has dump trucks not tractor trailers, so when we observed them coming into the site, it would make sense that they don't come from transfer sites. So we observed those trucks for 2 or 3 days leaving the site and then on the 18th that Monday we decided to go to the Reality Roofing location in Mineola. We saw those trucks go to 4 or 5 different locations and later we observed roofing material coming off a home in Nassau County, loading onto the truck, that truck then going to Coastal Distributors. Our surveillance only went for 4 days, they weren't even full days, if we continued that for a longer period of time we would have seen more of the

same. It is my opinion that the materials being brought out to Coastal, a great portion of that is coming from New York City and very little of it is going to any transfer station and certainly no transfer station on Long Island.

Mr. D'Amaro asked did you observe any other trucks coming to the facility that were from transfer stations, or that were from this area?

Mr. Murphy responded there were some trucks that did exactly what they were supposed to do. We did see some trucks that did go to a transfer station and then went to the site.

APPEARED: James Flores
36 15 87th Street, Jackson Heights, NY

Mr. Flores was duly sworn.

Mr Cuthbertson asked Mr. Flores the report that I handed to the Board, and that you have in front of you, did you perform that report?

Mr. Flores responded yes.

Mr. Cuthbertson asked and you did the surveillance in that report?

Mr. Flores responded yes.

Mr. Cuthbertson asked Mr. Flores are you a private investigator?

Mr. Flores responded yes.

Mr. Cuthbertson asked and by whom are you employeed?

Mr. Flores responded IIG, International Investigative Group.

Mr. Cuthbertson asked how long have you been a private investigator?

Mr. Flores responded in the United States, 8 years.

Mr. Cuthbertson asked did you go to the Coastal facility on certain days in September?

Mr. Flores responded yes.

Mr. Cuthbertson asked are your observation contained in this report?

Mr. Flores responded yes.

APPEARED: Harry Jordan, Esq
1701 Pennsylvania Avenue, Washington, D.C.

Mr. Jordan stated I have been an attorney for over 40 years, during that period of time I have specialized in transportation. I started my career by working with the Interstate Commerce Commission for 3 years in their Section and Proceedings which I handled a variety of cases in the sense that I was a staff member. I have a very good familiarity with the Interstate Commerce Act before and after it was changed by the ICC Termination Act. I wrote contracts and Agency Agreements for clients. I am still in the transportation business, when I was asked to appear

here I was given copies of most of the documents, and I read them. I can say without any reservation that I totally disagree with Mr. McCue that the exemption provision does not apply here, not only opinion for what its worth, but there are several Courts and the Surface Transportation Board which is the successor to the ICC. There are 3 or 4 cases which are almost the same as what we have here, they have been sited in the brief and one is a high tech case which has a great history as far as instructing what is and what is not exempt and regulated, we have the rare situation of having the Surface Transportation Board look at that determination and find that it was not transportation by rail and therefore not entitled to exemption, that case was later affirmed by the Third Circuit, case by the same name, which had the same finding. We have a case that is very informative that occurred in New England and is sited which came to the same conclusion and I will come back to these. And then a third case, involving West Palm Beach, I will not get into the facts of these, but the common factor was the party that was involved in the trans-loading or the transportation that was challenged and had come into the Surface Transportation Board or the Court challenging any state regulation of that they had a basic argument, its exempt it's a real operation and therefore you people have no authority over us. The identical argument we have here. In all those cases the common factor is that those persons were not carriers, similar to Coastal. Coastal holds no authority from the Surface Transportation Board as a rail road, it's a private corporation, it's a for profit corporation and it has to be a carrier in order to be entitled to an exemption.

Mr. D'Amaro stated I think that they get to the carrier status through their Agency Agreement.

Mr. Jordan responded that's their argument, let me say how this works, Section 1.05.01B shields transportation services by rail road from state and municipal regulation provided the state regulation interferes with the transportation service. There is nothing across the board for a total exemption including, there are areas, including the area we have here, where there is local authority over these operations. Mr. McCue and the other side seems to want to take the approach that if you come within that, you can't do anything. That is not true. The exemption runs to the transportation by carrier and a carrier is somebody who has a authority from the Surface Transportation Board. They don't pass muster there, but what they argue is that we are not a carrier, we are the agent of New York Atlantic and therefore we are entitled to this exemption. There are two main documents that come into play, the first one was the lease arrangement that they had for a couple years and then the high tech case came out and that was shown to be risky, they came out with a new agreement. If you look at that agreement

and you look at the front page, it talks in terms of retaining or using Coastal as a contractor not as an agent, the word agent appears in only 2 places in the whole agreement. One is with respect to the unloading of these rail cars in Ohio, they say you are not our agent out there, you're on your own, the other one has to do with documentation, you can't as our agent have these freight bills, other than that there is nothing in that agreement, if you have an agency agreement you are very careful to make sure that all the relationships are spelled out and that this person is truly an agent.

Mr. D'Amaro asked you have experience yourself with drafting and enforcement of agency agreements. What constitutes an agency agreement and what does not. You have reviewed this agreement and you are of the opinion that this does not constitute to the extent of having Coastal benefit from the exempt status.

Mr. Jordan responded it is not an agent, it is actually providing a service. Counsel went through the risks and they all belong to Coastal. Usually your agency agreement is your rail road or motor carrier or whatever, he has an agreement with an agent who provides that you pick up a freight loading it on its facility, he is paid a fee for that.

Mr. D'Amaro asked would the activity conducted by Coastal, if it were conducted by the rail road be an activity that would be exempt from local regulation?

Mr. Jordan responded yes. Not entirely, there is the residue of potential regulation by local authorities but it can interfere If you're just talking about safety for example, a local law would not interfere with that, but if it were something they can't use the yard because of some reason then you have a burden on transportation.

Mr. D'Amaro stated the answer is that if the activity conducted by Coastal being conducted by the rail road itself, the local regulation would be an interference, and therefore not permitted.

Mr. Jordan responded I don't think in this case, even though it would be exempt, technically, what you're trying to do here is comply with your local zoning regulations would not be such a burden on that transportation that you still couldn't do it.

Mr. D'Amaro stated the appeal to this Board is whether or not we have jurisdiction to issue a stop work order, which means there is non-compliance with the zoning regulations which would require a permit process.

Mr. Jordan responded here you certainly do not have an activity on the part of Coastal that is by a rail road, putting aside the transfer agreement itself. You have to have that for the exemption to apply. So the issue becomes, looking at their agreement, is it an agent, and I am saying that it is not, that is not sufficient. In this case, we talked about the cost of, when you think about it for a moment, normally what would happen here is the rail road would hire Coastal to arrange for the transportation of freight to its facility, and it would pay Coastal so much

per load. Here we have Coastal arranging to bring the freight here, the rail road is not even providing the rail cars, its Coastal. Not only that Coastal has to pay the rail road. That doesn't make sense normally it's the rail road provides the equipment and that's its obligation, here its clearly Coastal's operation, they have all the profit. They are not a carrier they don't have the exemption. Even if there was an agency agreement here and they were truly an agent of the rail road, you are not still totally precluded from local regulations that don't totally interfere or shut down the operation.

Mr. D'Amaro asked it would be your position then if the rail road were conducting the operation directly, it would still be subject to a stop work order?

Mr. Jordan responded it could be, because they could come back and argue that ok if its (inaudible) we're preempted, and then the issue would become is that an unreasonable burden on this operation. If it is not then you still may do that. The West Palm Beach case goes into that in great detail.

Mr. D'Amaro asked what would be your opinion on that question?

Mr. Jordan responded I think that you still have the authority to do it would be my view. Again we're looking, the key here is everything they say, we're the agent. The transaction here, all the financial burden is on Coastal and Coastal has all the profit, and when you have an arrangement with an agent, you don't normally give all the profit to the agent. The agent dictates this operation, the agent controls this traffic, it's the agent, the opening page of that agreement says they're a contractor not an agent. They're independent, they are on their own for that reason there isn't any exemption available. You have the authority to enforce your orders.

Mr. Cuthbertson stated just to conclude the high tech decision Third Circuit case the most recent decision had a very important footnote the Court says that the parties cannot contractually determine whether they are a rail carrier, so in many respects the piece of paper is irrelevant, its how they conduct their operation, so we would say to you the members of the Board that the way their operation is conducted its clear that they are not an operation that New York Atlantic has no control but in addition if you look at the piece of paper that they have submitted, their contractual relationship is still one that they have agreed to be bound by, both have written this contract is one where New York Atlantic does not have control. What they put before you as an exhibit is an example of New York Atlantic not having control. Mr. Jordan talked about it. To conclude I said that the agency agreement was disingenuous I have to tell you that based on the surveillance that was done, they out and out (Coastal) didn't tell the truth at the first hearing that you had. Page 83 of the transcript they said "Presently we are only seeking materials that go through transfer stations, where its presorted and we have a very clear understanding with these transfer stations as to what we will accept and not accept we are not taking individuals that may have a truck load or just an unauthorized truck, we are not a transfer station at all." Clearly not true, a roofing company bringing materials directly to the site not coming from a transfer station. Page 84 of the transcript says "we are not doing any sorting at

the site" again in response from a question from Mr. Gorn page 103 of the transcript they confirm again that they are only accepting materials from other transfer stations. I am reminded of an old saying "Trust is the coin of the realm" that in this realm you need trust. That is the currency that matters to me. When Mr. D'Amaro asked the people to come up here, to put up their right hand and swear that they are going to tell the truth, it means something, because you can't go out and investigate everyone's operation. You have to rely on the truth of the statements that they are making. You can't approve this application on the merits, we believe the law is clear and it will take some time, you have able counsel I'm sure they will sort through the briefs, but when you look at this on the merits I think you'll see that the exemption does not apply. This is an important case because it sets a precedent. The precedent that it would set to allow this type of activity along the rail line throughout the Town of Babylon is a troubling one, especially when the position is taken that you can't regulate us, you can'tlook at the environmental impact even though we're going to bring thousands of trucks with New York City garbage onto your roadways in order to make a profit. Thank you Mr. Chairman.

APPEARED: John F. McCue (ph)
6 Water Street, New York, NY

Mr. McCue stated I will be responding, I will say on the High-Tech case the Third Circuit did come down right after that hearing, we hadn't seen it at that point. It did not however, affirm the Office of Proceedings decision denied that case, in fact there was a foot note in the case, that the counsel for High-Tech had neglected to note to the Third Circuit Court that the Office of Proceedings had determined that High-Tech was not a rail carrier, it was determined not to be a rail carrier because it did not have a sufficient agreement with the Canadian Pacific Railroad it had nothing but a license to operate that yard and the only thing in that license that basic connected it to Canadian Pacific Railroad, it could only operate for the purpose of loading cars to be shipped on the Canadian Pacific Railroad. There is a huge difference between that agreement and the Coastal agreement and yet the Coastal agreement was modified but before that under the old lease Coastal was loading non-construction things, it was loading telephone poles, misc. general merchandise and so quite clearly there was alarm and New York Atlantic and Coastal negotiated an agreement that would do what they intended to do proper. The issue in High-Tech was by the Office of Proceedings controlled it wasn't agency, an agent can be a partial agent or a full agent. The issue however, in the High-Tech case and all the other court cases is not agency or ownership it is control. The activities on the site have to be controlled in some fashion or other and in the New York Atlantic contract New York Atlantic has paragraph after paragraph of items where it controls, it has the right to control all of Coastal's activities. If Coastal wants to bring a new product onto the railroad it has to get the railroad's approval to do it. The railroad has the right to move stuff around on the property, they cannot unreasonably interfere with Coastal's activity because Coastal has certain parameters it has to meet, its obligations under the contract so you can't have that contract and then take action to shut the guy down so its all reasonable, but the fact is the railroad has ownership of the property, the right to use the property and the right to move stuff around on the property as it wishes, it has the right to oversee absolutely

everything Coastal does, has the right to audit its books. The railroad does get paid per car charge and the railroad also gets its freight and the entire purpose of having somebody on this property, this was given to Coastal as agent for the railroad to try to get freight onto the railroad and its working. It didn't work for the first year or two under the lease but now its starting to work and they have made their agreement very clearly that the Long Island Railroad has control. Counsel has sited the three cases, there is a case in Massachusetts, there is a case in Washington State the Milford case is a case where a steel fabricator had leased property from a railroad and the railroad not the steel fabricator was looking for an exemption. The steel fabricator didn't show up, the Surface Transportation Board deemed that not to be a railroad operation because it was an industrial operation. The only relationship was a lease from the railroad, it was a shore line railroad and they just didn't want this customer kicked off their land. But the shipper didn't show up at the hearing. The West-Palm Beach case the Florida East Coast Railroad had leased space to an aggregate dealer, the aggregate dealer was not operating as a common carrier he was handling his own freight, they were handling their only freight. The only case that is even close is High-Tech and there was no control. Now here you have the Long Island Railroad and they have full control, under the operating agreement Long Island Railroad Coastal is obligated to be a common carrier, in other words anybody who offers freight has to be considered. Long Island Railroad has the right to refuse but not really, because a common carrier must ship anything that is presented to it that is legal and they must give them a rate. They can fiddle with that rate and they can do all kinds of things to keep people off the railroad but they must be reasonable and if they refuse to do it they are subject to the jurisdiction of the Surface Transportation. We are having this argument as to whether Coastal is a common carrier is a transportation company or not. Unfortunately that is an issue that can only be decided by the Surface Transportation Board and what happens when you go to Federal Court as has happened in Massachusetts when somebody was challenging a automobile reload facility, the court deferred to the Surface Transportation Board to answer these questions. The railroad is exempt from any licensing requirement and unfortunately the document we are dealing with today is failure to get licenses to submit plans, you do have authority to enforce the building regulations, enforce your fire regulations, and all the standards you would apply to any building and that has been upheld throughout. You have police authority to enforce standards and to keep anything from being a nuance. If the operation is a nuance you have police authority to do something about it. This is clearly a transportation related facility its transportation under the railroad under the ICC Termination Act and there is sufficient control that this is an operation of the Long Island Railroad and it is also an agency for limited purposes also.

Mr. D'Amaro stated it's a higher jurisdiction or a preemptive jurisdiction should decide the issue we would be the first to abide by it, but they have not decided that issue in this case so as you're pointing our we need to make that decision, because it is our building inspector that issued the stop work order. So these definitions and these cases are highly relevant because we are as a Town that has a permitting process for different operations in the Town whether you're talking about a public garage or loading material onto railroad cars that does impact the quality of life for the Town, it does impact the environment within the

Town so we are hearing both sides and that is the purpose having these hearings is that we really need to hone in on in the first instance whether or not this Board and even the Municipality has this jurisdiction to proceed along this

path. We are going to render a decision but I would expect either way however we decide that this will ultimately be taken to some other authority that is going to decide that under Federal Law, I assume that's where this is going?

Mr. Goren stated I just had a couple of questions, there were a bunch of documents that I've been asked to clarify it, I apparently referred to Long Island Railroad and its New York Atlantic, please have the record modified it is always New York Atlantic.

Mr. D'Amaro stated so noted.

Mr. Goren stated Mr. Cuthbertson submitted a couple of documents which I have not had the opportunity to review, there may be some information contained within those documents that I may (inaudible) I don't want to get into the issue of us giving you affidavits and then we're back at square one. I just don't know what was submitted. I do have a couple of questions, at the last hearing there was a Memorandum of Law that was submitted by myself, there was a Memorandum of Law that was submitted by Mr. Armantano, then the Board on the recommendation of the Town Attorney had suggested that we could submit some replies. I submitted a reply and it was accepted but I believe Mr. Armantano's reply was not accepted. My question is, is that reply Memorandum of Law part of this record?

Mr. D'Amaro asked what is the basis of your belief that the reply memorandum was rejected, I thought we just sent back the affidavit, because I think the record was held open so we could have some briefing back and forth.

Mr. Goren responded ok I thought the letter also rejected that, I do not object to that being part of your record, I think its important.

Mr. D'Amaro responded since you don't object, it will be included.

Mr. Goren also said what Mr. Cuthbertson submitted tonight was an affidavit of James Murphy sworn to on September 23rd so I believe that is the same affidavit that was submitted by Mr. Armantano rejected and is now back here.

Mr. Goren further stated first of all on the issue of going to the Surface Transportation Board that has been discussed over and over but I want to reiterate to this Board that my client stands ready, willing and able to allow officials from the Town of Huntington to come to the site, review the site, ask whatever questions they want and look at exactly what we are doing, so you have a level of comfort that we are a trans-load facility. I would just like to respond to some of what has been said here.

Mr. D'Amaro stated just so the record is clear I think you were referencing the Town of Babylon.

Mr. Goren responded Town of Babylon. Anyway the affidavit of Mr. Murphy which I now confirm is the same affidavit that we had before. If you look at it very carefully I don't dispute Mr. Murphy's qualifications

Mr. D'Amaro said I'm sorry to interrupt but it would not be appropriate for anyone, for the Town to go down and visit the site, but I think we're past that.

Mr. Goren responded I was not referring to this Board, I don't know if your rules would permit that anyway, I was referring to the officials in the Town of Babylon that may have concerns about the site. We have expressed over and over a willingness to let them come on and see what is going on.

Mr. D'Amaro stated that is fine, and I appreciate it but that is separate and distinct from anything that is going to be communicated to this Board. I have to be protective of the record because I don't want to go through this constant defensive posture.

Mr Goren stated Mr. Murphy's affidavit, I don't doubt that he is a distinguished FBI agent, but I have read this affidavit several time and the report that he has attached to it, from what I'm reading Mr Murphy himself is the only person who swore to this affidavit, he was the only person involved in this report at this hearing that did not witness anything what so ever concerning the site as it relates to this report. He is talking about a report that is attached to it, the report itself is not signed by anybody, it is totally referencing observations that were made by four people he claims to be agents, Bob Rothschild, Rich Merlino, Joe Jablonski and Damin Lane, none of whom appeared before you or signed this statement. I don't believe its valid, we don't know who these people are, we don't know what their qualifications are, quite frankly even if they exist and they weren't here to present this before you. One of the conclusions that Mr. Murphy comes to based on his field agents report is that AJ Recycling is not a valid transfer station licensed by the Department of Conservation. I took two minutes on Google today after I looked at this report again and I would like to submit to you what I found on Google, I was able to determine that they are, I don't believe this affidavit or the testimony is of any relevance to the proceeding.

Mr. Kane asked is Coastal taking in materials from New York City?

Mr. Goren responded I am going to get to that. We as an agent of New York Atlantic we do not have the choice, we have an obligation under the law to accept legally whatever a customer wants to bring that they contract to accept. We cannot discriminate, its Interstate Commerce you can't discriminate based on where they are coming from or what they're having. The other thing is its not just construction material as we testified at the prior hearing, other materials have been trans-loaded. Also at the prior hearing, my client's testified that they are constantly getting phone calls from other business who have other types of

commodities that they want to trans-load but they cannot enter into relationships to do that right now until the issue before this Board is concluded.

Mr. Kane stated it seems to me that one of the purposes of this whole thing is to take trucks off the road, it doesn't seem like we are taking trucks off the road if we're bringing stuff in from New York and sending trucks back and forth again.

Mr. Goren stated some is coming from New York and a lot is coming from here, but we can't discriminate, we can't tell people that they can't come here.

Mr. D'Amaro stated the prior hearing you were establishing that you are truly trans-loading as opposed to transferring and your activity was limited to trans-loading and you explained why its being done the way its being done on site; it still fell within the definition of trans-loading which gets you into the railroad activity which gets you to the exemption.

Mr. Goren responded the reason I asked about Mr. Armentano's reply affirmation is because I wanted to point out to this Board that he realizes the Surface Transportation Board decision is making his argument about the facts. We don't agree with his conclusions about those decisions but Pinelawn itself realized that the Surface Transportation Board is a venue where you have to decide issues such as what we have before us tonight. They have been in operation for a while now, I asked if there have been any other complaints from Pinelawn and based on the record, there are no complaints. This is not a new operation, this has been operating as a railroad yard, in fact Mr. Poscillico himself testified tonight that all the years he has been observing this site he has been observing trans-loading operations.

Mr. D'Amaro stated I have another question, two things, one I really do not want to have a further continuation of this hearing, I think that we have fully heard all the issues. I am very loath at this point to say lets just keep it open for a limited purpose of exchange in responding.

Mr. Goren stated just for the record to reiterate New York Atlantic and the MTA consented to this application and New York Atlantic participated in the original hearing. I think we have met our standard and we are entitled to this exemption and if the Town feels there are things they want to look at we are obligated under Federal Law to have them come in and look at it and try to accommodate wherever we can but it is an operation we believe we are entitled to continue.

Mr. D'Amaro stated the other question I had was is there anything precluding any interested party or the applicant from going to that Surface Transportation Board at this time? Do you need to exhaust this venue before you...

Mr. Goren responded let me defer...

Mr. McCue stated when a proceeding like this has started it has to end before we can go any Federal Jurisdiction. You however could ask for an opinion of the Board. During the process that is done all the time by Courts all over the

country. They do send requests for an advisory opinion to the Board and there is an office down there that does nothing but that. So that can be done.

Mr. Goren asked my guess is that you would prefer not to keep the hearing open?

Mr. D'Amaro stated what I would like to do is, your primary concern is some of the documentation that was submitted.

Mr. Goren stated my concern is about the unknown, stuff I haven't read I can't respond to and if its part of this record, I know its dragging on but I know this Board having been down here many times is very concerned about this case and its going backwards and forwards to make sure everyone is given a fair opportunity, all I'm saying is that I have no idea what is contained within some of these documents and if you're going to rely on it I think I should and you should have the opportunity to respond.

Mr. D'Amaro asked Mr. Cutherbertson did you have any thoughts on this?

Mr. Cutherbertson responded I think there are two documents that essentially were new that Mr. Goren is referencing, one is this surveillance agreement the other is this press release, an agreement with the Borough of Queens and New York Atlantic not having transfer stations.- If his response, and again it's the Boards decision, if his response were limited to those two documents to the degree he wants to respond then I think that's reasonable and if the Board is so inclined we have no objection.

Mr. Goren stated if those are the only two documents.

Mr. Cuthbertson responded the reply memo is the same that was submitted, the affidavits are the same, and I believe that's it.

Mr. D'Amaro stated I think what I'd like to do is propose I really want to err on the side of giving everyone what they perceive to be a full and fair opportunity so I think we should allow Mr. Goren an opportunity to at least respond to anything that has been presented here this evening. I think that's appropriate, but we have to put a limit on that, so what I would like to propose, can you identify now the specific documents that you need to respond to?

Mr. Goren stated I believe, could I see the Poscillico affidavit I believe I have seen; the Murphy affidavit I have seen; this press release packet I have not; Mr. Jordan's resume I don't contest his 40 years of experience, I just differ with his opinion; the surveillance report that appears to be unsigned I have not seen and this press release, these two documents, that would be sufficient. I don't know if you want to give me the time to present live testimony to respond to this or do you just want me to do it in writing? I don't know if I have to present anything factually to respond to this, I may need to... I think with reference to this press release Mr. McCue is a quick read so he can respond.

Mr. McCue stated I don't have to be a quick read I was there, this is a what we call a mitigation in the process of going for an application with a board, sometimes you get objections the carriers tend to make agreements that mitigate resistance essentially and unfortunately New York Atlantic was too ready to do these things. This was a deal with the Borough President of Queens County, it has expired, it is not the reason trucks are coming out here, there are lots of transfer stations in Queens County, the reason trucks are coming out here temporarily is because the idea of putting waste on rail is relatively new, it is moving very slowly, and when the people who are in the business find out there is a rail facility they go to it, and the reason they go to it is, if they can't go to it they have to drive to Ohio and the difference is coming out here 30 miles which is a temporary inconvenience or going 800 miles to Ohio and so the choice to them is relatively easy. This has expired, it was a short term deal so there wouldn't be a plethora of this kind of activity and it prevented the New York Atlantic railroad from moving waste through Queens County. The tragedy at the time was Long Island did not object because by doing that they made sure that all waste on Long Island would remain on the highway for a period of time because you can't get out of Long Island without going through Queens County except by rail, so this was a deal, not in my backyard, and this is exactly what we don't want nationally. It shouldn't have happened, but it did happen before the Surface Transportation Board and it happened because nobody objected to it. I thank you.

Mr. Goren stated I think I will call Mr. Sternberg to testify and answer some of these questions, because maybe I can continue to read this document and we can deal with some of these issues of where trucks are coming from, operations and...

Mr. D'Amaro asked is there a chance here this evening that we won't have to get into the reply situation?

Mr. Goren stated I'm going to read this while I'm going to ask Martin Sternberg to come up he had testified at the last hearing you have to swear him again.

APPEARED: Martin Sternberg
8 Woods Crossing, Brookville, NY

Mr. Sternberg was duly sworn.

Mr. Sternberg stated Mr. Cuthberson alluded that the gentleman that we brought here at the last hearing before you, raised their hand and swore to tell the truth, that they were lying. I think he owes this Board an apology and certainly the professionals that came before you at the last hearing, so having said that let me say that the materials that we bring in by truck are normally trucked either out of state or out to Brookhaven or to the 110 Sand location off of 110. So that in many cases what we look at and the Federal Government is looking at and the State of New York is looking at is to cut down mileage that trucks travel to either deliver or to dispose of whatever materials they carry. This type of a trans load facility is exactly what achieves that, most of your tucks that enter Long Island

from the City and normally its Queens or Brooklyn or the Bronx travel to Brookhaven another 30 miles beyond Route 110 and 30 back, its 60 miles.

Mr. D'Amaro stated I think we heard this testimony before.

Mr. Stemberg further stated other trucks that come into the 110 Sand area, 110 is another operation off of 110 west of 110 so that the impact to the area is no more or no less what we are looking at here is saving precious fuel in a exerted effort by all the states to start to use more rail and less truck. That is all I have to say.

Mr. Goren stated now I'd like to call on Mr Joseph Ritigliano.

APPEARED: Joseph Ritigliano
2596 National Drive, Brooklyn, NY

Mr. Ritigliano was duly sworn.

Mr. D'Amaro asked just for the record, what is your connection to the applicant?

Mr. Ritigliano responded I'm a member of Coastal Distribution, its an LLC. Just to address the Board, this process that we are on now was started I wasn't at the last hearing, but I did read it, everything we did within the Town of Babylon was with Town of Babylon's either approval or asked for approval and then was given letters as you know in the past that the Town had no jurisdiction throughout this whole process the Town Tim Bessimer, Mr. Casserly right down the line, well aware of what Coastal was intending to do. I believe your Supervisor, prior to becoming Supervisor, had meetings with me. Mr. Horsely had meetings with me, talking about an uncomfortable feeling, being here today fighting for our lives, basically, several millions of dollars invested, maybe we wouldn't have made the investment. We clearly made our investments and plotted all of our plans with the Town of Babylon fully aware, so to claim that we just appeared or popped up, I'm upset about that because it seems to be humorous at certain points, humorous my money, our money is on the line here that's not humor, I see a lot of people looking at there watches, I'll stay here until 4 a.m. for the amount of dollars invested I think I have to stay here to 4 a.m.

Mr. D'Amaro stated we appreciate that. But the issue here, I cannot speak, I don't think any Board member here can speak to what happened previously with other Town Officials but we are here and we cannot refuse to hear this issue of whether or not in fact that this stop work order was properly issued and if we have jurisdiction to do it, we have to go through this process.

Mr. Ritigliano stated I'm ok with the process but to go and find the truth as counsel says the truth needs to be found is the base of everything, the truth has gotten maybe another venue, if that's what we choose to seek, if we don't choose to seek the truth a lot of people are up here and of questions to be asked I heard a few good questions, but when the answers weren't coming the right way your testimony from the investigator, a significant amount of trucks are coming from

Long Island from right down the road, an importer of waste, Babylon is an importer of waste, don't you import ash from Huntington? Isn't 110 Sand importing waste from the city and that resides here, that will be here forever. And the truck trips the methodology how it was gotten to, its rail trips and I could do the math with you and show that the truck volume is significantly less, we're currently operating at a 40 or 50 % capacity with 30 - 35 truck trips a day, happening in 10 hours that's 3.5, Mr. Poscillico comes here, every ton of asphalt he manufactures, his ingredients are first delivered by truck then trucked out, we offered him a rail opportunity, I guess our personalities clashed which is why he is here today and couldn't make eye contact with me, I was at many meetings with him. He is a major truck violator, he used buzz words like...

Mr. D'Amaro stated that is not the purpose of this meeting.

Mr. Ritigliano responded I know its not the purpose but I need to vent a little bit, he uses buzz words like...

Mr. D'Amaro stated we are not here to vent, sir.

Mr. Ritigliano responded no problem, then we will go on.

Mr. D'Amaro stated I want to finish speaking, now I understand you have a very major vested interest in this project, but we also have to protect our record and make sure we only hear what is relevant or what we deem as relevant, I'm not trying to cut you off but I do have to stick to this issue, whether or not this Board has jurisdiction. I'm trying to do that here, its to your benefit as well.

Mr. Ritigliano responded I agree we will see if this Board has jurisdiction and then we will go to other venues if needed. But as we come today with the truck trips, let me refute that, the volume of trucks, New York Atlantic in negotiating the agreement has put some hurdles we'll call it volume, car volume hurdles for us to get over, that is for Coastal to represent. Currently right now, Coastal represents about 800 car trips a year of Long Island Railroad barrel stone. There is a mechanism by which that'll be credited that never stops at the facility. That material comes down from a quarry upstate that we've arranged to give Long Island Railroad their barrel by rail that used to come by truck on to Long Island. This is clearly comes out of the Governors mandate to get trucks off the road. We're not bringing more trucks on the road, trucks that are coming into the area are in the area, a lot of them leave our facility and might go and do some work down the road, hauling sand back off Long Island, so it's a good synergy with the things that are happening. To look at it and say its 40,000 truck trips not in my backyard wouldn't have happened in our area, you have the rail spur and I understand the Town of Babylon says well maybe it will happen on every corner, there is no other team track or commercial rail owned by New York Atlantic or controlled by New York Atlantic in the Town of Babylon for this to happen on. A commercial rail spur that simply goes into a building on private property is a private rail spur and initially I think that was the argument that was coming that maybe this is Pinelawn property and not railroad property. Its rail property and

even that is being argued right in another venue, we will be conferencing that case with the judge next week So this case has taken on many facets all provoked by Pinelawn, and we are hearing them and expending the dollars to hear them, so I grant that your board has to do but if it's seeking the truth why don't we go to the powers that have this record, the Fed Surface Transportation Board if not the Federal Circuit...

Mr. D'Amaro stated I think your own expert testified that you need to go through this process first, before it can go up to that board.

Mr. Ritigliano responded I think John McCue... we need to exhaust this process, is that this statement or can this Board

Mr. McCue in the background stated we can't go but the Board can go to the Surface Transportation

Mr. Ritigliano asked could this Board go to...that's what I'm getting to the Board can go and if it's the seeking of truth go and seek it.

Mr. D'Amaro stated I think we're competent and capable of doing that as well. I take your point. I think we should be very cautious before we allow any other agency or body to determine what we as a Town or a Zoning Board has jurisdiction over. I think we can make that decision as well but it may be something that we want to take a look at as well.

Mr. D'Amaro further stated I would like to ask you a question before you go, did you negotiate the agency agreement with the railroad?

Mr. Ritigliano responded yes.

Mr. D'Amaro asked you had personal involvement with that?

Mr. Ritigliano responded yes.

Mr. D'Amaro asked when was that agency agreement actually put into place, roughly?

Mr. Ritigliano responded I don't recall the date. About 6 months ago, does that sound right? I'll rely on their date August 5, 04, I know it was prior to any commencement of operation at the facility, so it predates the operations as...

Mr. D'Amaro asked prior to that agreement which is a relatively new agreement, was Coastal at the site?

Mr. Ritigliano responded Coastal was at the site, upgrading the site, putting that structure.

Mr. D'Amaro asked you don't own the property that your operation sits on, is that correct?

Mr. Ritigliano responded no.

Mr. D'Amaro asked were you a tenant at the site?

Mr. Ritigliano responded at that point I believe we were operating under a lease agreement, that's how we gained access to the site.

Mr. D'Amaro stated it was a lease agreement, is the lease agreement still valid and existing now?

Mr. Ritigliano responded no I believe the lease agreement has been replaced by the agency agreement.

Mr. D'Amaro asked what prompted you to go from the lease agreement to replace with the agency agreement?

Mr. Ritigliano responded advice of counsel.

Mr. D'Amaro asked what convinced you?

Mr. Ritigliano responded back in March I think, around Easter last year, we were served with some documents

Mr. McCue stated the thing that actually started the process was the railroad had leased land and there was a challenge to the railroads legal right to do that, so there was a flaw in the title which caused everybody to be concerned, so that was why the process started and then the High-Tech Case came down and the process of negotiating how to get out of a mess.

Mr. Ritigliano stated a question came up in March of last year with the ownership of the land which was way after Coastal had expended dollars in improvements...

Mr. D'Amaro asked when you made this substantial investment in this site did you go into this believing that in fact you were operating as a carrier and that the protection or exemption from compliance with the local municipalities licensing procedures?

Mr. Ritigliano responded yes and that was even furthered by the letter from the Town of Babylon when our architect submitted our drawings that the Town of Babylon has no jurisdiction I believe it says over the railroad property. Then again the railroad property was a leased property for 99 years

Mr. D'Amaro asked you weren't operating at that time were you?

Mr. Ritigliano responded we were operating on a trans-ship loan basis coming down in cars to the Long Island Railroad property, it was not actually handling the material at a facility because it wasn't ready yet.

Mr. D'Amaro asked so you weren't operating at this site at the time?

Mr. Ritigliano responded at the time of ... of August 5th?

Mr. D'Amaro stated before when you were still under the lease agreement, you said you were more of a start up mode.

Mr. Ritigliano responded we were renovating the facility, that took some time, we started that 2002 I think we submitted plans to the Town, by the time things were delivered, I think it was August '03. We were trans-loading commodities but not the volume that we are today and the benefits of which we are today right now there is a tremendous push by some metal dealers on the Island to put their material on rail, it would require us to invest in a single piece of handling equipment, about $500,000, in order to put the metal into cars, and I'm reluctant to sign my name to any more dotted lines because of my ability to pay if I'm limited by the Town. That is holding right now, that's right here, they are local vendors, some of them are right here in the Town, that right now truck the materials as far as Ohio and Indiana and realize the benefit of putting it on a railroad car, 100 ton at a time as opposed to 2 ton at a time. These are the benefits that we can bring.

Mr. D'Amaro stated I really don't think anyone disputes the benefits, that I think is really a function of what is the appropriate procedure.

Mr. Ritigliano stated and if there is an appropriate procedure to be followed, we are more than happy to follow it. I really think I'm spending more dollars finding out what the procedure is than actually complying with the procedure.

Mr. D'Amaro stated it's the world in which we live.

Mr. Cuthberson stated its an interesting notion that they can't now go the Surface Transportation Board, New York Atlantic Railroad, their agreement with the Long Island Railroad when they became a rail carrier this is in documents that have been submitted to you, their transfer agreement, the agreement between New York Atlantic and Long Island Railroad specifically did not begin until Surface Transportation Board approval was in place. So they knew that that was something they could do before they spent this money, if they were relying on the Federal Railroad pre-emption that they could have conditioned the term of this agreement upon their approval, they didn't choose to do so and its difficult to listen to them complain at this point, that they can't go to the Surface Transportation Board because they have to get through this process. With respect to Mr. Murphy, and his agency, its just a practical matter to get 4 agents to come in and testify before you is a difficult notion, he came here, he swore an oath to tell you the truth, I believe he did and I'll leave it at that. There was a comment made that Coastal is bound to accept any commodity and that is the reason why they take some of the construction and demolition debris from outside, their submission to you specifically says on page 5 that Coastal will facilitate the transfer of cargo between trucks and rail cars in central Long Island

within no more than 25 miles of the origin or destination of the shipment. I did what's called a MapQuest search, and I traced the addresses, I didn't bring that with me but I hope you will rely on my word, in Brooklyn and the Bronx and there more than 25 miles from the facility, that is their representation in their submission to you. Lastly, with respect to the agreement, that between the Borough of Queens and New York Atlantic Railroad the portion that reads term says that the agreement will be effective upon execution and will remain in effect so long as the transfer agreement is in effect and that is referencing the transfer agreement between New York Atlantic and Long Island Railroad and then says that the MTA has to approve it. We have no information that the MTA didn't approve it and that the transfer agreement between Long Island Railroad and New York Atlantic is no longer in effect because that would undermine the whole case they have to rely on an agreement with Long Island Railroad and New York Atlantic. I thank the Board for your time and patience.

Mr. McCue stated as the issue is essentially jurisdiction, the transaction between the New York Atlantic and the Long Island Railroad had to be approved by the Board because of the change in ownership in the railroad, the change in management in the railroad. Unfortunately, this facility you have in Babylon is a yard track, a team track type operation, that does not require Board authority to do, that is the transaction between Coastal and New York Atlantic did not have to be approved. The type of proceeding that we would need to do now would be to go to the Board for an advisory opinion as to whether Coastal is in fact a railroad operator or not. That is something that is available, it wouldn't have been something you would have done to get a lease approval. This is the time to do it. But it wasn't the time to do it when we were writing this lease.

Mr Goren stated again Coastal expended a tremendous amount of money in reliance upon Mr. Casserly's memorandum, I understand the law and other boards and agencies can change town's positions. But they did expend a lot of money and a lot in this operation, they do have a lot to loose and basically our opinion is the only reason there was a turnaround was from the point of view of the town was because of opposition from one entity, Pinelawn. I think we can conclude, I have read Mr. Flores' memo and other than the fact I think he maybe referring to my car, its just referring to a lot of cars going back and forth and the skies were sunny and the temperature rose to 83 degrees on August 30th I don't think there is much more that I have to deal with there. I do through out another suggestion, I think we were getting to with the discussion of going to the Surface Transportation Board, if the Town chooses to ask for an advisory opinion, perhaps this court would want to keep open the proceeding waiting for that decision, we would certainly consent under the law and obviously there are time periods where you have to render a decision, so we would consent to an extension of time for whatever you would need for that to be done, and then maybe you would get from the Surface Transportation Board a road map as to what jurisdiction we do have, because I believe they will still say that we do have jurisdiction, what control, land use, aspects of the operation the Town can control and then you could incorporate that into your decision and then finalize this process. It's a suggestion I throw out that may work for all parties. I thank you for your indulgence and ask that you would grant us our relief.

Mr. D'Amaro stated all interested parties and the applicant having had a full and fair opportunity to be heard and I think we can all agree on that now. I thank everyone for your testimony we appreciate your patience and your time and all of the testimony will be considered. The hearing is closed, the record is closed and the Board will reserve decision and the applicant will be notified. Thank you.

ADJOURNED TO 2/17/05

Application #04-563 of Marlene D'Aloisio, 10 Easton Ave., N. Babylon, NY. Permission to diminish west side yard from 10' to 2'; to diminish total side yards from 25' to 15'; to diminish rear yard from 30' to 28.7' with 2' roof overhang; to diminish distance to east side lot line from 2' to 0.6' and to diminish distance to front lot line from 40' to 37' for shed #1; to diminish distance to east side lot line from 6' to 3.1' for pool; to diminish distance to east side lot line from 2' to 0.7' for shed #2; to diminish distance to east side lot line from 6' to 4.4' for existing pool deck with stairs; to diminish distance to rear yard lot line from 6' to 5' and to diminish distance to west side lot line from 6' to 1.3' for rear deck with stairs. All in connection with the erection of an attached garage and rear 2nd story sunroom, 2 sheds and above-ground pool with deck. Property located on the south side of Easton Ave., 170' east of Euclid St., N. Babylon, NY.
SCTM#0100-113-3-50
Zoning District: Residence C Zone

Application #04-542 of Dal-One Ent., 1 Beech St., Islip, NY. Permission to diminish front yard setback from 30' to 13' with 2' roof overhang and stoop encroachment in connection with the erection of a 1-family dwelling with internal garage and front porch. Property located on the north side of Commerce Blvd., 733.48' east of Great Neck Rd., Amityville, NY.
SCTM#0100-172-2-34.4
Zoning District: Residence C Zone

Application #04-560 of Pedro Cruz, 47 Centerwood St., N. Babylon, NY. Permission to diminish distance to front lot line from 40' to 18.9'; to diminish distance to front lot line for detached garage from 40' to 25' with stoop encroachment. All in connection with an existing front deck with stairs and detached 2-car garage. Property located on the north west corner of Centerwood St. & Troy Ave., N. Babylon, NY.
SCTM#0100-81-1-25
Zoning District: Residence B Zone

ADJOURNED TO 3-3-05.

Application #04-480 of Animal Emergency Svc., P.C., 155 Knickerbocker Ave., Bohemia, NY. Special permission for special exemption for continued use to conduct an animal hospital; to diminish off-street parking from 101 spaces required to 63 spaces provided in connection with a portion of an

TOWN OF BABYLON
ZONING BOARD OF APPEALS

Minutes of Public Hearing
held on
February 3, 2005
re:
Application #04-267
(Continuation of prior hearing for submission of new evidence only)

Application by Coastal Distribution, LLC for relief in the form of vacating and annulling a Stop Work Order issued by Building Inspector Bessemer on or about 3/25/04.

Audio tapes of above-noted hearing transcribed at the Babylon Town Hall office of the Town Attorney, on June 1, 2005, by Donna Gilmore, a Stenotype Reporter and Notary Public within and for the State of New York.

A P P E A R A N C E S:

Louis D'Amaro, Chairman
Thomas Young, Board member
Gwendolyn L. Brown, Board member
Denise Kretz, Board member
Burton Koza, Board member
Michael Kane, Board member
Thomas Weinschenk, Board member

Rachel Scelfo, Esq., Attorney for the Board
Brian Zitani, DEC
Coleen Farrell, Recording Secretary

Mark Cuthbertson, Esq., Attorney for Pinelawn
Michael Posillico, Witness
James Murphy, Witness
James Flores, Witness
Harry Jordan, Witness

James Gaughran, Attorney for Coastal
John McHugh, Attorney for Coastal
Martin Sternberg, Witness
Joseph Rutigliano, Witness

THE CHAIRMAN: All right, ladies and gentlemen. Thank you for your patience.

I'd like to call the next application, which is Application No. 04-267. The application is brought by Coastal Distribution, LLC, and the property is located in East Farmingdale. This is actually a continued hearing from a previous evening, and Mr. Gaughran, would you like to note your appearance on the record.

MR. GAUGHRAN: Yes. James Gaughran, 191 New York Avenue, Huntington, New York. I am the attorney for the applicant.

THE CHAIRMAN: All right. And just before you proceed, as I stated previously, this is a continued hearing. The purpose of the hearing is not to take any, or to go over any evidence or testimony that was previously submitted, but rather for any new evidence or testimony that the applicant or any interested party would like to submit to the board.

And for the record, I'd just like to go over the background a little bit. What had happened is after the hearing had been

closed on the first occasion, the board did receive some affidavits which were rejected by the board and sent back to the applicant, but we felt that to avoid even the appearance of having taken something in, that it would not be appropriate for the board to do so without communicating it to the other side or to any other interested party, as well as the public. We felt it would be appropriate in the board's discretion to continue the hearing on public notice to give everyone an opportunity to come down and continue with the record.

So with that said, Mr. Gaughran, is there anything that you would like to add?

MR. GAUGHRAN: Yes, except I think, Mr. Chairman, you meant affidavit submitted by an opponent.

THE CHAIRMAN: That's correct.

MR. GAUGHRAN: You said the applicant.

THE CHAIRMAN: Yes.

MR. GAUGHRAN: No, it's my understanding that this has been reopened, you know, we concluded our testimony on

September 9th. I was not aware that it was an opportunity tonight for us to present new evidence. I thought it was just an opportunity for an opponent to present some new evidence and then you can ask them, apparently, to pay for the advertising, et cetera.

So we have no new evidence to present tonight. We'll just refer you to the record, hasn't been that long ago, and I know this board is certainly most able to be able to look at the record and come to a conclusion.

But, you know, to reiterate, my clients are operating a railroad transloading facility, they're an agent of the New York & Atlantic Railroad, and it is an activity that the federal law recognizes as exempt as it relates to the town's jurisdiction. And there is a venue where the town or any interested party could go to if they feel that my client's operation as a transloading facility is either not a transloading facility or perhaps somebody might feel that part of its operation isn't a

transloading facility and doesn't meet the exemption. There is a federal Surface Transportation Board in Washington, D.C., -- that is the venue where one would go. There is a reason for this, because, you know, while I have and my client has the utmost respect for this board and the work that you do, if every zoning board or other municipal board in the United States of America could determine where railroad facilities would be sited and not sited we wouldn't have a railroad. That's why Congress exempted these type of facilities and activities.

I think rail transportation is still an important part of our infrastructure in this country, I think Congress still does, and so I would just rest on that. Although I would like to just ask if there has been anything new that has been submitted into the record since the last, or into the file that will be part of the record since the last hearing, other than I know some letters back and forth by myself and the Chair and the attorneys.

THE CHAIRMAN: Other than

correspondence that went more to procedure, to my knowledge there's been nothing else added to the record.

And just to follow up on my comments prior, even though you are standing on the record previously submitted at the prior hearing, this zoning board has always felt in the interest of fairness that if there was even the hint that something had come into the record that was inappropriate or should not have been submitted or however it's viewed, it's better to err on the side of the public hearing aspect of the application, republish, renotice, invite everyone down. And Mr. Gaughran, I'm going to also offer to you that should some testimony proceed here this evening that you feel the need to respond to, you're certainly welcome to do so.

MR. GAUGHRAN: Okay, I very much appreciate that. But at this point there have been no complaints or anything else that's been filed that's a part of any record here in the town?

FEMALE VOICE: (Inaudible).

MR. GAUGHRAN: Well, I'm just saying not from Pinelawn, there's nothing else that has come in from any interested party or town department or anything concerning the operation of this facility?

THE CHAIRMAN: No, and in fact we'll indicate on the record, or I'll indicate on the record, that as of the beginning of this continued hearing the record will only be what was previously submitted at the prior hearing and in fact we'll incorporate those proceedings into these proceedings as well, just for the sake of overkill.

MR. GAUGHRAN: Okay. So I would just ask if we have the opportunity to respond tonight or later if we feel we need it to anything that is presented.

Also John McHugh, an attorney who is an expert on federal transportation law who testified before you at the last hearing is also available.

THE CHAIRMAN: All right. I encourage you to do so and also I ask you to be mindful of the fact though that we do have the prior record and we're trying to keep

this somewhat more limited.

MR. GAUGHRAN: That's why I'm going to stop.

THE CHAIRMAN: Okay.

MR. GAUGHRAN: Thank you.

THE CHAIRMAN: Thank you.

With that said, is there anyone who would like to comment on the application?

Mr. Cuthbertson, welcome.

MR. CUTHBERTSON: Good evening, thank you, Mr. D'Amaro.

My name is Mark Cuthbertson, Law Offices of Mark Cuthbertson, 434 New York Avenue, Huntington, New York, and I represent Pinelawn Cemetery, who is opposing this application.

THE CHAIRMAN: Okay, welcome.

MR. CUTHBERTSON: Thanks.

THE CHAIRMAN: And Mr. Cuthbertson, we did have a prior hearing before you were involved representing your client, and we did have, the client you're representing this evening was previously represented. I don't want to discourage anyone from offering some additional testimony or evidence, but we are

trying to limit it to just that, so I'd appreciate if you'd be mindful of that.

MR. CUTHBERTSON: Yes, and I will try mightily, Mr. Chairman, to abide by that, bearing in mind that to give some relevance to the testimony we bring here tonight there may be an occasion to refer to the prior testimony.

THE CHAIRMAN: Sure, please go ahead.

MR. CUTHBERTSON: I want to first just comment on what Mr. Gaughran said about federal preemption. What he's saying about going to the Surface Transportation Board presupposes that his client is a rail carrier. We dispute that on the facts and on the law, and we're going to hold forth at length about that, and in order to go to the Surface Transportation Board and complain you should be complaining about a rail carrier. We don't believe that Coastal is a rail carrier and for that reason our grievances don't lie before the Surface Transportation Board.

I'm going to briefly preview the

testimony that you're going to hear tonight to give you a little road map of what's to come and what we intend to talk about tonight, and then just talk about one or two salient points that I think are important to emphasize before we put the witnesses on.

We have four witnesses today. First is Michael Posillico, he is a neighbor of the facility, the Coastal facility at 1600 New Highway. He is also a civil engineer and the president of Blue Water Environmental. They specialize and are renowned for environmental cleanup, and he has an extensive knowledge of environmental law. And as a part of his testimony he is going to testify as to the direct observations that he makes at the Coastal site, of the Coastal site from the second story of the office building in which he works every day. He has a chance to work in the vicinity every day and he's going to tell you about his observations.

Next you'll hear from James Murphy. He's the president of Sutton Associates. They are a private investigation firm of about eighteen people. He is a former

special agent with the FBI, worked in the FBI headquarters, and he will testify to the effect that the majority of the construction and debris material that is coming to this site during the surveillance that he performed is coming from locations in New York City, and not from locations on Long Island. And frankly, he will also tell you that despite the assurances that you received at the last hearing, that the Coastal facility is accepting construction and demolition debris from areas other than transfer stations, and he'll go into that in detail.

You'll also hear from a James Flores very briefly. He performed a surveillance report before the last hearing, and he confirms a lot of what Mr. Murphy will be testifying to and specifically the types of trucks that are coming there and the locations from which they come. I'm only going to have him hand up his report and testify very briefly, because I think Mr. -- Sutton Associates, Mr. Murphy did a little more extensive job.

Last you'll hear from Harry Jordan. He is an expert on federal railroad preemption with forty years in the field. He previously worked for the ICC, the Interstate -- the ICC, which was the predecessor to the Surface Transportation Board, and as you may recall the Surface Transportation Board regulates railroads. He has extensive knowledge, having worked in the transportation field for over forty years.

He will testify unequivocally that Coastal does not qualify for federal preemption based on fact and law. He'll also base his conclusions on a very recent case, a case that came out almost, within five days of the hearing, a Third Circuit case that is identical on the facts, the Hi Tech case, which was referenced, we talked about at the last hearing, but it was a District Court case at this point, it was a full record on appeal, the decision of the District Court that an identical facility does not qualify for federal preemption was affirmed by the Third Circuit Court of Appeals, making it three different entities that have looked at

a similar set of facts; the Surface Transportation Board had a look at this facility, the District Court in New Jersey had a look at this facility, and the Third Circuit Court of Appeals had a look at this facility and said there was no federal preemption on those facts.

He'll also rebut a number of statements that were made by Mr. McHugh and he'll review with you the provisions of Coastal's so-called transload agreement which they say is an agency agreement. He's drafted agency agreements, he's familiar with the law of agencies, and he will tell you in definitive terms that this is not an agency agreement. And the linchpin for Coastal, what they hang their hat on, is that they are the agent of New York Atlantic Railroad, which has qualified for a federal exemption from regulation, local regulation. If they're not an agent, they don't qualify. In definitive terms he'll tell you they are not an agent of the New York Atlantic Railroad, and he'll speak more about that.

Just briefly, two things. Last time

we were here Mr. McHugh talked about the public policy, the important public policy underlying railroads and preemption, and the fact is he basically said to you despite the impact, the environmental impacts there was nothing you could do. Federal law preempted, there's no environmental review of this situation, and in order for this important public policy to be carried out and for us to take trucks off the road on Long Island, that this facility would have to stand and they qualified for a federal exemption.

Well, it turns out based on our investigation and the surveillance done by Mr. Murphy that they're not taking trucks off the road in Long Island, they are bringing trucks from New York City, from the five boroughs of New York City, construction and demolition materials into the Town of Babylon. And relying on their testimony and what they've submitted, Mr. McHugh, their expert, said that if you have a rail car and fill a rail car that's from six to seven truck loads that could fit in that rail car. Okay. And when you do the math, at a bare

minimum Coastal is required to fill 3200 rail cars in the fourth year of their agreement, at minimum. They're contractually bound by the New York Atlantic Railroad to fill those rail cars, and then New York Atlantic in turn is contractually bound to the MTA to make sure that happens. If you take that and do the math, 3200 rail cars, up to six truck loads there, you're talking about, just about 19,000 trucks that you need to come in to this facility, the Coastal facility each year. That's at a minimum. That is 150 -- and these go both ways, they've got to come in and they've got to go out, so if you double the number it's 40,000 trips. And with that, if you look at the number of business days that are in the year, that would be 150 truck trips per business day of the year, new trucks that come into this area on New Highway. And that's not my speculation, that's not me being hysterical or alarmist, that's data they supplied to you.

And frankly, they made the case for taking trucks off the road. Remember when

they talked to you about the notion that we need to take trucks off the road, there are more accidents, it damages the infrastructure, traffic congestion. They made the case why trucks should come off the road, and here it is they're bringing trucks to the Town of Babylon, they're going to destroy the infrastructure and clog the local area.

And I have to tell you that they had a real estate expert testify, Mr. Breslin, and I really wonder if he knew that there were 40,000 new truck trips coming into this area whether he'd have the same opinion about what it would do to the vicinity.

I am fortunate enough to sit on the 110 Task Force with Supervisor Bellone and Councilman Horsley, and I say that for one reason and one reason only. We are, that is an entity, that's a bi-town entity, Babylon and Huntington, and it's committed to looking at ways to keep what we have in terms of economic development and to make sure that 110, the Route 110 corridor, which is the economic engine for Long Island, stays that

way. The biggest impediment we have, the biggest challenge by far that we need help with is traffic.

Just imagine what this is going to do to traffic in the area, just imagine what it's going to do to all the new retail that this board and the town has worked to bring into that area. It will have a devastating impact, and all because we're trucking New York City garbage into Babylon.

And the fact is our expert, Mr. Jordan, found out something very interesting. He looked at the file in the Surface Transportation Board. When New York Atlantic, they had to make an application to the Surface Transportation Board, and there was public comment on that, and the fact of the matter is, and I'd like to hand this up to the board --

THE CHAIRMAN: "They" meaning the applicants here this evening?

MR. CUTHBERTSON: No. No. Let me be clear. New York Atlantic, which is, they claim is an agent, their agent, which we believe it's not, they had to go to the

Surface Transportation Board, there was a chance for people to comment, and I want to hand up a press release, an agreement that came out of that application. And what it is is the Borough of Queens lobbied such that a transfer station such as this can't be located in Queens by New York Atlantic Railroad. One of the reasons why the garbage is coming here to Babylon from Queens, and there's a facility in Jamaica from which, and Mr. Sutton will testify to this, is because the Borough of Queens made an agreement with New York Atlantic that you can't bring, you can't have one of these transload facilities in Queens. And that's stated in this press release very clearly in the bullet point at the bottom, "New York Atlantic Railroad will not establish any transfer station in Queens County." And I think this agreement is important because it speaks to the notion that there are people who lobbied against having these and why the garbage is coming east and not coming from local areas.

And lastly, I just want to say briefly, and Mr. Jordan is going to talk

about this, just the issue of this so-called agency agreement. It's tremendously disingenuous. A month before the last hearing they had a lease, they broke the lease and entered into a new agreement to say that they're no longer a tenant, they're an agent. Completely disingenuous.

And just briefly, and I hope the non-lawyers on the board will bear with me, an agent is a person who by agreement has a relationship with a principal and he represents that person, and you're familiar with travel agents, with real estate agents. The essential element in an agency relationship, and they're telling you that they have an agency relationship, is control. And you maintain control, the principal maintains control. New York Atlantic should be maintaining control if they are truly the principal and Coastal is the agent, so remember that word, "control." It's critical. And they don't control them. It's very clear when you look at their agreement, it's very clear when you look at their relationship that they don't control them,

and I would encourage your counsel to look at this supposed agency agreement and note that there is no control by New York Atlantic first, and I want to, it's in our brief that we submitted but I want to just point out a few of the provisions.

Paragraph 1.05 of that agreement says that "New York Atlantic's responsibility and liability for the cars and their contents bound to or from the facility ends when the cars are uncoupled from New York Atlantic's locomotive at the facility, and the railroad's responsibility" -- New York Atlantic's responsibility and liability -- "is resumed when the cars are coupled back to the locomotives."

Does that sound like control to you? They have no control. Once they're uncoupled from the locomotives, New York Atlantic by their own contract has no control.

They don't even, New York Atlantic doesn't even maintain the tracks. Paragraph 1.07 of the agreement says that Coastal has to maintain the tracks. Coastal has to buy the railroad cars. And another paragraph in

the agreement says "Coastal acknowledges that New York Atlantic may use the tracks and other yard facilities from time to time for railroad purposes, so long as that use does not unreasonably interfere with Coastal's operation." So from time to time New York Atlantic can use the facility if they don't interfere with Coastal's operations. Doesn't sound like they control the facility to me. And the list goes on and on, there are other provisions. Another important provision is that Coastal built all the improvements here, and specifically by the terms of their agreement, the millions of dollars they spent on this airplane hangar building, they're able to take it when they leave, it's theirs when they go. Does that sound like an agent of a principal? Doesn't sound like that to me.

And you heard from New York Atlantic's president and he stated specifically on the record some things I think that don't indicate that there is control of this facility. He's the president of New York Atlantic, his name is Mr. Krebs,

he testified before you last time, and when asked if he had been to the site he said yes, I've been there a number of times and I just like to make sure everything is nice and clean, which it always is. When he was asked if prohibited materials were brought to the site he deferred and said Coastal's representative would have to answer that. That's at page 67 he was asked that.

At page 73 he was asked what percentage of the materials are construction and demolition materials. He replied, "I don't know. I really don't care what the percentage is. As long as it's all rail, that's what I care about." Doesn't sound like a man who controls a facility to me. And the list goes on, I don't want to belabor it. I just want your counsel to note that it is in our reply memorandum.

And lastly, the issue I would emphasize with you is money. I mean, when you talk about control don't you talk about money, what's the flow of the money? Here Coastal made all of the investments, that's clear. Coastal gets all of the real money

under the agreement, and that's clear, and I'm not going to go into the details, but we make that point in our reply memorandum. You know, when you're an agent, you're a real estate agent, you get 4 percent, 6 percent; you're not getting the whole of the money like Coastal gets under this agreement. Here the money speaks volumes, and Coastal is clearly not the agent of New York Atlantic.

I want to, Mr. Chairman, before I call Mr. Posillico, hand up an original of the affidavits that were submitted to you, of the affidavits that were submitted to you and rejected and also copies for the board. Two out of the individuals listed in the affidavits are going to be testifying here tonight, we thought it was important for you to have their affidavits as well, and I'd like to call at this point Mr. Harry Jordan, and I want to give you his resume.

THE CHAIRMAN: Okay, very good.

MR. CUTHBERTSON: And this is Mr. Jordan's resume, and at this point I'll call Harry Jordan. He is an expert in federal transportation law.

THE CHAIRMAN: All right. Thank you, Mr. Cuthbertson. Mr. Jordan, good evening, welcome.

MR. JORDAN: Good evening.

THE CHAIRMAN: If you would kindly state your name and address for the record, sir.

MR. JORDAN: Be glad to, but first of all, thank you for having me.

I think you called --

MR. CUTHBERTSON: You know what? I'm sorry, I called Mr. Jordan out of order. Mr. Posillico was kind enough to come here and wait, and with the board's indulgence, I'd like Mr. Posillico to come up.

THE CHAIRMAN: Well, Mr. Jordan, it was nice meeting you.

And Mr. Posillico, same to you, welcome. And please state your full name and address for the record.

MR. POSILLICO: Michael Posillico, address is 1600 New Highway, representing Farmingdale Properties. I am the managing partner for Farmingdale Properties, which is directly across from the Coastal facility.

THE CHAIRMAN: Okay, very good, and again welcome. Please raise your right hand.

(Michael Posillico was duly sworn as a witness.)

THE CHAIRMAN: And sir, what would you like to tell the board.

MR. POSILLICO: Well, one of the things that I guess learning through the process here is I've been following some of the testimony that the town has been having and some of hearsay and learning more facts, but from my experience as the manager here, I've kind of seen the transformation of this area over many, many years that's been historically used a transload facility.

And I hear that word "transload." My experience as president of Blue Water Environmental, which we've conducted environmental remediation work and large civil work in the metropolitan area, is that transload -- because we've done some work with New York Atlantic, actually just completed the first phase of a project in Hicksville for GTE surveying and hauling approximately 80,000 tons of radioactive

material out of the Town of Oyster Bay through the Hicksville facility yard -- is that transload generally means you take material from one mode and you move it to another mode, and kind of a rule of waste hauling is it never hits the ground. So when I saw waste hitting the ground as it does every day across the street, which is easy for me to see, I assumed that somehow this entity had gone through the long arduous process of obtaining a 360 permit for transfer. We've also conducted work with volumes of dredge spoils, hauling those spoils from barge to truck, using machines where we take materials from the barge and place them in the truck. Again, transload material does not hit the ground and from my knowledge of federal law, certainly not as extensive as I'm sure some of the counsel here, is that that is a permitted transfer and whether it's a rail or a barge, the intent, which I understand as a civil engineer is to keep trucks off the road, keep the efficiency up, and keep costs down for the taxpayers and the people in commerce, and

I think that's Congress's general provision, is again, if it didn't happen that way then everyone would stand up and complain. But when the material hits the ground it raises the bar for concern; ground water contamination, what are the methods and means, traffic, because it becomes a whole different type of animal from my experience, or not an animal, but a way of managing materials. From what I observed there, understanding trucking and understanding volumes is that the numbers that Mr. Flanagan referred to are accurate, that over time the waste flow in New York City, if that in fact is where the material is coming from, easily could represent 3200 cars a year and up, because there is no place to take the material other than when the local landfills shut down, Fresh Kills is shut down, Arthur Kill is -- not Arthur Kill -- Fountain Avenue is shut down, so the material has to come somewhere, go somewhere. We don't have really good solutions for recycling as a practical matter. So the material that I've observed there is kind of a rough C and D

material coming in, being dumped on the ground --

THE CHAIRMAN: What kind of material is it?

MR. POSILLICO: Like a rough, some sort of demolition material, doesn't look like --

THE CHAIRMAN: These are your own personal observations?

MR. POSILLICO: These are my personal observations. I also manage two recycling facilities, one in the Town of Babylon, one in Westbury area where we take recycled concrete and road material, so I know the difference between that type of debris which we recycle and trash, which would be regular garbage, and C and D that you get from demolition, building demolition and mixed waste from building demolition.

I'm also aware that mixed demolition that comes from buildings sometimes can contain materials such as asbestos, depending upon the abatement procedure, and contain lead, and those materials, again, depending on the specific source and how it's regulated

are of concern. So those materials and those dusts are being admitted, asbestos and lead. And that's not a good thing. That's not a good thing for the tenants of my building, it's not a good thing for people, the workers at our facility, and not having gone through the process of air monitoring, knowing what's there, documenting the source, I have great concern.

I am an opponent of this application or this request for relief and I think for very good reason. I think there's a process, it's a very arduous and difficult one that the local agencies put you through, but that's the bar.

From my understanding this would permit me, under a similar circumstance, because we have a rail spur on our facility, if we were able to arrange an arrangement with the MTA then we could become an agent, and we could use our facility at 1600 to perform the same service. I think that would be very, very concerning for Babylon and many other places within Long Island and New York State. So I'm here to speak against it, and

those are my words.

MR. CUTHBERTSON: I would just ask, Mr. Posillico, if you could tell the board, generally, what you observe on a day-to-day basis, what goes on across the street at the Coastal site so the board could be aware of what goes on.

THE CHAIRMAN: And before you answer that question, ordinarily tell us the frequency of your observations, how often are you viewing the site or near the site.

MR. POSILLICO: Well, if my partners were here I'd say daily, but it's probably about three to four days a week. I'm there in the morning early, usually seven, eight a.m., I usually leave at night, you know, six, seven o'clock, somewhere around there.

THE CHAIRMAN: And what do you see?

MR. POSILLICO: And I see trucks, generally tractor trailers coming in, occasional roll-offs. They bring material in, they reorientate the trucks, dump the material on a pad inside the building. I see either Bobcat, which is small payloader type equipment, or payloaders pushing the material

around. As a contractor I would tell you that generally we don't like to handle things more than once, so if there wasn't a reason to sort or to examine, the best thing to do would be just to put it on the rail car, so I would assume not having permission to go on the property that there's some sort of observation going on, because it doesn't make a whole lot of sense to put stuff on the ground and move it around and then put it back on the truck, it would cost you more money. So I'm assuming that the economics are there, that there's some sort of examination before they preload the material. That may be the case, may not be the case. That's generally what I observe. I don't know if some of the materials that are sorted are culled out and put into other piles, but generally that's what I see, material being moved around, heaped up, and that's generally what I see.

THE CHAIRMAN: But not going directly from say a carrier right onto the rail?

MR. POSILLICO: No. Those type of

units, they're called intermodal containers, there are facilities in New Jersey, Epic is a very large transload facility, and they take material that goes in an intermodal container, the material is placed in that container, and then it is loaded directly onto that rail car, and that's generally what that facility had done in the past when it had used operations or direct stone off-load and other types of facilities of direct, cement, direct loading, never dumping on the ground and reloading.

THE CHAIRMAN: Okay, very good. Is there anything else you'd like to add?

MR. POSILLICO: That's it.

MR. WEINSCHENK: Just one question.

THE CHAIRMAN: Yes, go ahead.

MR. WEINSCHENK: Can you just tell me, how many trucks a day are you observing?

MR. POSILLICO: The frequency is moderately active now. I wouldn't say it's, I don't believe it's at the level of 150 trucks a day, but that could occur. The waste stream from my knowledge is there. It's probably six to seven an hour at some

times. There are trucks parked in the shoulder at times, which is a very dangerous traffic condition with the shoulder. We've been struggling with that area along the shoulder for many years now, it's very heavily traveled in the morning and the evening and when there are vehicles parked along the outside of the fence it makes it even tougher to negotiate a turn. Plus you have the rail crossing right there, so you can imagine trucks back up and cars both directions, a truck or trailer outside the property line and then trying to make a turn, it's very dangerous.

THE CHAIRMAN: Thank you, very much, Mr. Posillico, we appreciate your comments.

Mr. Cuthbertson?

MR. CUTHBERTSON: Yes. Mr. Chairman, at this time I'd like to call James Murphy, who is the president of Sutton Associates to talk about the surveillance he did of the Coastal facility and its truck, or trucks, that come to the site.

MR. MURPHY: Good evening, Mr. Chairperson.

THE CHAIRMAN: Mr. Murphy, welcome to the zoning board, and if you'd be kind enough to state your full name and address for the record.

MR. MURPHY: It's James F. Murphy, 325 Duffy Avenue, Hicksville, New York 11781.

THE CHAIRMAN: Thank you, and again, welcome. Please raise your right hand.

(James Murphy was duly sworn as a witness.)

THE CHAIRMAN: Please go ahead.

MR. MURPHY: As a way of just qualifying myself, I am a qualifying officer of the Sutton Associates, it's a licensed and bonded private investigative firm. I come before you with about 38 years of investigative experience, the last twenty in the private sector, prior to that working with the FBI backwards from '80 to '84 as a senior ranking officer in the Eastern District of New York, which encompasses Staten Island, Brooklyn, Queens, Nassau, and Suffolk. And prior to that five years down at the FBI in the FBI director's office in

planning and evaluations looking at FBI programs and commenting on their health and whether or not they needed to change. Before that as an agent and supervisor working bank robbery and terrorist matters in the New York field office.

My company now, Sutton Associates, provides three lines of service; due diligence work, backgrounds on people for investment purposes, merger and acquisitions. We do employment screening work, and then we also do what we would consider routine investigative work.

In September I was called by Mr. Justin Lock, and he asked if we would take a look at his facility or take a look at Coastal Distributors, and determine two things. One was the materials that were being brought to the site, to Coastal, were they construction and demolition materials. And the second was where were they coming from, were they coming from a transfer station, was that transfer station located on Long Island.

Our surveillance was only a four day

surveillance. We started on September 17th, on Friday, and wrapped up the following Wednesday, but the observations I think are very telling.

THE CHAIRMAN: That's of 2004?

MR. MURPHY: That's correct, sir.

THE CHAIRMAN: All right.

MR. MURPHY: The names I'll mention to you, Metropolitan Transfer Station is located in Bronx County. AJ Recycling is located in Bronx County. Regal Recycling is located in Jamaica, New York. City Recycling is located in Brooklyn, New York. And Reality Roofing is in Mineola in Nassau County.

Our observations just in the short period of time the first day took us with some trucks from AJ Recycling leaving Coastal and going to Metropolitan Transfer. The following Monday then what we did was we put people at Coastal Distributors to see who was coming, and people up at Metropolitan Transfer in the Bronx County to see what was leaving there. At 5:30 in the morning we observed two tractor trailers from AJ

Recycling leaving the Metropolitan Transfer station in the Bronx and coming directly to Coastal Distributors and unloading there. They left there at 5:40, arrived at 6:10. Little later that morning, about ten o'clock that morning, we observed a truck coming from Metropolitan, an A and J Recycling truck coming from Metropolitan Transfer going to an AJ facility in the Bronx on Valley Street. What we observed was that truck being loaded with debris and it was construction debris and leaving that location and coming directly to Coastal Distributors. Clearly, they were not transfer locations, clearly they were not on Long Island. So it was material that was being brought from New York City to Long Island.

The second observation that we had on the same day and we had two days later had to do with Reality Roofing in Mineola. We observed, I would say, and my report has some details, I don't --

MR. CUTHBERTSON: I would like to comment to the board, attached to Mr. Murphy's affidavit that I handed up is

his surveillance report, so the details are in there, it's a very detailed report. I'm just trying to let him highlight it.

MR. MURPHY: What we noticed with Reality Roofing is that Reality Roofing has dump trucks, not tractor trailers. So when we observed them coming into the site, it would make sense that our experience is that they don't come from transfer sites, so what are they dumping there. So we observed those trucks for a period of two or three days leaving the site, a number of them leaving the site, and then on that 18th, I believe it was, also that Monday, we decided to go to the Reality Roofing location in Mineola. We saw those trucks go to four or five different residential locations and later that afternoon after watching one truck particularly, roofing material coming off a home, residential home in Nassau County, loaded onto the truck, that truck then going to Coastal Distributors.

Now, I would emphasize the fact that our surveillance only went for four days. They weren't even full days in the sense that

we started early, but we were through by four or five on the one night. I would think that if we had continued that for a long period of time, we would have seen much more of the same.

So certainly my opinion as an investigator with 38 years experience, is that the materials which are being brought out to Coastal, a great portion of that is coming from New York City. And very little of it, very little that we saw, is going through any transfer station, and certainly no transfer station on Long Island. Now, that's not to suggest that some of it is not, I think there is some that is. But what we saw does not support that.

Are there any questions I could answer?

THE CHAIRMAN: Just did you observe or try to observe any other trucks coming to the facility that were from transfer stations or that perhaps were from the region, from this area?

MR. MURPHY: There were some trucks that, there was some trucks that did exactly

what they were supposed to do. There were occasions where we saw trucks that did go to a transfer station here on Long Island and them did go to the site. I can't testify as to exactly what they had in the trucks, but that did happen. The majority of it was not that.

THE CHAIRMAN: The majority --

MR. MURPHY: The majority of the materials being brought in --

THE CHAIRMAN: So how do you determine that the majority was not, unless you knew the schedules and the timing for every truck coming to the facility? How would you know, what's your methodology for that?

MR. MURPHY: I'm not sure I understand the question.

THE CHAIRMAN: In other words, if you're making a conclusion that the majority of the trucks coming to the site are coming from let's say New York City and not coming from a transfer station --

MR. MURPHY: The majority of the trucks that we observed, the ones that we --

THE CHAIRMAN: Oh, that you observed, I see.

MR. MURPHY: -- picked up, that we observed, were coming from other locations outside of the Long Island area. When we see that, when we see that we have a business located in Manhattan -- I'm sorry -- in Brooklyn or in the Bronx and it's coming here, that would make us look at that and say where are they picking up their material, are they picking up on Long Island to bring it here. And they were not.

THE CHAIRMAN: Right.

MR. MURPHY: And then again, the dump trucks they were bringing there don't usually go to transfer stations, at least in my experience they don't, so that piqued our curiosity also. So in those that we looked at we were confident that they were not going to transfer stations on Long Island and that the debris that was being brought was coming out of New York City.

THE CHAIRMAN: Any questions from the board?

MALE BOARD MEMBER: Mr. Murphy, just

to clarify, there were instances where materials were coming from transfer stations in New York City sites; is that correct?

MR. MURPHY: Well, Metropolitan Transfer is a transfer site, and those A and J trucks were coming from those locations. They were coming from those locations, they were also coming from AJ's location, which is not a transfer site. But again, I qualified that before by saying that we didn't see those sites on Long Island, those trucks were not coming from transfer stations on Long Island.

MALE BOARD MEMBER: Okay. And with the majority of the trucks you observed, what companies were they from?

MR. MURPHY: Again, the companies I had mentioned before are AJ Recycling.

MALE BOARD MEMBER: And that's located where?

MR. MURPHY: That's in the Bronx.

Metropolitan Transfer, that's in the Bronx, that's the facility they were going to. The Regal Recycling, which is in Jamaica, New York, and City Recycling, which

is in Brooklyn, New York. And then the household materials, the roofing materials was with Reality Roofing in Mineola.

MALE BOARD MEMBER: Thank you, very much.

THE CHAIRMAN: Thank you, appreciate your testimony, sir.

MR. MURPHY: Thank you.

MR. CUTHBERTSON: Next, Mr. Chairman, we would call very briefly Mr. James Flores, and he prepared a report, and the reason we called him is he prepared a surveillance report prior to the hearing that was held and made certain observations and the report is here and I would give it to the board, and frankly it confirms that a lot of the activities that were going on in terms of the companies that were shipping materials in were both being, were doing so before the hearing and after the hearing. When the decision was made after the hearing, excuse me, after the hearing Mr. Sutton came in and did, Sutton Associates came in and did a more extensive report to trace the garbage coming from the trucks and where it was coming from.

So Mr. Flores, I'd just ask you that the report that I've handed to the board and that you have in front of you, did you perform that report?

MR. FLORES: Yes.

MR. CUTHBERTSON: And you did the surveillance that's contained in that report?

MR. FLORES: Yes.

MR. CUTHBERTSON: Okay. Thank you, very much.

THE CHAIRMAN: Okay, thank you, Mr. Cuthbertson.

Sir, welcome, and please state your full name and address for the record.

MR. FLORES: My name is James Flores, my address is 3615 87th Street in Jackson Heights, New York.

THE CHAIRMAN: All right. Please raise your right hand.

(James Flores was duly sworn as a witness.)

THE CHAIRMAN: Please go ahead.

MR. CUTHBERTSON: If I may, to speed things along, Mr. Chairman, Mr. Flores, are you a private investigator?

MR. FLORES: Yes.
MR. CUTHBERTSON: And by whom are you employed?
MR. FLORES: By IIG, International Investigative Group.
MR. CUTHBERTSON: Okay. And how long have you been a private investigator?
MR. FLORES: In the United States eight years.
MR. CUTHBERTSON: And did you go to the Coastal facility on certain days in August and early September and perform a surveillance report?
MR. FLORES: Yes.
MR. CUTHBERTSON: And are your observations contained in this report?
MR. FLORES: That's correct.
MR. CUTHBERTSON: Okay, thank you.
THE CHAIRMAN: Okay. Is there anything else that --
MR. CUTHBERTSON: No. In the interest of time I would like you to just take a look at the report. I think it confirms that a lot of the same companies were coming to the site prior to the hearing.

THE CHAIRMAN: All right. Mr. Flores, thank you, very much.

MR. FLORES: You're welcome.

THE CHAIRMAN: I appreciate your time and your report will be made part of record.

MR. CUTHBERTSON: Next, Mr. Chairman, I would call Harry Jordan, who is a lawyer and our transportation expert.

THE CHAIRMAN: Mr. Jordan, welcome back. And once again just state your name and address for the record, please.

MR. JORDAN: Okay. My name is Harry Jordan, and my address is 1701 Pennsylvania Avenue Northwest, Washington, D.C.

THE CHAIRMAN: Right down the road from 1600, isn't it?

MR. JORDAN: We can see The White House from the corner office.

THE CHAIRMAN: Sir, you're an attorney; is that correct?

MR. JORDAN: Yes.

THE CHAIRMAN: Welcome again, and please go ahead.

MR. JORDAN: I have been an attorney

for over forty years, and during that period of time have specialized in transportation. I started my career by working with the Interstate Commerce Commission for three years, once I got out of law school in their section of proceedings, in which I handled a variety of cases, handled in the sense that I was a staff member. I participated in licensing, rate matters, complaints involving motor carriers, railroads, water carriers, freight forwarders and what have you. I have a very good familiarity with the Interstate Commerce Act before and after it was changed by the ICC Termination Act. After I worked with the Interstate Commerce Commission, I was on the staff of American Trucking Associations, which is, as the name implies, a transportation company, association, and was involved in litigation. On behalf of the association appeared before the ICC at the time, federal courts, administrative agency hearings all over the country on broad industry questions, at times at odds with the railroad, at times in support of railroads.

In 1967 I joined a law firm called

McDonald and McInerney and became a partner one year later, and it was a specialty firm, it specialized in transportation, and we represented railroads, motor carriers, freight forwarders, water carriers, everything, and in all areas of transportation. Appeared in hearings before the ICC at the time, the Department of Justice matters, DOT -- the DOT was created sometime later, but nonetheless, DOT, state agencies, just covered everything. And in the process I wrote contracts including agency agreements for clients. I remained with them until the firm, two of the senior partners decided they had enough or had made enough money, whatever, and I continued in the transportation and I still do that type of work today.

When I was asked to appear here, I was given copies of most of the documents involved here and I had read them, and I can say without any reservation that in particular Mr. McHugh's testimony regarding the status, the exemption status, and I can say without any reservation I totally

disagree with him, that the exemption provision for reasons I'm going to say does not apply here, not only my opinion for what it's worth is one thing, but there are several courts in the Surface Transportation Board which, as you now know, is the successor to the ICC.

There are three or four cases which are almost substantially factually the same as what we have here. They've been cited in the briefs, and one is the Hi Tech case, which has a great history as far as instructing what is and is not exempt and regulated. We have the rare situation of having the Surface Transportation Board look at that factual determination and find that it was not transportation by rail and therefore not entitled to the exemption. That case was later confirmed -- affirmed by the Third Circuit in a case by the same name, which had the same finding.

We have a case that is very informative that occurred, Milford case, which occurred up in New England, and it's cited in the pleadings which came to the same

conclusion, and I will come back to these, and then a third case involving West Palm Beach. I'm not going to get into the facts of these because they're in the briefs and I'm sure it's getting late. But the major factor in all three, the common factor was that the party that was involved in the transloading or the transportation that was challenged and had come in either to the Surface Transportation Board or the court challenging any state regulation made the basic argument it's exempt, it's a rail operation, and therefore you people have no authority over us, the identical argument we have here. And in all those cases the common factor is that those persons were not carriers. Similar to Coastal. Coastal holds no authority in the Surface Transportation Board as a railroad. It's a private corporation, it's a for profit corporation, and it has to be a carrier in order to be entitled to the exemption.

THE CHAIRMAN: Right, but I think that they get to the carrier status through their agency agreement.

MR. JORDAN: Yes, that's their argument. But basically -- and I might say, I have copies of those cases that would be helpful to your counsel so they wouldn't have to chase them down.

THE CHAIRMAN: We appreciate it.

MR. JORDAN: But, and I'll provide them when I'm finished. Yes, that is their argument, and I'll come around to that, but let me stop for a minute and say exactly how this works, and I'm sure I can do it briefly.

Section 10501B talks, shields transportation services by railroads from state and municipal regulation, provided the state and municipal regulation interferes with the transportation service. There's not an across-the-board total exemption. There are areas, including the area we have in consideration here, where there is local authority over these operations.

THE CHAIRMAN: So you can fall within the definition of a carrier, if I'm using the right word, but yet still have regulated activity for that carrier.

MR. JORDAN: That's right.

THE CHAIRMAN: And it's a state or municipal --

MR. JORDAN: Yes, you can. And the one case I'm talking about is the one, West Palm Beach, goes into great detail to explain that. Mr. McHugh and the other side seems to want to take the approach that hey, if you come within that mix that you can't do anything. That's not true.

Now, again, the exemption runs to transportation by carrier. And what is a carrier, is somebody who has authority from the Surface Transportation Board. Obviously they don't pass muster there.

But what they argue is that we're not a carrier, but we're the agent of New York Atlantic, which is a carrier, and therefore we're entitled to this exemption. Well, there are two documents here, two main documents that come into play. The first one was their lease arrangement that they had for a couple of years and then when the Hi Tech case came out and that was shown to be risky, they came out with a new agreement, so they had the transfer, operating transfer

agreement. If you look at that agreement and you look at the front page, halfway down it, it talks in terms of retaining or using Coastal as a contractor, not as an agent. The word "agent" appears there in only two places in the whole agreement. One is with respect to the unloading of these rail cars in Ohio. They say you're not our agent out there, you're on your own for that, we have nothing to do with that, and the other one has to do with documentation. They talk about you can as our agent have these freight bills, but if, other than that there's nothing in that agreement. If you have an agency agreement you're very, very careful to make sure that all the relationships are spelled out and that this person is truly an agent. Now, I'm not going to get into the other specifics, because counsel has already indicated the other --

THE CHAIRMAN: But you have experience yourself with drafting and enforcement of agency agreements --

MR. JORDAN: Yes, I have.

THE CHAIRMAN: -- and what

constitutes an agency agreement and what does not.

MR. JORDAN: Yes, right.

THE CHAIRMAN: And you've reviewed this agreement and you're of the opinion it does not constitute an agreement --

MR. JORDAN: It does not.

THE CHAIRMAN: -- to the extent of having Coastal fall and benefit from the exempt status, so to speak.

MR. JORDAN: Absolutely. It's not an agent, it is actually providing a service. As I say, counsel went through the various assumption of the risks, they all belong to Coastal. I mean, usually your agency agreement is your railroad or your motor carrier or whatever it happens to be. He has an agreement with an agent, where an agent provides maybe pick up a freight, loading it on its facilities. He's paid a fee for that.

THE CHAIRMAN: Let me ask you a question. Would the activity conducted by Coastal, if it were conducted by the railroad, be an activity that would be exempt from local regulation?

MR. JORDAN: Yes.

THE CHAIRMAN: It would.

MR. JORDAN: Well, not entirely. I mean, there's always this residue of potential regulation by local authorities, but it can't interfere. I mean, if you're just talking about safety, for example, or something of that nature, a local rule, local law would not interfere with that. But if it was something that they can't use the yard because of some reason, then you've got a different -- then you have a burden on transportation.

THE CHAIRMAN: So the answer is that if the activity conducted by Coastal were being conducted by the railroad itself, the local regulation would be an interference and therefore not permitted.

MR. JORDAN: If, I don't think in this case, even though it would be exempt, technically. What you're trying to do here is comply with your local zoning regulations, would not be such a burden on that transportation if you still couldn't do it. But I mean that's not an issue you have here.

railroad and railroad operation, we're preempted, and then the issue would become is that an unreasonable burden on this operation. If it is not, then maybe the stop order is a little different, but if it is not then you still may do that. That West Palm Beach case goes into that in great detail.

THE CHAIRMAN: What would be your opinion on that question?

MR. JORDAN: I think that you still have the authority to do it, would be my view.

THE CHAIRMAN: All right. Let's go ahead, I didn't mean to interrupt.

MR. JORDAN: But again, we're looking at, the key here from their standpoint is everything they say, oh, we're the agent, we're the agent. An agent is what you do, it's not what you call it. And as I say, the transaction here, all the financial burden, everything else is on Coastal, and Coastal has all the profit, and when you have an arrangement with an agent you don't normally give all the profit to the agent. The agent dictates this operation, the agent

controls this traffic, it's the agency, you know, what they're saying is the agent, and it's really, as the opening page of that agreement says, they're a contractor. Not an agent. They're a contractor. They're independent, they're on their own. For that reason there isn't any exemption available to them. And you have the authority in those circumstances to enforce your orders.

Now, as I said, I don't, since counsel has already gone through some of the criteria of what's defective in that agreement I'm not going to go over those, except that it seemed pretty clear that from the standpoint of control, from the standpoint of revenue and that's generated, who runs the operation, it's not New York Atlantic, it's Coastal. And it cannot do that unless it has proper authority. And since it doesn't as a carrier, there's no exemption.

MR. JORDAN: Thank you.

THE CHAIRMAN: Thank you, sir.

Any questions?

All right. Thank you again.

Mr. Cuthbertson?

MR. CUTHBERTSON: Just to conclude, Mr. D'Amaro, the Hi Tech decision, the Third Circuit case, the most recent decision I think had a very important statement albeit it a footnote, and the court says that the party cannot contractually determine whether they're a rail carrier. So in many respects the piece of paper is irrelevant. It's how they conduct their operation.

So we would say to you, members of the board, that even the way their operation is conducted it's clear they're not an agent, that New York Atlantic has no control. But in addition, if you look at the piece of paper that they've submitted, their contractual relationship is still one that they've agreed to be bound by, they both have written this contract, is one where Coastal, excuse me, New York Atlantic does not have control. What they've put before you as an exhibit is an example of New York Atlantic not having control. Mr. Jordan talked about it, I think we talked about it very forcefully in the brief so I'm not going to

go through the details of it.

To conclude, I said that the agency agreement was disingenuous. I have to tell you that based on the surveillance that was done, they out and out, Coastal, didn't tell the truth at the first hearing that you had, and I want to just read you a couple of excerpts and I'll sit down.

On page 83 of the transcript they said, "Presently we're only taking materials that go through transfer stations where it's presorted and we have a very clear understanding with these transfer stations as to what we will accept and may not accept. We are not taking individuals that may have a truckload or just an unauthorized truck. We're not a transfer station at all."

Clearly not true. Roofing company bringing materials directly to the site, not coming from a transfer station.

Page 84 of the transcript they say, "We're not doing any sorting at the site."

Again, in response to a question from Mr. Gaughran, page 103 of the transcript they affirm again that they're only accepting

materials from other transfer stations. I'm reminded of an old saying, and the old saying is that trust is the coin of the realm, and in this realm you need trust. That's the currency that matters in government. When Mr. D'Amaro asks people to come up here and put up their right hand and swear that they're going to tell the truth, it means something. Because you can't go out and investigate everyone's operations. You have to rely on the truth of the statements that they're making. You can't trust what they've told you about their relationship, you can't trust what they say their operation is. But even if you did trust them, you can't approve this application on the merits.

We believe the law is clear, it will take some time, you have able counsel, I'm sure they'll sort through the briefs, but when you look at this on the merits I think you'll see that the exemption does not apply. Frankly, it's an important case because it sets a tremendous precedent. I remember hearing that Supervisor Bellone weighed in with a memo on this, I would imagine that he

doesn't do that very often, but the precedent that it would set to allow this type of activity along the rail line throughout the Town of Babylon is a troubling one, especially when the position is taken that you can't regulate us, you can't look at the environmental impact, even though we're going to bring thousands of trucks with New York City garbage onto your roadways in order to make a profit.

So thank you, very much, Mr. Chairman, for this adjourned hearing, and witnesses are still available with any other questions you may have.

THE CHAIRMAN: All right, very good. Thank you, Mr. Cuthbertson, we appreciate all the testimony so far.

And Mr. Gaughran, at this time -- just before you come up is there anyone else who would like to address the board other than the applicant at this time?

MR. GAUGHRAN: Hold on.

THE CHAIRMAN: Okay, take your time.

MR. GAUGHRAN: A couple of minutes?

THE CHAIRMAN: Sure, no problem.

Absolutely. We'll take a two-minute break.

(Brief recess)

MR. GAUGHRAN: I do have some comments to make, but I would like to ask Mr. McHugh if he could first specifically address the exemption issues.

THE CHAIRMAN: Sure.

MR. McHUGH: Yes, I would like to just go over these briefly, in response to the gentleman from Washington.

THE CHAIRMAN: Okay, no problem. We need to first ask you to state your full name and address.

MR. McHUGH: I'm John F. McHugh. My address is 6 Water Street, New York, New York 10004, and I think my resume was handed up the last time I was here. I have not been in the railroad industry as long as my opponent has, but I've been here a while.

THE CHAIRMAN: We do recall you being here the last time, thanks for coming back. We appreciate it.

Please raise your right hand.

(John McHugh was duly sworn as a witness.)

MR. GAUGHRAN: He's an attorney too.
THE CHAIRMAN: Oh, I apologize, sorry about that.
MR. McHUGH: I think attorneys must do this too.
THE CHAIRMAN: Fair enough.
We did hear from you at length at the prior hearing. I'm not going to discourage you from speaking your mind here this evening, but just please be mindful of the fact that we did hear about the exemption at the prior hearing.
MR. McHUGH: I'm just going to be responding here, I'm not going to really go into what we did before, I think that was fully covered.
I will say on the Hi Tech case the Third Circuit did come down I guess right after that hearing, or right before it, but we hadn't seen it at that point.
THE CHAIRMAN: Right.
MR. McHUGH: It did not, however, affirm the Office of Proceeding's decision, the Hi Tech case. In fact, there was a footnote in that case that the counsel for

Hi Tech had neglected to note to the Third Circuit Court that the Office of Proceedings had determined that Hi Tech was not a rail carrier. It was determined not to be a rail carrier because it did not have a sufficient agreement with the Canadian Pacific Railroad, it had nothing but a license to operate that yard. And the only thing in that license that basically connected it to the Canadian Pacific Railroad, it could only operate for the purposes of loading cars to be shipped on the Canadian Pacific Railroad.

There's a huge difference between that agreement and the Coastal agreement, and yes, the Coastal agreement was modified. But before that under the old lease, Coastal was loading non-construction demolition things, it was loading telephone poles, and miscellaneous general merchandise freight, and so quite clearly there was alarm and New York & Atlantic and Coastal negotiated an agreement that would do what they intended to do properly.

And the issue in Hi Tech was by the Office of Proceedings control. It wasn't

agency per se. An agent can be a partial agent or a full agent. Agency can be, as you lawyers all know, you can define your agency and limit it, and you have to do that carefully. The issue, however, in the Hi Tech case and all the railroad cases is not agency or ownership, it is control. The activities on the site have to be controlled in some fashion or other. And in the New York & Atlantic contract, the New York & Atlantic has paragraph after paragraph of items where it controls, it has the right to control all of Coastal's activities. If Coastal wants to bring a new product onto the railroad it has to get the railroad's approval to do it. The railroad has the right to move stuff around on the property, yes. They cannot unreasonably interfere with Coastal's activity because Coastal has certain parameters it has to meet to meet its obligations under the contract, so you can't have that in a contract and then take action to shut the guy down. So it's all reasonable. But the fact is the railroad has ownership of the property, the right to use

the property, and the right to move stuff around on the property as it wishes to, it has the right to oversee absolutely everything Coastal does, has the right to audit its books.

Now, he says that the railroad doesn't get paid. The railroad does get paid a per car charge and the railroad also gets its freight. The entire purpose of having anybody on this property, and they had tried other people before, they actually tried CSX, a major railroad had this as its terminal for a period of time and because it didn't have the marketing interest in Long Island it didn't ship anything. So this was given to Coastal as agent for the railroad to try and get freight onto the railroad, and it is working, and it didn't work for the first year or two under the lease because they just got a few shipments, but now it's starting to work and they have made their agreement very clearly that the Long Island Railroad has control.

Now, counsel has cited three cases. There's a case in Massachusetts, there's a

case in Washington state. The Milford case is a case where a steel fabricator had leased property from a railroad and the railroad, not the steel fabricator, was looking for an exemption. The steel fabricator didn't show up. The Office of the Surface Transportation Board deemed that not to be a railroad operation because it was an industrial operation, the only relationship was a lease from the railroad. It was a short line railroad and they just didn't want this customer kicked off the land. But the shipper never showed up at the hearing. So that case doesn't have a lot of significance because it was a no-show.

The West Palm Beach case was the Florida East Coast Railroad had leased space to an aggregate dealer. The aggregate dealer was shipping, was not operating as a common carrier, he was handling only his own freight, Milford also, they were only handling their own materials, they weren't handling other materials.

The only case that's even close is Hi Tech and that was there was no control.

Here you have the Long Island Railroad has full control. Under the operating agreement with the Long Island Railroad, Coastal is obligated to be a common carrier. In other words, anybody who offers freight has to be considered. Now, Long Island Railroad has the right to refuse but not really. Because a common carrier must ship anything that's presented to it that's legal and they must give them a rate. Now, they can fiddle with that rate and they can do all kinds of things to try and keep people off the railroad, but they must be reasonable and if they refuse to do it they are subject to the jurisdiction of the Surface Transportation Board.

Now, we're having this wonderful argument today as to whether Coastal is a common carrier, is a transportation company. Now, unfortunately, that is an issue that can only be finally decided by the Surface Transportation Board. And what happens when you go to federal court, and it has happened in Massachusetts when somebody was challenging an automobile reload facility for the Guilford system up there, the court

deferred to the Surface Transportation Board to answer these questions.

Now, counsel says that you do have some jurisdiction over the railroad and that's absolutely correct. The railroad is exempt from any licensing requirement, and unfortunately the document we're dealing with there is the failure to get licensed to submit plans. You do have the authority to enforce your building regulations, you can enforce your fire regulations, you can enforce all the standards you would apply to any building, and that has been upheld throughout. You have police authority to enforce standards and to keep anything from being a nuisance. Now, if the operation is a nuisance you have police authority to do something about it.

But at this point I know that I have entered a new realm when somebody who is running an asphalt plant comes in to complain about dust.

But any rate, as to the Surface Transportation, I disagree with my fellow colleague who practices before the board, but

this is clearly a transportation-related facility, it's transportation under the ICC Termination Act, and there is sufficient control that this is an operation of the Long Island Railroad and it is also an agency for limited purposes also. So, but I think that we should probably brief those cases for you and make sure that you have the entire case and the interpretations that have come down. And there are other cases pending around the country which will be coming down in the next few weeks which will also be useful, so we probably should put this off and unfortunately you're being handed a very major case here in a very casual way.

THE CHAIRMAN: Well, if a higher jurisdiction or a preemptive jurisdiction should decide the issue, we'll be the first to abide by it, that's fine, but they have not decided that issue in this case, so as you're pointing out we need to make that decision, because it is our building inspector that issued the stop work order. So these definitions and these cases are highly relevant, because we are, I guess as a

town that has a permitting process for different operations in the town where they talk about a public garage or loading material onto railroad cars, that does impact the quality of life in the town, it does impact the environment within the town and how it's impacted, what's happening, what's going on the ground and things like that, so, you know, it's, we're hearing both sides and that's the purpose of having those hearings, is that we really need to hone in on in the first instance whether or not this board and even the municipality has this jurisdiction to proceed along this path. And we're going to render a decision, but I would expect either way, however we decide, that this will ultimately be taken to some other authority that's going decide that under federal law, I'm going to assume that's where this is going.

MR. McHUGH: Probably.

THE CHAIRMAN: Yeah. Okay. Thank you. Mr. Gaughran?

MR. GAUGHRAN: Yes, good hearing. Mr. Chairman, members of the board, just had

a couple of questions. There were a bunch of documents that --

MR. McHUGH: I've been asked to clarify. I apparently referred to the Long Island Railroad, it's New York & Atlantic.

THE CHAIRMAN: Yes.

MR. McHUGH: Please have the record modified, it's always New York & Atlantic.

THE CHAIRMAN: So noted, yes, we understand. Thank you.

MR. GAUGHRAN: Mr. Cuthbertson submitted a number of documents which I have not had the opportunity, I believe, to review, so there may be some information contained within those documents that I may --

MR. CUTHBERTSON: -- live testimony to you.

MR. GAUGHRAN: And I don't want to get into the issue of us giving you affidavits and then we're back at square one. I just don't know what was submitted except I do have a couple of questions.

Mr. Cuthbertson, that's why I asked you before, if there had been anything submitted since the last hearing. At the

last hearing there was a memorandum of law that was submitted by myself, there was a memorandum of law that was submitted by Mr. Armentano. Then the board had, basically on the recommendation of the town attorney had suggested, you know, that we could submit some replies. I submitted a reply and it was accepted, but I believe Mr. Armentano's reply was not accepted. I guess my only question is is that reply memorandum of law part of this record? I'm not objecting to it being, I just don't know if it is or not.

THE CHAIRMAN: Did we send him back a reply or not?

(Discussion held amongst the board members.)

THE CHAIRMAN: Mr. Gaughran, what's the basis of your belief that the reply memorandum was rejected? I thought we had just sent back the affidavits because I think the record was held open so we could have some briefing back and forth.

MR. GAUGHRAN: I thought the letter also rejected that. I do not object to that being part of your record. I think it's

important and I think it's relevant. I'm just trying to clarify for my own mind whether or not it is part of the record.

THE CHAIRMAN: Well, especially since you don't object to it being made part of the record, we'll include it.

MR. GAUGHRAN: Okay.

THE CHAIRMAN: If it was rejected we'll put it back in.

MR. GAUGHRAN: Just for my own response I need to know whether or not it is a part of the record. And from looking at what Mr. Weinschenk just gave me, it appears that what Mr. Cuthbertson submitted tonight is the affidavit of James Murphy sworn to on September 23rd, so I believe that is the same affidavit that was originally submitted by Mr. Armentano, rejected, and is now back here?

THE CHAIRMAN: I don't know.

MR. GAUGHRAN: Correct?

MR. CUTHBERTSON: Correct. All of those back in.

MR. GAUGHRAN: Okay. All right. I will -- first of all, on the issue of going

to the Surface Transportation Board, I think that has been discussed over and over, but I want to reiterate to this board and to this microphone with the town attorney present that my client stands ready, willing, and able to allow officials from the Town of Huntington to come to the site, review the site, ask whatever questions they want and look at exactly what we're doing so that you have a level of comfort or that the town as a whole has a level of comfort that we are a transload facility.

I'd just like to respond briefly to some of what has been said here.

THE CHAIRMAN: Just so the record is clear, I think you were referencing the Town of Babylon.

MR. GAUGHRAN: Town of Babylon, yes. What did I say?

THE CHAIRMAN: Huntington.

MR. GAUGHRAN: Did I say Huntington? Uh-oh. Well, that's because he's here.

Anyway, the affidavit of Mr. Murphy, which I now confirm is the same affidavit that we had before, if you look at it very

carefully, I do not dispute Mr. Murphy's qualifications, but --

THE CHAIRMAN: Mr. Gaughran, I'm sorry to interrupt you, I just have to tell you though that it would almost not be appropriate for anyone, you're saying for the town to go down and visit the site and make a determination, but I think we're past that.

MR. GAUGHRAN: But I wasn't referring to this board, I was referring to the, which I don't know if your rules would permit that anyway, I was more referring to officials in the Town of Babylon that may have concerns about the site. We are, you know, have expressed over and over again a willingness to let them come in and see what's going on.

THE CHAIRMAN: That's fine and I appreciate that, but that's separate and distinct from anything that's going to be communicated to this board --

MR. GAUGHRAN: No, I understand.

THE CHAIRMAN: -- and I really have to be protective of the record here because I don't want to go through this constant

defensive posture that, you know, something came in and we never --

MR. GAUGHRAN: No, I understand.

THE CHAIRMAN: I don't want to go through all that.

MR. GAUGHRAN: I understand.

Mr. Murphy's affidavit, I have no doubt he is a distinguished former FBI agent, but I have read this affidavit several times and the report that he has attached to it, and from what I'm reading Mr. Murphy himself personally, who is the only person who swore to this affidavit and he's the only person involved in this report who appeared in this hearing, did not witness anything whatsoever concerning the site as it relates to this report. He is talking about a report that is attached to it, the report itself is not signed by anybody, it is totally referencing observations that were made by four people he claims to be agents by the names of Bob Rothschild, Rich Merlino, Joe Jablonski, and Darren Lane, none of whom appeared before you, signed the statement, certainly it's not a sworn statement, so I really believe the

relevance, I mean, obviously as a board you have the right to give the evidence whatever weight you deem valid. I don't believe it is valid whatsoever. We don't know who these people are, we don't know what their qualifications are, we don't know quite frankly even if they exist. And they aren't here to present this before you.

And one of the conclusions that Mr. Murphy comes to based on his I guess field agent's report is that AJ Recycling is not a valid transfer station licensed by the state of, by the Department of Environmental Conservation. Well, I took two minutes on Google today after I looked at this report again, and I would like to submit to you what I found on Google. It was, you know, I'm not a private investigator, but with all of two minutes I was able to determine that they are, and I'd just point to that as an example because I don't believe this affidavit nor the testimony is of any relevance to the proceeding. If I could just present this.

MR. KANE: Mr. Gaughran, can I just ask you a question, please?

MR. GAUGHRAN: Yes.

MR. KANE: Is Coastal taking in C and D materials from New York City?

MR. GAUGHRAN: Yeah, I'm going to get to that, okay?

We as an agent of New York & Atlantic, we do not have the choice, we have an obligation under the law to accept legally whatever a customer wants to bring that they contract to accept. There is -- we can't discriminate. You cannot discriminate, it's interstate commerce. You can't discriminate based on where somebody is coming from and what they're having. And that was part of our record at the last hearing.

The other thing is it's not just construction and demolition material, as we testified at the prior hearing. Other materials have been transloaded, and also at the prior hearing my client testified to, and it's become even more evident since that they are constantly getting phone calls from other businesses who have other types of commodities that they would like to transload

but they cannot enter into relationships to do that right now until the issue before this board and perhaps other levels of government are concluded, it's just a practical situation.

MR. KANE: It seems to me then one of the purposes of this whole thing was to take trucks off the road. If we're taking trucks off the record, it don't seem like we're taking trucks off the road if we're bringing stuff in from New York and sending those trucks back and forth again.

MR. GAUGHRAN: Some of it is coming from New York and a lot is coming from here. But we can't discriminate. We can't tell people that they can't come here.

MR. KANE: Okay.

MR. GAUGHRAN: I mean, I think we have presented and we could testify again as to where this stuff is coming from, but I think we have testified that where the significant, or the significant bulk of this is coming from the Long Island area, but yes, we have to take stuff and I guess if somebody figures they can, you know, bring it here and

if it's worth their doing it they do it and we have no choice in terms of, you know, what Mr. Posillico and others have called sorting and et cetera. We presented testimony to you at the last hearing that that's the way you have to transload this C and D material. It has to be put on the floor so it can be put in the cars and not tip the cars over, that's just what was prior testimony that we have presented.

THE CHAIRMAN: Right. I think Mr. Gaughran, the prior hearing you were establishing that you are truly transloading as opposed to transferring, and so that your activity was limited to transloading and you explained why it was being done the way it was being done on site, it still fell within the definition of transloading activity which gets you into the railroad activity which gets you to the exemption. I thing that's where you went with that.

MR. GAUGHRAN: And the reason I asked about Mr. Armentano's reply affirmation is because I just wanted to point out to this board's attention that he relies on Surface

Transportation Board decisions in making his arguments about the facts. We don't agree with his conclusions about those decisions, but Pinelawn themselves realized that the Surface Transportation Board is a venue where you have to decide factual issues such as what we have before us tonight. They've been in operation for a while now, they've been in operation for a little bit longer since the last hearing. I asked if there were any complaints that had been filed. We heard tonight from Pinelawn and their witnesses, and based on the record I presume anything that comes into the town complaining about this facility under your code would automatically come before this board for your attention. There are no complaints. Because I believe my clients are running a facility that is working well. Also, again, this is not a new operation for use of this property. This has been operated as a railroad yard. In fact, Mr. Posillico himself testified tonight that all the years he has been observing this site he has been observing transloading operations. So, and as we

testified at the prior hearing this use as a railroad facility, including transloading materials, has basically been going on for one hundred years.

Just bear with me a second, I just want to see if --

Mr. Posillico testified about some documents submitted by Mr. Flanagan. I don't know if that was just a mistake or --

MR. CUTHBERTSON: Let me just state for the record, John Flanagan is another lawyer and I think he just --

MR. GAUGHRAN: Okay, fine.

MR. CUTHBERTSON: -- and he was talking about --

MR. GAUGHRAN: Then strike that. Okay. Okay.

THE CHAIRMAN: Mr. Gaughran, I have another question, as long as we're here just discussing this on and on and on. Two things; one I really do not want to have a further continuation of this hearing. I think that we've fully heard all the issues.

MR. GAUGHRAN: I have no --

THE CHAIRMAN: I am very loathe at

this point to say let's just keep it open even for a limited purpose of exchanging and responding.

MR. GAUGHRAN: Well, but I would like to, you know, there was one of the gentlemen here who testified, I think he just left, I forget his name, one of the other investigators. He submitted some report. I haven't seen that. I don't know what's in it.

MR. KANE: We haven't seen it either, it just came in.

MR. GAUGHRAN: Right, but I'm saying it was submitted to you and Mr. Cuthbertson made it clear that for the purposes of moving this hearing along he was just going to basically have him testify, he basically just testified I did this investigation, I swear to this report, gave it to you. I don't know what's in it.

THE CHAIRMAN: Everyone is entitled to make their own presentation and submit whatever evidence and testimony they have. We try to accommodate by allowing responses back and forth, but frankly, I have to cut

that off at some point, I just have to do that.

MR. GAUGHRAN: Okay. But if you rely on any evidence contained within there that is inaccurate and I can refute, then -- well, I guess that's your prerogative as a board.

THE CHAIRMAN: It's just that, you know, again, I don't want to -- how dire a need is it for you to have the record open or to respond to anything further?

MR. GAUGHRAN: You know, you could keep it open for a week and allow me the opportunity to look at what was submitted that I haven't had a chance to see and maybe I could answer it quickly. I can't answer that question because I don't know what's in it. And he was referring to, Mr. Cuthbertson also referred to a press release and a Surface Transportation Board meeting, I mean, I'd like to look into that and respond.

If I could just finish. Just also for the record, reiterate New York & Atlantic and the MTA consented to this application and New York & Atlantic participated in the

original hearing with the testimony of Mr. Krebs. I think we have met our standard. We're entitled to this exemption and we, you know, if the town feels, not you, but if the town feels there are things they want to look at we're obligated under federal law to have them come in and look at it and try to accommodate wherever we can, but it's an operation we believe we're entitled to continue.

THE CHAIRMAN: All right. Now, the other question I had was is there anything precluding any interested party or the applicant from going to that Surface Transportation Board at this time?

MR. GAUGHRAN: Let me defer that.

Do you need to exhaust this venue before you --

MR. McHUGH: Yes, under the Juenger decision, when a proceeding like this is started, it has to end before we can go to any federal jurisdiction. You, however, could ask for an opinion of the board. You're in the process, that's done all the time by courts all over the country, they do

send requests for an advisory opinion of the board, and there is an office down there that does nothing but that. So that can be done.

THE CHAIRMAN: Is there anything else you want to add?

MR. GAUGHRAN: Well, so I guess my question is that you would prefer not to keep the hearing open.

THE CHAIRMAN: Well, what I would like to do is your primary concern is some of the documentation that was submitted?

MR. GAUGHRAN: My concern is about the unknown, stuff I haven't read I can't respond to. And if it's part of this record, and I know this is dragging on, but I know this board, having been down here many times is very concerned about this case and is going backwards and forwards to make sure that everybody is given a fair opportunity and that a very reasoned decision is made. All I'm saying is that this is out there, I have no idea what's contained within some of these documents, and if you're going to rely on it I think I should have the -- you should have the opportunity to have information that

may contradict it or explain it.

THE CHAIRMAN: Why don't we do this.

Mr. Cuthbertson. Did you have any thoughts on that?

MR. CUTHBERTSON: Yeah, I think there are two documents that essentially were new that Mr. Gaughran is referencing, one is this surveillance agreement, the other is this press release, an agreement with the Borough of Queens and New York Atlantic about not having a transfer station. If his response, and again, it's the board's prerogative, but as a suggestion, if his response were limited to those two documents just where he wants to respond well then, I mean, we certainly think that's reasonable and if the board is so inclined we have no objection.

MR. GAUGHRAN: Those are the only two documents?

MR. CUTHBERTSON: The reply memo is the same that was submitted, the affidavits are the same, and I believe that's it.

MR. GAUGHRAN: Did you give me the --

MR. CUTHBERTSON: No, I, the Farrell Fritz reply memorandum ...

THE CHAIRMAN: All right. I think what I'd like to do or propose is I really want to err on the side of giving everyone what they perceive to be a full and fair opportunity, so I think we should allow Mr. Gaughran an opportunity to at least respond to anything new that's been presented here this evening. I think that's appropriate. But we have to put a limit on that. Okay? So what I'd like to propose -- can you identify now the specific documents that you need to respond to?

MR. GAUGHRAN: I believe the only -- could I see the --

THE CHAIRMAN: Yeah. Who has the whole set?

FEMALE VOICE: We gave you the whole set.

MR. GAUGHRAN: You gave me the whole packet?

FEMALE VOICE: Yeah.

MR. GAUGHRAN: Now I've mixed it all up.

The Posillico affidavit I've seen, the Murphy affidavit I've obviously seen, this press release and packet I have not, Mr. Jordan's resume, well, I don't contest his forty years of experience. I do differ with his opinion. This report, I guess this is the other gentleman's report. So the surveillance report that appears to be unsigned I have not seen and this press release.

MR. McHUGH: The one by Queens County.

MR. GAUGHRAN: Yeah, that's --

These two documents, that would be sufficient. Now, I don't know if you want to give me the time to present live testimony to respond to it or do you want me to just do it in writing. You know, I don't know if I have to present anything factually to respond to this. I may need to ...

(Discussion amongst the board members.)

THE CHAIRMAN: All right. I think what we've --

MR. GAUGHRAN: I was just going to

say, I think with reference to this press release, Mr. McHugh is a quick read, so he can respond.

MR. McHUGH: Don't have to be a quick read, I was there.

This is what we call a mitigation. In the process of going for an application before the board sometimes you get objections and the carriers tend to make agreements to mitigate the resistance, essentially, and unfortunately New York & Atlantic was a little too ready to do these things.

This was a deal with the Borough President of Queens County. It has expired. It is not the reason trucks are coming out here. There are lots of transfer stations in Queens County. The reason trucks are coming here temporarily is because the idea of putting waste on rail is relatively new, it is moving very slowly, and when the people who are in the business find out there is a rail facility they go to it. And the reason they go to it is if they can't go to it they have to drive to Ohio. And the difference is coming out here thirty miles which is a

temporary inconvenience or going 800 miles to Ohio. And so the choice to them is relatively easy.

This has expired, it was a short-term deal so that there wouldn't be a plethora of this kind of activity, and it prevented the New York & Atlantic Railroad from moving waste through Queens County. The tragedy at the time was that Long Island did not object. Because by doing that they made sure that all waste on Long Island would remain on the highway for a period of time because you can't get out of Long Island without going through Queens County by rail. So this was a deal, not in my back yard, and this is exactly what we don't want nationally. It shouldn't happen, but it did happen before the Surface Transportation Board, and it happened because nobody objected to it. So I thank you for that.

THE CHAIRMAN: Very good.

MR. GAUGHRAN: I think then I will call Mr. Sternberg to testify and answer to some of these questions, because maybe I can continue to read this document and we can

deal with some of these issues of, you know, where trucks are coming from and operations and from the --

THE CHAIRMAN: Is there a chance here this evening that we won't need to get into the reply situation? Is that what you're saying?

MR. GAUGHRAN: That's what, I'm going to read this while -- I'm going to ask Mr. Sternberg to come up and, he had testified at the last hearing, but you have to swear him again.

THE CHAIRMAN: Sure, welcome.

MR. STERNBERG: Good evening, Chairperson, members of the board. Want me to swear in?

THE CHAIRMAN: I want you to state your full name and address.

MR. STERNBERG: Martin Sternberg, 8 Woods Crossing, Brookville, New York.

THE CHAIRMAN: Mr. Sternberg, welcome, and please raise your right hand.

(Martin Sternberg was duly sworn as a witness.)

THE CHAIRMAN: Please go ahead.

MR. STERNBERG: Gentlemen, firstly, before I answer some of these issues that came up, Mr. Cuthbertson alluded that the gentlemen that we brought here in the last hearing came before you, raised their hand and swore in to tell the truth and that they were lying, and I think he owes this board an apology and certainly the professionals who came before you at the last hearing.

So having said that, let me say that the materials that we bring in by truck are normally trucked either out of state or out to Brookhaven or to the 110 Sand location off of 110, so that in many, many cases what we look at and what the federal government is looking at and the State of New York is looking at is to cut down on the mileage that trucks travel to either deliver or to dispose of whatever materials they carry. And this type of a transload facility is exactly what achieves that. Most of your trucks that enter Long Island from the city and normally it's Queens or Brooklyn, the Bronx, travel to Brookhaven, another 30 miles, at least 30 miles beyond Route 110, and 30 back. It's 60

miles.

THE CHAIRMAN: I think we heard this testimony before.

MR. STERNBERG: Yeah. Other trucks that come impact coming through the 110 Sand area, 110 there's another landfill, excuse me, operation off of 110, west of 110. So that the impact to the area is no more or no less. What we're looking at here is saving precious fuel in an exerted effort by all the states to start to use more rail and less truck.

That's all I have to say.

THE CHAIRMAN: Thank you.

MR. GAUGHRAN: Now I'd like to call on Mr. Joseph Rutigliano to testify also as a principal of Coastal.

MR. RUTIGLIANO: Hi, Joseph Rutigliano, 2596 National Drive, Brooklyn, New York.

THE CHAIRMAN: Okay. Please raise your right hand.

(Joseph Rutigliano was duly sworn as a witness.)

THE CHAIRMAN: And just for the

record, what is your connection to the applicant?

MR. RUTIGLIANO: I'm a member of Coastal Distribution, it's an LLC.

THE CHAIRMAN: Very good. Go ahead.

MR. RUTIGLIANO: I'm an original member.

Just to address the board, this process that we're on now was started, I wasn't at the last hearing but I did read it, everything we did always in the Town of Babylon was either with the Town of Babylon's either approval or asked for approval and then was given letters, as you know, in the past, that the town had no jurisdiction. Throughout this whole process, the town, Tim Bessemer, Mr. Casserly, right down the line had been well aware of what Coastal was intending to do. I believe even your supervisor prior to becoming your supervisor had meetings with me, Mr. Horsley had meetings with me. Talking about an uncomfortable feeling, being here today fighting for our life, basically, several millions of dollars invested, maybe we

wouldn't have made the investment, but we clearly made our investment and plotted all of our plans with the Town of Babylon fully aware. So the claim that we just appeared or popped up, I'm upset about that because it seems to be humorous at certain points, humorous, my money, our money is on the line here. That's not humor. I see a lot of people look at their watch, I'll stay here until 4 a.m. For the amount of dollars invested I think I have to stay until 4 a.m.

THE CHAIRMAN: We appreciate that.

MR. RUTIGLIANO: So that's the problem here.

THE CHAIRMAN: But you know what? The issue here, I cannot speak or I don't think any board member here can speak to what happened previously with other town officials. But we are here and we cannot refuse to hear this issue of whether or not, in fact, this stop work order was properly issued and if we have jurisdiction to do it. We have to go through this process.

MR. RUTIGLIANO: I'm okay with the process. Actually, I am. I'm paying.

But to go and find the truth, as counsel here said, the truth needs to be found, it's the basis of everything. The truth is gotten maybe in another venue, if that's what we choose to seek. If we don't choose to seek the truth a lot of people up here, and questions to be asked. I heard a few good questions, only the answers weren't coming the right way. The testimony from the gentleman, the investigator, a significant amount of trucks are generated from Long Island, from right down the road. I mean, an importer of waste? Babylon is an importer of waste. Don't you import ash from Huntington? I mean isn't 110 Sand importing waste from the city. And that resides here, that will be here forever. So, and the truck trips, the methodology how it was gotten to, it's rail trips and I could do the math with you and show that the truck volume is significantly less. We're currently operating at I would say a 40 or 50 percent capacity, with 30, 35 truck trips a day happening in ten hours, that's 3.5.

Mr. Posillico comes here, every ton

of asphalt he manufactures, his ingredients are first delivered by truck, then trucked out. We offered him a rail opportunity. I guess, you know, our personalities clashed, which is why he was here today and couldn't make eye contact with me, I was at many meetings with him. He's a major truck violator. He used both --

THE CHAIRMAN: This is not the purpose of this hearing.

MR. RUTIGLIANO: He used -- I know it's not the purpose, I need to vent.

THE CHAIRMAN: We're not here to vent, sir.

MR. RUTIGLIANO: He used buzz words like lead -- well, sorry.

THE CHAIRMAN: We're not here to vent, sir.

MR. RUTIGLIANO: -- trucks in the area --

THE CHAIRMAN: I want to finish speaking.

MR. RUTIGLIANO: Trucks that's in the area --

THE CHAIRMAN: Sir, I want to finish

speaking. Now, I understand you have a very major vested interest in this project.

MR. RUTIGLIANO: Okay.

THE CHAIRMAN: But we also have to protect our record and make sure we only hear what's relevant or at least what we deem is relevant.

MR. RUTIGLIANO: Okay.

THE CHAIRMAN: So I'm not trying to cut you off, but I do have to stick to this issue about whether or not this board has jurisdiction. We're trying to do that here. It's to your benefit and to everyone else's benefit as well.

MR. RUTIGLIANO: Okay, I agree we'll see if this board has jurisdiction and then we'll go to other venues if needed.

But as we come to the truck trips, let me refute that. The volume of trucks, New York & Atlantic in negotiating the agreement has put some hurdles, we'll call it volume, car volume hurdles for us to get over. That's for Coastal to represent. Currently right now Coastal represents about 800 car trips of Long Island Railroad ballast

stone. There's a mechanism by which that will be credited, that never stops at the facility. That material comes down from a quarry upstate, that we've arranged to get Long Island Railroad their ballast by rail, which used to come by truck onto Long Island. This is clearly, comes off the governor's mandate to get trucks off the road.

We're not bringing more trucks on the road. The trucks that are coming into the area are in the area. A lot of them leave our facility and might go and do some work down the road hauling sand back off Long Island, so it's kind of a good synergy with things that are happening. To look at it and say, well, it's 40,000 truck trips, not in my back yard, wouldn't have happened in our area, you have the rail spur and I understand the Town of Babylon says well, maybe it'll happen on every corner. There is no other team track or commercial rail owned by New York & Atlantic or controlled by New York & Atlantic in the Town of Babylon for this to happen on. A commercial rail spur that simply goes into a building on private

property is a private rail spur. And initially I think that was the argument that was coming, that maybe it's Pinelawn property and not rail property. It's rail property and that's even being argued right now in another venue, we'll be conferencing that case with the judge next week.

So this case has taken on many facets, all provoked by Pinelawn, and we're hearing them and expending the dollars to hear them. So I grant it, your board has to do, but if it's the seeking of the truth why don't we go to the powers that have this record, the Surface Transportation Board, if not the federal circuit.

THE CHAIRMAN: Well, I think your own expert testified that you need to go through this process first before it can go up to that board.

MR. RUTIGLIANO: I think, John McHugh, we need to exhaust this process, is that this, or can this board --

MR. McHUGH: We can't go to the --

MR. RUTIGLIANO: Could this board go to the --

MR. McHUGH: The board can go to the Surface Transportation Board.

MR. RUTIGLIANO: Okay. That's what I'm getting to. The board can go, if it's truly seeking of truth, go and seek it. That's all I really have to say.

THE CHAIRMAN: Well, I think we're competent and capable of doing that as well. So I take your point, but --

MR. RUTIGLIANO: Well, you know, before this conversation that even if your decision by either party will be appealed to another venue, why not eliminate that step and go to that venue.

THE CHAIRMAN: Yeah, it was a question that I had asked, but also I think that we should be very cautious before we allow any other agency or body to determine what we as a town or a zoning board has jurisdiction over, and I think we can make that decision as well, but it may be something that we want to take a look at as well. You know, I would like --

MR. RUTIGLIANO: I appreciate the chance to speak before you, I apologize for

getting a little testy.

THE CHAIRMAN: No, it's all right. I want to ask you a question before you go.

Did you negotiate the agency agreement, what you termed the agency agreement with the railroad?

MR. RUTIGLIANO: Yes.

THE CHAIRMAN: You did. You had personal involvement with that?

MR. RUTIGLIANO: Yes.

THE CHAIRMAN: When was that agency agreement actually put into place, roughly?

MR. RUTIGLIANO: I don't recall the date. It was six months ago.

Does that sound right?

Yeah, I'll rely on their dates. The document is dated, so the document speaks --

THE CHAIRMAN: Yeah, okay, whatever it, so roughly it's --

MR. GAUGHRAN: August 5th.

MR. RUTIGLIANO: August 5th? I know it was prior to any commencement of operations at the facility, so it predates the operations as today with the facility.

THE CHAIRMAN: Now, prior to that

agreement, which is a relatively new agreement, was Coastal at the site?

MR. RUTIGLIANO: Coastal was at the site, we were upgrading the site, upgrading fence, track, putting in new structure.

THE CHAIRMAN: Now, you don't own the property that your operation sits on, is that correct?

MR. RUTIGLIANO: No.

THE CHAIRMAN: Were you a tenant at the site?

MR. RUTIGLIANO: At that point I believe we were operating under a lease agreement, that's how we gained access to the site.

THE CHAIRMAN: Okay, a lease agreement. Why -- is the lease agreement still valid and existing now?

MR. RUTIGLIANO: No, I believe the lease agreement in that document has been replaced by the license, by the agency agreement.

THE CHAIRMAN: And what prompted you to go from the lease agreement to replace it with the agency agreement?

MR. RUTIGLIANO: Advice of counsel.
THE CHAIRMAN: So what, what convinced you?
MR. RUTIGLIANO: Well, back in March, I think, around Easter of last year, we were served with some documents from Pinelawn.
MR. GAUGHRAN: I think Mr. McHugh has testified to that.
MR. McHUGH: The thing that actually started the process was the railroad had leased land and there was a challenge to the railroad's legal right to do that. So there was a flaw in the title which caused everybody to be quite concerned. So that was why the process started and then the Hi Tech case came down in the process of negotiating how to get out of a mess.
MR. RUTIGLIANO: The question arised (sic), came up in March of last year, with the ownership of the land, which is way after Coastal had expended dollars in improvements --
MR. GAUGHRAN: I think this board has heard enough of that.
THE CHAIRMAN: When you made this

substantial investment in this site, did you go into this believing that in fact you were operating as a carrier and that carried the protection or exemption from compliance with the local municipality's licensing procedures?

MR. RUTIGLIANO: Yes, and that was even furthered by the letter proffered by the Town of Babylon when our architect submitted our drawings that the Town of Babylon has no jurisdiction, I believe it says, over the railroad property. And then again, as it metamorphosed, the railroad property was a leased property for 99 years --

THE CHAIRMAN: But you weren't operating at that time, were you?

MR. RUTIGLIANO: We were operating on a trans-ship load basis coming down in cars through the Long Island Railroad, we were operating on that. It was not actually handling the material at the facility because it wasn't ready yet.

THE CHAIRMAN: So you weren't operating at the site at the time?

MR. RUTIGLIANO: At the time of? Of

August 5th?

THE CHAIRMAN: Before you, when you were still under the lease agreement. You said you were more in a start-up mode?

MR. RUTIGLIANO: We were renovating the facility, that took some time. We started that in 2002, I think we submitted plans to the town, by the time things were delivered it was August '03. August of '03.

THE CHAIRMAN: Okay.

MR. GAUGHRAN: Well, there --

MR. RUTIGLIANO: No, that was there. But that was, we testified to that. Okay.

So we were transloading commodities, but not in the volume at which we are today and the benefits of which we are today seeing, and right now there's a tremendous push by some metals, metals dealers on the Island, to put their material on rail. It would require us to invest in a single piece of handling equipment that's about $500,000 in order to magnetize the metal and put it into cars, and I'm reluctant now to sign my name to any dotted lines because of my ability to pay if I'm limited by the town.

So that's holding up right now, and that's right here, I mean, they're local vendors, some of them are right in your town that right now truck their material as far as Ohio and Indiana and realize the benefit of putting it on a railroad car 100 ton at a time as opposed to 2 ton at a time. And these are the benefits that we could bring.

THE CHAIRMAN: I don't think anyone really disputes the benefit. I think it's really a function of what is the appropriate procedure.

MR. RUTIGLIANO: And if there is an appropriate procedure to be followed we're more than happy to follow it. I really think I'm probably spending more dollars finding out what the procedure is than actually complying with the procedure.

THE CHAIRMAN: The world in which we live, you know.

MR. RUTIGLIANO: We'd be happy to comply with the procedure.

THE CHAIRMAN: All right. Thank you, sir.

MR. RUTIGLIANO: Thank you, very

much.

THE CHAIRMAN: Mr. Gaughran, anything else?

MR. GAUGHRAN: This is a final word?

THE CHAIRMAN: Well, let's discuss that.

Why don't we do this. In all fairness, you went first and they had asked for a continuation, but why don't we do this. Since you've just responded, Mr. Cuthbertson, if there's anything else you would like to add, go ahead, and then I'll allow Mr. Gaughran to conclude the hearing.

MR. CUTHBERTSON: Okay. First, I think it's an interesting notion that they can't now go to the Surface Transportation Board. New York Atlantic Railroad, their agreement with the Long Island Railroad when they became a rail carrier, and this is in documents that have been submitted to you, their transfer agreement, the agreement between New York Atlantic and Long Island Railroad specifically did not begin, the term of that agreement did not begin until Surface Transportation Board approval was in place.

So they knew that that was something they could do before they spent this money, if they were relying on the federal railroad preemption that they could have conditioned the term of this agreement upon their approval. They didn't choose to do so, and it's difficult to listen to them complain at this point that they can't go to the Surface Transportation Board because they have to go through this process.

With respect to Mr. Murphy and his agents, it's just a practical matter to get four agents to come in and testify before you, practicality is a difficult notion. He came here, he swore an oath to tell you the truth, I believe he did and I'll leave it at that.

There was a comment made that Coastal is bound to accept any commodities and that's the reason why they take some of the construction and demolition debris from outside New York. Their submission to you specifically says on page 5 that Coastal will facilitate the transfer of product from trucks and rail cars in central Long Island

within no more than 25 miles of the origin or destination of the shipment. And I did what's called a Mapquest search, and I traced the addresses, and I didn't bring that with me, I hope you'll rely on my word, the addresses in the Brooklyn and the Bronx, and they're more than 25 miles from the facility. That's their representation in their submission to you.

Lastly, with respect to the agreement that, between the Borough of Queens and New York Atlantic Railroad, the portion of this that reads terms says that "the agreement will be effective upon execution and so will remain in effect so long as a transfer agreement is in effect," and that's referencing the transfer agreement between New York Atlantic and Long Island Railroad, and then says that the MTA has to approve it. We have no information and had no information that the MTA didn't approve it and that the transfer agreement between Long Island Railroad and New York Atlantic is no longer in effect because that would undermine certainly the whole case they have to rely on

an agreement between Long Island Railroad and New York Atlantic, and thank the board for your time and your patience.

THE CHAIRMAN: Thank you.

MR. McHUGH: As the issue is essentially jurisdiction, the transaction between the New York & Atlantic Railroad and the Long Island Railroad had to be approved by the board because of the change in ownership of the railroad, the change in management of a railroad. Unfortunately, this facility you have in Babylon is a yard track, a team track type operation. That does not require board authority to do. In other words, the transaction between Coastal and New York & Atlantic did not have to be approved.

The type of proceeding that we would need to do now would be to go to the board for an advisory opinion as to whether Coastal is in fact a railroad operator or not. That is something, it is available, but it wouldn't have been something you would have done to get a lease approved. So basically, this is the time to do it. It wasn't the

time to do it when we were writing this lease.

MR. GAUGHRAN: Again, Coastal expended a tremendous amount of money in relying upon Mr. Casserly's memorandum. I understand the law and other boards and other agents can change town's positions later on, but they did expend a lot of money and they have invested a lot in this operation and they do have a lot to lose. And basically our opinion is the only reason there was a turnaround was from the point of view of the town, that they then brought it to your board was because of opposition from one end of the Pinelawn.

So Mr. Chairman, members of the board. I think we can conclude.

I have read Mr. Flores's memo, and other than the fact that I think he may be referring to my car, he's just referring to a lot of cars going back and forth, and the skies were sunny and the temperature rose to 83 degrees on August 30th, I don't think there's much more that I have to deal with there.

I do throw out another suggestion that I think, you know, we were kind of getting to, with this discussion about going to the Surface Transportation Board. If the town chooses to ask for an advisory opinion, perhaps this board would want to keep open its proceeding waiting for that decision. We would certainly consent under the law, and I know obviously there are time periods where you have to render a decision, so we would consent to an extension of time for whatever you would need for that to be done, and then maybe you would get from the Surface Transportation Board a road map as to what jurisdiction we do have, because I believe they will say that we do have jurisdiction, what controls, land use, aspects of the operation the town can control, and then it would be grounds for you to incorporate that into your decision and then finalize this process. It's just a suggestion I throw out that might work for all parties.

Okay. And I thank you, very much, for your indulgence and ask that you grant us our relief. Thank you.

THE CHAIRMAN: All right, Mr. Gaughran, thank you, very much.

And the parties, all interested parties and the applicant having had a full and fair opportunity to be heard, I think we can all agree on that now.

I thank everyone for your testimony. We appreciate your patience and your time. All of the testimony will be considered and the hearing is closed, the record is closed, the board will reserve decision and the applicant will be notified.

Thank you.

CERTIFICATION

I, DONNA GILMORE, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

THAT the foregoing transcript is a true and accurate transcript of my stenographic notes recorded from audiotape.

IN WITNESS WHEREOF, I have hereunto set my hand this 2nd day of June, 2005.

Donna C. Gilmore

DONNA GILMORE

Exhibit #3

A-789

Town of Babylon Zoning Board of Appeals
200 East Sunrise Highway, Lindenhurst, NY 11757-[illegible]8
Phone (631) 957-3011 Fax (631) 957-4254

APPLICATION TO THE ZONING BOARD OF APPEALS

FOR OFFICE USE ONLY

ZBA Number _____ Date/Time received _____

Type of Application:

- ☐ Residential
- ☐ Business
- ☐ Industrial
- ☐ Multiple Residence
- ☐ Sr Citizen MR
- ☐ Variance(s) .
- ☐ Public Garage
- ☐ Sign Permit
- ☐ Special Exception Use
- ☐ Subdivision – number of plots ____

1. Property Address: 1633 New Highway, E. Farmingdale, New York
   Suffolk Co. Tax Map #0100-35-2-2
   Zone: Residence A PTS Appl. Number: _____

2. Applicant's Name: Coastal Distribution , LLC
   Address: 1633 New Highway, E. Farmingdale, New York 11735
   Phone Number (631) 756-2000 Fax Number: (631) 756-2001

3. Property Owner's Name: Pinelawn Cemetary
   Address: Pinelawn Road, Farmingdale, New York 11735
   Phone Number: _____ Fax Number: _____

4. Contact Person's Name (for correspondence): _____
   Address: _____
   Phone Number _____ Fax Number: _____

5. Complete statement of relief, variance and/or special exception use requested:
   Relief in the form of vacating and annulling a stop work order issued by Building Inspector Bessemer on or about March 29, 2004.

6 A summary statement of the practical difficulty or unnecessary hardship created or existing because of the existing zoning regulations as applied to the subject premises is as follows.
The issuance of the stop work order is not authorized under New York State Law because the leaseholder, the MTA and The Long Island Railroad are exempt from zoning regulations and the Town of Babylon is without jurisdiction to issue said order and said order should be vacated.

7 Has a variance or special exce[illegible] use ever been applied for on this prop[illegible]?

☐ Yes ☒ No

If yes, indicate the Zoning Board of Appeals number, date of decision and attach copies of all decisions

_____

_____

8. *Has application ever been made to any of the following boards?*

Town Board	☐ Yes	☒ No
Planning Board	☐ Yes	☒ No
Accessory Apartment Review Board	☐ Yes	☒ No

If yes, explain the nature of the application and the disposition thereof and attach copies of all decisions if available

_____

_____

_____

_____

9. Name of the School District and address of the Administrative office which the subject property is located within:

Farmingdale School District #22, Business Office, 50 Van Cott Avenue, Farmingdale, New York 11735

10. Is the subject property located within 500' of any of the following? (if applicable, check one or more)

- ☐ [a] Town or Village boundary line (if yes, indicate which Town or Village: _____)
- ☐ [b] State parkway, road, park or other recreational facility (existing or proposed)
- ☒ [c] County road or right-of-way
- ☐ [d] *Stream or drainage channel owned by the County or for which the County has established channel lines*
- ☐ [e] *State or County owned parcel on which a public building is situated*
- ☐ [f] Federal owned property
- ☐ [g] The Atlantic Ocean, any bay in Suffolk County or estuary of any of the foregoing bodies of water

11 Is property within one mile of Republic Airport? ☒ Yes ☐ No

Sworn to before me this

27 day of April 2004

Notary Public Qualified in Suffolk Co. Reg. #02BU5041390 Exp 4/3/03

Owner/Applicant's Signature

Exhibit 4

A-792

FULL DISCLOSURE AFFIDAVIT

In the matter of the Application of:

Coastal Distributions, LLC

Address:

1633 New Highway, Farmingdale, New York

to the Town of Babylon Zoning Board of Appeals

State of New York

County of Suffolk

Joseph Rutigliano, being duly sworn, deposes and says:

1. This Affidavit is made by your deponent and intended to be filed with the above Board of the Town of Babylon to fulfill requirements of the appropriate sections of the Babylon Town Code with respect to the above-entitled application made or intended to be made affecting property located and described as follows:

To vacate stop work order which was issued where the Town of Babylon did not have jurisdiction to do so.

2. Name and address of the person making and signing this Affidavit:

Joseph Rutigliano, 1633 New Highway, Farmingdale, New York

3. If the person making this Affidavit is not the applicant, state relationship to the applicant:

Members of Coastal Distributions, LLC

4 List the names and addresses of ALL persons who have any interest whatsoever in the project and properties described in this application, direct or indirect, vested or contingent. This includes but is not limited to owner, partner, contract vendor, contract vendee, lessor, sub-lessor, contract lessor, lessee, sub-lessee, contract lessee, mortgagor, mortgagee, holder or contract holder of any beneficial interest, holder or contract holder of any encumbrance or lien, guarantor, assignee, agent, or broker. List such person(s) even if the interest arises as the result of providing funds for acquiring or developing the property, and whether or not the interest arises from or is affected by the decision of these municipal Board(s). Please state if any of these are, or are related to, officers or employees of the Town of Babylon and state the nature of relationship and extent of interest. If any of the above is a corporation, list all principals of said corporation.

Martin Sternberg, Member, Coastal Distribution , LLC
Joseph Rutigliano, Member, Coastal Distribution , LLC
The Metropolitan Transportation Authority
The Long Island Railroad
The New York and Atlantic Railway, Fred Krebs, President

5. List the names and addresses of ALL persons who will receive any benefit of any kind as a result of their work, effort or services in connections with this application. Please state the nature of relationship and extent of interest, and note if any of those mentioned are officers or employees of the Town of Babylon.

Forchelli, Curto, Schwartz, Mineo, Carlino & Cohn, LLP, 425 Broad Hollow Road, Suite 315, Melville, NY 11747
Oliver Wilhelm, Cybul & Cybul Architects, 1084 River Road, Edgewater, NJ 07020

The undersigned affirms the truth and completeness of the above under penalty of perjury.

Sworn to before me this
27th day of April 2004

Notary Public
Qualified in Suffolk
Reg. # 02BU5041390
Exp 4/3/03

COASTAL DISTRIBUTION , LLC
By:
Owner/Applicant's Signature
Joseph Rutigliano, Member

Exhibit #5

A-795

TOBEQRA - SHORT ENVIRONMENTAL ASSESSMENT FORM

PROJECT ID NUMBER: _____

PART I – PROJECT INFORMATION
(to be completed by applicant or project sponsor)

1. Applicant/Sponsor: Coastal Distribution , LLC
2. Project Name: Coastal Distribution , LLC
3. Jurisdiction: Municipality: Town of Babylon County: Suffolk
4. Precise Location:
   (street address, road intersections, prominent landmarks, etc. or provide map)
   1633 New Highway, Farmingdale, New York 11735
   SCTM #100-35-2-2
5. Is proposed action? ☐ New ☐ Expansion ☒ Modification/Alteration
6. Describe project briefly: Appeal of stop work order issued by Building Inspector Timothy Bessemer on March 29, 2004 because the order was issued where the Town lacked jurisdiction over the leaseholder, the MTA and LIRR.
7. Amount of land affected: Initially _____ sq. ft. Ultimately _____ sq. ft.
8. Will proposed action comply with existing zoning or other existing land restrictions?
   ☐ Yes ☐ No
   If no, describe briefly: Not applicable.
9. What is present land use in vicinity or project?
   ☒ Residential ☒ Industrial ☐ Commercial ☐ Agricultural
   ☐ Park/Forest/Open Space ☐ Other _____
   Describe briefly:
   To the east is residentially zoned land owned by Pinelawn Cemetary and used as a cemetary. To the west is industrial zoned land containing numerous industrial and warehouse uses and outdoor storage. To the southwest is Republic Airport and a retail shopping center known as Airport Plaza.

10. Does action involve a permit, approval or funding, now or ultimately from any other governmental agency (federal, state or local)? [x] Yes [ ] No

If yes, list agency(s) and permit(s)/approval(s): Approval issued by Long Island Railroad.

11. Does any aspect of the action have currently valid permit(s) or approval(s)?

[ ] Yes [x] No

If yes, list agency name(s) and permit(s)/approval(s): _____

12. As a result of proposed action will existing permit(s)/approval(s) require modification?

[ ] Yes [x] No

If yes,explain: _____

I certify that the information provided above is true to the best of my knowledge.

Print Applicant/Sponsor Name: [illegible]

Signature: _____ Date: 9/12/04

Exhibit #6

A-798

~~PROPERTY OWNER'S~~ ENDORSEMENT

(to be completed if the applicant and/or business owner is not the property owner)

State of New York

County of Suffolk

Fred Krebs, being duly sworn, deposes and says that (s)he resides at 68-01 Otto Road, Glendale, NY in the County of Queens, and State of _____, and that (s)he is the ~~(owner in fee) or~~ (President of the New York and Atlantic Railway Corporation, which is the ~~owner in fee~~ long term leaseholder of the premises described in the foregoing application to the Zoning Board of Appeals and that (s)he has authorized Coastal Distribution , LLC to make the foregoing application.

(Corporate Seal)

Sworn to before me this 23rd day of Apr., 2004

Notary Public

J. TIMOTHY SHEA, JR.
Notary Public, State of New York
No. 02SH6010515
Qualified in Suffolk County
Term Expires July 20, 2004

Fred Krebs

Owner, Partner, Corporate Officer, or Other (state title)

If more than one owner, attach additional Property Owner's Endorsement Forms

Exhibit #7

A-800

PROPERTY OWNER'S ENDORSEMENT

(to be completed if the applicant and/or business owner is not the property owner)

State of New York

County of New York

Roco Krsulic, being duly sworn, deposes and says that ~~(s)he resides at~~ _____ ~~in the County of~~ _____, and State of ~~New York~~, ~~and that~~ (s)he is the Director of Real Estate of the Metropolitan Transportation Authority, Long Island Railroad Company which is the ~~owner in fee~~ long term leaseholder of the premises described in the foregoing application to the Zoning Board of Appeals and that (s)he has authorized Coastal Distributions, LLC to make the foregoing application.

(Corporate Seal)

Sworn to before me this 18th day of May, 2004

Christine T Maiocchi
Notary Public

CHRISTINE T. MAIOCCHI
Notary Public, State of New York
No. 02MA4863124
Qualified in Westchester County
Commission Expires May 27, 2006

Owner, Partner, Corporate Officer, or Other (state title)

If more than one owner, attach additional Property Owner's Endorsement Forms

A-801

Exhibit #8

A-802

ZONING BOARD OF APPEALS: TOWN OF BABYLON
COUNTY OF SUFFOLK STATE OF NEW YORK

----------x

In the matter of the application of COASTAL DISTRIBUTION, LLC, METROPOLITAN TRANSIT AUTHORITY, THE LONG ISLAND RAILROAD COMPANY, AND THE NEW YORK AND ATLANTIC RAILWAY FOR AN ADMINISTRATIVE APPEAL CONCERNING THE PREMISES KNOWN AS SUFFOLK COUNTY TAX MAP NUMBER 100-35-2-2 LOCATED AT NEW HIGHWAY, EAST FARMINGDALE, TOWN OF BABYLON, COUNTY OF SUFFOLK, STATE OF NEW YORK.

NOTICE OF APPEAL

----------x

SIRS:

PLEASE TAKE NOTICE that the Coastal Distribution, LLC., Metropolitan Transit Authority, The Long Island Railroad Company, and the New York and Atlantic Railway hereby appeals the issuance of a Stopped Work Order dated 3/29/04 (a copy of which is attached hereto) by Building Inspector Timothy Bessemer concerning the premises designated therein as district 100-35-2-2 on the Tax Map of the County of Suffolk and being located on New Highway in East Farmingdale, NY.

Said appeal is taken from the whole of said determination, as well as, each and every part thereof. The grounds of the Appeal include, but are not limited to, the following:

(1) The commencement of erection of a building on the premises was done with the permission of the current lease holder of the premises The MTA, The Long Island Railroad Company, and New York and Atlantic Railway by Coastal Distribution, LLC., and accordingly the Town of Babylon, it's departments, and it's agents do not have authority or jurisdiction, under New York State Law, to issue the above referenced stopped work order, or interfere in any way with said building project.

Dated: Melville, New York
April , 2004

Yours truly,

COASTAL DISTRIBUTION, LLC

By _____
Joseph Rutigliano, Member
1633 New Highway
Farmingdale, New York 11735

A-804

STOP ALL WORK IMMEDIATELY

WARNING OF VIOLATIONS

OF

BUILDING CODE REQUIREMENTS

CALL (516) 957-3058

Please Call Between 8:00am and 4:30pm

RE: SCTM #

DIVISION OF BUILDING

TOWN OF BABYLON

200 EAST SUNRISE HIGHWAY

LINDENHURST, N.Y. 11757

DATE ISSUED: 3/29/01

BY:

LOCATION:

REMARKS:

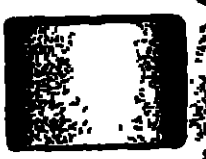

Exhibit #9

A-806

ZONING BOARD OF APPEALS: TOWN OF BABYLON
COUNTY OF SUFFOLK: STATE OF NEW YORK

----------x

In the matter of the application of COASTAL DISTRIBUTION, LLC, authorized agent of METROPOLITAN TRANSIT AUTHORITY , THE LONG ISLAND RAILROAD COMPANY, AND THE NEW YORK AND ATLANTIC RAILWAY FOR AN ADMINISTRATIVE APPEAL CONCERNING THE PREMISES KNOWN AS SUFFOLK COUNTY TAX MAP NUMBER 100-35-2-2 LOCATED AT NEW HIGHWAY, EAST FARMINGDALE, TOWN OF BABYLON, COUNTY OF SUFFOLK, STATE OF NEW YORK.

AMENDED NOTICE OF APPEAL

----------x

SIRS:

PLEASE TAKE NOTICE that the Coastal Distribution, LLC., authorized agent of the Metropolitan Transit Authority, The Long Island Railroad Company, and the New York and Atlantic Railway hereby appeals the issuance of a Stopped Work Order dated 3/29/04 (a copy of which is attached hereto) by Building Inspector Timothy Bessemer concerning the premises designated therein as district 100-35-2-2 on the Tax Map of the County of Suffolk and being located on New Highway in East Farmingdale, NY

Said appeal is taken from the whole of said determination, as well as, each and every part thereof. The grounds of the Appeal include, but are not limited to, the following:

(1) The commencement of erection of a building on the premises was done with the permission of the current lease holder of the premises The MTA, The Long Island Railroad Company, and New York and Atlantic Railway by Coastal Distribution, LLC., and accordingly the Town of Babylon, it's departments, and it's agents do not have authority or jurisdiction, under New York State Law, to issue the above referenced stopped work order, or interfere in any way with said building project.

Dated: Melville, New York
May 27, 2004

Yours truly,

COASTAL DISTRIBUTION, LLC

By _____
~~Joseph Rutigliano, Member~~
1633 New Highway
Farmingdale, New York 11735
MARTIN STERNBERG, MEMBER

A-808

WARNING OF VIOLATIONS
OF
BUILDING CODE REQUIREMENTS

CALL (516) 957-3058

Please Call Between 8:00am and 4:30pm

RE: SCTM #

DIVISION OF BUILDING

TOWN OF BABYLON

200 EAST SUNRISE HIGHWAY

LINDENHURST, N.Y. 11757

DATE ISSUED: 3/29/04

BY:

LOCATION:

REMARKS:

APR-19-2004 01:31P FROM:COASTAL DISTRIBUTION 631 756 2001 TO:16316225456 P:2/6

Exhibit #10

A-810

FORCHELLI, CURTO, SCHWARTZ, MINEO, CARLINO & COHN, LLP

COUNSELORS AT LAW

JEFFREY D. FORCHELLI
ANTHONY V CURTO, P.C.
DONALD JAY SCHWARTZ
PETER R. MINEO
TERENCE E. SMOLEV, P.C.
JOSEPH F. CARLINO (Retired)
PETER ALPERT
JOHN V TERRANA
BRIAN R. SAHN
BARBARA SHAHEEN ALESI
ANTHONY B. BARTON
JOSEPH F BUZZELL
JAMES RICCA
JAMES E. CANTANNO
GARY M. KUSHNER
WARREN S. ARTHUR
WILLIAM F SONESSO
ANDREW B. CURTO
STEVEN G. GAEBLER
AARON GERSHONOWITZ
JUDY L. SIMONCIC

330 OLD COUNTRY ROAD
P.O. BOX 31
MINEOLA, NEW YORK 11501
TELEPHONE: (516) 248-1700
FACSIMILE. (516) 248-1729

425 BROAD HOLLOW ROAD, SUITE 315
MELVILLE, NEW YORK 11747
TELEPHONE: (631) 622-5400
FACSIMILE. (631) 622-5456

WEB SITE: fcsmcc com
E-MAIL: info@fcsmcc.com

PLEASE RESPOND TO: MINEOLA ☐
MELVILLE ☒

COUNSEL
GINA RAIO BITSIMIS
WILLIAM S. COHN
HON JOHN J. FLANAGAN
JANET GANTO
ANTHONY J SABINO

OF COUNSEL
ARMAND P D'AMATO
ROBERT A. MELILLO
J. TIMOTHY SHEA
JOHN M STOLFI

ASSOCIATES
RICHARD A. BLUMBERG
JAMES A. BOGLIOLI
DIANA R. FANTANO
JOHN C. FARRELL
NICOLE B. GILL
WILLIAM G. GOODE
CHRISTOPHER J. JULA
MARY E. MONGIOI
ROBERT T. REIMAN
J. TIMOTHY SHEA, JR.

RECEIVED - TOWN ATTORNEY
BY: MAIL
OVERNIGHT
PERSONAL
FAX
INITIAL DMA

June 1, 2004

JUN 2 9 27 AM '04

TOWN ATTORNEY'S OFFICE
Town of Babylon

Dennis Cohen, Esq
Town Attorney's Office
Town of Babylon
200 E. Sunrise Highway
N. Lindenhurst, NY 11757

Re: Zoning Board of Appeals Application of Coastal Distribution, LLC

Dear Dennis:

Coastal Distribution, LLC has recently filed a Notice of Appeal, together with an Application to the Zoning Board of Appeals which appeals the issuance of a certain Stop Work Order issued by Building Inspector Timothy Bessemer and the assertion that the Town has jurisdiction over the subject property, proposed improvements and proposed operation.

The Application is made pursuant to Town Law Section 267-b(1) which authorizes a party aggrieved by determination of an administration official charged enforcing the zoning code to appeal such determination the Zoning Board of Appeals. An administrative appeal constitutes an exempt action pursuant to the State Environmental Quality Review Act (see Frampton v. Zoning Board of Appeals, 114A.D.2d 670, 494 N.Y.Supp2d 479 (3rd Dept, 1985); Matter of Linstrom v. Zoning Board of Appeals, 205A.D.2d 890, 613 N.Y.Supp2d 427, (2nd Dept., 1994).

The MTA/Long Island Railroad has a long-term lease of the subject premises from The Pinelawn Cemetery. Coastal Distribution, LLC is a sublessee through the New York and Atlantic Railway based on an agreement between New York and Atlantic Railway and the MTA/Long Island Railroad. Coastal Distribution, LLC has commenced improvements on the subject premises for the purposes of allowing for the shipment of goods and supplies by rail.

FORCHELLI, CURTO, SCHWARTZ, MINEO, CARLINO & COHN, LLP
COUNSELORS AT LAW

Clearly, as will be further stated at the hearing before the Zoning Board, the stop work order was improperly issued. The subject property and the improvements at issue are exempt from Town jurisdiction. In fact, the exception from Town jurisdiction was previously recognized by the Town.

In accordance with the Zoning Board application, the issuance of the Stop Work Order should be rescinded and a formal determination that the Town does not enjoy jurisdiction over the operation or improvements which are the subject of the present appeal issued.

Pursuant to Town Law §267-a(6), Coastal Distribution's zoning board appeal stays all proceedings in the furtherance of the action appealed from (which includes the stop work order issued by Mr. Bessemer). See also, People v. Baris Shoe Company, 174 Misc 2d 529, 664 N.Y.S 2d 1004 (Dist. Ct., Nassau County, 1997); Town of Groton v Langer, 175 Misc.2d 47, 667 N.Y.S.2d 1014 (Sup. Ct., Tompkins County, 1997); People v. Fells, 133 Misc.2d 341, 504 N Y.S.2d 751 (Justice Ct., Town of Reinbach, 1986); People v. Bell Atlantic, 183 Misc.2d 61, 703 N.Y.S.2d 688 (Justice Ct., Village of Tuckahoe, 2000).

Thank you for your time and attention to this matter.

Very truly yours,

J. TIMOTHY SHEA, JR.

TSJ·caf

Enclosures

Exhibit #11

A-813

(6)

JAMES F. GAUGHRAN
ATTORNEY AT LAW

191 NEW YORK AVENUE
HUNTINGTON, NEW YORK 11743

(631) 385-7004
FAX (631) 425-7030
(NOT FOR SERVICE)

June 9, 2004

Town of Babylon
Zoning Board of Appeals
200 E. Sunrise Highway
Lindenhurst, NY 11757-2598

RE: Application of Coastal Distribution, LLC
1633 New Highway, East Farmingdale, NY

Dear Sir or Madam:

Please be advised that I have just been retained to represent Coastal Distribution, LLC in the above referenced application which was recently filed.

I am also now the contact person for said application.

Please let me know if you need anything more and when the hearing is scheduled for.

I thank you for your attention to this matter.

Very truly yours,

JAMES F. GAUGHRAN

JFG:was

JUN 14 2004

35-2-2
n/o/e New Hwy + Conklin St.

Exhibit #12

A-815

FARRELL FRITZ, P.C.

290 Broad Hollow Road
Melville, NY 11747
Phone: (631) 547-8400
Fax: (631) 547-0501

EAB Plaza
Uniondale, New York 11556-0120
PHONE: (516) 227-0700
FACSIMILE: (516) 227-0777
www.farrellfritz.com

2488 Montauk Highway
P.O. Box 1980
Bridgehampton, NY 11932
Phone: (631) 537-3100
Fax: (631) 537-5049

June 18, 2004

JOHN M. ARMENTANO
PARTNER
DIRECT DIAL: (516) 227-0682
DIRECT FAX: (516) 336-2210
jarmentano@farrellfritz.com

OUR FILE NUMBER
16413-102

Hon. Louis D'Amaro, Chairman
Members of the Board of Zoning Appeals
Town of Babylon
Town Hall
200 East Sunrise Highway
Lindenhurst, NY 11757

RECEIVED JUN 21 2004

Re: Application of Coastal Distribution, LLC for relief from a Stop Work Order issued on March 29, 2004 in connection with construction of property at 1633 New Highway, East Farmingdale, New York

Dear Chairman D'Amaro and Members of the Board:

This firm represents Pinelawn Cemetery, the owner of the property on which Coastal Distribution has erected a structure. Part of the structure involved in this Application is located on land that is leased to Long Island Railroad/MTA and, significantly, another portion of this structure is located on land owned by Pinelawn in which Coastal has no interest. We are currently in Supreme Court, Suffolk County, attempting to obtain judicial relief in these circumstances.

The lease issue aside for the moment, it is Pinelawn's position that, even if Coastal had an interest in the land on which the building is located, Coastal cannot operate a commercial enterprise at the site because it is zoned for residential use only. Under such circumstances, a business use would not be allowed to operate on residentially zoned property, and the fact that the LIRR/MTA may be involved in some manner with a portion of the property, does not exempt a private profit-making party, *i.e.*, applicant, from the rules and regulations of the Town. Further, to our knowledge, applicant did not even seek a building permit from the Town. Of course, if a building permit were sought, it should be denied due to the proposed commercial use in a residential zone.

Please advise my client and me of the public hearing in the above-referenced matter.

Thank you for your anticipated cooperation.

Respectfully,

John M. Armentano

JMA:sk
Enclosures

cc: Hon. Dennis Cohen, Town Attorney
Mr. Stephen Locke
Mr. Justin Locke

Exhibit #13

A-818

04-267

(1)

JAMES F. GAUGHRAN
ATTORNEY AT LAW

191 NEW YORK AVENUE
HUNTINGTON, NEW YORK 11743

(631) 385-7004
FAX (631) 425-7030
(NOT FOR SERVICE)

June 28, 2004

Hon. Louis D'Amaro, Chairman
Members of the Board of Zoning Appeals
Town of Babylon
Town Hall
200 East Sunrise Highway
Lindenhurst, NY 11757

RE: Application of Coastal Distribution, LLC to vacate and annul a Stop Work Order on property at 1633 New Highway, E. Farmingdale, NY

Dear Chairman D'Amaro and Members of the Board:

I am in receipt of a letter addressed to you by John Armentano, Esq. concerning the above referenced application.

We are prepared to refute each and every representation made by Mr. Armentano in his letter of June 18, 2004. However, I believe it would be more proper for us to respond as part of the testimony we will present at the Public Hearing on this application.

I thank you for your consideration of this matter.

Very truly yours,

JAMES F. GAUGHRAN

JFG:wns

JUN 29

Exhibit #14

A-820

(2) Dec Res 9-9-04

Town of Babylon

200 East Sunrise Highway
Lindenhurst, New York 11757-2597
Telephone:(631) 957-4482

Lindsay P. Henry
Councilman

TO: Louis D'Amaro Chairman, Board of Appeals

FROM Lindsay P Henry, Councilman

DATE: August 13, 2004

REF App # 04-267 of Costal Distribution, LLC

Having been present at the ZBA Meeting of Thursday, September 9, 2004, and heard Supervisor Bellone's memo read aloud at that meeting, I want to go on record joining Supervisor Bellone in all respects on pertinent issues regarding this application, and indicate my solidarity with the Supervisor in opposition to subject application

LPH/slb

Exhibit #15

A-822

NOTICE OF REFERRAL TO SUFFOLK COUNTY PLANNING COMMISSION

For office use only
Appl. Type No.:04-267 Name:Coastal Distribution
Suffolk Co. Tax Map # 0100-35-2-2

Pursuant to Sections A-14 - 14 to 23 of the Suffolk County Administrative Code, the Planning Board of the Town of Babylon hereby refers the following proposed zoning action to the Suffolk County Planning Commission: (check one)

_____ New and recodified zoning ordinance

_____ Amendment to the Zoning Ordinance

_____ Zoning changes

_____ Special Permits

___X_____ Variances

Location of affected land: nec #1633 New Hway & Conklin St, E Farmingdale
Within 500 feet of: (check one or more)

_____ Town or village boundary line

____X____ State or county road, parkway or expressway

_____ State or county park or recreation area

_____ Stream or drainage channel owned by the county or for which the county has established channel lines

_____ State or county owned parcel on which a public hearing is situated

_____ Federal owned property

_____ One mile of an airport or nuclear power plant

_____ The Atlantic Ocean, Long Island Sound, any bay in Suffolk County or estuary of any of the foregoing bodies of water

Comments: Within 500' of Wellwood Av CR3

Date: Signed:
Title:

Date received by Suffolk County Planning Commission:

File No:

Exhibit #16

A-824

Town of Babylon

200 E. Sunrise Highway
Lindenhurst, New York 11757
(631) 957-3000

STEVEN BELLONE
SUPERVISOR

August 18, 2004

Coastal Distribution, LLC
1633 New Hway
E Farmingdale NY 11735

ATTENTION: Sign must
be posted by midnight,
August 2,2004
Application No. 04-267

Your Board of Appeals hearing date has been scheduled for THURSDAY September 9, 2004, at 6:00 P.M. The hearing will be held in the Town Board Meeting Room in the East Wing of Town Hall, 200 East Sunrise Highway, Lindenhurst, New York. Please read the enclosed instructions carefully and follow all directions.
Should you have any further questions, please do not hesitate to call this office at (631) 957-3011. Thank you for your understanding and cooperation in this matter.

Very truly yours,

Louis D'Amaro
Chairman
Zoning Board of Appeals

LD:lh
Enc.
Cc:Pinelawn Cemetery, James F. Gaughran, Esq., Fred Krebs, John Armetano, Esq.

Lindsay Patrick Henry, Councilman; Wayne R. Horsley, Councilman; Ellen T. McVeety, Councilwomen, Deputy Supervisor; Carol A. Quirk, Councilwoman; Corinne DiSomma, Receiver of Taxes; Janice E. Tinsley-Colbert, Town Clerk

An Equal Opportunity / Affirmative Action Employer

Exhibit #17

A-826

15

COUNTY OF SUFFOLK

STEVE LEVY
SUFFOLK COUNTY EXECUTIVE

DEPARTMENT OF PLANNING

THOMAS ISLES, AICP
DIRECTOR OF PLANNING

August 23, 2004

Town of Babylon
Zoning Board of Appeals

Re: Application(s) of "Coastal Distribution, LLC" Town of Babylon (#04-267)

Gentlemen:

Pursuant to Sections A 14-14 to 23 of the Suffolk County Administrative Code, the above referenced application(s) is/are not within the jurisdiction of the Suffolk County Planning Commission

Very truly yours,

Thomas Isles
Director of Planning

S/s Gerald G. Newman
Chief Planner

GGN cc

G:\CCHORNY\ZONING\ZONINGWORKING\NON-JURI2004\BA267 ALG

RECEIVED AUG 26 2004

LOCATION
H. LEE DENNISON BLDG. - 4TH FLOOR
100 VETERANS MEMORIAL HIGHWAY

MAILING ADDRESS
P.O. BOX 6100
HAUPPAUGE, NY 11788-0099

(631) 853-5190
TELECOPIER (631) 853-4044

Exhibit #18

A-828

TOWN OF BABYLON
ZONING BOARD OF APPEALS
AFFIDAVIT OF POSTING

FOR OFFICE USE ONLY

Applicant:

SCTM #0100-

In the matter of the Zoning Board of Appeals application of:

Coastal Distribution, LLC

P.O Address 1633 New Highway

East Farmingdale, New York 11735

State of New York)
ss:
County of Suffolk)

Martin Sternberg being duly sworn, deposes and says:

1 THAT (s)he _____ is the applicant, if corporation, give title party.

2. THAT this affidavit is made in compliance with the provisions of the Code of the Town of Babylon, which requires an Affidavit of Posting.

3. THAT in compliance with the provisions of the Code of the Town of Babylon, the deponent has posted or has caused to be posted upon the property which is the subject of the application a notice of the said application.

4. THAT said notice was posted on the subject property on the 26th day of August, 2014

5. THAT said notice complies in all respects with the requirements as to size, form, content, material, location and time of posting, elevation and length of time displayed.

6. THAT the deponent makes this affidavit knowing full well that the truth of the statements contained herein will be relied upon.

Sworn to before me this 8th day of September, 2014

Signature

Notary Public

JAMES F. GAUGHRAN
Notary Public, State of New York
No. 02GA5031918
Qualified in Suffolk County
Commission Expires Aug.16, 2016

Exhibit #19

A-830

cybul & cybul
ARCHITECTS

submitted @ ZBA hearing 9/9/04

September 8, 2004

Zoning Board of Appeals
Town of Babylon
200 East Sunrise Highway
Lindenhurst, NY 11757

Re: Coastal Distribution LLC
Freight Handling Structure

Dear Board,

Cybul & Cybul Architects were the architects involved with the design of the above referenced structure.

As the Architects we designed this structure to meet the requirements of the NYS Building Code predicated on IBC 2001 and associated supplements. This included area limitation, egress, wall rating (not applicable) and height.

The pre-engineered building supplier Varco Pruden was responsible for the structural steel design in compliance with the above referenced code. Based upon their drawings, notes and references, they indicated their compliance.

After this office and our client tried to get the plans reviewed, we received correspondence from the Town of Babylon dated August 8th, 2003 stating that they would not be reviewing our plans or issuing permits for this structure.

I trust this meets with your approval.

Very Truly Yours,

Oliver Wilhelm

DAVID N. CYBUL, A.I.A. MARTIN CYBUL, A.I.A. OLIVER WILHELM, A.I.A. CYBULARCH@AOL.COM
1084 RIVER ROAD, EDGEWATER, NEW JERSEY 07020-1395 (201) 224-4100 (212) 366-5252 FAX: (201) 224-0274

Exhibit #20

A-832

Town of Babylon

Department of Environmental Control

Memorandum

DATE: September 8, 2004

TO: Louis D'Amaro, Chairman, Zoning Board of Appeals

FROM: Joseph Guarino, Senior Environmental Analyst, Environmental Control

SUBJECT: ZONING BOARD OF APPEALS APPLICATION NO. 04-267, COASTAL DISTRIBUTION LLC

DEPARTMENTAL COMMENTS

Project Address: n/e/c New Highway & Conklin Street
Hamlet: East Farmingdale

SEQRA STATUS: Type II Action, SEQRA complete

DEPARTMENTAL RECOMMENDATIONS/COMMENTS:
The application currently before the Board is Type II pursuant to SEQRA. This determination is limited to the current application and should a future application for this site come before the Town a subsequent SEQRA determination would be necessitated based on that proposal.

Joseph Guarino
Senior Environmental Analyst

JG:ch

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY,

Plaintiffs,

-against

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, PETER GASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON and PINELAWN CEMETERY,

Defendants.

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DOCKET NO : 05-CV-2032 (JS)(ETB)

DEFENDANTS', THE TOWN OF BABYLON THE TOWN OF BABYLON BOARD OF ZONING APPEALS, AND PETER CASSERLY, RETURN

PART II

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21) Appeal, dated September 9, 2005, of Coastal Distribution, LLC, Metropolitan Transportation Authority, The Long Island Railroad and the New York and Atlantic Railway from the Issuance of a Stop Work Order by the Building Inspector of the Town of Babylon on March 29, 2004

22) Letter dated September 9, 2004 to Hon. Louis D'Amaro Chairman & Members of the Board of Appeals from Farmingdale Properties LLC.

23) Letter dated September 9, 2004 to Hon. Louis D'Amaro, Chairman & Members of the Board of Appeals from Farrell Fritz, P.C. with certain printouts attached thereto.

Exhibit #21

A-835

ZONING BOARD OF APPEALS
TOWN OF BABYLON

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In the Matter of the Appeal of

COASTAL DISTRIBUTION, LLC, METROPOLITAN TRANSPORTATION AUTHORTY, THE LONG ISLAND RAILROAD and THE NEW YORK AND ATLANTIC RAILWAY,

From the Issuance of a Stop Work Order by the Building Inspector of the Town of Babylon on March 29, 2004.

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INTRODUCTION

This is an appeal from the issuance of a stop work order by the office of the Building Inspector of the Town of Babylon, apparently on the grounds that a building permit and/or site plan approval had not been obtained prior to the erection of a building by Coastal Distribution, LLC ("Coastal") pursuant to the applicable provisions of the Town Code. As will be fully explained below, the stop work order is without legal authority as the town does not have jurisdiction to require either a permit or site plan approval.

THE TOWN'S LACK OF JURISDICTION

Coastal has been appointed as the agent of the New York and Atlantic Railroad ("NYA"), which operates freight services over lines of the Long Island Railroad which is owned by the Metropolitan Transportation Authority ("MTA"). The Long Island Railroad ("LIRR") is a subsidiary of MTA. NYA, is a railway operating pursuant to a Federal franchise. Coastal's agency as well as its operating authority are limited to the operation of transload facilities on these properties, i.e., facilities for moving freight between

railway cars and trucks as part of NYA's line haul common carrier rail services. Coastal is not permitted to engage in any other use of the premises.

As such, Coastal operates pursuant to a franchise created by federal law and is subject only to requirements imposed by the United States Surface Transportation Board which has exclusive jurisdiction over railway operations. Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §10101 et seq.; see City of Auburn v. STB, 154 F.3d 1025, 1029-31 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999); Friends of the Aquifer, slip op. at 4; Joint Petition for Declaratory Order – Boston and Maine Corp. and Town of Ayer, MA, STB Finance Docket No. 33971, slip op. at 8 & n 24 (STB served May 1, 2001), Borough of Riverdale–Petition for Declaratory Order– The New York Susquehanna and Western Railway Corporation, STB Finance Docket No. 33466, slip op. at 5 (STB served Sept. 10, 1999)

Municipal zoning authority over the subject premises is also superseded by the New York State Public Authorities Law §1266(8) [1]

Therefore, well established law makes it abundantly clear that local laws and regulations, which require permits or approvals for activity within a local or state jurisdiction, are pre-empted by both State and Federal Law where, as here, the activity in issue is that of a railroad operating common carrier services on MTA property pursuant to a federal franchise.

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[1] Public Authorities Law §1266(8) provides in pertinent part: "8. The authority may do all things it deems necessary, convenient or desirable to manage, control and direct the maintenance and operation of transportation facilities, equipment or real property operated by or under contract, lease or other arrangement with the authority and its subsidiaries, and New York city transit authority and its subsidiaries. Except as hereinafter specially provided, no municipality or political subdivision, including but not limited to a county, city, village, town or school or other district shall have jurisdiction over any facilities of the authority and its subsidiaries ."

OWNERSHIP, LEASING AND LICENSING BACKGROUND

The subject property is located in Farmingdale and consists of two adjoining parcels owned by Pinelawn Cemetery but subject to a lease to the LIRR since August 30, 1904 and November 1, 1905 for a period of 99 years. In 2003, MTA and LIRR effectively renewed these leases for an additional 99 years. In 1996, MTA and LIRR subleased the property to NYA to be used for the same purposes as the LIRR. In 2002, NYA subleased to Coastal, also for the same purposes as were engaged in by the LIRR for a century. The foregoing facts are set forth with more detailed provided in the affidavit of Roco Krsulic, Director of Real Estate of the MTA annexed hereto as Exhibit "A". The leases are annexed hereto collectively as Exhibit "B".

Effective August 6, 2004, Coastal entered into a License Agreement with NYA, which effectively canceled their sub-lease agreement. A complete copy of the License Agreement is annexed hereto as Exhibit C. The License Agreement has therefore replaced the Coastal-NYA sublease agreement and clarifies that the sole activity permitted at the site is "...the transloading services between rail and truck for ... non-hazardous freight...".

Specifically, ¶1.04(a) of the License Agreement provides as follows:

> COASTAL shall perform transloading services between rail cars and trucks at the Facility for Customers of the RAILROAD. Such services shall include only those commodities, movements and equipment allowed by applicable law and regulations and approved by RAILROAD which approval will not be unreasonably withheld. COASTAL shall immediately cease and desist from any operations which shall be found to be in violation of any contractual or other obligation of RAILROAD upon notice from Railroad.

The License Agreement makes it clear that Coastal is under the control and supervisory authority of NYA (referred to as the "RAILROAD") in the License

Agreement. Thus, ¶1.02 states: "RAILROAD shall control all aspects of the Facility's transloading operations."

Coastal may not engage in any activities on the premises other than the transloading of non-hazardous materials under the control and supervision of NYA. As such, no question exists that the state and federal exemptions from municipal zoning authority apply fully to Coastal and its activities at the site.

Annexed hereto as Exhibit "D" is the affidavit of Joseph Rutigliano with exhibits, submitted in the Pinelawn litigation, discussed below, which confirms the foregoing.

BUILDING CODE COMPLIANCE

While Coastal is not required to obtain a building permit or site plan approval, it nevertheless has fully complied with the applicable building code and safety regulations, a fact apparent from the stop work order here which is limited only to a failure to obtain site plan approval or a permit. Coastal has previously supplied full particulars of the construction in issue to MTA and town officials. Peter Casserly, Commissioner of Planning and Development previously advised that the Town has no jurisdiction and does not review plans or issue building permits for the subject property. Mr. Casserly's letter dated August 8, 2003 is annexed hereto as Exhibit "E". However, Coastal's plans were fully reviewed for building code and safety compliance by the MTA.

Coastal has at all times acted in good faith regarding the construction activities on site. Coastal has and will continue to comply with building and safety regulations, other then obtaining permits, and will cooperate in minimizing any effects of its operations on the area so long as those regulations and/or efforts do not unreasonably impact on Coastal's obligations to NY&A or to the public as a common carrier.

IMPACT ON SURROUNDING AREA

As set forth in the Rutigliano affidavit and attachments (Exhibit "D" hereto), the development and use of the subject site is consistent with and in harmony with area development where industrial and commercial uses prevail and are fully consistent with the use of these parcels of land for the last century. There is nothing about the Coastal operation that will be harmful or deleterious to nearby uses, including Pinelawn.

The building that Pinelawn has complained about was erected for the purpose of minimizing impacts by providing for the enclosure of the loading and unloading activities between rail and truck traffic. Coastal's operation will in fact improve site conditions and impacts.

The numerous commercial and industrial uses in the area are outlined in detail in the Rutigliano affidavit and are shown on the attached photos. These are all included in Exhibit D.

BENEFITS OF RAIL TRANSPORTATION

As also demonstrated in the Rutigliano affidavit, the entire Long Island region stands to benefit from the Coastal's transloading facility by decreasing the volume of truck traffic on Long Island and on its roadways. This has been recognized and encouraged by the State of New York as evidenced by the letter from John F. Guinan, Assistant Commissioner of the Office of Passenger and Freight Transportation for the State of New York attached as Exhibit D to the Rutigliano affidavit.

Specifically, Coastal will facilitate the transfer of cargos between trucks and rail cars in Central Long Island, within no more than 25 miles of the origin or destination of the shipment. Each railcar loaded or unloaded at the facility will remove not less than

five fully loaded, i.e. 82,000 lb. trucks, from the highways of Long Island and those running through the City of New York to all points.

Using statistics compiled from the Victoria Transportation Policy Institute (www.vtpi.org) an entity which is relied upon by environmental consultants working on transportation related projects, the public cost per truck mile is between $.612 and $2.170. One component of that cost is the cost of accidents not covered by insurance. That cost alone is between $.18 and $.56 per truck mile traveled. A US Government publication, Full Cost Pricing of Highways, USDOT Volpe National Transportation Systems Center, January 1996, Reproduced as Table 2-6 shows that the average taxpayer road related costs of truck movement over and above all user fees and road taxes is $.152, per mile in 1996 dollars.

The Texas Public Policy Institute has most recently analyzed the comparative public costs of /Truck and has reached the following conclusions:

- Rail has a lower fatality rate than trucks. The freight railroad fatality rate was 0.73 per billion ton miles in 1998, one-seventh that of the 5.26 large truck rate (Figure 27).107
- Rail moves freight with less energy (Figure 28). Freight railroads consumed 361 BTUs per ton mile in 1998, approximately one-eighth that of highway freight (2,850).108
- Rail generally pollutes less than trucks (Figure 29). It is estimated that, per ton mile, trucks emit 37 percent more Hydrocarbons than rail (Figure 30), 1 97 times more Carbon Monoxide, and 4.56 times (Figure 31) more Nitrogen Oxides (NOx).109
- Finally, as noted above, rail freight rates are lower than those of trucks, lowering ultimate product prices.

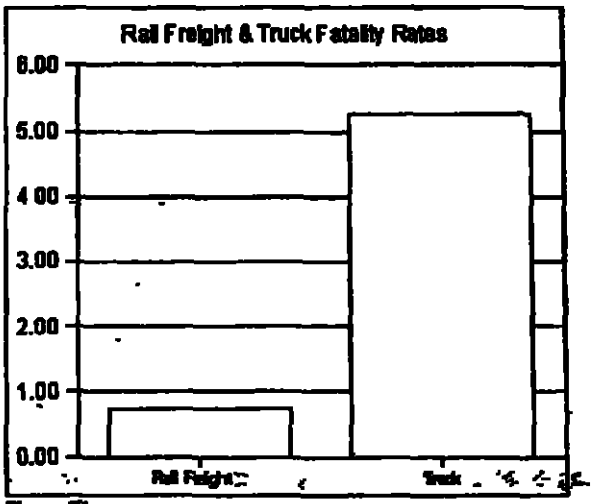


Figure 27
Fatalities per billion ton miles.
Calculated from Bureau of Transportation Statistics and U.S. Department of Transportation Fatality Analysis Reporting System data.

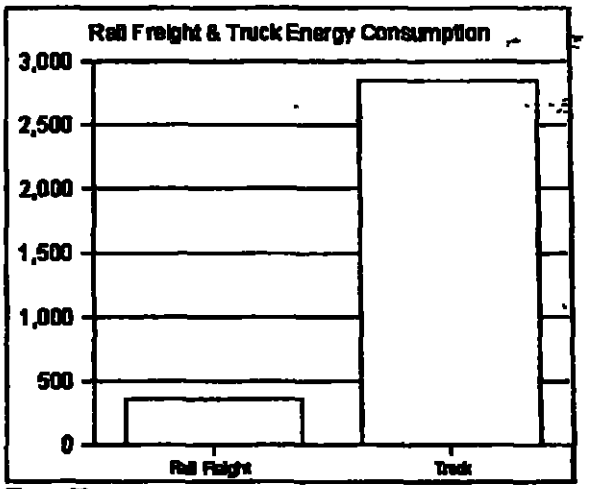


Figure 28
BTU's per ton miles.
Calculated from Bureau of Transportation Statistics data

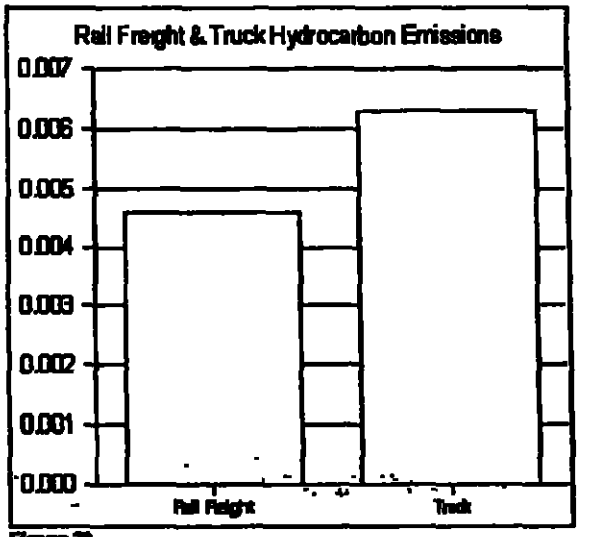


Figure 29
Pounds of pollutant per ton mile.
Calculated from Haulk.

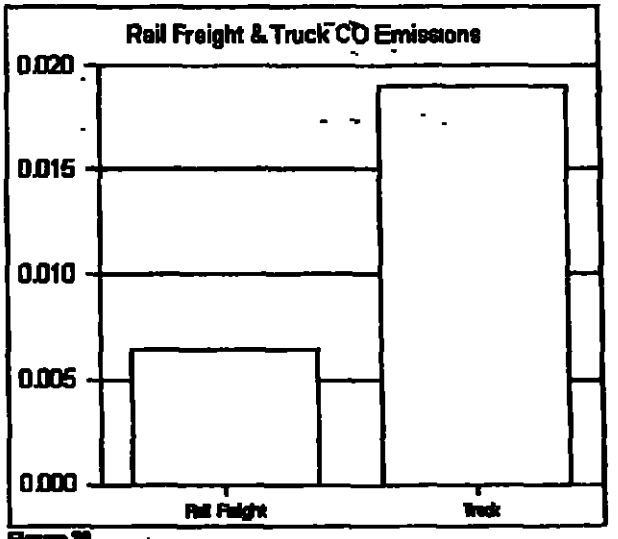


Figure 30
Pounds of pollutant per ton mile
Calculated from Haulk.

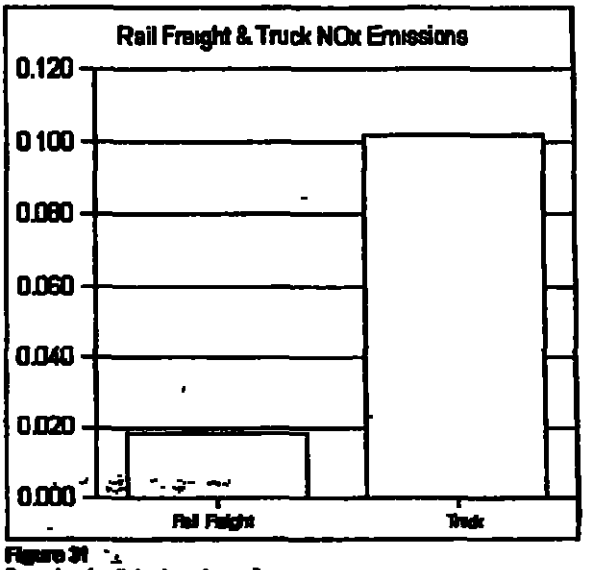


Figure 31
Pounds of pollutant per ton mile
Calculated from Haulk

Wendal Cox, Freight Rail's Potential to Reduce Traffic Congestion, Texas Public Policy Institute, (2003). Further, a few months ago the EPA published emissions standards for railway locomotives which will be implemented over the next few years. With these new regulations in place the environmental benefits from diversion of traffic from truck to rail will increase significantly.

Coastal's use and operation of the subject site as a transloading facility will have a positive impact on both the nearby community and the region. There are no adverse impacts that Pinelawn or any other neighbor of the site and the environmental and economic benefits are overwhelming.

PINELAWN LITIGATION

Pinelawn Cemetery ("Pinelawn"), as owner of the subject premises, has embarked on an ill-founded crusade to interfere with Coastal's operations and facilities. We understand that it was at their impetus that the stop work order was issued. Pinelawn

has made baseless allegations that Coastal is or intends to engage in the processing and sale of stone aggregate and to transload hazardous materials. Such activities would be in violation of the License Agreement.

Operation of a railway is a right with constitutional status: "To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States." Crutcher v. Kentucky, 141 U.S. 47, 57, 11 S.Ct. 851, 853 (1891). Similarly, Western Union Telegraph Co. v. Kansas ex rel. Coleman, 216 U.S. 1, 26, (1910), refers to "the substantial rights of those engaged in interstate commerce." Therefore, while Pinelawn's suit is private, the actions of the Town are under color of state law and could constitute a violation of 28 U.S.C §1983.

Pinelawn commenced a lawsuit against the MTA, LIRR, NYA and Coastal seeking to enjoin Coastal's activities and interfere with the railroad related operations. In connection with this effort, Pinelawn applied for a preliminary injunction to the Supreme Court, Suffolk County, which application was fully denied in an order issued by Justice Costello of that Court on August 6, 2004. A copy of that order is attached as Exhibit "F". In his order, Justice Costello ably sets forth the background and issues and finds fully in favor of Coastal, MTA, LIRR and NYA.

Specifically, Justice Costello describes the leasing history whereby LIRR leased the premises for a 99 year period with the right to renew for an additional 99 year period. The premises were operated by LIRR as a transload facility used to transfer various commodities from rail to truck and truck to rail and also to turn railroad cars and locomotives, the only such facility available for that purpose east of Glendale, New York.

MTA and LIRR in turn subleased the premises for the very same operation to NYA, which in turn subleased to Coastal, again for the very same purposes that the LIRR had used the property since approximately 1904.

Contrary to Pinelawn's assertions, Justice Costello found that these leases had been effectively renewed for an additional 99 years in 2003. Justice Costello also found that the municipal zoning authority over the subject site is superseded by state law (Public Authorities Law §1266[8]). Finally, Justice Costello dismissed Pinelawn's claim that it would suffer damage to its property and business as a result of Coastal's use of the property as "speculative at best".

However, beyond and in further support of this decision is the fact that these premises had been devoted to railway use for a century. It is a "team track", a public delivery facility, which must be maintained by a railway as part of its common carrier responsibilities to serve customers who do not have private sidings. "The general rule is that it is the responsibility of the carrier, as part of the transportation service covered by the line-haul rate, to 'deliver' the goods by placing them in such a position as to make them accessible to the consignee" Secretary of Agriculture v. United States, 347 U.S. 645, 647 (1954), and that final delivery is not completed if "anything remains to be done by the carrier in order to effectuate a delivery." Intech, Inc. v. Consolidated Freightways, Inc. 836 F.2d 672, 674 (1st Cir, 1987); Keystone Motor Freight 675 Lines v. Brannon-Signaigo Cigar Co., 115 F.2d 736, 738 (5th Cir.1940); Brockway Smith Co. v. Boston and Maine Corp., 497 F.Supp. 814, 818 (D.Mass.1980). Therefore, NYA's common carrier obligation includes the delivery of cargos by rail to a place where the consignee has access, the precise use for the facility at bar for a century. See also: United States v.

United States Smelting Refining and Manufacturing Co., 339 U.S. 186, 195, (1950). Pinelawn could not, by terminating a lease agreement, terminate the common carrier obligation it assumed by leasing its land to the Long Island Railroad for railroad purposes. See Smith v. Hoboken Shore Warehouse and SS Connecting Railroad, 328 U.S. 123, 130 (1945). Specifically, the Court noted:

> Here the question is whether the lessee or the lessor shall perform the service. But § 1(18) provides that 'no carrier by railroad' shall abandon 'the operation' of all or any portion of a line without a certificate from the Commission. Discontinuance of operations by the trustee is abandonment of operations by a carrier within the meaning of § 1(18).

Therefore, by the act of leasing land to a rail operator, a lessor becomes a common rail carrier subject to the provisions of 49 U.S.C. § 11101 and 49 U.S C. § 10903. The service at that facility, and thus its use by the railway, cannot be terminated unilaterally by Pinelawn.

We attach for the Board's consideration as Exhibit "G" legal memoranda and arguments submitted to Justice Costello that amplify and further elaborate upon the arguments made herein.

CONCLUSION

The project in issue has a positive environmental effect on the region and has no significant adverse local effect. The site and the activity on the site are both within the exclusive jurisdiction of the United States Surface Transportation Board and are exempt from local permitting or site plan approval by operation of both federal law and the New York State Public Authorities Law §1266(8). The stop order in issue was unlawfully issued and should be revoked

Dated: Huntington, New York
September 9, 2004

James F. Gaughran
Attorney for Applicants
191 New York Avenue
Huntington, New York 11743
631-385-7004

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

PINELAWN CEMETERY,

Plaintiff,

- against -

COASTAL DISTRIBUTION, LLC, METROPOLITAN TRANSPORTATION AUTHORITY, THE LONG ISLAND RAIL ROAD COMPANY and THE NEW YORK AND ATLANTIC RAILWAY,

Defendants.

AFFIDAVIT

Index No. 8599-04

STATE OF NEW YORK }
} SS:
COUNTY OF NEW YORK }

ROCO KRSULIC, being duly sworn, deposes and says:

1. I am the Director of Real Estate of defendant Metropolitan Transportation Authority (the "MTA") of which defendant The Long Island Rail Road Company (the "LIRR") is a subsidiary and agency (the MTA and LIRR are sometimes herein referred to collectively as the "Railroad"). The Railroad owns and operates railroad and related systems on Long Island. I am fully familiar with the facts and circumstances set forth herein, based upon my own personal knowledge, and from records and documents of the Railroad with which I am familiar.

2. I submit this affidavit in opposition to the motion by plaintiff Pinelawn Cemetery ("Pinelawn") for a preliminary injunction seeking to improperly stop the completion and operation of a railroad transloading facility on property effectively owned by the Railroad, and with respect to which defendants New York and Atlantic Railway ("NYAR") as freight operator for the Railroad,

and Coastal Distribution, LLC ("Coastal") its sub-tenant, have assumed responsibility to manage and operate.

3. It is the Railroad's position that Pinelawn's application is without basis and should be denied. Among other things, the property that it seeks to impair has been utilized by the Railroad, for railroad related purposes, for ninety-nine years, with the leases for the property having been extended and reinstated by Pinelawn, in writing, for another ninety-nine years. Moreover, since it is Railroad property, being used for railroad related purposes – as we understand, a freight transload facility – jurisdiction over the facility is vested by law in the Railroad. In any event, the planned use of the property as described to us is not objectionable to the Railroad, is consistent with the prior use of the property by the Railroad, and appears in harmony with the use of properties in the surrounding area.

4. Accordingly, for these reasons, as further discussed below, and as explained by our attorneys in the accompanying papers, the plaintiff's motion should be denied.

The Farmingdale Rail Yard

5. The property that is the subject of this lawsuit (hereinafter, the "Rail Yard") has been in the hands of the LIRR for one hundred years, and it is my understanding that it has been utilized by the LIRR, for railroad related functions, over that entire period of time. The Rail Yard adjoins the Railroad's main line, and is adjacent to New Highway, in a highly commercial/industrial area of Farmingdale, in Suffolk County. As noted in plaintiff's papers, the Rail Yard has been the subject of two 99 year leases, from Pinelawn to the LIRR, which leases were attached to the motion papers of plaintiff as exhibits 2 and 3, respectively. The leases date from August 1904 and November 1905.

Both leases explicitly contemplated that the Rail Yard would remain in the Railroad's possession, effectively in perpetuity, since they both contained renewal periods for additional 99 year periods.

6. The Rail Yard, while as a technical matter is comprised of two separate parcels, has been effectively utilized by the Railroad over the years as a single piece of railroad Rail Yard. We believe that the LIRR constructed railroad spurs on the Rail Yard soon after taking possession of the Rail Yard very early in the 20th century, and has used the Rail Yard for its purposes, including for the movement of freight, since that time.

7. In recent years, for example, the Rail Yard has been used by the LIRR as a waste transfer station, and to house maintenance facilities and for related purposes. It has never, to our knowledge, been used by the Railroad for farm purposes, and we do not understand the reference to such a thing by plaintiff, since the Rail Yard was granted to the LIRR, which, it is self evident, runs a railroad, and has done so for 170 years. We are not aware that the Rail Yard has been used for any cemetery related purposes since Pinelawn demised it to the LIRR, over one hundred years ago.

8. Thus, in short, the Rail Yard has been in the exclusive possession of the Railroad for more than one hundred years, and it has been used by the Railroad for purposes related to the operation of the Railroad, including the provision of freight services, during that time. Moreover, it was not the expectation of the Railroad that the Rail Yard would revert back to Pinelawn at the conclusion of the initial 99 year lease period. Indeed, to the contrary, it was the Railroad's intention to keep the Rail Yard in the hands of the Railroad, as the Rail Yard is useful to it in connection with the operation of the Railroad, and in particular, at this time, for the provision of freight services by the Railroad's freight operator.

The Rail Yard Is To Be Used by the Railroad's Freight Operator As a Transload Facility

9. The LIRR for many years, prior to 1996, provided not only commuter service to passengers on its rail lines, but provided as well freight services to various commercial customers on Long Island. In connection with the provisions of such services, the LIRR owned and operated various rail freight facilities.

10. In November of 1996, the LIRR entered into a Transfer Agreement with NYAR, pursuant to which, among other things, the LIRR ceased its operations related to the provision of freight services, and transferred its rights and obligations in that regard to NYAR. Thus, under the Transfer Agreement, the LIRR granted to NYAR all rights to own, conduct and operate, on an exclusive basis, the freight operations of the Railroad, on and with certain property owned and/or leased by the Railroad, which property would continue to be retained by the Railroad. NYAR commenced the provision of freight services in accordance with the Transfer Agreement in 1997.

11. . The Transfer Agreement also, among other things, provided that NYAR could construct freight related facilities and infrastructures, including transloading facilities, in connection with the provision of freight services on Railroad property, with respect to which management and control was vested in NYAR, in accordance with the terms of the Agreement. The Transfer Agreement also permitted NYAR to enter into contracts, subleases or other agreements with third parties in connection with the provision of freight services on Railroad Rail Yard.

12. In February 2002, the Railroad was advised by NYAR that it had entered into a contractual relationship with Coastal, and that it was their intention to use the Rail Yard in order to

construct and operate a transloading facility at the site, in connection with the provision of freight services to its customers on Long Island.

13. A transloading facility is a site at which freight is transferred from rail to truck. That is, the freight arrives at the site via rail, and is unloaded at the facility and transferred to trucks, for delivery to local customers on Long Island. It is our understanding that the operators of the facility do not contemplate that there will be any processing or operation related to the freight materials passing through the site, other than transferring the freight from one mode of transportation, (i.e., rail) to another (i.e., truck).

14. Following NYAR's communication to the Railroad in 2002, there ensued some discussion between the NYAR and the Railroad concerning the use of the Rail Yard, because it involved moving certain of the operations of the LIRR that were then extant at the site. The parties reached an understanding concerning such matters in mid-2002, and the LIRR moved certain of its operations to a different location, so that NYAR (and Coastal) could commence the provision of freight services at the Rail Yard.

15. The Railroad during this time informed NYAR that it was the long term leaseholder of the Rail Yard (and not, as a technical matter, the fee holder) and that the leases ran until August 2003, and November 2004, but were renewable for additional 99 year terms. It was the intent of the Railroad that the Rail Yard would remain in the possession of the Railroad, and that the lease terms would be extended, as was the Railroad's absolute right by virtue of the options granted it under the terms of the leases.

16. The Rail Yard had become important to the freight operations that were being conducted by NYAR, and in which the Railroad possessed an interest. The use of the Rail Yard as

a freight transloading facility was consistent with the purposes for which the land was first acquired by the Railroad, and the Railroad's prior use of the Rail Yard. Such a use also clearly facilitates the provision of freight services by NYAR, in accordance with the terms of the Transfer Agreement between it and the LIRR.

The Leases Are Renewed and Reinstated

17. As noted above, the Rail Yard had been Railroad property for one hundred years, had been utilized for railroad related purposes, including the provision of freight services, over such period of time, and had become part of the freight operations of the Railroad, and transferred to NYAR, for purposes of constructing and operating a transloading facility.

18. Although it had been the Railroad's intention to renew both leases affecting the Rail Yard for additional 99 year terms (and, we believe, Pinelawn's as well since it constructed a fence separating the cemetery property from the Rail Yard), we realized that as of August 2003, the Railroad had not yet exercised the option to renew on the lease set to run as of August 30, 2003. This was completely inadvertent on the Railroad's part, and was a pure oversight on the part of the Railroad.

19. There was, to be perfectly candid, some difficulty within the Railroad in initially locating copies of these ancient leases, so that the Railroad could properly exercise the options. We thereafter made contact with one of Pinelawn's attorneys in an effort to obtain copies of the leases. While Pinelawn's attorneys were somewhat slow in accommodating us, we eventually engaged in discussions with Pinelawn about the subject of the Rail Yard, and retaining possession of the Rail Yard for an additional term, as reflected in the leases.

20. It is our understanding, and we were certainly led to believe, that Pinelawn itself regarded the Rail Yard as Railroad property, and did not express any opposition or disagreement to the Rail Yard remaining in the Railroad's possession for an additional 99 year term.

21. However, since with respect to the August 1904 Lease, the time within which the Railroad was to exercise its option had, as a technical matter, passed, the Railroad and Pinelawn agreed to reinstate this Lease. Such reinstatement was not necessary with respect to the other lease affecting the Rail Yard (the November 1905 Lease), since the time within which to exercise the Railroad's option had not yet run, and the Railroad therefore merely exercised its option with respect to that Lease.

22. Pinelawn, contrary to the position it now takes in this litigation, readily agreed to *reinstate and extend the 1904 Lease. Accordingly, by Letter Agreement* dated October 17, 2003, and signed by Pinelawn's President on October 23, 2003, Pinelawn and the Railroad agreed to reinstate and extend the August 1904 Lease. The Agreement explicitly recites that:

> [the Railroad is] hereby agreeing to reinstate and extend the Lease dated August 30, 1904 for 99 more years through July 31, 2102. Please have an authorized party concur by signing below .....

Pinelawn's President, Mr. Stephen Locke, executed the Agreement in the space provided on the Agreement for that purpose, specifically reciting as well that Pinelawn's concurrence "refers to August 30, 1904 Lease." (See Letter Agreement, annexed to the Safar Aff., as Exhibit A.)

23. Thus, as of October 23, 2003, the leases affecting the Rail Yard had been renewed and reinstated, in writing, by Pinelawn. It was certainly the Railroad's understanding, based upon our discussions with Pinelawn, and the Letter Agreement, that both leases had been extended, and that the Rail Yard would remain in the Railroad's possession, and used for railroad-related purposes,

for the ensuing one hundred years. It should be pointed out that one lease extension without the other is senseless, and renders the Rail Yard virtually useless to the Railroad.

24. It is also important for the Court to be aware that the extensions of the leases by Pinelawn were not taking place in a vacuum. NYAR and Coastal were set to commence construction of the transload facility at the Rail Yard site; and the issues involving the extensions of the leases needed to be resolved prior to such time, as Pinelawn was made aware, and well knew.

25. Indeed, it is our understanding that Pinelawn actually delivered a copy of the Letter Agreement to NYAR and Coastal representatives at the Rail Yard itself, on October 23, 2003, when the parties met to discuss the further development of the site by NYAR and Coastal. Pinelawn at that time examined the site and the proposed plans for the transload facility, and provided NYAR and Coastal with its agreement signifying the renewed and extended long term leaseholds. It thus seems quite apparent that Pinelawn intended that Coastal and NYAR rely on the delivery of the lease extensions, so that construction of the transload facility at the Rail Yard could proceed.

Pinelawn's New Position Is Baseless

26. The issue of the lease extensions having been resolved by Pinelawn's execution of the Letter Agreement, and delivery to Coastal and NYAR by Pinelawn itself at the Rail Yard site, the construction of the transload facility began, we understand, almost immediately, and was substantially complete before there was any objection by Pinelawn.

27. We do not know why Pinelawn, some months later, suddenly changed course, and expressed the view that the August 1904 Lease had not been extended, that the construction was problematic, and that the Town of Babylon should put a stop to it. We do know that this "litigation position" is directly contrary to the position it had last year, which is reflected in signed writings, and

which was expressed to the Railroad and to Coastal/NYAR. And it was only taken after substantial completion of the facility had occurred, with the apparent concomitant significant expenditure of funds.

28. It is also noteworthy that the Town of Babylon took the position that it had no jurisdiction regarding the Railroad's Rail Yard. This was conceded explicitly in a letter from the Town to a representative of Coastal, when Coastal initially sought approval from the Town for the construction of the transloading facility at the Rail Yard. By law, the Railroad possesses an exemption with respect to Railroad property (whether owned outright or leased by the Railroad), used for railroad related purposes, which is not subject to the permitting or other similar procedures of local municipal authorities. The propriety of the use to which such property is put is within the province of the Railroad.

29. In any event, based on our understanding of the use to which the Rail Yard will be put, it does not appear to be objectionable in any respect.

30. As we have above mentioned, the Railroad has been informed that the facility at the Rail Yard will be a transload facility, which would involve, we have been advised, the transfer of freight from the rail cars upon which it traveled to Long Island, to trucks for delivery to the local freight customers with which NYAR (and/or Coastal) has contracted to provide such services. We understand as well that all, or nearly all, of the transferring of materials will take place inside of the structure at the site, thus apparently minimizing the possibility of any disturbance to the surrounding areas.

31. This use of the Rail Yard appears consistent with, and reflects the nature of, the surrounding areas, which is predominately industrial and commercial in character. There are asphalt

and concrete processing plants directly across New Highway, and a large bus depot and Republic Airport in very close proximity to the site.

32. More significantly from the Railroad's perspective, the Rail Yard has always been used for railroad related purposes, including for the provision of freight services, and the proposed use as a transload facility appears to be consistent with such prior use. It is also a use that NYAR has a right to put the Rail Yard to, consistent with the terms of the Agreement transferring all freight operations of the Railroad to it. Indeed, this planned use may be less intrusive than other prior uses of the Rail Yard, including as a waste transfer station.

33. While the LIRR has gotten out of the business of directly providing freight services to customers on Long Island, the Railroad has an interest in facilitating the development and growth of freight operations on Long Island. Such development plays a role in reducing truck traffic and the related adverse effects of such traffic on Long Island, and has other positive consequences.

34. Pinelawn's attempt to obtain an injunction from the Court, if successful, would prevent the provision of freight services, and impede freight operations in which the Railroad has an interest. The Railroad does not believe, for all of the reasons discussed above, that Pinelawn should succeed in such effort.

Conclusion

35. For all of the reasons set forth herein, and in the accompanying papers submitted by the Railroad's attorneys, plaintiff's motion for a preliminary injunction should be denied in all respects.

ROCO KRSULIC

Sworn to before me this
10th day of May, 2004

Notary Public

CAROL ROTHSTEIN
Notary Public, State of New York
No. 01RO6061364
Qualified in Kings County
Commission Expires November 27, 20 06

Exhibit B

A-861

LEASE TO LIRR

THIS INDENTURE, made the First day of November in the year one thousand nine hundred and five (1905) between THE PINELAWN CEMETERY, party of the first part, and THE LONG ISLAND RAILROAD COMPANY, party of the second part;

WITNESSETH, that thesaid party of the first part for and in consideration of the rents, covenents and agreements hereinafter mentioned, reserved, and contained, on the part of the said party of the second part, its successors and assigns, to be paid, kept and performed, has granted, demised and to farm letten, and by these presents does grant, demise and to farm let, unto the said party ofthe second part, its successors or assigns, all that tract or parcel of land at Pinelawn, in the town of Babylon, County of Suffolk and State of New York, bounded and described as follows:

BEGINNING at a point in the easterly line of the public road known as the New Highway at its intersection with the northerly line of property leased to the Long Island Railroad Company by the Pinelawn Cemetery under Indenture made August 30th, 1904, and recorded in the Clerk's Office of Suffolk County at Riverhead, N. Y., on October 28th, 1904, in Liber 558 of Deeds, Page 261, said point being one hundred (100) feet measured along said easterly line of the New Highway from the northerly property line of the Long Island Railroad Company; and running thence along said easterly line of the New Highway North 14° 12' East one thousand one hundred and twelve (1,112.0) feet; thence at right angles to last described course South 75° 48' East ninety and three tenths (90.3) feet; thence parallel with first described course and ninety and three-tenths (90.3) feet distant easterly therefrom South 14° 12' West seven hundred and twenty-six (726.0) feet; thence on a curve to the left having a radius of three hundred and seventy-five and seventy-eight one hundredths (375.78) feet, for a distance of four hundred (400) feet, more

or less, to the said northerly line of property leased to the Long Island Railroad Company by Pinelawn Cemetery; thence along said leased property North 87° 45' West two hundred and eighty-five (285) feet, more or less, to the point of beginning. Containing 2.8 Acres, more or less.

TO HAVE AND TO HOLD the said above mentioned and described premises, with the appurtenances, unto the said party of the second part, its successors and assigns, from the first day of November, one thousand nine hundred and five (1905), for and during and until the full end and term of ninety-nine (99) years thence next ensuing; and fully to be complete and ended, yielding and paying therefor unto the said party of the first part, its successors and assigns, yearly and every year, during the term hereby granted, the yearly rent or sum of one dollar, lawful money of the United States of America, in advance on the first day of November, in each and every year of said years.

PROVIDED ALWAYS, NEVERTHELESS, that if the yearly rent above reserved, or any part thereof, shall be behind, or unpaid, on any day of payment whereon the same ought to be paid as aforesaid, or if default shall be made in any of the covenants herein contained on the part and behalf of the said party of the second part, its successors and assigns, to be paid, kept and performed, then and from thenceforth it shall be lawful for the said party of the first part, its successors or assigns, into and upon the said demised premises and every part thereof, wholly to re-enter and remove all persons therefrom, and the same to have again, re-possess and enjoy as in their first and former estate, anything hereinbefore contained to the contrary thereof in anywise notwithstanding. And the said party of the second part for itself, its successors and assigns does covenant and agree to and with the said party of the first part, its successors and assigns, by these pres-

ents that the said party of the second part, its successors or assigns, shall and will yearly and every year during the said term hereby granted well and truly pay or cause to be paid unto the said party of the first part, its successors or assigns, the said yearly rent above reserved on the day and in the manner limited and prescribed as aforesaid by the terms thereof, without any deduction, fraud or delay, according to the true intent and meaning of these presents.

AND that on the last day of the said term, or other sooner determination of the estate hereby granted, the said party of the second part, its successors or assigns, shall and will peaceably and quietly leave, surrender and yield up unto the said party of the first part, its successors or assigns, all and singular the said demised premises.

AND the said party of the first part, for itself, its successors or assigns, does covenant and agree to and with the said party of the second part, its successors and assigns, by these presents, that the said party of the second part, its successors or assigns, paying the said yearly rent above reserved, and performing the covenants and agreements aforesaid, on its or their part, the said party of the second part, its successors or assigns, shall and may at all times during the said term hereby granted, peaceably have, hold and enjoy the said premises, without any manner of let, suit, trouble or hindrance, of or from the said party of the first part, its successors or assigns, or any person or persons whomsoever.

AND the said party of the second part hereby covenants to bear, pay and discharge all such taxes, duties and assessments whatsoever as shall or may during the said term hereby granted be charged, assessed or imposed upon the said premises.

AND the said party of the first part for and in consideration of the premises hereby promises and agrees to

and with the said party of the second part, to execute unto it a new lease similar in all respects to this, except in regard to a renewal, to run for a similar period of ninety-nine years, for the premises aforesaid upon receiving from the party of the second part a notice i. writing claiming such renewal, at any time not less than three months prior to the expiration of the term granted by these presents.

IN WITNESS WHEREOF, the said parties to these presents have caused their respective corporate seals to be hereunto affixed, and caused the same to be subscribed by their duly authorized officers, on the day and year first above written.

PINELAWN CEMETERY,

By [signature]
Pres

THE LONG ISLAND RAILROAD COMPANY,

By [signature]
President.

Attest: [signature]
Secretary

State of New York, :
:ss:
County of ' ', :

On the 5th day of January, in the year 1906, before me personally came A. L. V. P. Gray to me known, who being by me duly sworn, did depose and say that he resided in the City of New York, Boro. of Manhattan, that he is the President of the Pinelawn Cemetery, one of the corporations described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto, as the President of said corporation by like order.

[signature]
Notary Public
Kings Co

CERTIFICATE FILED IN NEW YORK COUNTY.

CERTIFICATE FILED IN NEW YORK COUNTY.

State of New York,
County of Nassau } ss:

On the second day of January, in the year one thousand nine hundred and [illegible] before me personally came Adolph Otten to me known; who, being by me duly sworn, did depose and say, that he resided in the County of Nassau New York that he is the President of the Long Island Railroad Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

NOTARY PUBLIC, SUFFOLK COUNTY,
CERTIFICATE FILED IN QUEENS COUNTY.

that lot or parcel of land situate in the Village of Patchogue, County of Suffolk and State of New York, known and designated as lot number twenty-eight 28 on a certain map on file in Suffolk County Clerk's office, surveyed by Emmett F. Smith, entitled Map No. 3, Property of Edward F. Taber, Wm. A. Northridge and Wm. P. Wood, situate at Patchogue, Suffolk Co. N.Y. said lot being located on the easterly side of Wood avenue and being 50 feet in width by 150 feet in depth retaining and holding the remainder of said mortgaged premises as security for the payment of said mortgage according to its conditions. Witness our hands and seals this first day of July 1904.

In presence of } C. W. Ruland L.S.
Geo. H. Furman } Smith W. Conklin L.S.

Said Mtge. Oct 15, 1904 reduced to $500 of Principal, interest pd. thereon to May 29 1904.

State of New York, County of Suffolk ss: On this 14 day of October in the year One thousand nine hundred and four before me, the subscriber personally appeared Smith W. Conklin and C. Wallace Ruland to me personally known to be the same persons described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same.

Geo. H. Furman, Notary Public.

Recorded 28 Oct 1904 @ 12 M.
Solomon Kitchen Clerk.

This Indenture made the 30th day of August, in the year one thousand nine hundred and four, Between The Pine Lawn Cemetery, party of the first part and The Long Island Railroad Company, party of the second part, Witnesseth, that the said party of the first part for and in consideration of the rent covenants and agreements hereinafter mentioned reserved, and contained on the part of

party of the second part, its successors and assigns to be paid, kept and performed, has granted, demised and to farm letten, and by these presents does grant, demise and to farm let, unto the said party of the second part its successors or assigns, All that tract or parcel of land at Pine Lawn, in the Town of Babylon, County of Suffolk and State of New York, bounded and described as follows: Beginning at the southwest corner thereof at the intersection of the New Highway with the land of The Long Island Railroad Company, running thence easterly by and with the land of the said party of the second part, fifteen hundred (1500) feet, thence northerly fifty (50) feet, thence westerly by and with land of the party of the first part and parallel with the south line hereof eleven hundred (1100) feet thence again northerly fifty (50) feet thence again westerly by and with land of the party of the first part parallel with the south line hereof four hundred (400) feet to the New Highway, thence southerly by and with the New Highway one hundred (100) feet to the land of the party of the second part and the point and place of beginning To have and to hold the said above mentioned and described premises with the appurtenances unto the said party of the second part its successors and assigns, from the thirtieth day of August, one thousand nine hundred and four, for and during and until the full end and term of ninety-nine (99) years thence next ensuing and fully to be complete and ended, yielding and paying therefor unto the said party of the first part, its successors and assigns, yearly and every year, during the term hereby granted, the yearly rent or sum of one dollar, lawful money of the United States of America, in advance on the thirtieth day of August in each and every year of said years. Provided always, nevertheless, that if the yearly rent above reserved, or any part thereof, shall be behind, or unpaid on any day of payment whereon the same ought

[redacted]

to be paid as aforesaid or of default shall be made
in any of the covenants herein contained on the part
and behalf of the said party of the second part its
successors and assigns to be paid kept and per-
formed then and from thenceforth it shall be law-
ful for the said party of the first part its success-
ors or assigns into and upon the said demised pre-
mises and every part thereof wholly to re-enter
and remove all persons therefrom and the same
to have again re-possess and enjoy as in their
first and former estate anything hereinbefore con-
tained to the contrary thereof in anywise notwith-
standing. And the said party of the second part
for itself its successors and assigns does covenant
and agree to and with the said party of the first
part its successors and assigns by these presents
that the said party of the second part its successors
or assigns shall and will yearly and every year
during the said term hereby granted well and
truly pay or cause to be paid unto the said party
of the first part its successors or assigns the said
yearly rent above reserved on the day and in the
manner limited and prescribed as aforesaid by
the terms hereof without any declaration fraud or
delay according to the true intent and meaning
of these presents. And that on the last day of the
said term or other sooner determination of the said
term granted the said party of the second part
its successors or assigns shall and will peaceably
and quietly leave surrender and yield up unto
the said party of the first part its successors or
assigns all and singular the said demised pre-
mises And the said party of the first part for
itself its successors or assigns does covenant and
agree to and with the said party of the second part
its successors and assigns by these presents that
the said party of the second part its successors or

assigns paying the said [illegible] reserved and performing the covenants and agreements aforesaid, on its or their part the said party of the second part its successors or assigns shall and may at all times during the said term hereby granted, peaceably have hold and enjoy the said premises without any manner of let, suit, trouble or hindrance, of or from the said party of the first part, its successors or assigns or any person or persons whomsoever And the said party of the second part hereby covenants to bear, pay and discharge all such taxes duties and assessments whatsoever as shall or may during the said term hereby granted, be charged, assessed or imposed upon the said premises And the said party of the first part for and in consideration of the premises hereby promises and agrees to and with the said party of the second part to execute unto it a new lease similar in all respects to this except in regard to a renewal, to run for a similar period of ninety-nine years for the premises aforesaid, upon receiving from the party of the second part a notice in writing claiming such renewal, at any time not less than three months prior to the expiration of the term granted by these presents In Witness Whereof the said parties to these presents have caused their respective corporate seals to be hereunto affixed, and caused the same to be subscribed by their duly authorized officers on the day and year first above written

Sealed and Delivered in the Presence of } (L.S.) Pinelawn Cemetery
C. C. De Graw, Prest
(L.S.) The Long Island Railroad Company
By W. T. Potter, Vice President
Attest Frank E. Hoff Secretary

State of New York County of New York ss: On the 9th day of Sept in the year 1914 before me personally came C. C. De Graw to me known, who being by me duly sworn, did depose and say that he resided in the City of New York Bor. of Manhattan that he is the President of the Pine Lawn [illegible]

[redacted]

A-870

[redacted]

Company one of the corporations described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation and that he signed his name thereto as President of said Corporation by like order. L.S. John T. Reed, Notary Public New York Co. 295

[redacted]

State of New York County of Queens ss: On the 30th day of August in the year 1906 before me personally came W. H. Potter to me known, who being by me duly sworn did depose and say that he resided in Flushing in said County that he is the Vice President of the Long Island Railroad Company one of the corporations described in and which executed the above instrument; that he knew the seal of said Corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation and that he signed his name thereto as Vice President of said Corporation by like order.
Matthew J. Meany, Notary Public, Kings County, Cert filed in Queens County.
State of New York County of Queens ss: I, David L. Van Nostrand Clerk of the County of Queens and also Clerk of the County and Supreme Courts of said County, the same being Courts of Record, Do Hereby Certify, That Matthew J. Meany has filed in the Clerk's Office of the County of Queens, a certified copy of his appointment as Notary Public for the County of Kings with his autograph signature, and was at the time of taking the Proof or Acknowledgment of the annexed instrument, duly authorized to take the same. And further that I am well acquainted with the hand writing of said Notary Public, and verily believe the signature to the said certificate of Proof or Acknowledgment to be genuine. In Testimony Whereof, I have hereunto set my hand

and affixed the seal of [illegible] Court and County, the [illegible] day of [illegible] [illegible] [illegible] [illegible]

Recorded 27 October 1904 @ 12 A.
Solomon Hitchcock Clerk

This Indenture made the 30th day of September one thousand nine hundred and four between Anthony L. Campacci and Mary Campacci, his wife, both of the County of Kings, City and State of New York, parties of the first part, and Jewette L. Dwyer, of Plainfield, New Jersey, party of the second part, Witnesseth, That the said parties of the first part, in consideration of the sum of Forty Dollars lawful money of the United States of America, to them in hand duly paid before the delivery hereof, the receipt whereof is hereby acknowledged, have bargained, sold and conveyed, and by these presents do grant, sell and convey unto the said party of the second part, her heirs and assigns forever, All those certain four lots, pieces or parcels of land, situate, lying and being in the town of Brookhaven, County of Suffolk, State of New York, known and described as Lots Numbers 44, 45, 46 and 47, in Block marked or numbered [illegible] a certain Map filed in the office of the Clerk of Suffolk County, State of New York, at Riverhead, Long Island, State of New York, on the 25th day of January in the year one thousand eight hundred and ninety one known, designated and entitled as Map No. 433, Map of land of Woodville, Suffolk County, Long Island, New York, Francis A. Hawkins, surveyor, each of said lots being one hundred feet long by twenty five feet wide, being the same four lots conveyed by Benjamin L. Tuthill to Anthony L. Campacci, one of the parties of the first part hereto, by deed dated March 13th, one thousand eight hundred and ninety one and recorded in the office of the Clerk of the County of Suffolk, at Riverhead, New York, in Liber 3[illegible], Page 74 of Deeds or Conveyances, on the 27th day of July 1895 at 12 o'clock M. Together with the free use and enjoyment of the avenues, highways and streets laid out on said map

[redacted]

A-872

New York, NY 10017-3739
212 878-7000 Tel

Metropolitan Transportation Authority
State of New York

October 17, 2003

Via: Certified Mail – Return Receipt Requested
Fax: 212-704-6288

Jonathan B. Gaynin
Jenkens & Gilchrist Parker Chapin LLP
405 Lexington Avenue
New York, NY 10174

RE: Land Lease Agreements Dated November 1, 1905, and August 30, 1904 Between The Pinelawn Cemetery and The Long Island Railroad Company (LIRR) for Use as a Railroad Yard and Auxiliary Services of the Railroad.

Dear Mr. Gaynin:

On behalf of LIRR we are hereby exercising it's option to renew the above referenced lease dated November 1, 1905 for an additional ninety-nine (99) years thereby extending it through October 31, 2103.

We are also hereby agreeing to reinstate and extend the lease dated August 30, 1904 for 99 more years through July 31, 2102. Please have an authorized party concur by signing below, and return one original copy of this letter to my attention.

If you have any questions please call Mimi Fuhrman, of my staff, at (212) 878 – 7262.

Sincerely,

Roce Krsulic
Director of Real Estate

PINELAWN CEMETERY

Concurrence: President 10/23/03
Date

This concurrence refers to Aug 30 1904 lease.

Cc: S. Antman, F. Krebs
C. Malocchi, K. Rydzewski, Chron/file

A-873

TRANSFER AGREEMENT

BETWEEN

THE LONG ISLAND RAIL ROAD COMPANY

AND

SOUTHERN EMPIRE STATE RAILROAD COMPANY

Dated as of November 18, 1996

TRANSFER AGREEMENT
BETWEEN
THE LONG ISLAND RAIL ROAD COMPANY
AND
SOUTHERN EMPIRE STATE RAILROAD COMPANY

This Transfer Agreement is made as of this 18th day of November, 1996, by and between THE LONG ISLAND RAIL ROAD COMPANY, a New York State public benefit corporation, Jamaica Station, Jamaica, New York 11435, (including its successors, the "LIRR") and SOUTHERN EMPIRE STATE RAILROAD COMPANY, a Delaware corporation, (including its successors and permitted assigns, the "Freight Operator").

WITNESSETH:

WHEREAS, the LIRR owns and operates rail freight facilities serving a diversified customer base in the Long Island region;

WHEREAS, the LIRR issued a Request for Proposals ("RFP") for privatization of its freight services;

WHEREAS, Anacostia & Pacific Company, Inc., in contemplation of establishing a Freight Operator, submitted a proposal,

WHEREAS, the Freight Operator submitted a proposal in response to the RFP and a final proposal in response to the LIRR's Request for Best and Final Offers (collectively the "Proposals"); and

WHEREAS, this transaction is intended and should be construed as the LIRR entirely ceasing its operations

relating to the transportation of freight (other than as a customer) and granting the right to the Freight Operator to own, conduct and operate such freight operations on an exclusive basis on and with certain property retained by the LIRR; and,

WHEREAS, the parties wish to establish the terms and conditions upon which the freight services shall be owned and operated by the Freight Operator.

NOW, THEREFORE, in consideration of the benefits accruing to each of the parties as recited to herein, the parties do mutually agree hereto as follows:

ARTICLE 1: AGREEMENT AND DEFINITIONS

1.1 <u>The Agreement</u>

1.1.1 The agreement between the parties consists of this Transfer Agreement, which includes Exhibits 1 through 16 hereto, and documents specifically incorporated herein by reference (collectively, this "Agreement"). The Request for Proposals, the Request for Best and Final Offers and the Proposals are expressly superseded by this Agreement and shall be of no force or effect.

1.1.2 Each of the parties represents and warrants that it will perform in accordance with the terms and conditions of this Agreement.

1.1.3 This Agreement contains the entire understanding between the Freight Operator and the LIRR with respect to the Freight Operations. The parties are not bound by any written or oral statement or representation which is not expressly part of this Agreement. Any waivers, modifications or changes to this Agreement shall not be binding on either party unless set forth in a writing duly executed by both the Freight Operator and the LIRR.

1.1.4 (a) This Agreement is binding upon the Freight Operator upon its execution, but shall be null and void ab initio if (i) the LIRR fails to satisfy the requirements of clause (b)(i) within sixty (60) days of the Freight Operator's execution of this Agreement or such greater period as the Freight Operator, in its sole discretion, shall determine or (ii) the Freight Operator fails to satisfy the requirements of clause (b)(ii) within sixty (60) days of the LIRR's execution of this Agreement or such greater period as the LIRR, in its sole discretion, shall determine.

(b) The later of the dates on which the following requirements are satisfied shall be deemed the "Effective Date":

(i) The LIRR obtains the approval of the Board of Directors of the MTA and thereafter executes this Agreement; or

(ii) The Freight Operator secures approval or exemption for the transactions contemplated by this Agreement from the STB consistent with Article 12.1 hereof.

This Agreement shall be null and void in the event any labor protective provisions are imposed by the STB unless the parties otherwise agree or a party agrees to pay the cost associated with such labor protective provisions.

1.1.5 The Freight Operator shall commence the Freight Operations on or before April 1, 1997, provided that such date shall be extended in the event of the occurrence of an Event of Force Majeure or the existence of an injunction or order prohibiting or delaying such commencement, by the number of days of the duration of such Event of Force Majeure, injunction or order or such other period as may be mutually agreed upon by the parties, and shall continue the Freight Operations throughout the term of this Agreement (including the Extension Period, if applicable) except as otherwise provided herein. Such date on which the Freight Operator commences operations hereunder shall be referred to herein as the "Commencement Date."

1.1.6 The obligations of the Freight Operator hereunder are subject to the condition that on the date the Freight Operator is to commence operations pursuant to Section 1.1.5 there has been no material adverse change in the Freight Premises since September 16,

1996. For purposes of this Article 1.1.6 the expiration of any contract by its terms, including, without limitation, any cancellation by a party other than the LIRR, shall not, nor shall the effects thereof, constitute or be considered as a contributing factor to a material adverse change, provided that the failure to commence, or the termination prior to the Commencement Date, of the contract for movement of excavated rock in the volume [redacted] deemed a material adverse change for purposes of this Article. In the event of a material adverse change, this Agreement shall be deemed terminated and the Concession Fee shall be promptly refunded.

1.2 Definitions

1.2.1 Unless otherwise noted, the following definitions shall apply throughout this Agreement:

1.2.2 "AAR" means the Association of American Railroads.

1.2.3 "AAR Office Manual" means the Office Manual of the AAR Interchange Rules, adopted by the AAR, Operations and Maintenance Department, Technical Services Division, as amended from time to time.

1.2.4 "Abatement Period" means, (a) for any Annual Fee Period two separate periods of at least ten consecutive days; provided that for purposes of this clause (a) if the second of such periods straddles two Annual Fee Periods such period shall nevertheless

earthquakes, (g) quarantine, (f) blockade, (g) strikes, walkouts, lockouts or labor disputes, (h) actions by any governmental agency (other than the LIRR, the MTA or any other governmental agency controlled by the MTA) that have the effect of delaying or materially impeding the Freight Operations, (i) war, (j) insurrection or civil strife, (k) sabotage, (l) explosion, (m) other acts, events or circumstances, whether of the kind herein enumerated or otherwise, and whether caused or occasioned by or happening on account of the act or omission of one of the parties hereto or some person or entity not a party hereto, but only to the extent that such acts, events or circumstances are beyond the reasonable control of the affected party.

1.2.23 "Extension Period" is defined in Article 2.2.1 hereof.

1.2.24 "FRA" means the Federal Railroad Administration and any successor agency performing the same or similar functions.

1.2.25 "Final Termination Date" is defined in Article 14.2 hereof.

1.2.26 "Freight Operations" means all operations related to the movement of freight by rail (other than Company Traffic) on the Operating Premises, including, without limitation, the storage, warehousing, transloading of freight moved by rail and the storage of equipment used for transporting freight by rail.

1.2.27 "Freight Premises" means the real property, including the right-of-way, tracks, appurtenances, buildings, facilities, other physical plants, and improvements thereto used by the Freight Operator pursuant to this Agreement. Freight Premises shall include only the properties identified in Exhibit 1 hereto and all Sidetracks.

1.2.28 "Freight Rolling Stock" means Rolling Stock under the control of or operated by the Freight Operator.

1.2.29 "Freight Switch" means a rail switch and other track components connecting Joint Use Premises with Freight Premises that is used to switch Freight Rolling Stock from and to Joint Use Premises and Freight Premises.

1.2.30 "Hazardous Material" means (i) "hazardous substance" as defined under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9601 et seq., and any regulations promulgated thereunder, each as it may be in effect from time to time, (ii) "hazardous materials" as defined under the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801 et seq., and any regulations promulgated thereunder, each as it may be in effect from time to time, (iii) "hazardous waste" as defined under New York Environmental Conservation Law Section 27-0901 et seq., and any regulations promulgated thereunder, each as it may be in effect from time to time, (iv) "hazardous substance" as defined under the Clean Water Act, 33 U.S.C. Section 1321 et seq., and any regulations promulgated thereunder, each as it may be

in effect from time to time, (v) "Petroleum" as defined in N.Y. Environmental Conservation Law § 15.0514, and any regulations promulgated thereunder, each as it may be in effect from time to time, (vi) asbestos and (vii) polychlorinated biphenyls.

1.2.31 "Initial Expiration Date" is defined in Article 2.1 hereof.

1.2.32 "Interchange Rules" means the Interchange Rules included in the AAR Office Manual (or any successor manual).

1.2.33 "Joint Use Premises" means real property, including right-of-way, tracks, appurtenances, buildings, facilities, any other physical plants and improvements thereto used for both Passenger Operations and Freight Operations. Joint Use Premises shall include only the properties identified in Exhibit 2 hereto.

1.2.34 "Light Engines" means one or more locomotive units not coupled to cars or passenger coaches.

1.2.35 "LIRR Operating Rules" means all rules, requirements and procedures governing operations or activities on or about the Joint Use Premises and Passenger Premises, including the dispatching, movement and placement of Rolling Stock and the use and operation of infrastructure components and systems as outlined or incorporated by reference in the LIRR's "Rules of

1.2.46 "Rolling Stock" means a railroad car, locomotive, caboose, intermodel car, inspection car, passenger coach, cab car, bogie, wrecking equipment, work equipment and any other form of equipment with wheels operated on railroad track. Each of the foregoing will constitute a "unit" of Rolling Stock (it being understood that, with respect to any multiplatform car, each platform shall be considered a "unit").

1.2.47 "Sidetrack" means all track on the Freight Premises side of a Clearance Point of a Freight Switch that is used for switching freight cars and equipment to and from freight customer facilities or Team Track.

1.2.48 "STB" means the United States Surface Transportation Board or any successor agency performing the same or similar functions.

1.2.49 "Switch Maintenance Fee" is defined in Article 4.1.1(b) hereof.

1.2.50 "Team Track" means a rail facility, included in the Freight Premises, that is available for use by multiple rail customers for loading and unloading merchandise from Freight Rolling Stock. The Team Tracks are identified on Exhibit 1 hereof.

1.2.51 "Trackage Fee" is defined in Article 4.1.1(a) hereof.

1.3 All adjustments for inflation contained in this Agreement shall be based on the Indices of Railroad Material Prices and Wage Rates for Eastern Class I

Railroads (material prices, wage rates and supplements combined, excluding fuel) or, in the event such indices are discontinued, the Indices of Railroad Material Prices and Wage Rates for all Class I Railroads (material prices, wage rates and supplements combined, excluding fuel). If both such indices are discontinued then all adjustments for inflation contained in this Agreement shall be based on the Composite Implicit Price Deflator published by the Bureau of Economic Analysis, U.S. Department of Commerce or any successor agency.

ARTICLE 2: TERM AND RENEWAL

2.1 **Term**

Unless otherwise terminated as provided for in this Agreement, this Agreement shall remain in effect from and after the Effective Date through the twentieth anniversary of the Commencement Date (the "Initial Expiration Date").

2.2 **Renewal**

2.2.1 In the event the Freight Operator meets the following conditions, this Agreement may be renewed at the Freight Operator's option for a term of 10 years (the "Extension Period"), to commence on the Initial Expiration Date:

(a) The Freight Operator is not in material breach of any term(s) of this Agreement.

(b) The Freight Operator's safety record based on the average annual FRA-reportable accidents per 200,000 man hours or, if unavailable, other comparable measure, for the three (3) year period preceding the date of the Renewal Notice is equal to or better than the national industry average for Class C freight railroads for the same period or in the event that a national industry average for Class C freight railroads is not ascertainable such other comparable index as may be available. For purposes of this clause, accidents caused primarily by the LIRR shall be excluded from the Freight Operator's safety record; provided that such accident has been previously determined to be caused primarily by the LIRR.

(c) The annual average of freight carload volume (measured in terms of loaded "units" of Rolling Stock consisting of railroad cars and intermodel cars) transported in the Freight Operations for the three (3) year period preceding the date of the Renewal Notice shall be at least 24,474 carloads, or the percentage increase of the carload volume for the twelve calendar months preceding the Commencement Date to the carload volume for the twelve calendar months preceding the Renewal Date shall be more than 125% of the percentage increase achieved by the Eastern Class I Railroads for the corresponding periods; provided that if no such statistic is available

then the percentage increase achieved by all Class I Railroads nationwide shall be used.

(d) In respect of Capital Improvements for the period from the Commencement Date to the date of the Renewal Notice, the Freight Operator has invested or has caused to be invested in the [redacted]

(e) The Freight Operator gives notice in writing to the LIRR of its intent to renew the Agreement (the "Renewal Notice") no sooner than 13 years, but prior to 18 years, after the Commencement Date.

2.2.2 The terms and conditions of this Agreement shall remain in full force and effect during the Extension Period except for the following:

(a) The Freight Operator shall pay to the LIRR a [redacted] the commencement of the Extension Period, and ten equal annual [redacted] ch on each anniversary of the commencement of the Extension Period.

(b) Capital Expenditures during the Extension Period shall be at [redacted] the amount proposed in the Business Plan, indexed for inflation to the end of the twenty (20) year term of the Agreement using the methodology and indices described in Article 4.2.

2.2.3 Notwithstanding any provisions herein, nothing shall prevent the parties from negotiating any renewals for a term no greater than ten (10) years.

ARTICLE 3: GRANT OF RIGHTS TO USE

3.1 Right to Operate and Use

3.1.1 The Freight Operator shall have the exclusive right to use the Freight Premises and the Joint Use Premises to conduct Freight Operations in accordance with the provisions of this Agreement.

3.1.2 The Freight Operator shall have the exclusive right to manage, direct and control the Freight Premises; provided, that the Freight Operator shall not enter into any contracts, leases or other agreements which extend past the Initial Expiration Date or, if the Agreement is extended, such other applicable termination date, without the LIRR's prior written consent.

3.1.3 The Freight Operator may, at its sole risk and expense, construct or relocate freight-related facilities and infrastructures (such as transloading facilities, shops, team tracks, yards, sidings, etc.) within the Freight Premises, subject to prior review and approval by the LIRR of the Freight Operator's plans, which approval will not unreasonably be withheld; provided that such approval shall be deemed to be granted if the LIRR has not objected to such construction within 45 days of notice thereof. All

facilities constructed by the Freight Operator hereunder, improvements made thereon or improvements made to existing premises by the Freight Operator shall be made in compliance with applicable building codes and other regulations, and shall be owned by the LIRR as part of the Freight Premises.

3.2 Assignment of Contracts

3.2.1 The LIRR hereby assigns and the Freight Operator (a) hereby accepts all existing tariffs, customer contracts, leases, real estate agreements, side track agreements and other agreements applicable to the LIRR's existing Freight Operations and (b) shall have the right, from time to time, to take any lawful action to modify such contracts and agreements. Notwithstanding the foregoing, if any customer contracts, leases or real estate agreements (i) are not set forth on Exhibits 12 and 13 hereto or were not disclosed or made available to the Freight Operator during the Freight Operator's due diligence, (ii) are required to be assumed or otherwise performed by the Freight Operator and (iii) as a result, have a material adverse effect on the Business Plan, then the Freight Operator shall receive an Equitable Abatement in connection with such contracts and agreements.

3.2.2 In the event that the excavation spoils from the water supply shaft that is being created in the area known as Maspeth Yard and is the subject of an easement granted by The Long Island Rail Road Company

to the City of New York Department of General Services commencing on September 1, 1992 pursuant to a Purchase Option Agreement dated August 26, 1992, are not moved from the area by rail as required by Section 5 of the Terms and Conditions of that Agreement, except due to force majeure, the LIRR shall, at the request of the Freight Operator, promptly use good faith efforts to negotiate the "significantly higher compensation" referred to in said Section 5 and shall promptly pay to the Freight Operator from the additional compensation, if any, received the lesser of (i) the full amount of such additional compensation, if any; or (ii) 50% of the difference between $5.4 million and the revenues collected by the Freight Operator for movement of such material.

3.3 Limitations on Grant

3.3.1 The Freight Operator's right to conduct Freight Operations over the Joint Use Premises is subject to the LIRR's management, direction, dispatching, operation and control as set forth in this Agreement.

3.3.2 The grant of rights in Article 3.1 specifically excludes all of the following:

(a) Any right to control, direct or interfere with the LIRR's Passenger Operations on the Operating Premises or the Passenger Premises.

(b) Any subsurface or air rights in or associated with the Freight Premises or elsewhere in or associated with the Operating Premises, which subsurface and air rights shall remain with the LIRR.

(c) All utility occupancies currently located on the Freight Premises, including, but not limited to, the Buckeye Pipeline and all easements and reservations of record. To the extent any such utility has provided the LIRR with any indemnification, the LIRR shall use reasonable efforts to enforce such indemnification in favor of the Freight Operator, if and when applicable.

(d) Any rights to property encumbered by encroachments, tenants, licensees, squatters or other occupancies currently on the Freight Premises. There shall be no obligation on the part of the LIRR to take any action to remove the same except that the LIRR shall continue to pursue litigation pending on the Effective Date and the LIRR shall take actions to remove any encroachment that arose after September 16, 1996 and is existing on the Commencement Date that prevents the movement of Rolling Stock on lines being actively used immediately before the Commencement Date in connection with Freight Operations on the Freight Premises; provided that, encroachment in this sentence shall mean a permanent structure and provided, further that the Freight Operator shall inform the LIRR of

any such encroachments within 30 days after the Commencement Date; provided, however, that the Freight Operator (at its own expense) may on the LIRR's behalf take lawful action to remove any such occupancy which was not granted or approved by the LIRR or its predecessors in title. At the Freight Operator's request the LIRR, to the extent applicable, shall, at the expense of the Freight Operator, cooperate with the Freight Operator in connection therewith.

(e) Any right to use or permit others to use the Freight Premises for purposes not directly related to Freight Operations. Without limiting the generality of the foregoing, the Freight Operator shall not use or permit the use of the Operating Premises for:

(i) Tenancies not directly related to the Freight Operations;

(ii) Utility right-of-way or crossings, including electrical and telephone wires, fiber optic cables and pipelines of any kind (unless such utility is installed for the benefit of the Freight Operator or a permitted subtenant, with the prior permission of the LIRR); and

(iii) Advertising or billboards of any kind and signage not directly related to the Freight Operations.

Notwithstanding the foregoing, with respect to clause (i), the Freight Operator shall be permitted, with the prior consent of the LIRR, to use or permit the use of the Freight Premises for the purposes stated; provided that any contracts entered into with third parties in connection therewith are on terms no less favorable than could be obtained with an unaffiliated third party and that any revenues received therefrom shall be shared equally by the parties hereto.

The parties acknowledge and agree that in the case of clause (iii) above, (x) TDI has the exclusive right to install and maintain billboards on the Freight Premises, (y) no new billboards shall be installed on the Freight Premises without the prior written consent of the Freight Operator and (z) the Freight Operator shall permit TDI to have access to the Freight Premises, upon reasonable notice to the Freight Operator and at reasonable times, for the purpose of maintaining or removing any billboard. To the extent TDI has provided the LIRR with any indemnification, the LIRR shall use reasonable efforts to enforce such indemnification in favor of the Freight Operator, if and when applicable.

(f) The Freight Operator may not lease, license or otherwise assign any portion of the Operating Premises to any person for any purpose except by written consent of the LIRR which may be granted in the sole discretion of the LIRR; provided, however, that the Freight Operator may, without the prior written consent of the LIRR, lease or license portions of the Freight Premises to

shippers or others directly involved in the furtherance of Freight Operations on the Freight Premises (other than any such lease or license that has the effect, individually or taken together with all other leases or licenses, of causing all or a substantial portion of the Freight Operations to be conducted directly by any person or entity other than the Freight Operator), which shall be subordinate and subject to the terms and conditions of this Agreement. The LIRR shall receive prior written notice of any and all such agreements. Such leases and licenses, if any, shall provide for insurance and indemnification of the LIRR and its affiliates (including any government or governmental agency) to the same extent as provided under this Agreement. Such leases and licenses, if any, shall not relieve the Freight Operator of any obligations or duties imposed on it by this Agreement.

(g) Any use of the name The Long Island Rail Road Company or LIRR or any name derived therefrom or confusingly similar thereto, without the prior written consent of the LIRR; provided that the Freight Operator may use any other name with the words "the", "railroad" or "company". The Freight Operator agrees not to hold itself out as (a) having a common identity with the LIRR or any of its affiliates (including any government or governmental agency) or (b) acting as the LIRR's agent.

(h) Any title or estate in the ownership of the Freight Premises, any other part of the Operating Premises or the Passenger Premises.

(i) The right to conduct Passenger Operations.

3.3.3 The LIRR retains the right to use or to allow third parties to use the Freight Premises to construct, inspect, repair and maintain bridges, culverts and other structures (including structures in connection with the utilization by the LIRR of its subsurface or air rights hereunder) or construct utilities with reasonable prior written notice to the Freight Operator, provided however that any such use shall not materially interfere with the Freight Operations. The Freight Operator, upon receipt of prior written notice from the LIRR, will cooperate, without any cost to the Freight Operator, in allowing the LIRR to effectuate or permit any work described in this Article 3.3.3. Any indemnification or release by any third party to the LIRR with respect to the above shall, by its terms, also inure to the benefit of the Freight Operator.

3.3.4 Upon reasonable prior notice to the Freight Operator, the LIRR shall have the right to permit construction of a highway in conjunction with the Freight Premises on the Bay Ridge Branch from the 65th Street Yard (First Avenue) in Brooklyn to the connection with Conrail at Fresh Pond for mitigating the highway traffic congestion through Brooklyn and Queens during and after completion of the Gowanas Expressway

reconstruction and rehabilitation project. In such event, the Freight Operator will be entitled to receive from the LIRR damages as described in the next sentence. Damages means 50% of the revenues received during the twelve months preceding delivery of the aforementioned notice from customers that can no longer be served by rail due to such project multiplied by twice the number of years and fractional portions thereof of such period of interference. In addition, the LIRR shall, without duplication, indemnify the Freight Operator for any Loss or Damage in connection therewith. If the Freight Operator resumes Freight Operations after completion of this construction project, the Freight Operator shall be subject to certain scheduling limitations as to joint use to be agreed upon in writing. The LIRR shall use reasonable efforts to have the project work performed in a manner to minimize disruptions to the Freight Operations.

3.3.5 The following provisions apply to a portion of the Freight Premises known as Yard A and described more fully in Exhibit 5 hereto:

(a) The LIRR reserves the right to take exclusive possession of part or all of Yard A in the event it is needed to be used as part of the Passenger Operations, for expansion of Passenger Operations, or for any regional transportation plan. Subject to the last paragraph of this Article 3.3.5, the LIRR shall only exercise this right upon not less than six months prior

written notice to the Freight Operator and, in any event, only after December 31, 2001.

(b) The parties agree to negotiate, in good faith, mutually acceptable arrangements with the goal of avoiding additional cost or loss of operations by the Freight Operator in connection with any taking described in clause (a) above, including without limitation, the construction at the sole cost of the LIRR of freight facilities, which shall then become part of the Freight Premises, to handle the average daily volume of traffic handled in the Yard A facilities taken possession of by the LIRR under Article 3.3.5(a) hereof in the twelve (12) months preceding the time when the LIRR takes possession under said Article 3.3.5(a), all of which is subject to availability of an alternative site and capital funds.

(c) Should the Parties be unable to reach a mutually acceptable agreement as described in 3.3.5(b) hereof, the LIRR will reduce the Annual Fee for the balance of the term by an amount equal to the increased operational cost and lost profits associated with any taking described in clause (a) above, but in no event shall such amount exceed 25% of the Annual Fee. In the year in which the LIRR so takes possession, the Annual Fee will be prorated on a daily basis and reduced for the balance of the year, following the date of such possession in accordance with

the preceding sentence. In addition, to the extent the Freight Operator has made any Capital Improvements to Yard A, the Freight Operator shall receive from the LIRR the unamortized cost of such improvements; provided that such amortization shall be based on a useful life of seven years.

The foregoing provisions of this Article 3.3.5 shall not apply to the property identified in Exhibit 14, which property the LIRR shall be allowed to take any time after the Commencement Date without any compensation to the Freight Operator.

3.3.6 After giving notice of proposed construction under any provision of this Section 3.3, LIRR representatives shall meet with Freight Operator representatives to review the details of the construction project, including but not limited to work plans and schedules. If the construction project, in Freight Operator's sole opinion, requires flagmen or other personnel for safety or operational considerations, Freight Operator will assign personnel to the project at LIRR's sole expense.

3.3.7 The LIRR may, in respect of the Freight Premises, have its own systematic and periodic program of environmental auditing or a documented, systematic practice regarding its due diligence in preventing, detecting or correcting violations as defined in the Environmental Protection Agency Policy regarding

incentives for self-policing dated December 18, 1995 (or any successor thereto, as announced and in effect from time to time); and the Freight Operator shall provide access to its facilities, records and documents, and make available upon reasonable request such staff as may be necessary for the LIRR to conduct such a program or practice; provided, however, that the LIRR shall provide the Freight Operator with a copy of the written procedures or guidelines under which it conducts the program or practice, and shall conduct a review not more frequently than semi-annually at any facility. Upon preparation of a written report as a result of the audit or practice, the LIRR shall provide the Freight Operator with a copy of the report, and the Freight Operator, within 30 days thereafter shall provide any response or other comment on the recommendations or other materials presented in the report. The Freight Operator understands and agrees that the LIRR may operate such a program or practice for the LIRR's benefit, and the Freight Operator shall not be entitled to rely upon the results thereof for any purpose, except with the express written consent of the LIRR.

3.3.8 The LIRR retains the right of access to and exclusive use of the basement communications room in the LIC Freight Building at 21st Street and Jackson Avenue. The LIRR retains the right of access to such basement communications room on an ongoing basis for its own and NYNEX personnel, and for LIRR highway vehicles to enter and park in the parking lot outside the

building. Notwithstanding the foregoing, (i) LIRR shall be solely responsible for the maintenance and security of the basement communications room in the LIC Freight Building, and (ii) LIRR shall indemnify and hold harmless the Freight Operator for all Loss and Damage arising out of or in connection with the use of the basement communications room (except to the extent caused by the gross negligence, recklessness or willful or wanton misconduct of the Freight Operator).

3.3.9 The LIRR retains the right of access to and exclusive use of the property identified in Exhibit 15 that is located underneath the 21st Street Bridge and extends westward into the culvert between the concrete walls, Tracks 1 through 8 (identified in Exhibit 14 of the Transfer Agreement) in Yard A and the ground storage area in Maspeth Yard (Exhibit 16) from April 1997 through December 1998. The LIRR retains the right of access to these facilities for its own personnel and such contractor(s) as may be designated by the LIRR and where necessary, using LIRR crews and equipment. The Freight Operator will also make available to LIRR the western portion of the salt track in Arch Street Yard and Track 5 in Maspeth (identified in Exhibit 15, which is not part of the Freight Premises), on an as-needed basis as determined by LIRR for loading and unloading cars of Company Traffic consistent with the need of the Freight Operator. Movement of LIRR crews and equipment within Yard A, the Arch Street Yard and Maspeth Yard will be coordinated by the Freight Operator. Notwithstanding the foreoing, (i) LIRR

shall be solely responsible for the maintenance and security of the property described in Exhibit 15, and (ii) LIRR shall indemnify and hold harmless the Freight Operator for all Loss and Damage arising out of or in connection with the use of the property described in Exhibit 15 (except to the extent caused by the gross negligence, recklessness, or willful or wanton misconduct of the Freight Operator).

3.4 **Additions to Freight Premises**

3.4.1 In the event that the LIRR, in its sole discretion, determines that any portion of the Joint Use Premises which is necessary for the Freight Operations is no longer necessary in connection with its Passenger Operations or other public use, and therefore determines to abandon such portion, the Freight Operator shall have the option to accept such portion as an addition to the Freight Premises, and such portion shall be treated as Freight Premises thereafter and in any event shall no longer be treated as Joint Use Premises.

3.5 Reversion of Freight Premises to the LIRR Under Certain Circumstances

3.5.1 The Freight Operator may, by written notice to the LIRR, designate a portion or portions of the Freight Premises as being unnecessary in connection with the Freight Operations. At the option of the LIRR, such portions of the Freight Premises may revert to the LIRR's control and become a part of the Passenger Premises upon 30 days prior written notice to the Freight Operator; provided however, that (i) if any such portion that reverts to the LIRR includes any part of the right-of-way or an appurtenance associated with any tracks in the Freight Premises, such portion that reverts to the LIRR shall also include such tracks and (ii) in no event shall there revert to the LIRR any tracks or facilities that are only accessible through the Freight Premises. If the LIRR does not elect to have any such portion revert to its control (i) such portion shall remain as part of the Freight Premises and (ii) with respect to any such portion which is only accessible through the Freight Premises, the Freight Operator, with the consent of the LIRR (which consent shall not be unreasonably withheld), may remove and sell the rail and associated track materials thereon in accordance with Article 3.6.5(iii).

3.5.2 At any time during the notice period described in Article 3.5.1 hereof, the Freight Operator may reclaim such portion or portions of the Freight Premises by withdrawing the designation described in

Article 3.5.1 hereof.

3.5.3 In the event of a reversion hereunder, there shall be no reduction in the Annual Fee.

3.6 Condition of Freight Premises

3.6.1 The Freight Operator acknowledges that it has conducted due diligence to its satisfaction prior to signing this Agreement.

3.6.2 The LIRR has conducted an environmental audit dated July 12, 1996, which was made available for the Freight Operator's review.

3.6.3 The Freight Operator acknowledges and agrees that the Freight Premises are being transferred hereunder on an "as is/where is" basis and the Freight Operator shall, subject to the provisions of Article 8.4 hereof, be responsible for the condition of the Freight Premises as of the Commencement Date.

3.6.4 The Freight Operator is prohibited from selling, salvaging, demolishing or removing any part of the Freight Premises, including but not limited to the track, ties, ballast and track supports, without the prior written consent of the LIRR.

3.6.5 Notwithstanding any provision herein to the contrary: (i) the Freight Operator may, upon prior written notification to the LIRR, salvage and sell all surplus track materials stored on the right-of-way

within the Freight Premises, provided, that the net proceeds from any sale shall be shared equally by the Freight Operator and the LIRR; (ii) the Freight Operator may replace any part of the Freight Premises with parts of equal or greater quality and the proceeds from the sale of such replaced parts shall accrue to the Freight Operator; and (iii) net profits, if any, from the sale of any materials with the consent of the LIRR pursuant to Article 3.5.1 hereof shall be shared equally by the Freight Operator and the LIRR.

3.7 Freight Switches

3.7.1 Exhibit 6 hereto sets forth a list of Active Freight Switches, all of which have been classified as either Category A, Category B or Category C Freight Switches. Except as set forth below, the classification of a Freight Switch shall not change prior to the termination of this Agreement, including any Extension Period.

3.7.2 All Category C Freight Switches existing on the Effective Date shall automatically become Category B Freight Switches eighteen (18) months after the Commencement Date, for all purposes under this Agreement, including for purposes of Article 4.1.1(b) hereof.

3.7.3 Any Freight Switch that, after the Commencement Date, is (i) installed, including by way of replacement (other than when replacing a Category A Switch, which

replacement switch shall also be a Category A Switch) or (ii) newly activated, shall, after such installation or activation, be classified as a Category B Freight Switch, for all purposes under this Agreement, including for purposes of Article 4.1.1(b) hereof.

3.7.4 During the first eighteen (18) months after the Commencement Date, the Freight Operator may activate any Freight Switch identified in Exhibit 7 hereto, by providing thirty (30) days written notice to the LIRR. The LIRR shall, within a reasonable period of time, activate any such Freight Switch requested to be added, provided that, for each Freight Switch activated, the Freight Operator will be charged the cost to activate such Freight Switch.

3.7.5 After eighteen (18) months from the Commencement Date, the Freight Operator shall give at least thirty (30) days prior written notice to deactivate a Freight Switch. The monthly Switch Maintenance Fee shall be reduced accordingly following the lapse of such thirty (30) day period. The LIRR, at its sole option, may remove at any time after eighteen (18) months after the Commencement Date those Freight Switches identified in Exhibits 6 or 7 which are deactivated or are not activated by the Freight Operator during this period.

3.7.6 To install a new Freight Switch at any time, or to activate a Freight Switch in place after eighteen (18) months from the Commencement Date, the Freight

Operator shall make such request in writing to the LIRR, and follow the procedures outlined in Exhibit 8 hereto.

3.7.7 (a) The LIRR shall replace or rehabilitate, at its cost, any Category A Freight Switch that is in need of replacement or rehabilitation upon request of the Freight Operator or if the LIRR elects to replace or rehabilitate such Freight Switch.

(b) The LIRR shall replace or rehabilitate, at the Freight Operator's cost, any Category B or Category C Freight Switch that is, or is estimated to be within one (1) year of the date of notice set forth in this Article 3.7.7, in need of replacement or rehabilitation, provided that (i) the LIRR has furnished to the Freight Operator written notice that includes the cost of and schedule for such replacement or rehabilitation at least 120 days prior to the proposed date of initiating such replacement or rehabilitation (provided, that the LIRR shall not be obligated to furnish such notice in emergencies which affect the safety of Passenger Operations on the Joint Use Premises) and (ii) within 60 days after receipt of such notice, the Freight Operator has not notified the LIRR in writing that such Freight Switch should be deactivated rather than replaced or rehabilitated. Upon receipt of any such notice requesting deactivation, the LIRR may, but shall not be obligated to, deactivate the relevant Freight Switch immediately. Nothing set forth in this clause (b) shall preclude the LIRR from replacing or

rehabilitating a Category B or Category C Freight Switch, at its own election, at the LIRR's expense.

(c) The LIRR's obligation to repair Category C Freight Switches during the first 18 months shall be limited to repairs costing in the aggregate for any [redacted] In the event the aggregate cost is projected to exceed $15,000, the LIRR shall furnish notice to the Freight Operator of the required repairs and the associated cost. Within 30 days of such notice, the Freight Operator shall by written notice to the LIRR elect to (i) pay for that portion of the costs related to such repair which [redacted] (ii) deactivate the switch.

3.7.8 In connection with customers for which Category B or Category C Freight Switches are used, the Freight Operator shall continue to serve such customers for at least 18 months from the Commencement Date unless (i) a customer refuses to accept the same price and terms existing on the day prior to the Commencement Date or (ii) the Freight Operator elects to have the Freight Switch deactivated under Article 3.7.7 hereof.

ARTICLE 4: COMPENSATION

4.1 Compensation

4.1.1 The Freight Operator shall pay to the LIRR during the term of this Agreement, the following sums:

20.15.2 The LIRR hereby represents and warrants to the Freight Operator that the grant of rights and other assets by the LIRR to the Freight Operator provides the Freight Operator with sufficient rights to conduct the Freight Operations in a manner substantially similar to that conducted by the LIRR on the Effective Date, subject to the expiration of customer and other contracts that do not extend past the Commencement Date and subject to the requirements of Article 15.3 hereof.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement in duplicate and have caused their corporate seals to be hereunto affixed the day and year first written below.

THE LONG ISLAND RAIL ROAD COMPANY

By: _____
Thomas F. Prendergast
President

Date: 11/19/96

SOUTHERN EMPIRE STATE RAILROAD COMPANY

By: _____

Print Name: R.C. McCaffery Jr.

Title: President

Date: 15 November 1996

A-907

State of Delaware

Office of the Secretary of State

I, EDWARD J. FREEL, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF AMENDMENT OF "SOUTHERN EMPIRE STATE RAILROAD COMPANY", CHANGING ITS NAME FROM "SOUTHERN EMPIRE STATE RAILROAD COMPANY" TO "NEW YORK & ATLANTIC RAILWAY COMPANY", FILED IN THIS OFFICE ON THE SIXTH DAY OF DECEMBER, A.D. 1996, AT 4 O'CLOCK P.M.

A CERTIFIED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO THE NEW CASTLE COUNTY RECORDER OF DEEDS FOR RECORDING.

Edward J. Freel, Secretary of State

2683984 8100

960358622

AUTHENTICATION 8227709

DATE 12-09-96

A-908

EXHIBIT 1
MTA/LONG ISLAND RAIL ROAD
FREIGHT PREMISES

1. Branches
   a. Bay Ridge Branch (subject to New York City Transit Authority access on weekends)
   b. Central Extension, Franklin Avenue to Endo Blvd.
   c. Bushwick Branch
   d. North Shore Freight Branch (excluding NYC air rights above 22 ft. ATR)

2. Yards
   a. Fresh Pond Yard
   b. Yard-A (excluding NYC air rights above 22 ft. ATR)
   c. Arch Street yard (excluding NYC air rights above 22 ft. ATR)
   d. Blissville Yard (tracks not in service)
   e. Maspeth Yard
   f. Fremont Yard
   g. Bridgehampton North Siding and Team Yard
   h. Garden City Team Yard
   i. East Farmingdale (PW Long Siding, Wye and Team Yard)
   j. Richmond Hill Team Yard

   Several of the tracks in the yards listed above are out of service.

3. Appurtenant Facilities
   a. Atals Terminal (tracks not in service)
   b. Price Industrial Park
   c. Roosevelt Spur
   d. Kearney's Siding (tracks not in service)
   e. Degnon Terminal (tracks not in service)

4. Buildings
   a. Long Island City, Arch Street Freight House & Offices
   b. Long Island City, Yard-A Freight Car Repair Shop
   c. Long Island City, Yard A Yardmaster's Office
   d. Maspeth Yard Office
   e. Fresh Pond, Car Control Office (former Pond Tower)
   f. Fresh Pond, Welfare Facility
   g. PW Trailer
   h. Pine Aire (Brentwood) Trailer

5. Team Tracks
   a. Bay Shore
   b. Central Islip
   c. Eastport
   d. Farmingdale
   e. Greenlawn
   f. Huntington
   g. Islip
   h. Mattituck
   i. Medford
   j. Port Jefferson
   k. Riverhead
   l. Southampton
   m. Yaphank

EXHIBIT 2
MTA/LONG ISLAND RAIL ROAD
JOINT USE PREMISES

1. **Branches: Primarily Passenger Operations with Freight Operating Concession**
   - a. Main Line, Jamaica to Greenport
   - b. Montauk Branch, between Montauk and L.I. City Passenger Yard
   - c. Port Jefferson Branch, Hicksville to Port Jefferson
   - d. Central Branch, "B" Tower to Babylon
   - e. Hempstead Branch, between Queens and Garden City Interlockings
   - f. West Hempstead Branch, Valley to WM
   - g. Montauk Cut-off

2. **Yard and Team Tracks: Primarily Passenger Operations with Freight Operating Concession**
   - a. Port Jefferson
   - b. Montauk
   - c. Queens Village
   - d. Speonk
   - e. Hicksville
   - f. Patchogue
   - g. Sayville
   - h. Richmond Hill
   - i. Southhold
   - j. Pinneaire north side

3. **Bridges**
   - a. Cabin "M" Bride
   - b. "DB" Bridge

A-910

LEASE AGREEMENT: FARMINGDALE - 1

THIS LEASE AGREEMENT ("Agreement") made and entered into this 11 day of July, 2002, by and between New York & Atlantic Railway Co., hereafter referred to as "NYA" and Coastal Distribution, LLC. (and any of its agents, licensees and/or assignees), hereafter referred to as "Lessee".

A. Premises. NYA hereby agrees to let and Lessee hereby agrees to hire of NYA certain property located at Farmingdale Team Yard (PW) as more particularly described by the drawing attached hereto as Exhibit A (the "Premises"), for Lessee's exclusive use, at the rate and for the term set forth herein.

B. NYA Warranties. NYA warrants it is the owner (or agent for the owner) of the Premises, that it is fully authorized to enter into this agreement and has the right to grant Lessee the use of the Premises and each and all of the rights herein granted. It is agreed to by the Lessee the rights conveyed by this lease are subject to, and limited by, the rights conferred to NYA by the Transfer Agreement between the Long Island Rail Road and NYA.

C. Agreements. It is mutually agreed by and between the parties hereto as follows:

1. Rent / Rebates. The rate for Lessee's use of the Premises as provided herein shall be [redacted] per month, payable in advance, as provided in section C.14 hereof. The NYA and Lessee hereby agree to the following payment/rebate arrangement regarding the movement of LIRR material from the premises:

   a. Lessee will make [redacted] in funds available to NYA

   NYA will contribute the following to achieve a [redacted] payment to Lessee, which is equal to one-half of total funds required.

   b. NYA will add [redacted] to figure in "1-a" above, and submit funds to the LIRR in the amount of [redacted].
   c. NYA will rebate Lessee in the amount of [redacted] per rail car shipped where "Coastal Distribution", or affiliates as specified, show as consignee, at the station of Farmingdale, NY. This rebate will remain in effect until the amount of [redacted] has been apportioned to the Lessee. The term of this rebate shall not exceed three years from the effective date.
   d. NYA will reduce the rent on premises for the first twenty-four months of the agreement, to the amount of [redacted] per month. The security payment made by Lessee for the previously cancelled contract will be applied as the payment for September 2004 rent.

2. Improvements. Lessee shall have the right to make improvements to the premises. All investments, made by Lessee, including pavement, lighting, fencing, security of any kind, etc. shall be at the sole expense of Lessee with no reimbursement of any kind.

3. Term. This Agreement shall remain in effect for five (5) years from the date when the first railcar consigned to Lessee is brought to the Premises (the "Commencement Date"). The Agreement shall terminate five (5) years after the Commencement Date ("Termination Date"). The initial term of the volume commitment of the Agreement shall begin on the Commencement Date and shall end exactly one year later (i.e. if the Commencement Date is on August 1st, 2002, then the initial term shall end on August 1st, 2003). Each term following the initial term shall begin on the anniversary of the Commencement Date and

shall end the following year. After the initial term of the Agreement, Lessee shall automatically be entitled to another year until Termination Date provided that:

I. Lessee will meet a volume commitment of 1,200 carloads in the initial term, 1,800 carloads in the second term, 2,400 carloads in the third term, and 3,200 carloads for each term thereafter.

II. Lessee has not been in any material breach of any of the provisions of this Agreement.

III. NYA agrees to work with Lessee to renew Agreement after its expiration based on adherence by Lessee to all of the statutes as laid forth in this Agreement over its five-year term. The Agreement cannot be renewed past March 31st, 2017.

4. Damage, Vandalism, Graffiti, etc. NYA will not be held responsible for any damage/vandalism/graffiti, etc. to any material or equipment stored on the premises.

5. Indemnification. Lessee hereby assumes, releases and agrees to protect, save harmless, defend and indemnify NYA, MTA and LIRR, and its respective officers, shareholders, directors, employees, agents and assigns from and against any and all claims and liability caused by, arising out of or resulting in any manner from the condition, existence, use or occupancy of the Premises and any adjoining lands used by Lessee during the term of this agreement, including but not limited to:

I. All loss and damage to any property whatsoever, including property of NYA, MTA, LIRR and of all other persons whomsoever placed or stored upon Premises and upon any temporary usage area(s), and the loss of interference with any use or service thereof;

II. All loss and damage on account of injury to or death of any person whomsoever, including but not limited to employees and patrons of the parties hereto and all other persons whomsoever on the Premises and upon such temporary usage area(s); and

III. All consequential loss or damage occurring off the Premises but arising from acts or events on the Premises.

Notwithstanding the foregoing, Lessee shall not be responsible for and will not indemnify NYA, MTA or LIRR from and against any claims or liability arising out of or in connection with the gross negligence or gross willful misconduct of NYA, MTA or LIRR.

6. Required Insurance. Lessee shall maintain the following types of insurance with insurance carriers having a current A.M Best rating of not less than A-VIII, in the amounts provided for below and otherwise in form and substance acceptable to NYA:

I. Comprehensive General Liability Insurance with minimum limit per any one occurrence of $5,000,000. All exclusions as relating to Railroad Right of Way must be deleted from the policy, if this is not

the case, then insurance as set forth in Section 6.IV shall be provided by the lessee.

II. Automobile Liability Insurance (covering owned, hired and non-owned vehicles) in minimum limits of $2,000,000 for injury to or death of any one person, of $5,000,000 for injury to or death of more than one person in any one accident, of $5,000,000 for damage to property in any one accident.

III. Workers Compensation Insurance in an amount not less than required by The State of New York and as follows:

Coverage A – Statutory Policy form

Coverage B – Employer's Liability

- Bodily Injury by Accident: $1,000,000 each accident
- Bodily Injury by Disease: $1,000,000 each employee & Policy Limit

IV. Railroad Protective Liability Insurance in the amount of at least $10,000,000. The form shall be on an occurrence basis and be executed in favor of NYA as a named insured.

V. Lessee and all of its insurer(s) agree to waive subrogation (including without limitation Worker's Compensation) against NYA, LIRR, MTA, their agents and employees, which waiver(s) by insurer(s) shall also be expressed and evidenced in the certificates of insurance (including without limitation Worker's Compensation).

VI. All of Lessee's insurance shall be primary insurance with respect to the additional insured and will not participate with any other available insurance (and upon NYA's request Lessee's certificates of insurance shall reflect the foregoing primary aspect). All deductibles shall require written consent of NYA. All of Lessee's insurance of any type shall be from insurer(s) approved by NYA. Failure by NYA to object to the lack or contents of any of the certificate(s) or coverage(s) to be provided by Lessee shall not serve to waive or limit NYA's rights or remedies nor to eliminate or effect Lessee's obligations, waivers or liabilities under this contract.

Lessee shall furnish NYA Certificates of Insurance, in duplicate, evidencing all required insurance to be in full force and effect and that the same will not be canceled without at least thirty (30) days advance written notice by Insurance Company to NYA. The New York and Atlantic Railway, the Metropolitan Transit Authority and the Long Island Rail Road shall be shown as additional insured.

7. Condition of Premises. NYA does not warrant the condition of its property, equipment and facilities for any purpose. Lessee assumes the risk of using the Premises for any purpose, and accepts all conditions and defects present thereon, or associated therewith.

8 Removal of Improvements. At the end of the project, Lessee shall have the right to remove all of its structures and other material and equipment from said premises at the sole cost and expense of Lessee if they so desire; provided, that removal of such structures and other material and equipment will not damage the Premises in any way.

9 Emergency Interruptions. When requested by NYA, Lessee agrees to stop any activity in which it is engaged whenever NYA deems an emergency, as necessary to insure the timely and safe operations of the railroad and in no event will train operations or safety be jeopardized.

10. Compliance with Procedures and Instructions. Lessee, its officers, employees, agents, contractors and invitees agree to comply with all NYA operating procedures, safety rules, and instructions from NYA personnel.

11. Liability. Lessee agrees that when railcars are placed for unloading/loading at Premises, the security of the railcars and their contents shall remain with Lessee.

12. Freight Payments. Lessee shall maintain good credit with NYA. Lessee shall pay freight bills within fifteen (15) days of receipt. If account of Lessee is in arrears at any time during the term of the Agreement, this will be considered a violation of the Agreement, and NYA will be entitled to terminate the Agreement as specified in section 13.I hereof.

13. Termination.

I. This Agreement is subject to immediate termination by either party in the event of violations by the other party of any of the terms and conditions of this Agreement. Lessee shall have been given sixty (60) days written notice to cure any breach of any obligations of the Agreement. However, Lessee shall have been given fifteen (15) days written notice to cure violations as proscribed in section C.12 hereof.

II. Lessee shall have the right to cancel this agreement on sixty (60) days written notice.

III. NYA shall have the right to cancel this agreement on sixty (60) days written notice provided the railcar volume commitments as stated in section C.3.I hereof are not met.

14. Effective Date. This Agreement shall not become effective until Lessee has returned a signed copy of this Agreement, furnished evidence of insurance as specified in section C.6 hereof. All rental payments are due on the first day of every month. Lessee shall have a ten-day grace period for payment of rent.

AGREED AND ACCEPTED:

Lessee
Coastal Distribution, LLC.
30 A Glen Street
Glen Cove, New York 11542
Tel. 516-676-3700

By: _____
Joseph Quigliano

DATED: July 11, 2002

Lessor
New York & Atlantic Railway Co.
68-01 Otto Road
Glendale, New York 11385
Tel. 718-497-3023

By: _____

Check Payable To:
New York & Atlantic Railway Co.
Accounting Office
53 West Jackson Boulevard, Suite 335
Chicago, IL 60604
Fed. I.D.#: 13-3926500

DATED: July 11, 2002

Exhibit C

A-916

TRANSLOAD FACILITY OPERATIONS AGREEMENT

This TRANSLOAD FACILITY OPERATIONS AGREEMENT, effective as of August 5-6, 2004, is made and entered into by and between New York & Atlantic Railway Company ("Railroad"), and Coastal Distribution, LLC, a limited liability company of the State of New York ("Coastal").

RECITALS

WHEREAS, RAILROAD is a common carrier by rail conducting freight operations over certain tracks and facilities of The Long Island Rail Road Company pursuant to a Transfer Agreement dated November 18, 1996 (the "Transfer Agreement") that permits RAILROAD to lease or license certain properties for use in furtherance of freight operations; and

WHEREAS, RAILROAD and COASTAL are parties to a Lease agreement dated July 11, 2002 (the"Lease") providing for the lease of a yard and transloading facility ("the Facility") at the Farmingdale (P.W.) Rail Yard, located in Babylon, New York (the "Yard"); and

WHEREAS, the parties desire to cancel the Lease and modify their relationship in accordance with the following agreement; and

WHEREAS, RAILROAD desires to continue to offer and provide transloading and rail transportation services via carload to certain railroad customers ("Customers") at the Facility in conjunction with RAILROAD's rail line and the interstate railroad network; and

WHEREAS, COASTAL desires to continue to operate the Facility for and on behalf of RAILROAD; and

WHEREAS, RAILROAD desires to engage COASTAL as RAILROAD's contractor, to operate the Facility on RAILROAD's behalf; and

WHEREAS, the services shall be limited to providing transloading services between rail and truck for such non-hazardous freight, as may be agreed upon as provided herein, such freight being referred to generally as "Commodities" in this agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the representations, warranties, covenants and agreements set forth in this Agreement:

ARTICLE I – TRANSLOADING OPERATIONS

1.01. COASTAL Transloading Services. COASTAL shall, and shall have the exclusive right to, transload Commodities between trucks and rail cars at the Facility, for and on behalf of Railroad, pursuant to the terms of this Agreement. This right and obligation shall not be construed as a property interest in the Yard or the Facility, and is subordinate and subject in all respects to the terms and conditions of the Transfer Agreement.

1.02. RAILROAD Control of Operations. RAILROAD shall control all aspects of the Facility's transloading operations. RAILROAD shall have the right to review and audit COASTAL's business records related to the operation of Facility during regular business hours and shall have the right to inspect COASTAL's operation of the Facility at any time. COASTAL operations at the Facility and the Yard shall be subject to the supervisory authority of the RAILROAD's General Manager at Glendale.

1.03. RAILROAD Obligations. RAILROAD shall provide the existing Facility, AS-IS, WHERE IS. RAILROAD shall have the right to change the configuration of track at the Yard so long as such change does not unreasonably interfere with COASTAL'S operations. RAILROAD does not warrant the condition of the Facility or the surrounding areas, the Yard or its equipment for any purpose. COASTAL has examined the premises and assumes the risk of using the premises for any purpose, and accepts all conditions and defects present thereon or associated therewith, known or unknown, provided however, that COASTAL does not waive or relinquish any rights it may have against RAILROAD under the Lease as a result of or arising from the claim of Pinelawn Cemetery to property rights in the Yard as are, or may be, alleged in Pinelawn Cemetery v. Coastal Distribution, LLC, et al., County of Suffolk No. 04-8599. Any such claim shall survive this agreement and the cancellation of that Lease contained herein.

1.04 Rail Service: Railroad shall provide reasonable rail service to the Facility.

1.05 Custody of Lading and Equipment: RAILROAD'S responsibility and liability for the cars and their contents bound to or from the Facility ends when the cars are uncoupled from the RAILROAD'S locomotive at the Facility, and the RAILROAD'S responsibility and liability is resumed when the cars are coupled to RAILROAD'S locomotive.

1.04. COASTAL Obligations.

(a) COASTAL shall perform transloading services between rail cars and trucks at the Facility for Customers of the RAILROAD. Such services shall include only those commodities, movements and equipment allowed by applicable law and regulations and approved by RAILROAD which approval will not be unreasonably withheld. COASTAL shall immediately cease and desist from any operations which shall be found to be in violation of any contractual or other obligation of RAILROAD upon notice from Railroad.

(b) COASTAL shall enforce all rules and regulations, as promulgated by RAILROAD as to all Customers, COASTAL employees and visitors at the Yard. Railroad may

establish rules related to safety and train operation which are consistent with industry norms or which are mandated by law or regulation. RAILROAD and COASTAL will jointly determine all such other rules as will apply to the operation of the facility, such rules will be to assure the efficient operation of the facility and will be designed to minimize adverse impacts on neighbors. Further, Costal shall comply with any and all applicable governmental health, safety and environmental rules or regulations.

(c) COASTAL shall, at its sole cost, acquire or provide any additional loading equipment (not owned by RAILROAD) reasonably necessary for the efficient handling of material and conducting transloading operations at the Facility and Yard. COASTAL shall clearly identify all such equipment as COASTAL equipment. All such equipment will comply with all applicable regulations. COASTAL will have the right to install and remove such equipment as the market may dictate, subject to the approval of RAILROAD (and LIRR to the extent required under the Transfer Agreement).

(d) COASTAL may market the Facility and the services of RAILROAD available by use of the Facility. COASTAL shall obtain RAILROAD's advance written approval of all written materials, including brochures and other marketing material used by COASTAL in marketing RAILROAD's transload and transportation services related to the Facility. Unless RAILROAD otherwise provides to the contrary, any such marketing material and any signage located inside or outside of the Yard shall prominently indicate RAILROAD's name and/or logo.

1.06. Railcars: Unless otherwise agreed by the parties hereto in writing:

(a) COASTAL will provide railcars to be used for any movement of construction and demolition debris or other long-term, repeat Commodity shipments from the Facility. Such railcars must be in good condition and provide appropriate protection to maintain the quality of their lading. Railcars provided by COASTAL and used under this Agreement will be subject to prior approval of RAILROAD, which approval shall not be unreasonably withheld. COASTAL equipment will not earn per-diem while on RAILROAD. COASTAL will provide maintenance for such equipment except that, as necessary to provide running repairs, RAILROAD may repair en route and bill COASTAL in accordance with current Association of American Railroads (AAR) Rules or COASTAL's own repair standards.

(c) Equipment Compliance: All railcars used to transport the Commodities pursuant to this Agreement shall comply with AAR and American National Standard Institute (ISO) specifications, as well as all applicable laws, rules and regulations. It shall be the responsibility of the party providing the equipment in any case to assure such compliance.

(d) Supplemental Equipment: If COASTAL'S need for railcars exceeds its own supply, RAILROAD will, upon request, use its reasonable best efforts to obtain suitable railcars on such terms as may be applicable to such equipment, but at the sole cost of COASTAL. RAILROAD will provide equipment for all non-regular

customers of the facility on terms applicable to such shipments in railroad-supplied equipment.

(e) Equipment Availability: RAILROAD will provide storage for empty COASTAL equipment not to exceed 50 rail cars at no cost to COASTAL.

1.07. Track Inspection: RAILROAD will remain responsible for the inspection of all tracks within the facility. Coastal will make such repairs as RAILROAD shall reasonably determine are necessary to maintain the facility in compliance with applicable regulations. Should Coastal fail to make necessary repairs RAILROAD will close the track in question until such repair is made.

1.07. Tender of Shipment: COASTAL shall ensure that each tender of Commodities for outbound rail shipment is made by or on behalf of RAILROAD'S Customer by e-mail, Electronic Data Interchange or other electronic means as agreed by the parties on a Uniform Straight Bill of Lading for carload shipments, properly classifying the Commodity to be shipped.

1.08. Loading and Unloading of Lading:

(a) Compliance with Loading Rules: COASTAL shall have the sole responsibility, at its sole expense, for properly packaging, labeling, marking, blocking, bracing, placarding, and loading and unloading the Commodities tendered by Customers at the Facility to or from equipment to be transported pursuant to this Agreement. COASTAL shall comply with the loading rules of the AAR and applicable law. COASTAL shall further be responsible for insuring that the load limits of any equipment used for transporting the Commodities under this Agreement are not exceeded.

(b) Overloaded or Improperly Loaded Equipment: In the event it is discovered that equipment has been overloaded or improperly loaded, RAILROAD may set out such equipment at a location convenient to RAILROAD and shall notify COASTAL by facsimile or e-mail of the location of the overloaded or improperly loaded equipment. COASTAL shall have 24 hours to remove excess weight or adjust load; or, if deemed safe, RAILROAD will move the overloaded or improperly loaded equipment to the nearest appropriate site. In any event, COASTAL shall be responsible for all costs for movement of the overloaded or improperly loaded equipment, and payment of any additional expenses incurred by RAILROAD due to improper loading or overloading of equipment. RAILROAD will move the affected equipment to its destination in such manner and at such time as is practicable after RAILROAD receives notice from COASTAL that the problem has been corrected.

1.09. No Selection of Landfill: In the event the Commodities include construction and demolition debris neither RAILROAD, nor COASTAL on behalf of RAILROAD, shall participate in, or take any active interest in, the site selection for the storage or disposal of the materials transported hereunder. RAILROAD shall have no obligation with regard to disposition of Commodities tendered to it for transportation other than to deliver it to the consignee or to

another railroad for interchange. To the extent that COASTAL enters into any agreement with a Customer for disposition of Commodities after transportation of the Commodities by RAILROAD, COASTAL shall not do so as an agent of RAILROAD and shall indemnify, defend and hold the RAILROAD harmless from any claims or liability arising out of COASTAL's activities on its own behalf. For the purpose of monitoring compliance with this agreement, COASTAL shall provide RAILROAD, upon request, a copy of any contract it or any Customer enters into with a destination landfill or treatment site prior to shipping Commodities to that landfill or treatment site.

1.10. Commodity and Analysis Reports: If requested, COASTAL shall provide RAILROAD with a copy of any commodities analysis report that is required to be submitted to any federal, state or local agency or to the operator of any destination disposal sites.

1.11. Incidents: In the event of an incident during transportation over RAILROAD's lines under this Agreement, which involves a release of the Commodities, RAILROAD shall immediately notify COASTAL, and each party shall take immediate action.

(a) In any such incident where the release was caused by an act or omission of RAILROAD, the expenses of cleanup shall be the obligation of RAILROAD under the terms of this Agreement, and COASTAL shall, upon request of RAILROAD and to extent it is authorized by law and regulation:

(1) provide containers for loading of Commodities and accept for disposal Commodities being disposed of by RAILROAD as a result of the cleanup ("RAILROAD's Cleanup Waste"), subject to the parties' mutual agreement on the cost of disposal for RAILROAD's cleanup waste to the extent the net tonnage of that waste exceeds the net tonnage of the original Commodities; and

(2) credit against RAILROAD's disposal costs for RAILROAD's Cleanup Waste any monies already collectible by COASTAL from other parties for the original disposal of the Commodities involved in the incident.

(b) In any such incident where the release was caused by an act or omission of COASTAL, the expenses of cleanup shall be the obligation of COASTAL under the terms of this Agreement, and RAILROAD shall, upon request of COASTAL and to the extent it is authorized by law and regulation:

(1) transport the Commodities being disposed of by COASTAL as a result of the cleanup ("COASTAL's Cleanup Waste"); and

(2) credit against COASTAL's transportation costs for COASTAL's Cleanup Waste any monies already payable by COASTAL to RAILROAD for the original transportation of the Commodities involved in the incident.

1.12. RAILROAD Use. COASTAL acknowledges that RAILROAD may use the tracks and other yard facilities from time to time for railroad purposes so long as that use does not unreasonably interfere with Coastal's operation.

1.13 Exclusive Use: So long as the terms of this Agreement remain in effect, RAILROAD shall not authorize any other party to conduct transloading activities at the Farmingdale (P.W.) Yard or operate the Facility on RAILROAD'S behalf.

1.14 Non Interference: The parties shall use their best efforts to conduct their respective operations so as not to interfere with the operations of the other.

ARTICLE II – DOCUMENTS AND BILLING

2.01. Transport Documentation.

(a) All bills of lading and similar documents for outbound rail shipments from the Facility (collectively, "Transport Documentation") for the Commodities transloaded at the Facility shall be between RAILROAD and the Customer, but COASTAL, as RAILROAD'S agent, may execute such Transportation Documentation on behalf of RAILROAD. COASTAL shall advise RAILROAD from time to time of the names of the COASTAL officers and employees who will execute such Transport Documentation, and shall apply prudent internal control procedures to ensure compliance with the provisions of this Agreement.

(b) All Transport Documentation shall be on a form approved in writing by RAILROAD and shall specifically state that neither RAILROAD nor COASTAL shall take title to any Commodities and that RAILROAD shall not, under any circumstances, be responsible or liable for disposal of Commodities. COASTAL may enter into separate agreements (collectively, "Disposal Agreements") in its own name with Customers whereby COASTAL shall be responsible to such Customer for obtaining the disposal of COMMODITIES. In entering into and performing any Disposal Agreements, COASTAL shall not make any statement or take any action or fail to take any action that suggests that RAILROAD is in any way participating in or approving any Disposal Agreement of disposal arrangement. Any Disposal Agreements shall be entirely independent from the transportation and loading service provided under this agreement. Coastal shall separately invoice and collect any fees or charges on its own behalf under any Disposal Agreements.

2.02. Billing and Collection. COASTAL shall promptly bill and collect from Customers all Loading Fees (as defined below) for loading or unloading services rendered to the Customer by COASTAL. COASTAL shall remit to RAILROAD within two business days of clearance of funds by COASTAL'S bank such portion of the Loading Fees for RAILROAD'S corresponding Usage Fee (as defined below). COASTAL shall provide RAILROAD with a monthly accounting of the rail cars and trucks loaded by COASTAL under this Agreement, amounts billed and funds received. Loaded freight transportation charges will be collected by the Class I carrier unless otherwise provided by applicable transportation contract or tariff.

ARTICLE III – LOADING AND USAGE FEES

3.01. Rates and Charges. For and as its sole compensation for performing the transloading services, COASTAL shall be entitled to charge a Loading Fee ("Loading Fee") for such services, which fee shall be in addition to the rail freight transportation charge otherwise payable to RAILROAD for loaded freight car movements.

3.02 Use Charge: COASTAL shall pay to RAILROAD, for the use of the Facility and in recognition of the previous contributions to construction of the Facility by the parties, a usage fee (the "Usage Fee") of twenty dollars ($20) per loaded rail car (inbound or outbound). The Usage Fee for each loaded car in excess of 1,200 in any contract year (as determined by the anniversary of the effective date) shall be reduced to five dollars ($5).

3.03 Payment. Usage Fees payable to RAILROAD under this agreement shall be paid as provided in Section 2.02 above.

3.04 Discrepancies: Any discrepancy in billing or charges provided for under this agreement shall be reconciled between the parties. Any claim for adjustment or correction of charges paid, collected or remitted shall be made in writing by the party making the claim and delivered to other party within six (6) months of the date upon which the charge was paid, collected or remitted or shall be deemed waived. Any such claim shall be resolved pursuant to Section 7.03.

ARTICLE IV – COVENANTS OF COASTAL

4.01. Use of the Facility. During the term of this Agreement, COASTAL agrees and covenants as follows:

(a) COASTAL shall use the Facility only for the transfer of Commodities between trucks and railcars transported by RAILROAD.

(b) COASTAL shall access the Facility using only RAILROAD's primary access route off New Highway and shall not load or unload railcars outside the Facility.

(c) COASTAL may not allow other persons to operate the Facility without the prior written permission of RAILROAD which permission may be withheld for any reason.

(d) COASTAL shall, at its sole cost and expense, obtain any applicable required permits, licenses, waivers, consents or other governmental authority required for it to operate the Facility. Any costs incurred by RAILROAD in the process of obtaining any permits or operating authority for COASTAL will be paid by COASTAL, provided however COASTAL will not be responsible for any legal fees incurred by RAILROAD in reviewing submissions made by COASTAL or costs incurred by RAILROAD in obtaining any additional permits, authority or exemptions in the name of RAILROAD.

(e) Should RAILROAD'S operations be interrupted by any government agency, public authority or any entity authorized to do so, due to any deficiency in COASTAL'S permits or as the result of COASTAL's failure to obtain or comply with same, COASTAL shall defend, indemnify and hold RAILROAD harmless from any and all costs, including attorney's fees.

(f) COASTAL shall take reasonable steps to assure that any hauler, motor carrier or other person, party or entity operating to, at or from the Facility is duly licensed and authorized to so operate under applicable law.

(g) COASTAL and its affiliates, agents, contractors, employees and invitees shall adhere to RAILROAD's standard safety policies then in effect based on rule books, and revisions thereto, as provided to COASTAL by RAILROAD.

(h) COASTAL covenants that as of the Effective Date of this agreement, the Facility has been constructed and operated in compliance with (i) any applicable laws and regulations, and (ii) all buildings on the premises were built and all buildings to be built will comply with all requirements of the LIRR as may be imposed under the Transfer Agreement and with any applicable standards contained in any building and or fire codes and any other standard, law or regulation, except to the extent that RAILROAD and COASTAL agree such standards are not applicable. COASTAL covenants that it will maintain the Facility in compliance with such requirements during the term of this agreement. If COASTAL fails to take action within a reasonable time to comply with any such requirements, RAILROAD shall have the right, but not the obligation, to take the action required to comply with said requirements at the sole cost of COASTAL.

4.02. Condition of the Facility.

(a) COASTAL promises: 1) not to damage or misuse the Facility or allow its employees, contractors, agents or invitees to do so; 2) not to make any structural changes to the Facility without the prior written consent of RAILROAD; 3) to immediately notify RAILROAD of any conditions at the Facility that are dangerous to human health or safety, or that may damage the Facility; 4) that if COASTAL vacates the Facility, all fixtures and improvements will be left in good condition, except for ordinary wear and tear and shall become the property of RAILROAD and The Long Island Railroad; and 5) not to permit waste of the Facility. Notwithstanding the foregoing, unless COASTAL is in material breach of this agreement, upon the termination of this agreement COASTAL may elect, subject to requirements of the Transfer Agreement, to remove any improvements made at its own cost and leave the premises in its pre July 11, 2002 condition.

(b) COASTAL, at its expense, shall be solely responsible for all necessary repairs, maintenance and upkeep of the Facility.

(c) COASTAL shall not permit any liens to encumber the Facility for any labor or material furnished in connection with any work performed or claimed to have been performed in or about the Facility.

(d) If the Facility is destroyed or damaged so it is unfit to be used for the purposes existing prior to COASTAL'S occupancy, COASTAL will be responsible for returning the Facility to that condition which existed on July 11, 2002.

4.03. Insurance. Coastal shall maintain the following types of insurance with insurance carriers having a current AM Best rating of not less than A-VIII, in the amounts provided for below and otherwise in form and substance acceptable to RAILROAD:

(a) Comprehensive General Liability Insurance with minimum limit per any one occurrence of $5,000,000. All exclusions as relating to Railroad Right of Way must be deleted from the policy, if this is not the case, then insurance as set forth in Section 4.03(d) shall be provided by COASTAL.

(b) Automobile Liability Insurance (covering owned, hired and non-owned vehicles) in minimum limits of $2,000,000 for injury to or death of any one person, of $5,000,000 for injury to or death of more than one person in any one accident, of $5,000,000 for damage to property in any one accident.

(c) Workers Compensation Insurance in an amount not less than required by The State of New York and as follows:

Coverage A – Statutory Policy form

Coverage B – Employer's Liability

- Bodily injury by Accident: $1,000,000 each accident
- Bodily Injury by Disease: $1,000,000 each employee & Policy Limit

(d) Railroad Protective Liability Insurance in the amount of at least $10,000,000. The form shall be on an occurrence basis and be executed in favor of RAILROAD as a named insured. Costal and all of its insurer(s) agree to waive subrogation (including without limitation Worker's Compensation) against RAILROAD, LIRR, MTA, their agents and employees, which waiver(s) by insurer(s) shall also be expressed and evidenced in the certificates of insurance (including without limitation Worker's Compensation).

(e) All of Coastal's insurance shall be primary insurance with respect to the additional insured and will not participate with any other available insurance (and upon RAILROAD"S request Coastal's certificates of insurance shall reflect the foregoing primary aspect). All deductibles shall require written consent of RAILROAD. All of COASTAL'S insurance of any type shall be from insurer(s) approved by RAILROAD. Failure by RAILROAD to object to the lack or contents of any of the certificate(s) or coverage(s) to be provided by Coastal shall

not serve to waive or limit RAILROAD'S rights or remedies nor to eliminate or effect COASTAL'S obligations, waivers or liabilities under this contract.

COASTAL shall furnish RAILROAD Certificates of Insurance, in duplicate, evidencing all required insurance to be in full force and effect and that the same will not be canceled without at least thirty (30) days advance written notice by Insurance Company to RAILROAD. The New York and Atlantic Railway, the Metropolitan Transit Authority and The Long Island Railroad shall be shown as additional insured.

4.04. Maintenance. COASTAL shall obtain and pay for all utility charges for the Facility. COASTAL shall also pay the costs of maintenance and repair of the Facility.

4.05. Compliance with Regulations. COASTAL agrees to use the Facility in strict conformance with all applicable rules, regulations and ordinances of federal, state and municipal authorities including without limitation, any regulations concerning the handling of construction and demolition debris, except to the extent that RAILROAD and COASTAL agree such standards are not applicable.

ARTICLE V – TERM

5.01. Initial Term: The Agreement shall expire on the date five years after the effective date of this agreement (the "Initial Term"); provided, however, that RAILROAD shall also have the right to terminate this Agreement prior to expiration in the event:

(a) COASTAL breaches or fails to comply with any of the covenants, terms or conditions of this Agreement;

(b) RAILROAD loses the right to provide COASTAL with access to the Facility for any reason; or

(c) The Facility fails to meet the following minimum volume levels during the respective contract years (measured from the anniversaries of the effective date):

(i) 1200 carloads in the first contract year,

(ii) 1800 carloads in the second contract year,

(iii) 2400 carloads in the third contract year, and

(iv) 3200 carloads in the fourth and all subsequent contract years.

5.02 Renewal: The parties agree to discuss renewal terms for this agreement on and after the first anniversary of the Effective Date, unless COASTAL is in material breach of this agreement. Provided however, in no event will this agreement be renewed or extended to apply after March 31, 2017.

5.04 Dangerous or Unlawful Condition: Notwithstanding section 5.03 above, should any condition be created by COASTAL on the Facility that creates or contributes to a dangerous condition or results in RAILROAD or COASTAL being cited for a violation of any federal, state or local law, rule, ordinance or regulation regulating health, safety or the environment or which could result in conviction of a crime, misdemeanor or violation, RAILROAD, in its sole and absolute discretion, may immediately limit COASTAL's rights under this Agreement to prohibit the activity giving rise to such safety or environmental hazard or violation pending a final determination of the facts or of liability. However, to the extent that any such citation is not made against RAILROAD (i.e. is made against COASTAL alone) or does not relate to an immediate dangerous human health or safety condition, RAILROAD shall not have the right to terminate the activity until there is a non-appealable finding by the agency or the court with applicable jurisdiction, so long as (i) COASTAL is contesting the rule, regulation, citation or charge in good faith; and (ii) COASTAL and RAILROAD are legally able to continue to operate the Facility under the terms of this Agreement.

5.05 Coastal Termination. COASTAL shall have the right to terminate this agreement on sixty (60) days written notice to RAILROAD.

5.06 Effect of Termination. Upon termination COASTAL shall cease using the Facility and shall immediately remove its personal property there from. Except for termination by reason of breach, upon termination, the parties' obligations to each other shall immediately cease and, except for money then currently due and owing, and the indemnification rights provided herein, the parties' financial obligations to the other shall cease.

ARTICLE VI –INDEMNIFICATION

6.01. Indemnification. Coastal hereby assumes, releases and agrees to protect, save harmless, defend and indemnify RAILROAD, the Metropolitan Transit Authority and Long Island Rail Road Company, and their respective officers, shareholders, directors, employees, agents and assigns from and against any and all claims and liability caused by, arising out of or resulting in any manner from the condition, existence, use or occupancy of the Premises by COASTAL during the term of this agreement, including but not limited to:

(a) All loss and damage to any property whatsoever, including the Facility, the property of NY&A, MTA, LIRR and of all other persons whomsoever placed or stored at the Facility and including the loss or interference with any use or service thereof;

(b) All loss and damage on account of injury to or death of any person whomsoever, including but not limited to employees and patrons of the parties hereto and all other persons whomsoever on or around the Facility; and

(c) All consequential loss or damage occurring off the Facility premises but arising from acts or events on or around the Facility.

Notwithstanding the foregoing, COASTAL shall not be responsible for and will not indemnify RAILROAD, Metropolitan Transit Authority or Long Island Rail Road Company from and against any claims or liability arising out of or in connection with their own gross negligence or gross willful misconduct.

ARTICLE VII – MISCELLANEOUS

7.01 Termination of Lease. This Agreement supercedes the Lease dated July 11, 2002 by and between the parties and all amendments, modifications and interpretations thereof, and said Lease shall be hereby terminated and of no further force and effect.

7.01 Amendment and Waiver. This Agreement may not be amended or waived except in a writing executed by the party against which such amendment or waiver is sought to be enforced. No course of dealing between or among any persons having any interest in this Agreement will be deemed effective to modify or amend any part of this Agreement or any rights or obligations of any person under or by reason of this Agreement.

7.02 Notices. All notices, demands and other communications to be given or delivered under or by reason of the provisions of this Agreement will be in writing and will be deemed to have been given when personally delivered or three business days after being mailed, if mailed by first class mail, return receipt requested, or when receipt is acknowledged, if sent by facsimile, telecopy or other electronic transmission device. Notices, demands and communications to COASTAL or RAILROAD will, unless another address is specified in writing, be sent to the address indicated below:

Notices to COASTAL:

Joseph Rutigliano, Principal
Coastal Distribution LLC
1633 New Highway
Farmingdale, N.Y. 11735
631-756-2000
Fax 631-756-2001

With a copy to:

John F. McHugh, Esq.
6 Water Street, Suite 401
New York, N.Y. 10004
212-483-0875
Fax: 212-483-0876

Notices to RAILROAD:

Fred L. Krebs, President
New York & Atlantic Railway Company
68-01 Otto Road
Glendale, New York 11385

With a copy to:

Ronald A. Lane, Esq.
Fletcher and Sippel LLC
29 North Wacker Drive
Suite 920
Chicago, Illinois 60606-2875
312-252-1500
Fax: 312-252-2400

7.03 Arbitration. Any controversy or claim arising out of or relating to this Agreement or the breach thereof, other than disputes which are within the exclusive jurisdiction of the Surface Transportation Board, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules (including the Emergency Interim Relief Procedures), and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. Notwithstanding the foregoing, the parties hereto shall first use commercially reasonable efforts to settle any dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of ten (10) days, then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration as provided herein. The arbitrator shall be selected by the parties. In the event that they are unable to agree on the selection of an arbitrator within ten (10) days, the parties or their attorneys may request the American Arbitration Association to appoint the arbitrator. Prior to the commencement of hearings, the arbitrator shall provide an oath or undertaking of impartiality. The place of arbitration shall be New York, New York. Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party also may, without waiving any remedy under this Agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the arbitration. The award shall be made within two (2) months of the filing of the notice of intention to arbitrate (demand), and the arbitrator shall agree to comply with this schedule before accepting appointment. However, this time limit may be extended by mutual written agreement of the parties. The prevailing party shall be entitled to an award of reasonable attorney fees. The determination as to which party, if any, is the prevailing party and whether and how much in attorney's fees shall be awarded will be made by the arbitrator.

7.04 Assignment. This Agreement and all of the provisions hereof shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. Neither this Agreement nor any of the rights, interests or obligations hereunder may be assigned by COASTAL without the prior written consent of RAILROAD, which consent will not be unreasonably withheld. A Change of Control shall be deemed an assignment for the purposes

of this Agreement. RAILROAD shall have the right to assign this Agreement to any carrier which should succeed it as authorized by the Surface Transportation Board.

7.05 No Third Party Beneficiaries. Nothing in this Agreement shall confer any rights upon any person or entity that is not a party or permitted assignee of a party to this Agreement.

7.06 Severability. Whenever possible, each provision of this Agreement will be interpreted in such a manner as to be effective and valid under applicable Law, but if any provision of this Agreement is held to be prohibited by or invalid under applicable Law, such provision will be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

7.07 Complete Agreement. This Agreement, and the other documents referred to herein contain the complete agreement among the parties and supersede any prior understandings, agreements or representations by or among the parties, written or oral, which may have related to the subject matter hereof in any way. However, the letter agreement entered into by the parties on June __, 2004 in connection with LIRR's endorsement of COASTAL's application for zoning changes shall remain in effect unchanged. The section and paragraph headings of this Agreement are for reference purposes and shall not affect the meaning or interpretation of the Agreement.

7.08 Time of Essence. With regard to all dates and time periods set forth or referred to in this Agreement, time is of the essence.

7.09 Signatures; Counterparts. This Agreement may be executed in one or more counterparts, any one of which need not contain the signatures of more than one party, but all such counterparts taken together will constitute one and the same instrument. A facsimile signature will be considered an original signature.

7.10 Governing Law. This agreement shall be interpreted under the applicable laws of the United States and the regulations of such Federal Authorities as have exclusive jurisdiction over the activities contemplated. In matters involving the construction and interpretation of this document the internal laws, without regard for conflicts of laws principles, of the State of New York will apply.

7.11 Force Majeure. If either party is unable to meet its obligations hereunder as a result of acts of God, war, terrorism, insurrection, floods, strikes, derailments, or any like causes beyond its reasonable control, that party's obligations and those of such other party affected by such force majeure event, will be suspended for the duration of same; provided, however, that the parties will make all reasonable efforts to continue to meet their respective obligations during the duration of the force majeure event; and, provided further, that the party declaring a force majeure event shall promptly notify the other party of the same (including its anticipated duration), the nature of the force majeure event, and when it is completed. The suspension of any obligation owing to a force majeure event will neither cause the term of this Agreement to be extended nor affect any rights accrued under this Agreement prior to the force majeure event.

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

COASTAL DISTRIBUTION, LLC

By: _____

Its: Member

Date 8/5/04

NEW YORK & ATLANTIC RAILROAD CO. INC.

By: _____

Its: PRESIDENT

Date: 8/5/04

A-931

347 Madison Avenue
New York, NY 10017-3739
212 878-7000 Tel

Metropolitan Transportation Authority
State of New York

October 17, 2003

Via: Certified Mail – Return Receipt Requested
Fax: 212-704-6288

Jonathan S. Gaynin
Jenkens & Gilchrist Parker Chapin LLP
405 Lexington Avenue
New York, NY 10174

RE. Land Lease Agreements Dated November 1, 1905, and August 30, 1904 Between The Pinelawn Cemetery and The Long Island Railroad Company (LIRR) for Use as a Railroad Yard and Auxiliary Services of the Railroad.

Dear Mr. Gaynin:

On behalf of LIRR we are hereby exercising it's option to renew the above referenced lease dated November 1, 1905 for an additional ninety-nine (99) years thereby extending it through October 31, 2103.

We are also hereby agreeing to reinstate and extend the lease dated August 30, 1904 for 99 more years through July 31, 2102. Please have an authorized party concur by signing below, and return one original copy of this letter to my attention.

If you have any questions please call Mimi Fuhrman, of my staff, at (212) 878 – 7262.

Sincerely,

Roco Krsulic
Director of Real Estate

PINELAWN CEMETERY

Concurrence: [signature], President 10/23/03
Date

This concurrence refers to Aug 30 1904 lease. [signature]

Cc: S. Amman, F. Krebs.
C. Maloochi, K. Rydzewski, Chron/file

The agencies of the MTA. Peter S. Kalikow, Chairman
MTA New York City Transit MTA Long Island Rail Road MTA Long Island Bus MTA Metro North Railroad

EXHIBIT D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

PINELAWN CEMETERY,

Plaintiff,

-against-

COASTAL DISTRIBUTION, LLC, METROPOLITAN TRANSPORTATION AUTHORITY, THE LONG ISLAND RAIL ROAD COMPANY, and THE NEW YORK AND ATLANTIC RAILWAY,

Defendants.

Index No. 8599-04

AFFIDAVIT IN OPPOSITION

Judge Costello

Motion returnable May 11, 2004

STATE OF NEW YORK)
)ss.:
COUNTY OF NASSAU)

JOSEPH RUTIGLIANO being duly sworn, deposes and says:

1. That I am a member of COASTAL DISTRIBUTION, LLC ("COASTAL") and submit this affidavit in opposition to Plaintiff's motion seeking a preliminary injunction.

2. Plaintiff'S motion seeks an order preventing COASTAL from continuing construction on and development and use of two adjoining properties owned by PINELAWN CEMETERY. For the reasons hereinafter stated, based upon law and equity, the Plaintiff is not entitled to that relief.

COASTAL'S RELATIONSHIP TO THE PREMISES

3. By Lease Agreement dated July 11, 2002, between NEW YORK AND ATLANTIC RAILWAY CO. ("NYA") and COASTAL, a copy of which is annexed hereto and marked Exhibit "A", COASTAL was conferred all of the rights that were conferred to NYA by the LONG ISLAND RAIL ROAD ("LIRR") pursuant to a certain Transfer

Agreement between the LIRR and NYA dated November 18, 1996, a copy of which is annexed hereto and marked Exhibit "B".

4. Although the Transfer Agreement names the LIRR and Southern Empire State Rail Road Company, NYA is the successor to Southern Empire State Rail Road Company. See Exhibit "C".

5. In the Transfer Agreement, Southern Empire State Rail Road Company, now NYA, is referred to as "the freight operator".

6. Paragraph 3.1.3 found on Page 19 of the Transfer Agreement states the following:

> "The freight operator may, at its sole risk and expense, construct or relocate freight-related facilities and infrastructures (such as transloading facilities, shops, team tracks, yards, sidings, etc.) within the freight premises subject to prior review and approval by the LIRR of the freight operator's plans, which approval will not unreasonably be withheld; provided that such approval shall be deemed to be granted if the LIRR has not objected to such construction within 45 days of notice thereof. ..."

7. Thus, pursuant to the Transfer Agreement and the Lease Agreement between NYA and COASTAL, in March 2003 COASTAL began the construction of its building, a perimeter fence, a truck scale, railroad car scale components and its office trailer. Further, it began cleaning up the site by removing illegal debris, activated utilities and refurbished railroad tracks as required.

LONG ISLAND BENEFITS FROM THE COASTAL OPERATION

8. The people of Long Island currently waste countless productive hours in traffic. The air and noise pollution on the ground and congested roadways is harmful to everyone. The hours that engines sit idling create unnecessary pollution and waste.

9. Thus the construction of the aforementioned transloading facility was conceived in order to meet the need for alternative transportation methods on Long Island.

10. COASTAL was founded in the latter part of 2000 and formally organized in March 2001. It was formed for the specific purpose of maximizing the utilization of the existing railroad infrastructure on Long Island and in New York City. This effort is one that is recognized by the Department of Transportation to reduce traffic congestion in the downstate region.

11. The rehabilitation of the subject multiuse cooperative transload facility is a project that has enjoyed the support of many governmental agencies and authorities including but not limited to, New York State Department of Transportation (NYS DOT), Metropolitan Transit Authority (MTA), Long Island Rail Road (LIRR) and New York & Atlantic Railway (NYA).

12. New York & Atlantic Railway is the commercial rail freight operator for the Long Island and NYC regions. As

previously indicated, NYA has entered into a lease agreement with COASTAL granting the right to operate the subject transload facility to further promote rail transportation in the region. The railcar shipments forwarded to NYA for 2003 were in excess of 16,500 car loads. The railroad currently transports various products and commodities both into and out of the region such as construction aggregate, lumber, sheetrock, plastic resin, bentonite clay, printing paper, asphalt, food products, scrap metal, construction debris, recyclable waste paper, silica sand and peletized plastic. COASTAL will be the intermediate between the shipper and receiver of railroad freight.

13. The site has been redesigned to facilitate the enclosed unloading and loading of rail freight currently handled by New York & Atlantic Railway. COASTAL will serve businesses in the region that do not currently have access to a rail siding and would like to use the railroad as a means of transportation.

14. The facility will greatly reduce the amount of large heavy trucks congesting the Long Island Expressway, Sunrise Highway and other residential roadways. The site itself is quite unique and lends itself to be a perfect transloading facility due to its central location on Long Island as well as the fact that it is proportionately adequate to side a substantial amount of rail cars.

15. The facility will allow construction materials to be shipped in bulk by rail from Upstate and Canada and this material will further be distributed to local users via smaller and safer vehicles.

16. As stated, the New York State Department of Transportation has recognized the benefits which COASTAL's facility will bring to the State of New York. In a letter dated May 29, 2002, a copy of which is annexed hereto and marked Exhibit "D", JOHN F. GUINAN, Assistant Commissioner of the Office of Passenger and Freight Transportation for the State of New York, stated the following, in relevant part:

> "Thank you for your letter of April 26, 2002 regarding Coastal Distribution's efforts to establish a construction material transload facility on Long Island. As you know, New York State is investing in rail infrastructure improvements that facilitate freight movement as a strategy for reducing truck traffic in the New York City (NYC)/Long Island area. Thus, the Department of Transportation (DOT) supports Coastal's efforts as an important step to that objective.
>
> I discussed your letter with President Bauer of Long Island Rail Road's (LIRR) executive staff on May 24, 2002. LIRR is aware of Coastal's interest in establishing a transload facility in the vicinity of the East Farmingdale yard and is willing to cooperate with you and the New York and Atlantic Rail Road (NYA) to accomplish that objective. ... Best wishes for success with your transload facility. Please keep me informed of your progress."

PLAINTIFF'S "INFORMATION AND BELIEF" RENDITION OF THE COASTAL'S PROPOSED USES IS WRONG.

17. Contrary to the proposed uses claimed by the Plaintiff, the facility will be used to load and unload various

materials from trucks to railroad cars and from railroad cars to trucks. All of the transloading of freight will take place inside of the already constructed building so that the impact of such loading and unloading on the surrounding area will be minimal.

18. Attached hereto and marked Exhibit "E" are photos of the existing building. They show how a railroad car would enter the building, be loaded or off-loaded and then exit the building, with all activity taking place inside.

19. The Federal Aviation Administration in issuing its DETERMINATION OF NO-HAZARD TO AIR NAVIGATION found that it was not even necessary for the building to contain marking and/or lighting for aviation safety. See Federal Aviation Administration letter dated April 6, 2004 annexed hereto as Exhibit "F".

20. There will be no processing of any materials at all at the site. The materials received at the site for transloading will have already been processed elsewhere.

21. Further, contrary to Plaintiff's claims, all aggregate will be precrushed and washed at its origin. Therefore, any dust, dirt or grit resulting from the operation of the facility will be contained in the newly erected building. There will be no adverse effects on any bronze plaques or granite or marble surfaces at the Pinelawn Cemetery.

22. Additionally, unlike the commercial operations set forth in the photographs annexed hereto, any noise associated with this operation will also be contained inside the newly erected building. It should be noted that both the subject premises and Pinelawn Cemetery are in close proximity to Republic Airport, where jet and propeller aircraft take off and land resulting in above normal noise conditions. In addition, LIRR's main Montauk line runs parallel to the facility and Pinelawn Cemetery. Approximately 30 passenger trains pass per day, also creating above normal noise conditions. The facilities entrance and exits are off New Highway, a country road, with no access through Pinelawn Cemetery property.

COMMERCIAL BUSINESS IN THE AREA IS PLENTIFUL

23. Although the Plaintiff would have the Court believe that COASTAL is the only commercial business in the area, the following list of local industrial businesses located along New Highway just north of the rail tracks that enter the subject premises, confirms just the opposite:

Name of Company	Type of Business Conducted
Shea Trucking and Warehousing	Trucking and Storage
Blue Water Environmental	Contaminated Soil storage and Processing
JD Posillico	Road Building and Heavy Construction Main office, garage, and equipment storage and repair facilities

Posillico Brothers Asphalt	Manufacturing of Road Paving Material and crushing and recycling of old asphalt
G E Capital	Leasing and storage of mobile office trailers
K-Corr Bus Company	School bus parking and dispatch for 200 busses and pupil transportation
Tom Ruturra Crushing	Concrete recycling and crushing
Mignone & Son Contractor	Storage yard for trucks and materials
Wel-Made	Manufacturer of precast concrete products drainage, septic tanks, pipe, etc.
Concorde Ready Mix	Manufacturer of ready mixed concrete for foundations, sidewalks, roadways
R& D Transport	Trucking Company for earth products sand, soil, rock

24. Annexed hereto and marked Exhibit "G" are photos showing the aforementioned businesses which abut the leased premises:

PLAINTIFF'S ALLEGATIONS WERE MADE AFTER THE CONSTRUCTION WAS ALL BUT COMPLETED.

25. By letter dated January 15, 2004, a copy of which is annexed hereto and marked Exhibit "H", Plaintiff's attorney claims that a portion of the premises being leased by COASTAL is on land owned by Plaintiff which is no longer being

leased to the LIRR. The letter demands among other things, that the already built building **be removed.**

26. As early as **July 16, 2002,** your deponent sent a letter, a copy of which is annexed hereto and marked Exhibit "I", to Justin Locke, the Superintendent of the Plaintiff, addressing the fact that COASTAL was going to, without any cost to the Plaintiff, clean various debris that were contained on the subject leased premises. Additionally, the letter stated the following:

> **"The Long Island Rail Road is in the process of moving out, and we will be setting up the yard *shortly.*"**

27. The letter was as a result of a meeting that was held at the premises between your deponent and JUSTIN LOCKE. At the meeting, Mr. Locke was specifically advised as to what was going to be constructed at the site. He never objected. All construction was just about completed prior to the receipt of Plaintiff's attorney's letter of January 15, 2004.

28. Additionally, Plaintiff did not seek court intervention until April 6, 2004, after the building had been finished.

29. My attorney will hereinafter indicate why equity alone does not permit the Plaintiff to obtain the relief they seek.

BOTH LEASES FROM PLAINTIFF TO LIRR ARE IN FULL FORCE AND EFFECT.

30. The premises in question is subject to two leases both between PINELAWN and the LIRR.. One lease dated November 1, 1905 has been renewed and is not at issue.

31. Plaintiff claims that the other August 30, 1904 lease expired on August 30, 2003 and was not renewed by the MTA. [1] This is simply not true.

32. Annexed hereto and marked Exhibit "J" is a letter dated October 17, 2003 which was sent by ROCCO KRSULIC, Director of Real Estate for the Metropolitan Transportation Authority to JONATHAN S. GAYNIN of the law firm of JENKENS & GILCHRIST PARKER CHAPIN LLP, the then attorneys for the Plaintiff.

33. The letter stated that it was regarding "Land Lease Agreement Dated November 1, 1905 and August 30, 1904 Between The Pinelawn Cemetery and The Long Island Railroad (LIRR) for Use as a Railroad Yard and Auxiliary Services of the Railroad".

34. The letter goes on to state the following:

"On behalf of LIRR we are hereby exercising its option to renew the above-referenced lease dated

[1]The LIRR is a subsidiary of the MTA and it is the MTA that deals with real estate matters such as renewing leases.

November 1, 1905 for an additional 99 years thereby extending it through October 31, 2103.

We are also hereby agreeing to reinstate and extend the lease dated August 30, 1904 for 99 more years through July 31, 2102. Please have an authorized party concur by signing below and returning one original copy of this lease to my attention."

35. As can be seen by this document, under the words "Pinelawn Cemetery" and next to the word "concurrence" is the signature of Stephen Locke, the President of Pinelawn, dated October 23, 2003.

36. The document contains the additional language written in Mr. Locke's handwriting which states, **"This concurrence refers to August 30, 1904 lease."**. Next to those words is contained Mr. Locke's signature, **a second time.**

37. On October 23, 2003, a copy of the aforementioned October 17, 2003 letter containing Mr. Locke's concurrence to the reinstatement and extension of the August 30, 1904 lease was handed to me during a meeting held at the site by Pinelawn's representatives Michael Sceppa, Vice President of Pinelawn, Justin Locke and Buzz Schwenk.

38. At the same meeting, I showed those individuals the blueprints that were being used to construct the building that presently sits on the premises.

39. Contrary to the affidavit of Michael Sceppa, the representatives of Plaintiff were not shown preliminary sketches but were shown the actual blueprints.

40. Further, there was no secrecy as to what COASTAL's project would entail. I answered all of the questions that the three individuals had about what was going to be built at the premises. Additionally, they were granted full access to the premises and office trailer housing the blueprints.

41. As conceded by the Plaintiff, its property adjoins the subject premises and all of the aforementioned construction took place in full view of the Plaintiff.

42. Thus, Plaintiff's claim that the August 30, 2004 lease has not been renewed is totally without merit. Further, my attorney in his supporting papers has set forth why the law of equity would allow the lease to be renewed even if the Plaintiff had not agreed to do so.

COASTAL WILL SUSTAIN SEVERE DAMAGES IF THE INJUNCTION IS GRANTED

43. COASTAL has a customer base waiting for the delivery of various materials. Further, it has entered into freight contracts with Canadian Pacific Railways and CSXT for acceptance and transporting of freight. Additionally, we have entered into numerous agreements with shippers and

receivers of freight. Some of our customers are the Long Island Rail Road, Well-Made, Seville Central Mix and LaFarge N.A.

44. COASTAL has finished the construction of the building on the leased premises and has put into place substantial infrastructure in order to effectuate the operations of its transload facility.

45. As has been demonstrated, all of this activity took place with the knowledge of the Plaintiff prior to the initiation by Plaintiff of these proceedings.

46. In the event the Court issues the requested injunction, COASTAL will lose its contracts with all of its customers. Further, COASTAL is already losing the benefits of its contracts since it is losing the revenue that would have already been generated by those contracts. Based on the loss of the aforementioned contracts and the construction of the building and related equipment that is already in place, COASTAL's damages will exceed $3,000,000.00.

WHEREFORE, it is respectfully requested that the instant motion be denied in all respects.

JOSEPH RUTIGLIANO

Sworn to before me this
10th day of May, 2004.

Notary Public

DONALD JAY SCHWARTZ
Notary Public, State of New York
No. 30-4606060
Qualified in Nassau County
Commission Expires February 28, 2006

See Exhibit "B"

For The LIRR - NYA

TRANSFER Agreement and

NYA - Coastal Lease

Agreement

A-948

STATE OF NEW YORK
DEPARTMENT OF TRANSPORTATION
ALBANY, N.Y. 12232
http://www.dot.state.ny.us

JOSEPH H. BOARDMAN
COMMISSIONER

GEORGE E. PATAKI
GOVERNOR

May 29, 2002

Mr. Joseph Rutigliano
Coastal Distribution, LLC
30A Glen Street
Glen Cove, NY 11542

Dear Mr. Rutigliano:

Thank you for your letter of April 26, 2002 regarding Coastal Distribution's efforts to establish a construction materials transload facility on Long Island. As you know, New York State is investing in rail infrastructure improvements that facilitate freight movement as a strategy for reducing truck traffic in the New York City (NYC) / Long Island area. Thus, the Department of Transportation (DOT) supports Coastal's efforts as an important step toward that objective.

I discussed your letter with President Baner and Long Island Railroad's (LIRR) executive staff on May 24, 2002. LIRR is aware of Coastal's interest in establishing a transload facility in the vicinity of the East Farmingdale Yard and is willing to cooperate with you and the New York & Atlantic Railroad (NY&A) to accomplish that objective.

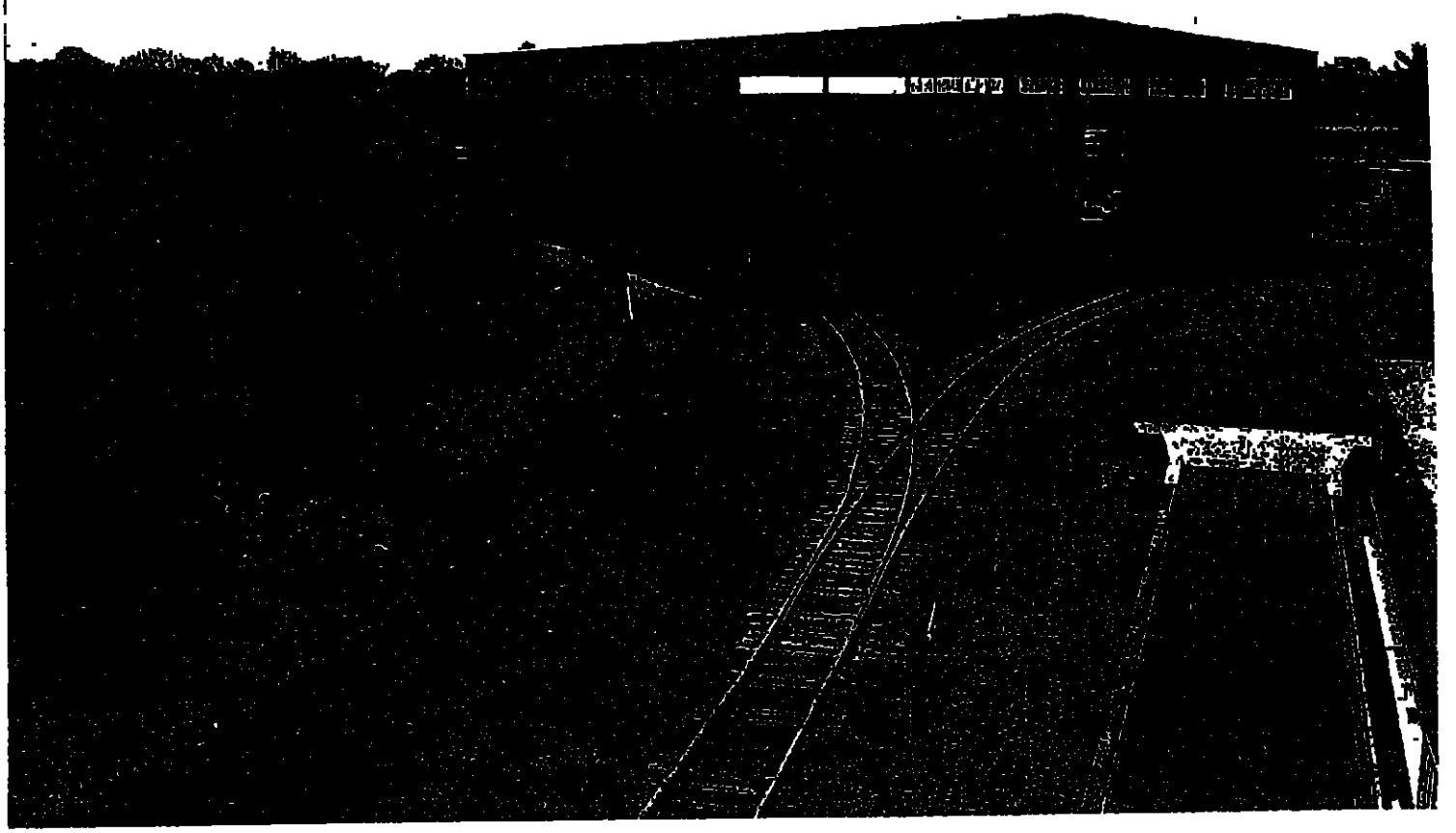
However, LIRR's position, is, essentially, that the area which Coastal proposes to occupy is not part of NY&A's leasehold and is currently utilized by it. Nevertheless, LIRR will vacate such property and permit Coastal's use if it is reimbursed for relocation costs. Toward that end, LIRR indicated a willingness to discuss options for reimbursement, such as reduced prices for purchases from Coastal.

Best wishes for success with your transload facility. Please keep me informed of your progress.

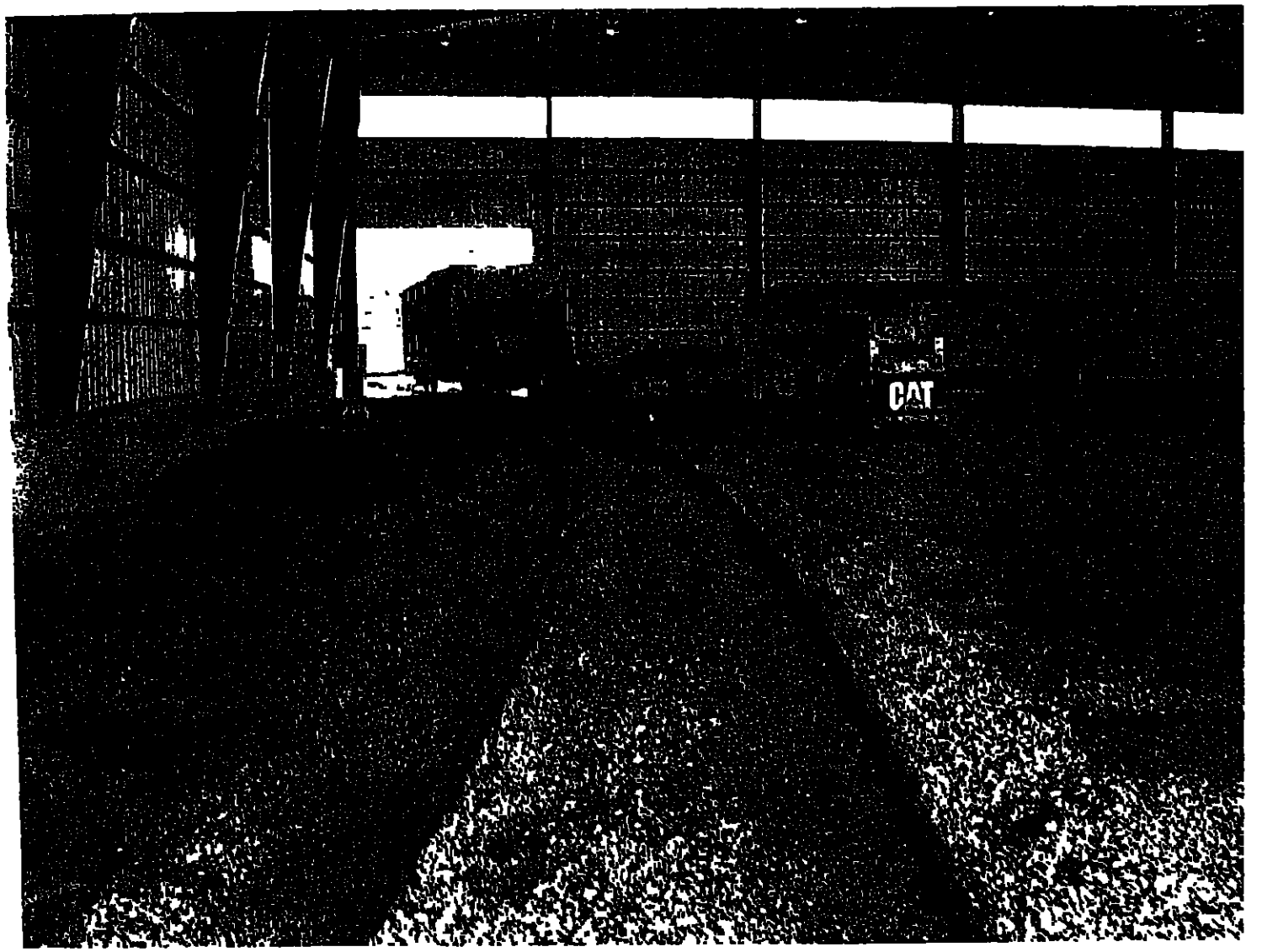
Sincerely,

John F. Guinan, Assistant Commissioner
Office of Passenger & Freight Transportation

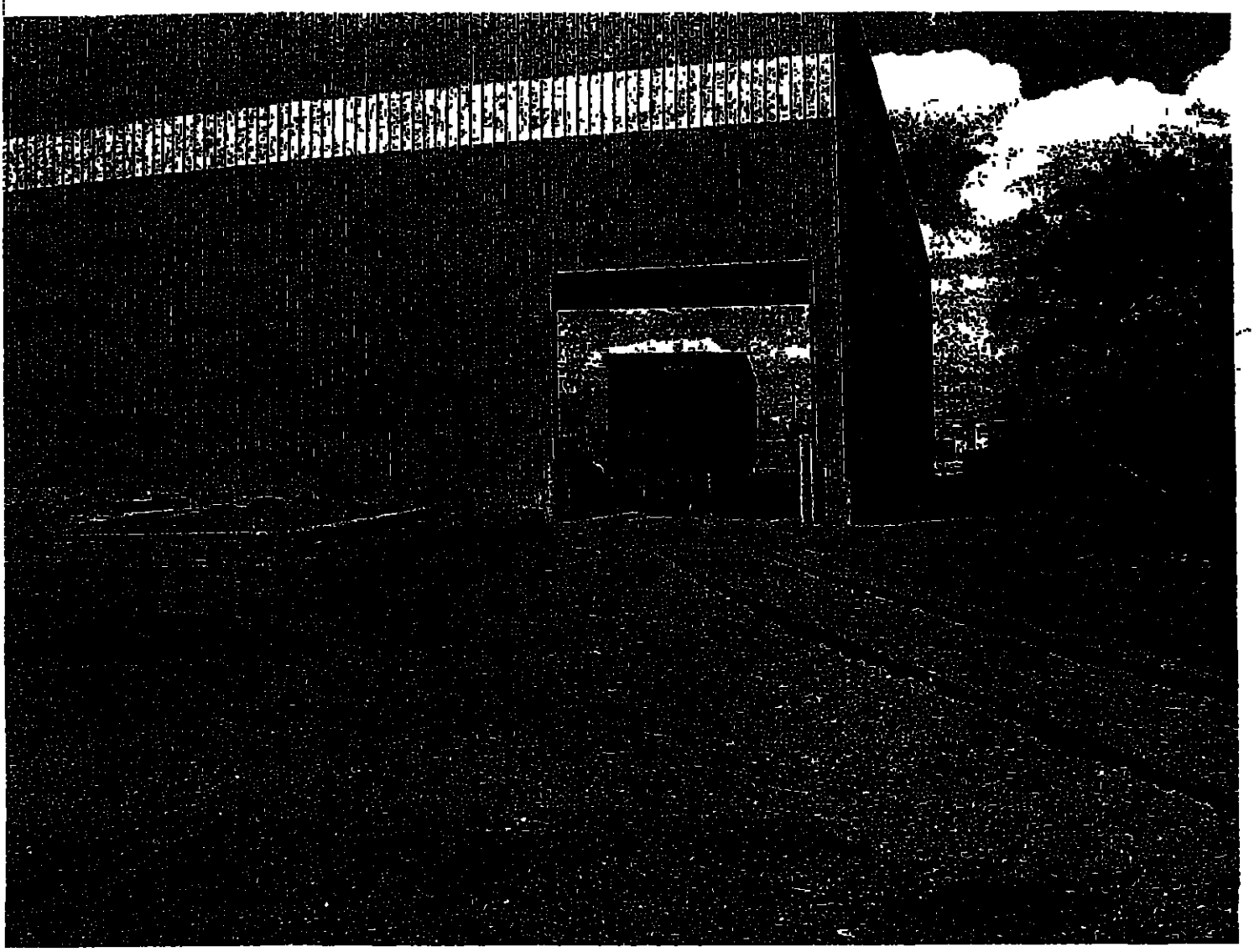
cc K. Baner, President Long Island Rail Road
D. George, Long Island Rail Road
F. Krebs, NY & Atlantic, Rwy.
R. Zarrillo, NYS Office of the Governor
N. Schneider, Freight & Economic Development Division



A-950



A-951



A-952

Federal Aviation Administration
Eastern Regional Office
1 Aviation Plaza-AEA-520
Jamaica, NY 11434

Aeronautical Study No.
[illegible]-AEA-710-OE

RECEIVED
APR 1 7 2004
CYBUL & CYBUL

Issued Date: 4/6/2004

OLIVER WILHELM
CYBUL & CYBUL ARCHITECTS
1064 RIVER ROAD
EDGEWATER, NJ 07020

** DETERMINATION OF NO HAZARD TO AIR NAVIGATION **

The Federal Aviation Administration has completed an aeronautical study under the provisions of 49 U.S.C., Section 44718 and, if applicable, Title 14 of the Code of Federal Regulations, part 77, concerning:

Structure Type: Building
Location: BABYLON, NY
Latitude: 40-44-33.74 NAD 83
Longitude: 73-24-47.96
Heights: [illegible] feet above ground level (AGL)
[illegible] feet above mean sea level (AMSL)

This aeronautical study revealed that the structure does not exceed obstruction standards and would not be a hazard to air navigation provided the following condition(s), if any, is(are) met:

Based on this evaluation, marking and lighting are not necessary for aviation safety. However, if marking and/or lighting are accomplished on a voluntary basis, we recommend it be installed and maintained in accordance with FAA Advisory Circular 70/7460-1 K Change 1.

This determination is based, in part, on the foregoing description which includes specific coordinates, heights, frequency(ies) and power. Any changes in coordinates, heights, and frequencies or use of greater power will void this determination. Any future construction or alteration, including increase to heights, power, or the addition of other transmitters, requires separate notice to the FAA.

This determination does include temporary construction equipment such as cranes, derricks, etc., which may be used during actual construction of the structure. However, this equipment shall not exceed the overall heights as indicated above. Equipment which has a height greater than the studied structure requires separate notice to the FAA.

This determination concerns the effect of this structure on the safe and efficient use of navigable airspace by aircraft and does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, State, or local government body.

A copy of this determination will be forwarded to the Federal Communications Commission if the structure is subject to their licensing authority.

A-953

If we can be of further assistance, please contact our office at (718)553-4546. On any future correspondence concerning this matter, please refer to Aeronautical Study Number 2004-AEA-710-OE.

Signature Control No: 375316-266349 (DNE)
Robert P. Alexander
Specialist

A-954

1064 River Road Edgewater, NJ 07020 201-224-4100 201-224-0274 (Fax)	FAX COVER CYBUL & CYBUL ARCHITECTS

To:	Joe Rutigliano	From:	Oliver Wilhelm
Fax:	631-756-2001	Pages:	3
Phone:		Date:	4/12/04
Re:	Coastal	CC:	Hugh Jones, Republic Airport FAX: 631-293-1429

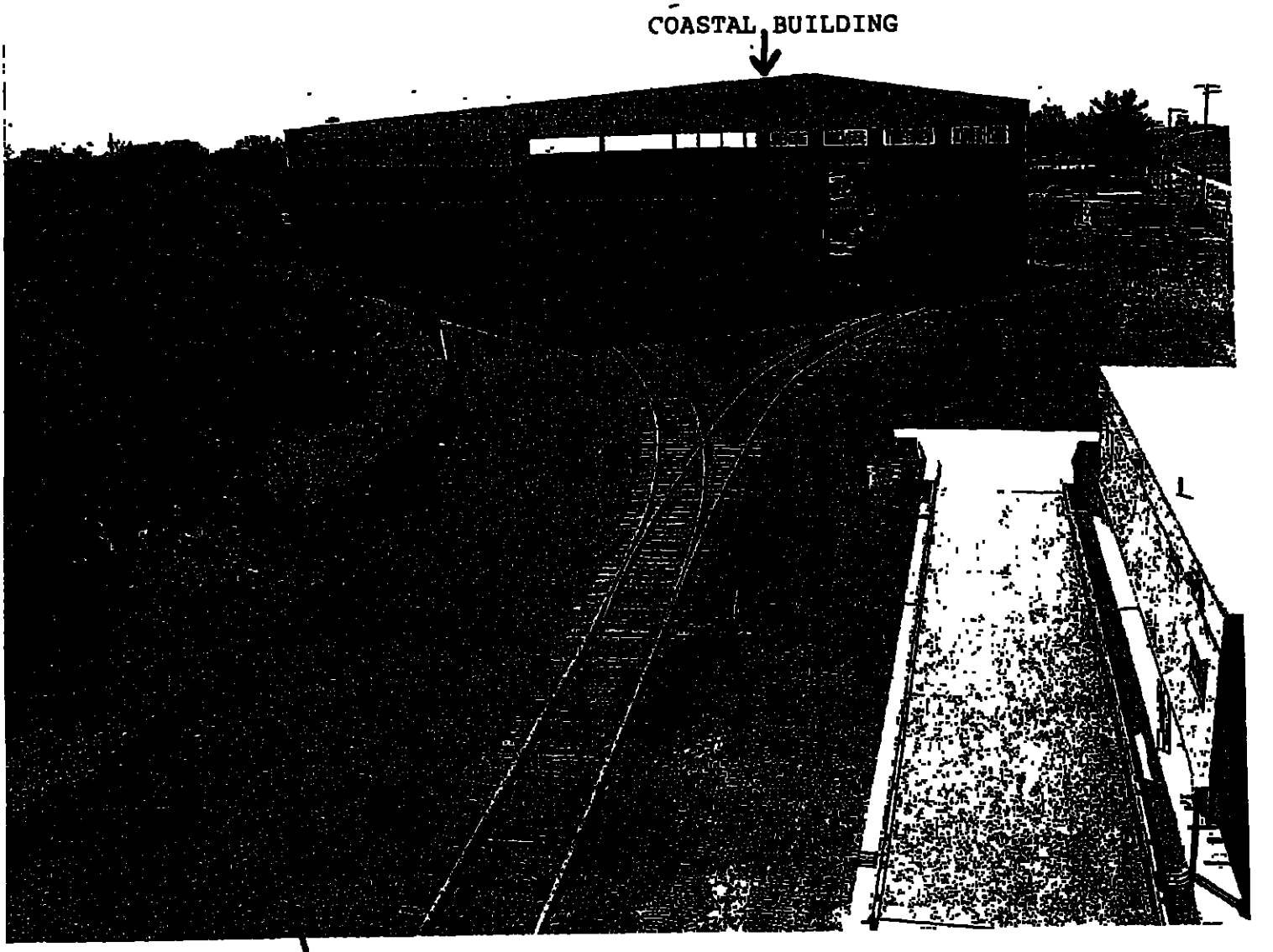
Urgent ☐ For Review X Please Comment ☐ Please Reply ☐

Joe,

FAX VERSION OF F.A.A. DETERMINATION.

HARD COPY TO FOLLOW VIA MAIL.

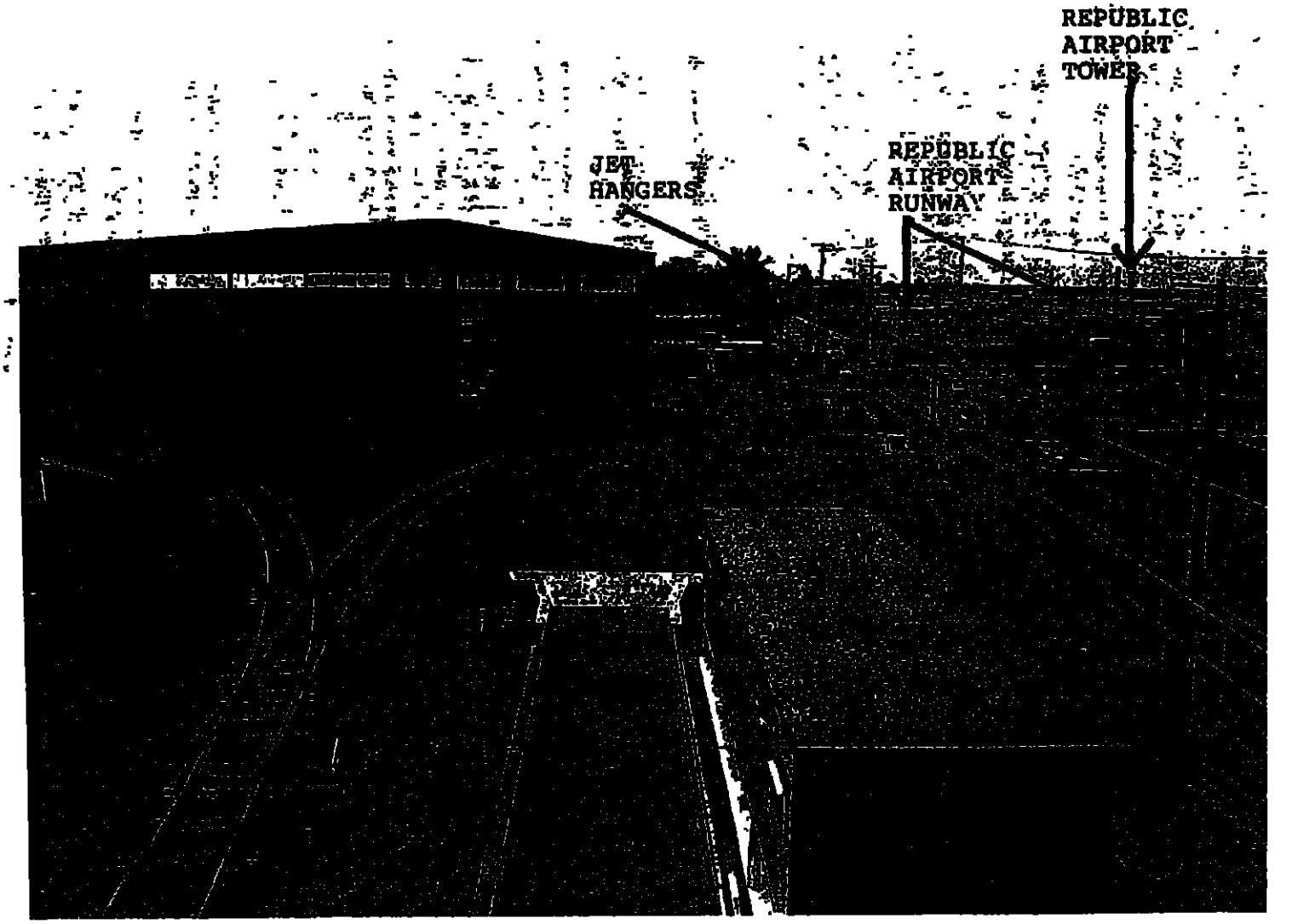
DAVID N. CYBUL, A.I.A. MARTIN CYBUL, A.I.A. OLIVER WILHELM, A.I.A.
1064 RIVER ROAD, EDGEWATER, NEW JERSEY 07020-1596 (201) 224-4100 (212) 362-5252 FAX: (201)224-0274
cybularch@aol.com


COASTAL BUILDING
PINELAWN CEMETERY

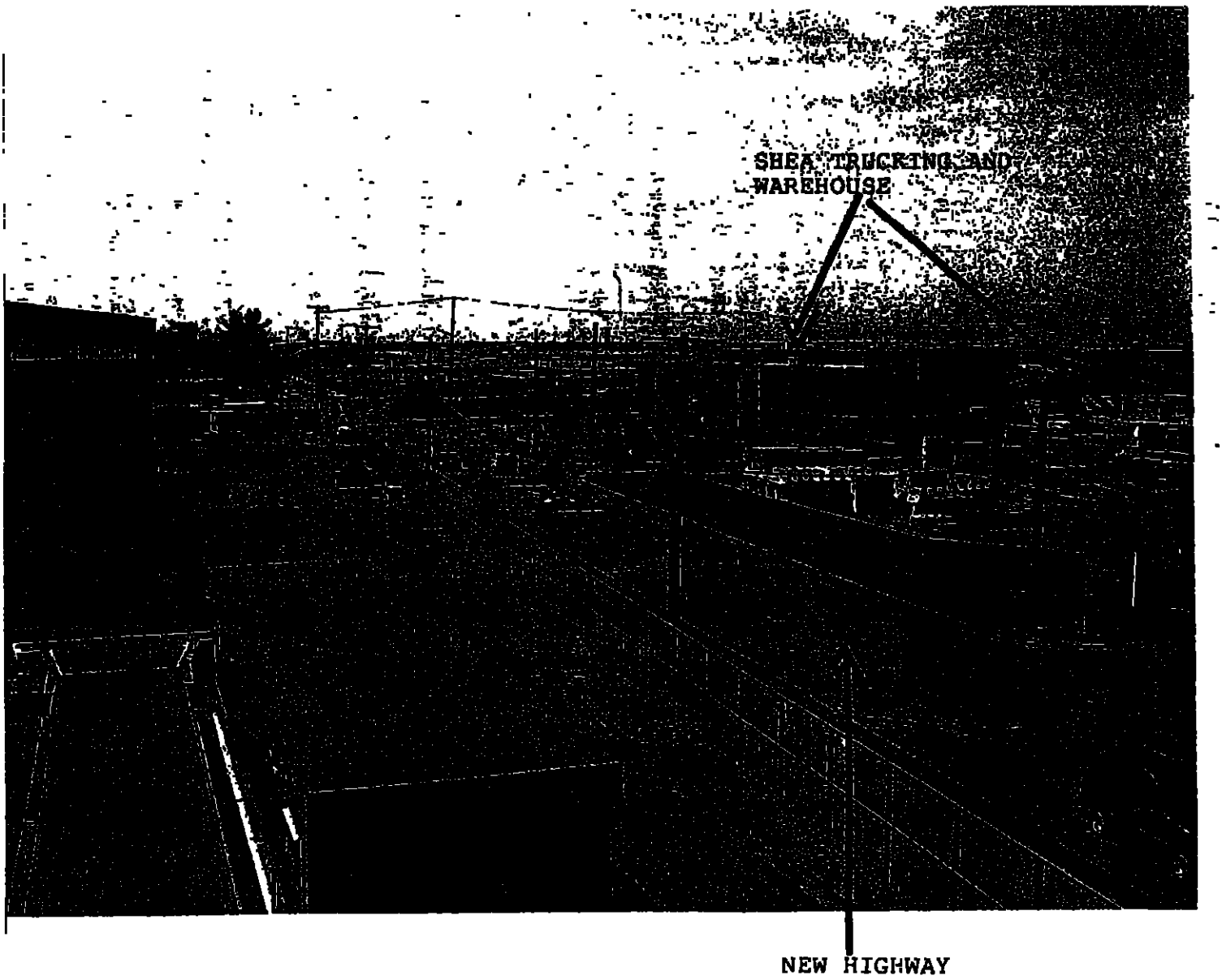
A-956

MAJOR COMMERCIAL ACTIVITY OTHER THAN COASTAL

A-957


REPUBLIC
AIRPORT
TOWER
JET
HANGERS
REPUBLIC
AIRPORT
RUNWAY

A-959



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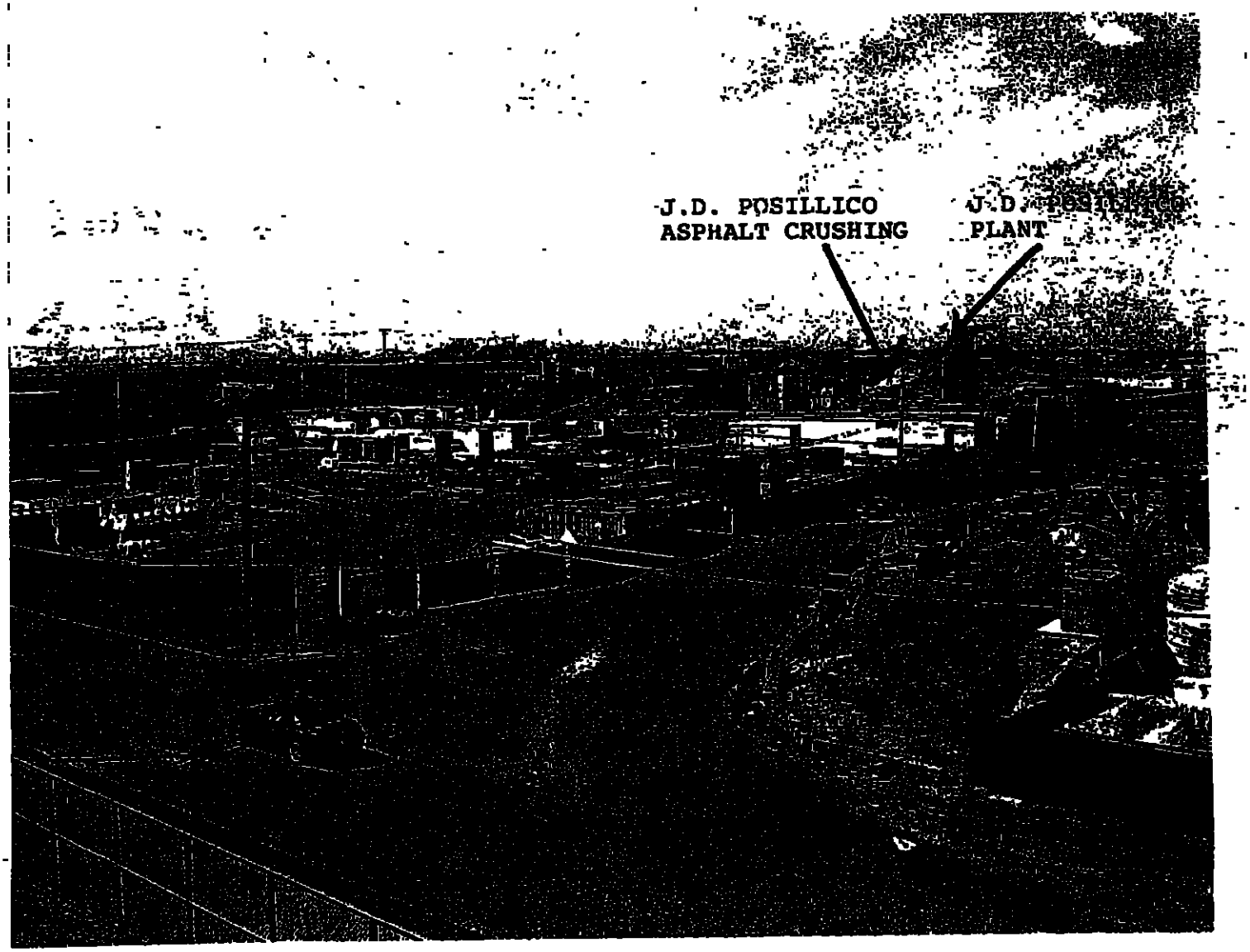
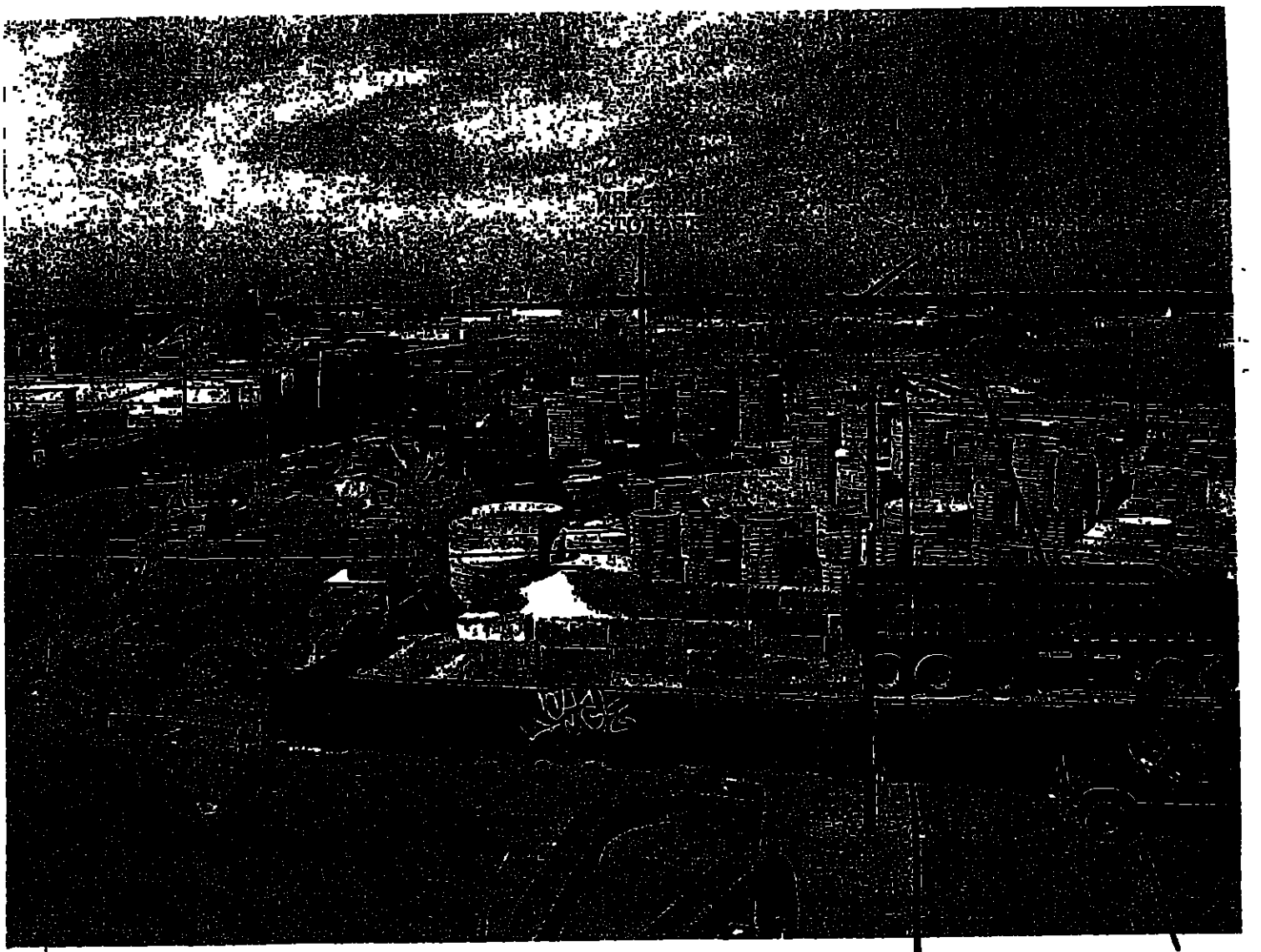


A-962

MIGNONE & SON
CONSTRUCTION YARD

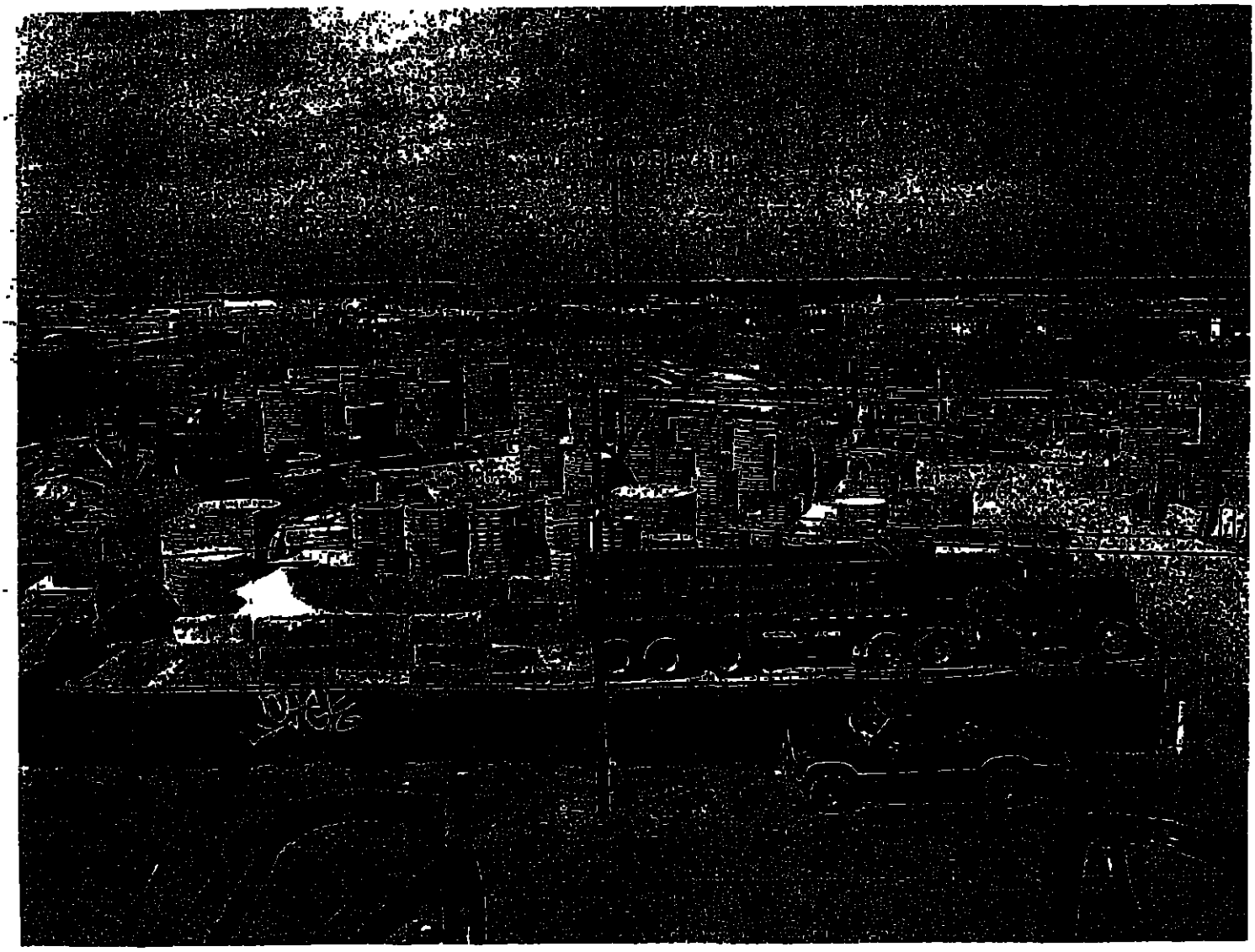
WEL-MADE SALT PILE



GE CAPITAL
OFFICE TRAILERS

TOM RUTUBRA
ROCK CRUSHIN

A-964



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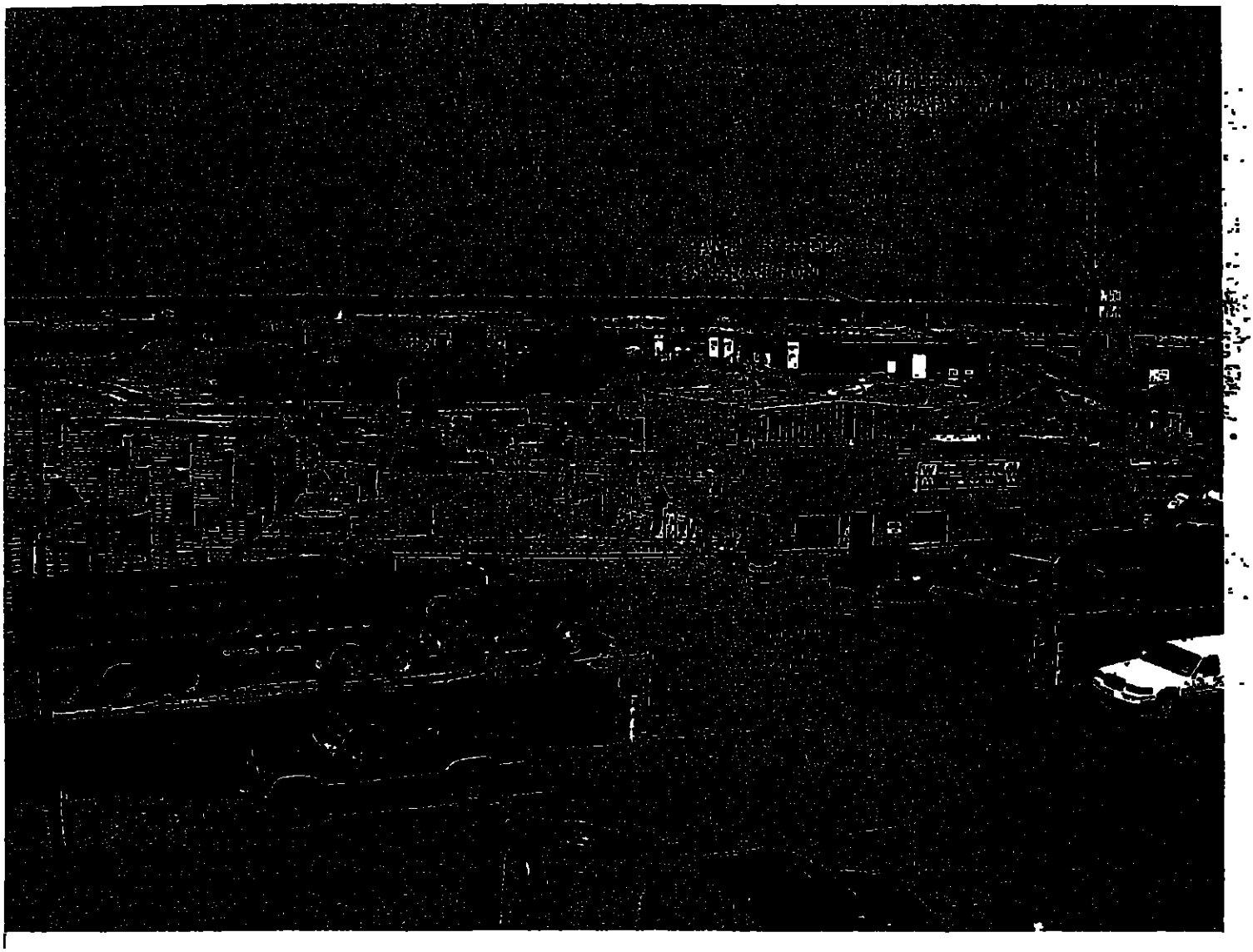

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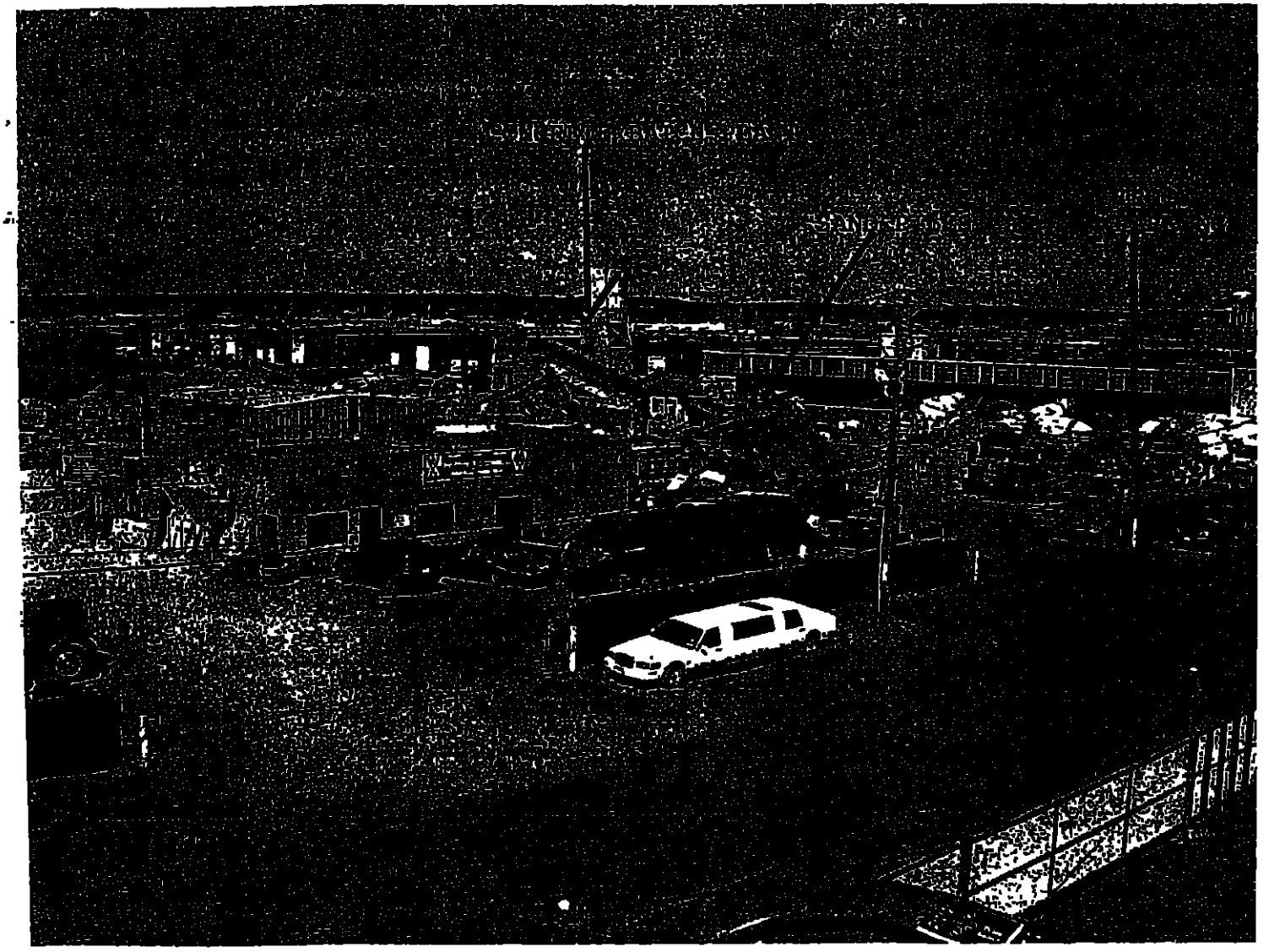

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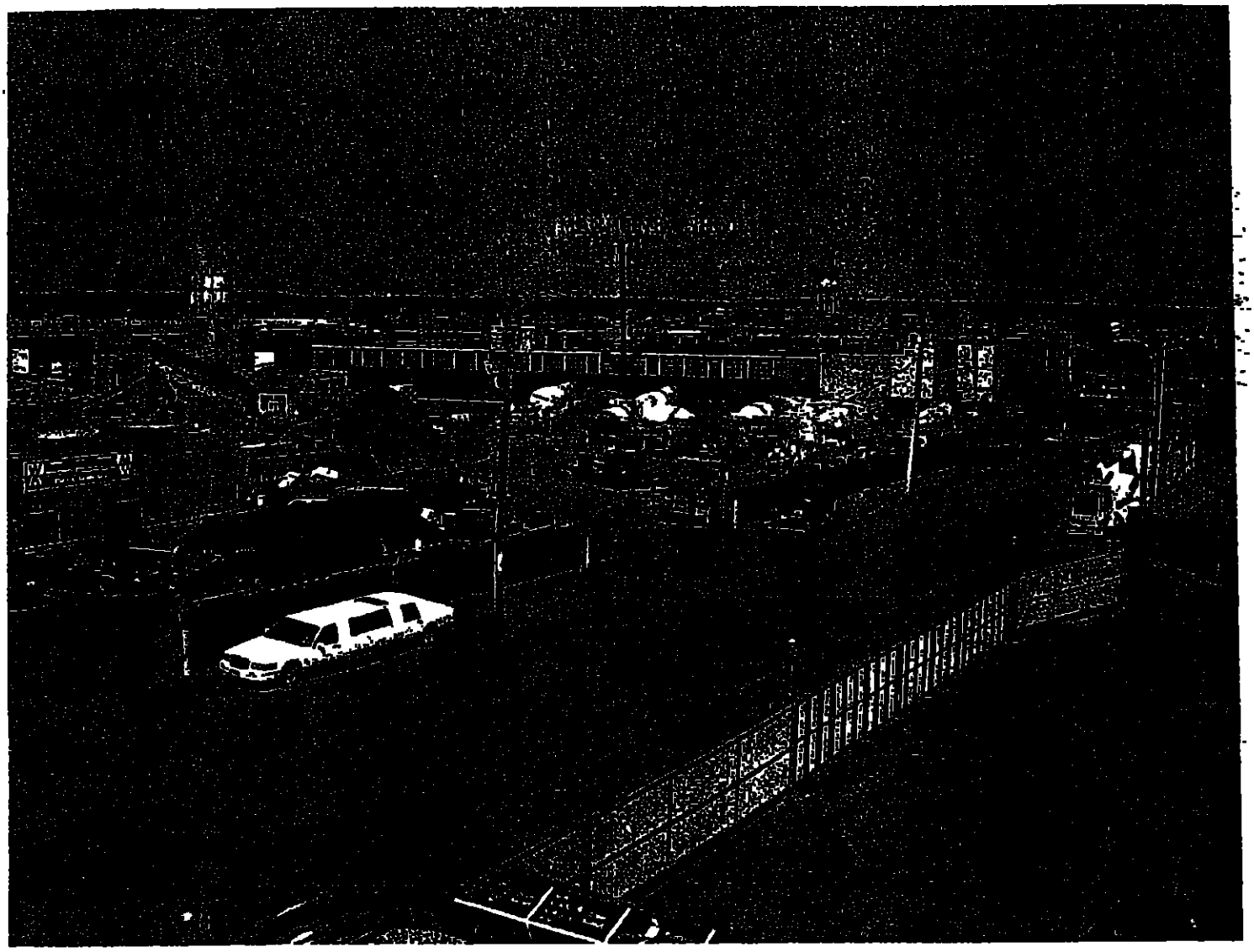
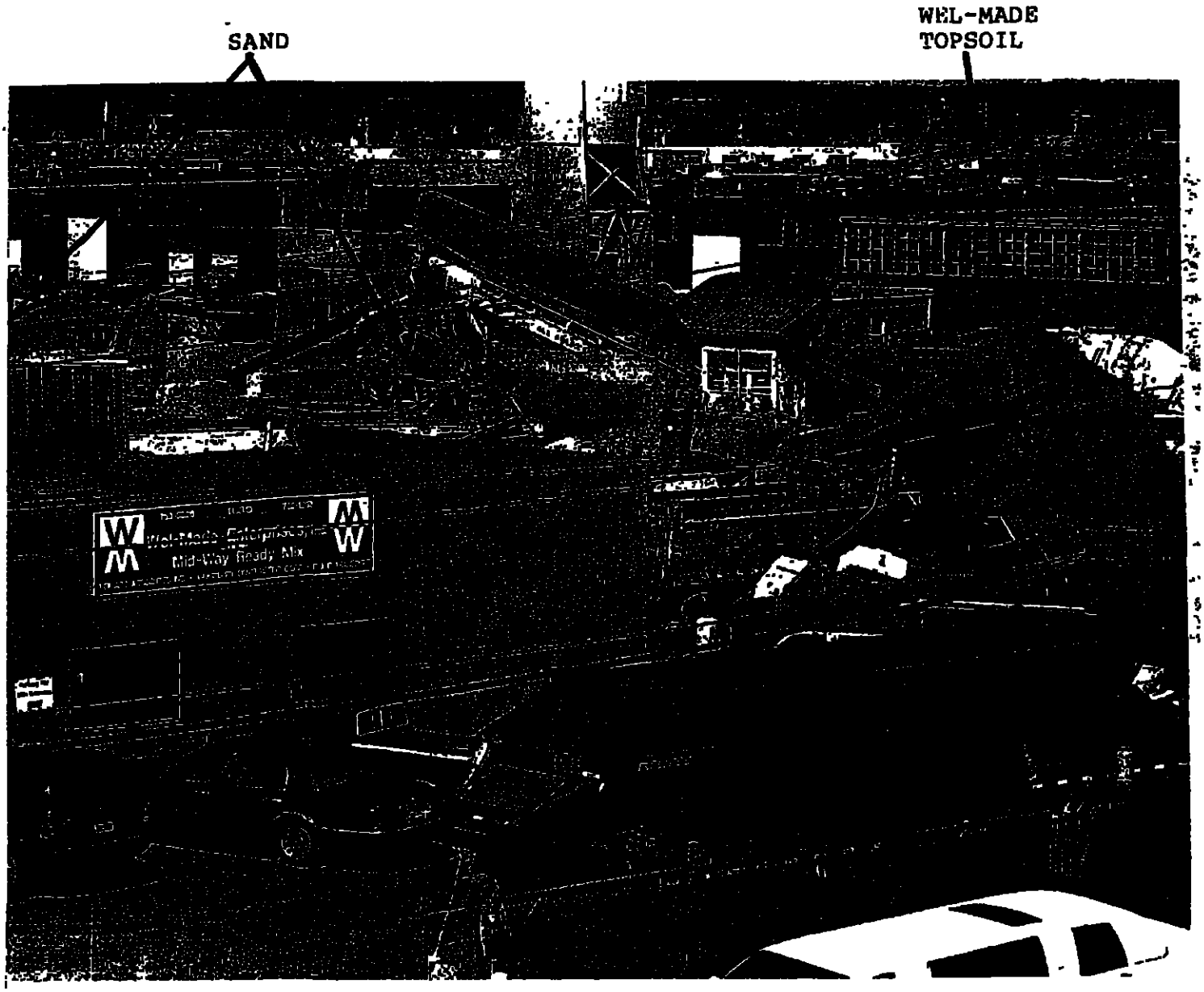


A-968

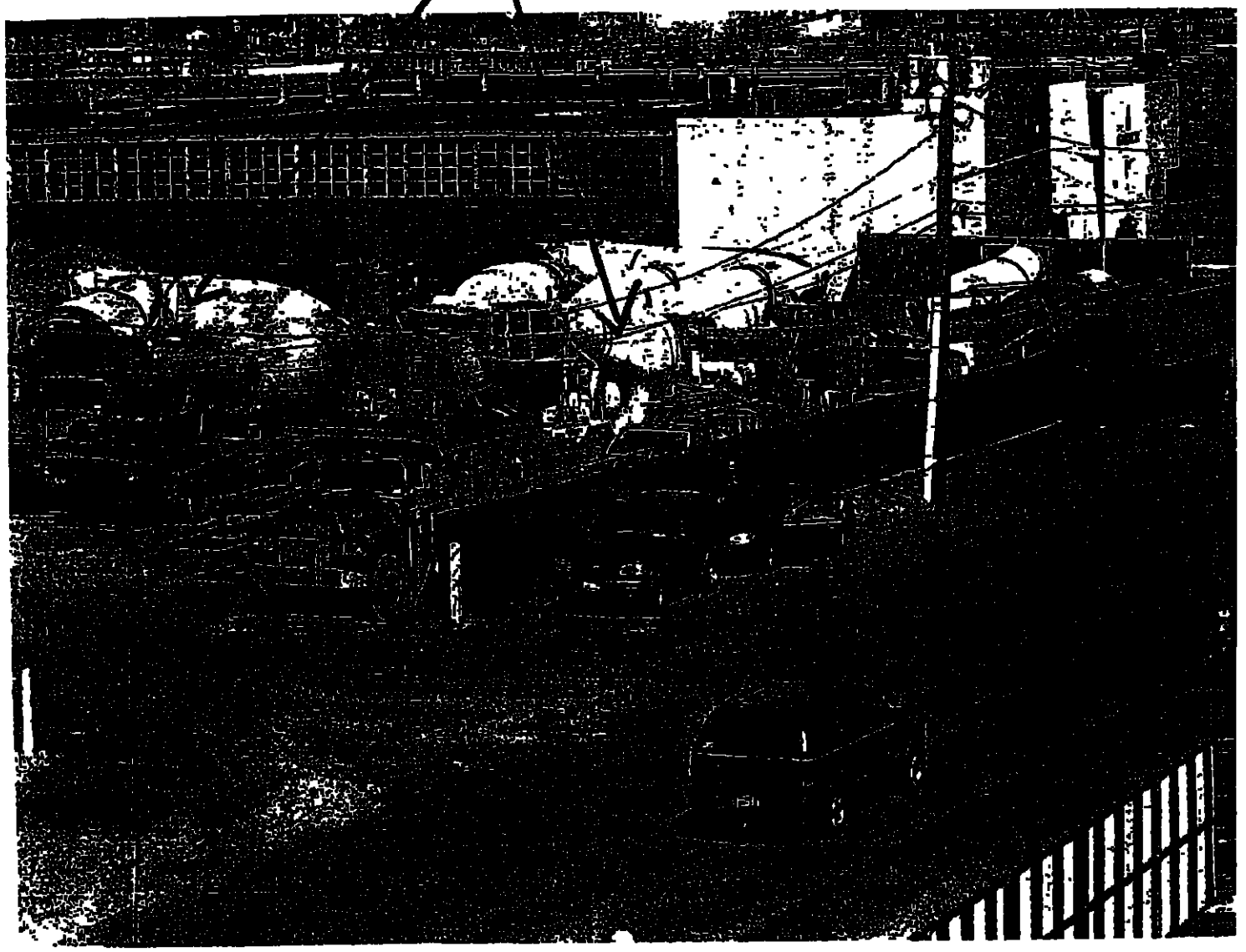
ASPHALT PLANT
J. D. POSILLICO
AGGREGATE
STORAGE
ASPHALT
CRUSHING
SHEA

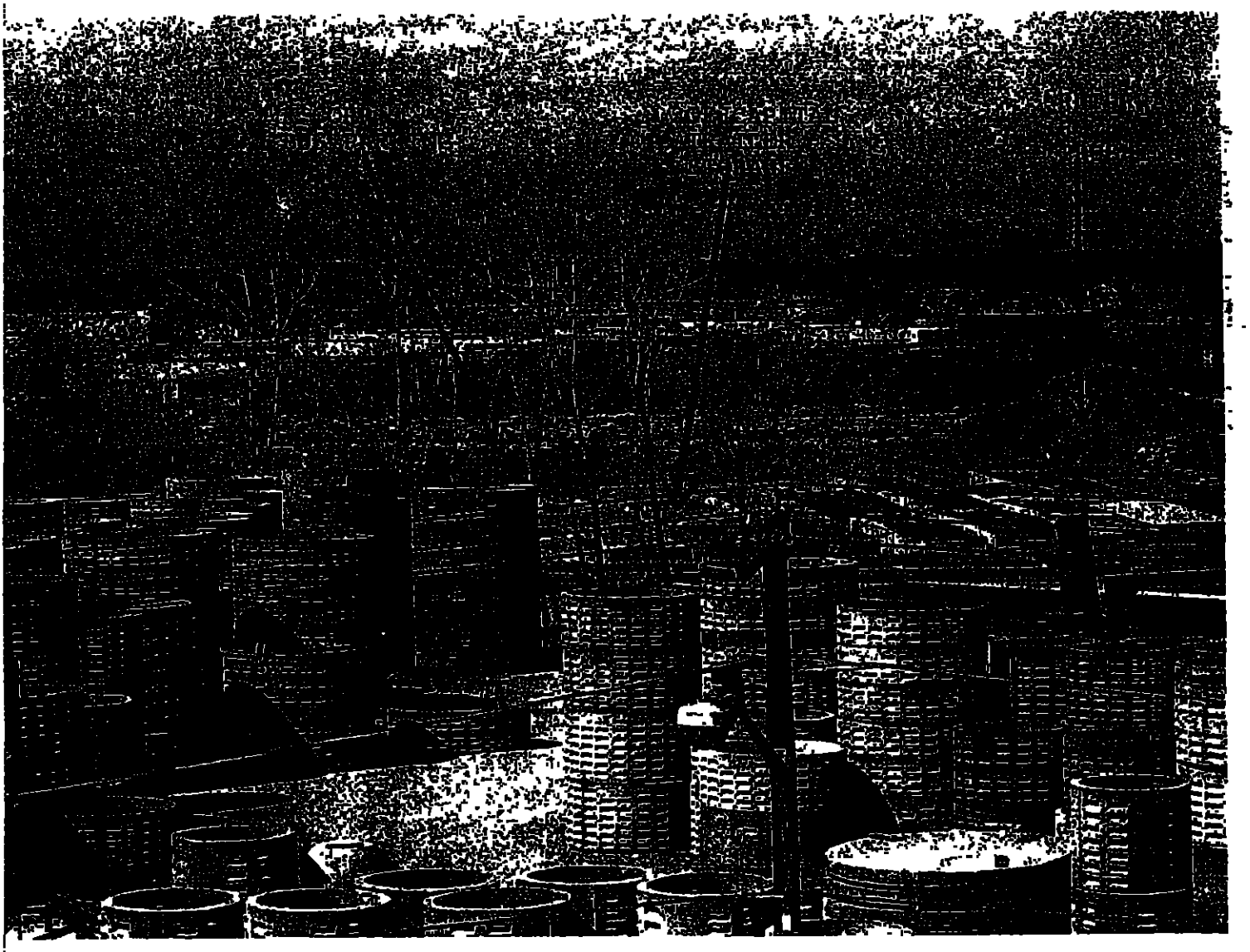
A-969


SAND
WEL-MADE
TOPSOIL
Wel-Made Enterprises
Mid-Way Ready Mix

A-970

CEMENT TRUCK PARKING





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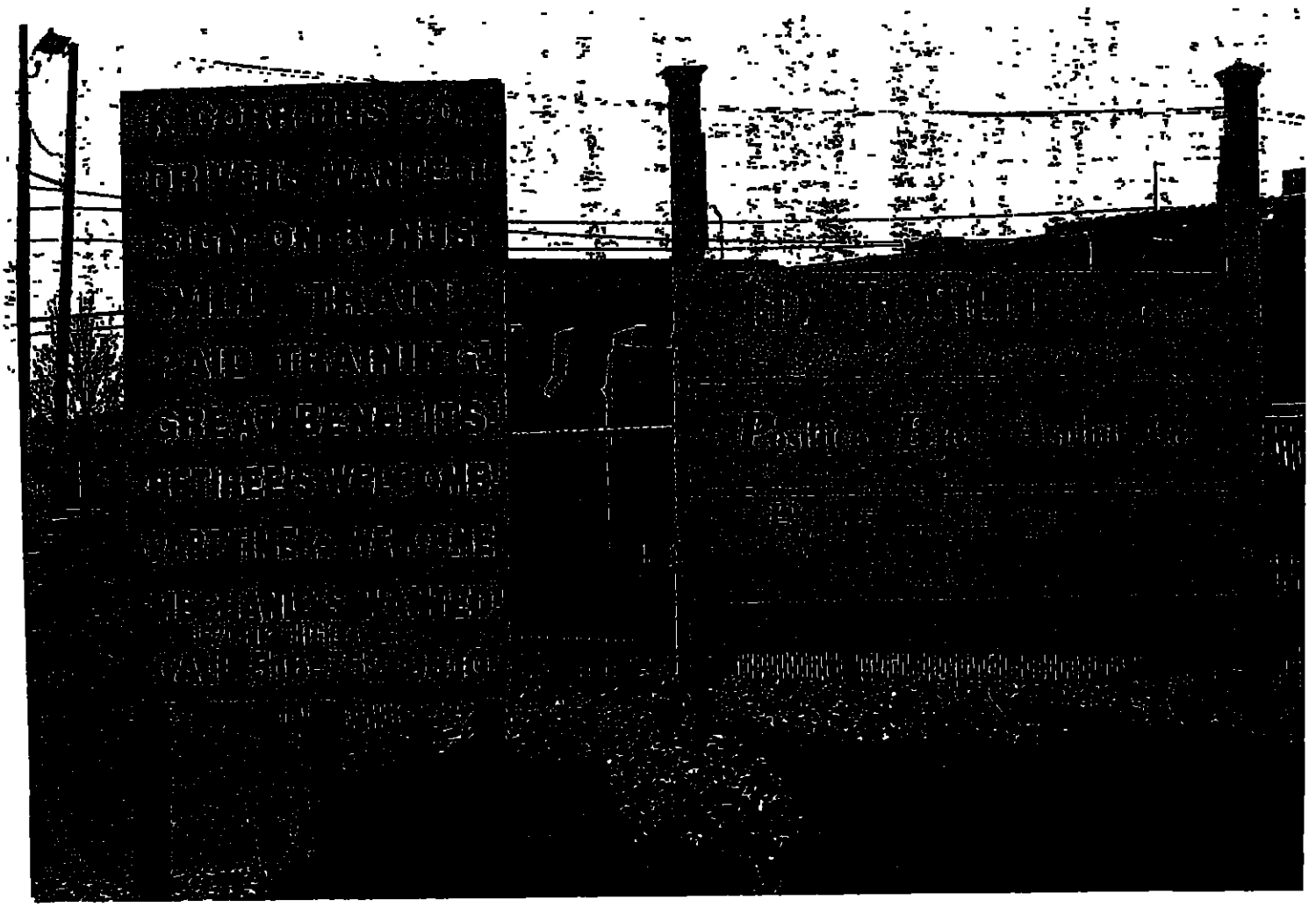
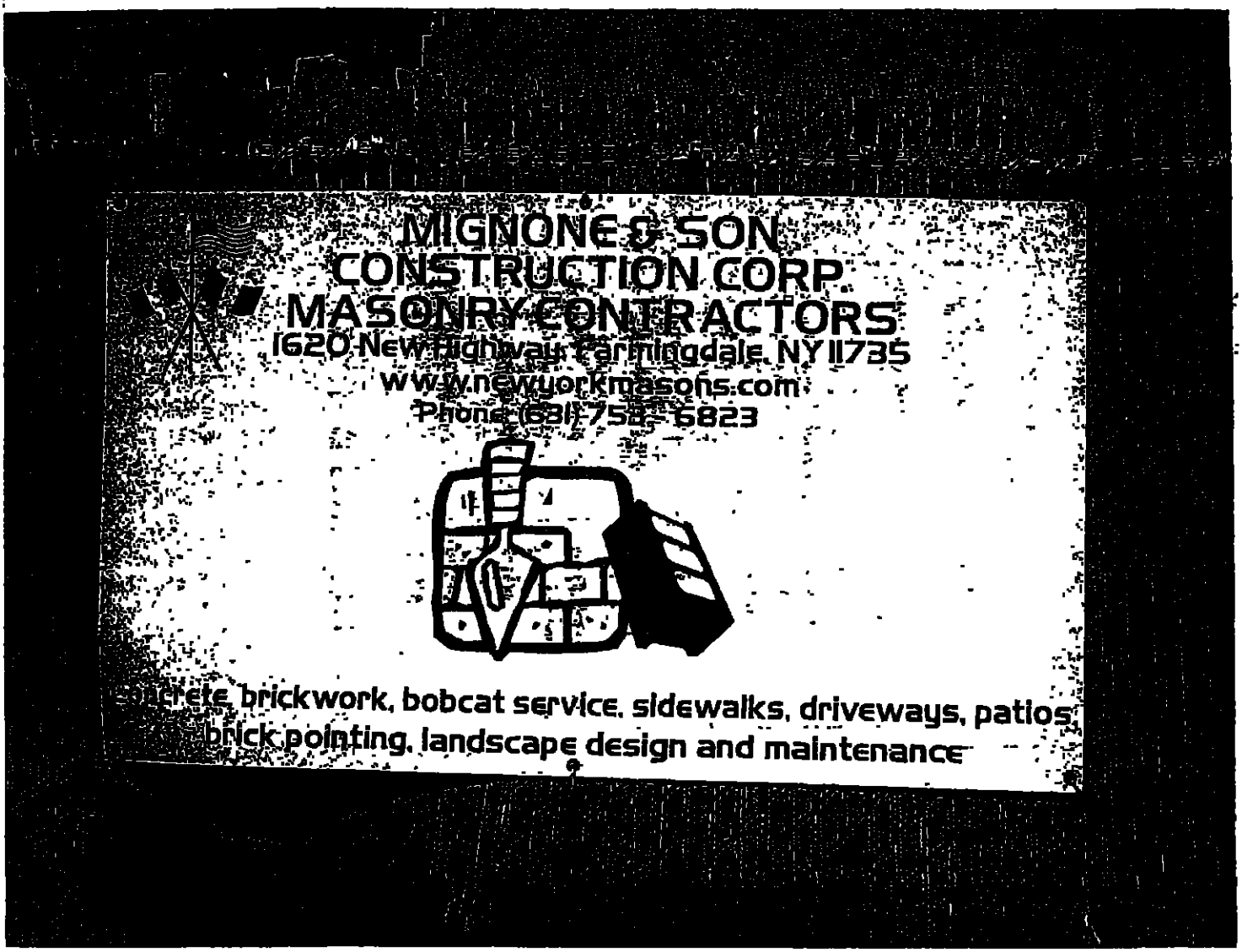
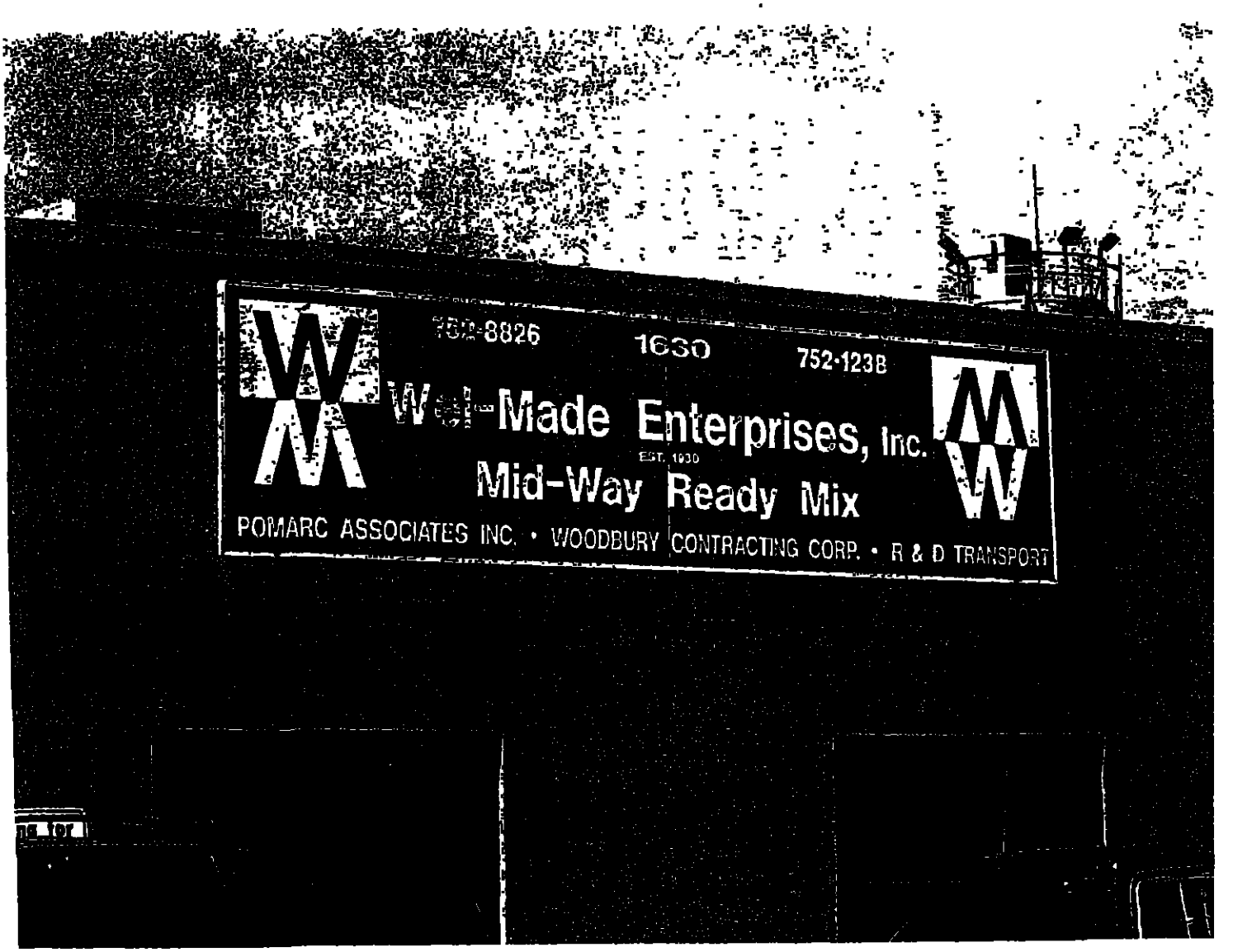
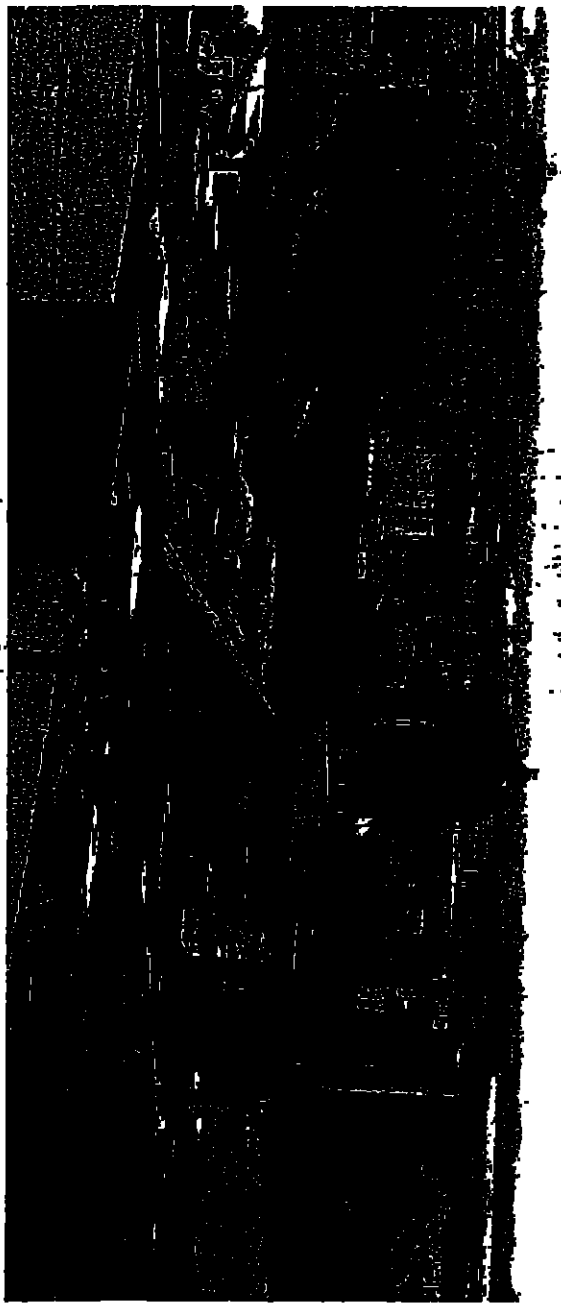



MIGNONE & SON
CONSTRUCTION CORP
MASONRY CONTRACTORS
1620 New Highway Farmingdale, NY 11735
www.newyorkmasons.com
Phone (631) 758-6823
crete, brickwork, bobcat service, sidewalks, driveways, patios
brick pointing, landscape design and maintenance

A-974


752-8826
1630
752-1238
Well-Made Enterprises, Inc.
EST. 1930
Mid-Way Ready Mix
POMARC ASSOCIATES INC. • WOODBURY CONTRACTING CORP. • R & D TRANSPORT

A-975



A-976

A-977

FARRELL FRITZ, P.C.

290 Broad Hollow Road
Melville, NY 11747
Phone: (631) 547-8400
Fax: (631) 547-0501

EAB Plaza
Uniondale, New York 11556-0120
PHONE: (516) 227-0700
FACSIMILE: (516) 227-0777
www.farrellfritz.com

2488 Montauk Highway
P.O. Box 1980
Bridgehampton, NY 11932
Phone: (631) 537-3100
Fax: (631) 537-3049

January 15, 2004

PHILIP C. KILIAN
PARTNER
DIRECT DIAL: (516) 227-0749
DIRECT FAX: (516) 336-2817
pkilian@farrellfritz.com

OUR FILE NUMBER
1613-102

BY FEDERAL EXPRESS

Ms. Mimi S. Fuhrman
Metropolitan Transportation Authority
347 Madison Avenue
New York, New York 10017

Re: Pinelawn Cemetery with The Long Island Railroad (Metropolitan Transportation Authority)

Dear Ms. Fuhrman:

We are special real estate counsel to Pinelawn Cemetery ("Pinelawn"). Mr. Gaynin of Jenkens & Gilchrist Parker Chapin, general counsel to Pinelawn, is in Europe on business and unable to respond to your faxed memo of January 9, 2004 in which you enclosed a lease of August 30, 1904 of land along New Highway ("August New Highway Lease") from Pinelawn to the Long Island Railroad ("LIRR"). This property is immediately south of land leased by Pinelawn to the L.I.R.R. on November 1, 1905 ("November New Highway Lease") which last mentioned Lease was renewed by the Metropolitan Transportation Authority ("MTA") last year.

The August New Highway Lease expired by its terms on August 30, 2003 without the MTA having exercised its right to renew which it was required to do by May 30, 2003. It may not now be renewed.

Pinelawn will not reinstate the August New Highway Lease as you have requested.

In addition, it has just come to our attention that Coastal Distribution, LLC may be constructing a building partially on the land which had been leased under the expired August New Highway Lease. If this is the case, they must immediately cease construction and remove their property and any structures or facilities they may have constructed on this land previously the subject of the August New Highway Lease.

Sincerely,

Philip C. Kilian

PCK:hp
cc: Jonathan S. Gaynin, Esq.

FFDOCS1\560561.01

A-978

COASTAL DISTRIBUTION, LLC

30A Glen Street
Glen Cove, New York 11542

Phone: 516-676-3700
Fax: 516-609-0943

July 16, 2002

Pinelawn Memorial Park
PO Box 420
Farmingdale, New York 11735
Attn: Justin Locke

Re: Clean up of debris on the New Highway siding.

Dear Justin,

Please advise me as soon as possible with respect to, the proposal made by Coastal for the clean up of the New Highway siding. The Long Island Rail Road is in the process of moving out, and we will begin setting up the yard shortly.

The proposal was as follows:

Coastal will remove the debris piles with out any cost to you. You will allow Coastal to use an additional piece of land approximately 50' x 750' (property occupied by the piles). The property will be secured and maintained by Coastal to prevent any future illegal dumping.

Please contact me at 917-886-2243.

Sincerely Yours,

Joseph Rutigliano

A-979

347 Madison Avenue
New York, NY 10017-3771
212 878-7000 Tel

Metropolitan Transportation Authority
State of New York

October 17, 2003

Via: Certified Mail – Return Receipt Requested
Fax: 212-704-6288

Jonathan S. Gaynin
Jenkens & Gilchrist Parker Chapin LLP
405 Lexington Avenue
New York, NY 10174

RE. Land Lease Agreements Dated November 1, 1905, and August 30, 1904 Between The Pinelawn Cemetery and The Long Island Railroad Company (LIRR) for Use as a Railroad Yard and Auxiliary Services of the Railroad.

Dear Mr. Gaynin:

On behalf of LIRR we are hereby exercising it's option to renew the above referenced lease dated November 1, 1905 for an additional ninety-nine (99) years thereby extending it through October 31, 2103.

We are also hereby agreeing to reinstate and extend the lease dated August 30, 1904 for 99 more years through July 31, 2102. Please have an authorized party concur by signing below, and return one original copy of this letter to my attention.

If you have any questions please call Mimi Fuhrman, of my staff, at (212) 878 – 7262.

Sincerely,

Roco Krsulic
Director of Real Estate

PINELAWN CEMETERY

Concurrence: [signature], President 10/23/03
Date

This concurrence refers to Aug 30 1904 lease. [signature]

Cc. S. Antman, F. Krebs,
C. Malocchi, K. Rydzewski, Chron/file

EXHIBIT E

A-981

Town of Babylon

200 E. Sunrise Highway
Lindenhurst, New York 11757
(631) 957-3000

STEVEN BELLONE
SUPERVISOR

August 8, 2003

Oliver Wilhelm
Cybul & Cybul Architects
1064 River Road
Edgewater, New Jersey
07020

RE: Long Island Railroad Property

Dear Mr. Wilhelm:

As per our conversation, I am confirming that the Town of Babylon has no jurisdiction over the Long Island Railroad Property. The Town of Babylon does not review plans or issue a building Permits for the Long Island Railroad property.

Thank you for your attention to this matter. If you have any questions please don not hesitate to call my office (631) 957-7414.

Very truly yours,

Peter M. Casserly
Commissioner
Planning & Development

PMC:ck

Lindsay Patrick Henry, Councilman | Wayne R. Horsley, Councilman | Ellen T. McVeety, Councilwoman, Deputy Supervisor | Carol A. Quirk, Councilwoman | Corinne DiSomma, Receiver of Taxes | Janice E. Tinsley-Colbert, Town Clerk

An Equal Opportunity/Affirmative Action Employer

EXHIBIT F

SHORT FORM ORDER COPY INDEX NO. 8599-2004

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXVII SUFFOLK COUNTY

PRESENT:
Honorable Ralph P. Costello

PINELAWN CEMETERY,

Plaintiff

-against-

COASTAL DISTRIBUTION, LLC, METROPOLITAN TRANSPORTATION AUTHORITY, THE LONG ISLAND RAILROAD COMPANY, and THE NEW YORK AND ATLANTIC RAILWAY,

Defendants.

R/D 4-23-04
S/D 5-11-04
Motion No. 001-MD

PLAINTIFF'S ATTORNEY
FARRELL FRITZ P.C.
BY: JOHN M. ARMENTANO, ESQ.
EAB Plaza
UNIONDALE, NY 11556-0120

DEFENDANT'S ATTORNEY
FORCHELLI CURTO SCHWARTZ ET AL
BY: DONALD J. SCHWARTZ, ESQ.
Attys for Def. Coastal
330 Old Country Rd PO Box 31
Mineola, NY 11501

SIMMRICH SAFAR & KHAKOFF LLP
Attys for Def. MTA & LIRR
320 Carleton Ave. Ste 3200
Central Islip, NY 11722

RUSIN & PURCELL, LLP
Attys for Def. NY & Atlantic RR
330 Vanderbilt Motor Pkwy
Hauppauge, NY 11788

Upon the following papers numbered 1 to 51 read on this motion for preliminary injunction Order to Show Cause and supporting papers 1-19 ; Answering Affidavits and supporting papers 20-32; 33-40; 41-48 ; Reply Affidavits 49-51 ; it is,

ORDERED, that the motion of plaintiff Pinlawn Cemetery for a preliminary injunction is denied as follows.

The controversy concerns two adjoining parcels of land owned by plaintiff Pinelawn located in Farmingdale, New York, which are adjacent to lands used by Pinelawn as a cemetery. By two instruments dated August 30, 1904 and November 1, 1905,

respectively, Pinelawn agreed to "grant, devise and farm-let" the two parcels to defendant Long Island Rail Road Company ("LIRR") for a term of ninety-nine years, with an option to renew at the end of the term. Since that time, LIRR has operated the parcels for railroad-related purposes. It is alleged that the parcels encompass the only "wye," or Y-shaped track used to turn railroad cars and locomotives, east of Glendale.

By agreement executed in 1996, defendant New York & Atlantic Railway ("NY&A") took over all of LIRR's freight business and leased from LIRR the area in question, both to turn and store cars, and as a "transload" facility, that is, a location used transfer various commodities from rail to truck. NY&A in turn sublet the facility to defendant Coastal Distribution, LLC, for the latter purpose.

It appears that in 2003, Coastal began constructing a building at the site to "contain and protect" the transload operation. The building itself straddles the two subject parcels. Pinelawn has commenced an action to permanently enjoin the construction and operation of the facility and has interposed the instant motion for a preliminary injunction.

In support of the motion, several arguments are posited. Firstly, Pinelawn alleges that Coastal is constructing the building to sell heavy building materials and equipment; to process and sell stone aggregate; and to transfer debris and hazardous waste materials. Pinelawn argues that this usage violates the use restriction contained in the leases (i.e. farming), violates the Town Code of the Town of Babylon, and will have a negative impact upon its cemetery business and property.

Secondly, Pinelawn argues that the 1904 leases have expired and that only one of them, the November 1904 lease, has successfully been renewed. Pinelawn acknowledges that it executed a letter "agreement" dated October 17, 2003, by which it "concurs" with LIRR's exercise of its options to renew both leases. However, Pinelawn argues that the renewal did not occur "not less than three months prior to the expiration of the term granted" as provided therein, and therefore, the renewal of the August lease was not timely.

It is axiomatic that movant must establish three elements in order to demonstrate its entitlement to a preliminary injunction.

to wit, a likelihood of success on the merits of the action; irreparable harm to the movant absent the injunction; and a balancing of the equities in movant's favor (see, e.g. *Aetna Insurance Co v Capasso*, 75 NY2d 860, 552 NYS2d 918 [1990]). Moreover, movant must show "a clear right to such relief under the law and the undisputed facts as set forth in the moving papers" (*Carman v Congregacion De Hits of New York, Inc.*, 269 AD2d 416, 416, 702 NYS2d 906 [2d Dept 2000]).

At bar, Pinelawn has failed, inter alia, to demonstrate a likelihood of success on the merits. Pinelawn's construction of the lease phrases "farm let" and "farm letten" as a restriction of LIRR's use of the site to agriculture is without merit. Rather, the caselaw supports defendants' counter-argument that the phrase "grant, devise and farm let" was the boiler plate language of the day meant to denote a lease of property for a term for any use as might be specified (see e.g. *Atlantic Avenue Railroad Company v Johnson*, 134 NY 375 [1892][railroad]; *Stewart v Long Island R. Co.*, 102 NY 601 [1886][railroad]; see also, *Darby v Callaghan*, 16 NY 71 [1857]["the words 'demise lease and to farm let' are technical expression to constitute a lease"]; Blacks Law Dictionary, 6th ed. p606 ["Farm let. Technical words in a lease creating a term for years"]). Pinelawn has submitted no legal authority to the contrary.

Pinelawn's further argument concerning the untimeliness of LIRR's renewal of the August 1904 lease is also unpersuasive. The letter agreement containing Pinelawn's "concurrence" in the renewal refers unequivocally in a handwritten addendum to the August 1904 lease. If the doctrines of waiver or estoppel do not prevent Pinelawn from disavowing its consent, it is likely that equity would intervene to relieve LIRR of the consequences of an untimely notice to renew (see, e.g. *Tritt v Huffman & Boyle Co.*, 121 AD2d 531, 503 NYS2d 842 [2d Dept 1986]).

As to Pinelawn's additional argument that the facility in question violates the Code of the Town of Babylon, it is probable that as the LIRR is a subsidiary of defendant Metropolitan Transportation Authority, municipal zoning authority over this site is superceded by the Public Authorities Law (see, Pub Auth Law §1266[8]).

Finally, Pinelawn's additional assertion that it will sustain damage to its property and business as a result of

Coastal's activities on the property is speculative at best. Hence, Pinelawn has failed to establish that it will be irreparably damaged if injunctive relief is not granted.

The motion is accordingly denied.

This matter is set down for a preliminary conference on the 31st day of August, 2004, at 9:30am, in the courthouse at 235 Griffing Avenue, Riverhead, Room 200. Pinelawn is directed to serve a copy of this order upon the calendar clerk of this court.

RALPH J. CATALDO

J.S.C.

Dated: August 6, 2004

Clerk only: Non-final Disposition

EXHIBIT G

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

PINELAWN CEMETERY,

Plaintiff,

-against-

COASTAL DISTRIBUTION, LLC, METROPOLITAN TRANSPORTATION AUTHORITY, THE LONG ISLAND RAIL ROAD COMPANY, and THE NEW YORK AND ATLANTIC RAILWAY,

Defendants.

Index No. 8599-04

AFFIRMATION IN OPPOSITION

DONALD JAY SCHWARTZ affirms the following under the penalties of perjury:

1. That I am an attorney duly licensed to practice law before the Courts of the State of New York and am a partner in the firm of FORCHELLI, CURTO, SCHWARTZ, MINEO, CARLINO & COHN, LLP, attorneys for Defendant, COASTAL DISTRIBUTION, LLC ("COASTAL").

2. That this affirmation is submitted in opposition to Plaintiff's motion for a preliminary injunction dated April 6, 2004.

PLAINTIFF'S BURDEN

3. It is well settled that in order to prevail on a motion for a preliminary injunction, the movant has the burden of demonstrating a likelihood of ultimate success on the merits, irreparable injury absent the granting of the preliminary injunction and that a balancing of equities favors the

movant's position. Gambar Enterprises v. Kelly Servs., 69 A.D.2d 297, 418 N.Y.S.2d 818.

4. A party is not entitled to a preliminary injunction unless the right is plain from the undisputed facts. If the right depends upon an issue which can only be decided upon at trial, the injunction cannot be granted. Pine Hill-Kingston Bus Corp. v. Davis, 225 App. Div. 182, 232 N.Y.S. 536; Voorhees & Hobart v. Hobart, 251 App. Div. 11, 295 N.Y.S. 616. Where the facts are in sharp dispute, a preliminary injunction will not be granted. Morrin v. Structural Steel Bd. of Trade, 231 App. Div. 673, 248 N.Y.S. 273; Geed v. Braunstorf, 277 App. Div. 1001, 100 N.Y.S.2d 181; CF Schwamm v. Alpert, 31 Misc.2d 768, 221 N.Y.S.2d 917; Jaymar's v. Schwartz, 37 Misc.2d 314, 235 N.Y.S.2d 249.

PLAINTIFF'S CLAIM THAT THE AUGUST 30, 1904 LEASE WAS NOT RENEWED IS WRONG.

5. As is set forth in the affidavit of JOSEPH RUTIGLIANO, on October 23, 2003, three representatives of the Plaintiff met with him and delivered to him a fully executed copy of the METROPOLITAN TRANSPORTATION AUTHORITY'S October 17, 2003 letter reinstating and extending the August 30, 1904 lease for 99 more years through July 31, 2102.

6. The document can not be more specific wherein Plaintiff's President, STEPHEN LOCKE, signed his name and wrote in his own handwriting in response to the request "please have

an authorized party concur by signing below", the words "this concurrence refers to August 30, 1904 lease".

7. Thus, Plaintiff's claim that the August 30, 1904 lease was not renewed or extended is totally without merit. Said lease is in full force and effect.

A COURT OF EQUITY SHOULD PERMIT THE REINSTATEMENT OF THE SUBJECT LEASE EVEN WITHOUT PLAINTIFF'S CONSENT.

8. Even if the 1904 lease had expired and was not reinstated with the consent of the Plaintiff, the Courts of this state, under the circumstances herein presented, excuse the late notice and permit the lease to be reinstated.

9. The lease in question is a 99 year lease requiring its renewal three months prior to its expiration. Therefore, no action needed to be taken with regard to its renewal for 98 years and 9 months. Further, upon information and belief, the MTA's failure to exercise the renewal of the lease was an honest mistake. Additionally, the Plaintiff has not been prejudiced in that it did not change its position based upon any claim of late renewal of the subject lease.

10. The Court of Appeals in Jones v. Gianferante, 305 N.Y. 135 (1953) was faced with a case where the Appellate Division affirmed the lower Court in finding that it properly exercised its discretionary equity jurisdiction by excusing, on the ground of an honest mistake by a tenant and an absence of

prejudice to the landlord, the tenant's delay in serving a Notice of Intention to exercise an option to renew a lease.

11. The Court held that the failure to notify the landlord was the result of an honest mistake and that the landlord suffered no damage by the delay. It further held that to evict the tenant would cause the tenant much hardship because of his investment in a business. Thus the Court, citing Matter of Topp, 81 N.Y.S.2d 344, exercised its equity jurisdiction and permitted the tenant to exercise its option to renew.

12. In Application of Topp, supra, the Court stated the following:

> "A court of equity will, however, grant relief to a tenant who has failed to give the required notice if his delay has not been so great as to constitute laches, and the failure to give due notice was attributable to an honest mistake where the tenant has a valuable interest in the property and the delay has caused no injury to the lessor."

13. The case law of this state continued after Jones, supra, to follow and apply its holding permitting a court of equity to allow a tenant to exercise late notice of its option to renew. See, George W. Millar & Co., Inc. v. Wolf Sales & Service Corp., 65 Misc. 585, 318 N.Y.S.2d 24; Rizzo v. Morrison Motors, Inc., 29 A.D.2d 912, 289 N.Y.S.2d 903 (4th Dept., 1968; Ringelheim v. Krasch, 112 N.Y.S.2d 13.

14. In Ringelheim, supra, the Court based its ruling largely on its finding that the lease did not provide that time

was of the essence in the exercise of the option. There is no time of the essence language in the case at bar.

15. Later, the Court of Appeals in Sy Jack Realty Co. v. Pergament Syosset Corp., 27 N.Y.2d 449, 318 N.Y.S.2d 720 (1971) cited Williston on Contracts, stating the following:

> "Williston and other commentators - - to whom we have already referred - - are even more explicit. This is what Williston has written about the matter (Contracts, vol. 1, § 76, p. 249, n.): 'where an option is contained in a lease or other contract involving an estate in land, some courts of equity, especially in recent years, have tended to view the offer as not automatically lapsing on expiration of the option period, as for instance, in case of renewal of a long term lease, where to do so would involve substantial forfeiture and the lessor has not materially changed his position in reliance on the optionee's failure to exercise his option within the stated time.'" (emphasis added)

16. The facts in this case are analogous to those stated by Williston. The subject 1904 lease was a 99 year long term lease and the lessor has not materially changed his position in reliance on the optionee's failure to exercise his option.

17. The Court of Appeals in J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc., 42 N.Y.2d 392, 397 N.Y.S.2d 958 (1977) went even further in allowing a tenant to exercise its option to renew its lease after the option period had already expired. In J.N.A. Realty Corp., supra, the lease agreement contained an option to renew the lease which stated that the tenant was to notify the landlord by certified mail six months prior to the

last day of the term of the lease if the tenant desired a renewal.

18. Subsequently, the landlord sent a letter to the tenant informing him that the option had expired and that the tenant was to vacate the premises. The tenant then sent a Notice of Intention to renew the option which was refused by the landlord.

19. The Court in J.N.A. Realty Corp., supra went on to allow the tenant to exercise the late option to renew when the failure to exercise on a timely basis was as a result of his own neglect or mere forgetfulness. The Court stated:

> "A tenant or mortgagor should not be denied equitable relief from the consequences of his own neglect or inadvertence if a forfeiture would result. (Giles v. Austin, 62 N.Y. 486; Noyes v. Anderson, 124 N.Y. 175; Roy's of North Syracuse v. P & C Food Markets, supra; see also, 2 Pomeroy, Equity Jurisprudence [5th Ed.], § 452, P 287). **The rule applies even though the tenant or mortgagor, by his inadvertence, has neglected to perform an affirmative duty and thus breached a covenant in the agreement."** (emphasis added)

20. The Court should exercise its equity powers and permit the reinstatement of the subject lease because to prevent the exercise of said option would cause substantial forfeiture to COASTAL and the other Defendants by preventing the continuation of railroad operations at the premises which have existed for 100 years.

THE HISTORICAL USE OF THE WORDS "FARM LET" OR "FARM LETTEN" DOES NOT PROHIBIT THE PROPERTY FROM BEING USED FOR RAILROAD PURPOSES.

21. The historical terminology "Farm let" or "Farm Letten" seems to have been a part of the standardized lease phrase "granted, demised and farm let" used widely in lease agreements during the 1800s and at the turn of the century. Although it is used in cases where rent is to be paid partially out of farm proceeds or a share of the produce, it is also used when non-agricultural land is involved. See, Stewart v. Long Island R. Co., 8 N.E. 200 (N.Y. Ct. of App. 1886); Atlantic Ave. R. Co. v. Johnson, 31 N.E. 903 (N.Y. Ct. of App. 1892) **(both cases dealing with railroads leasing lands for railroad purposes, and not for farm related purposes,** in which the leases use the term "farm let"); see also, Burns v. City of N.Y., 108 N.E. 77 (N.Y. Ct of App. 1915) (wherein the term was used in connection with the lease of a small piece of property in N.Y. City and no mention of farming or cultivation of payment with produce was made); Bruce v. The Fulton National Bank of the City of New York, 70 N.Y. 154 (N.Y. Ct. of App. 1879); Darby v. Callaghan, 16 N.Y. 71, *3 (N.Y. Ct. of App. 1857) (the usual words whereby a lease is made are "demise, grant and to farm let"); Tyler v. Heidorn, 46 Barb. 439,*8 (Supreme Court, N.Y. Cty. 1866); Vilias v. Featherson, 87 N.Y.S. 1094 (App. Div. 1st Dep't 1904) (where the term was used in a lease concerning a piece of property in New York City

intended to be used as a newspaper and tobacco stand); The Windsor Hotel Co., v. Hawk, 49 How. Pr. 257 (Supreme Court, N.Y. Cty. 1875) (where the term was used in a lease concerning Manhattan property on which the Plaintiff planned to build the Windsor Hotel); Kavanaugh v. Cohoes Power & Light Corp., 187 N.Y.S. 216 (Albany Cty., 1921) (wherein the words were used in a lease of property used for a power plant).

22. The subject words were sometimes used in share cropping situations, but only where there were no other terms of granting or demise used in conjunction, and where the intent of the parties to create a cropping situation and not a lease situation is readily apparent from the instrument in question. Courts do not naturally assume a share cropping from the use of the language "farm let" and the exact terms of the agreement are analyzed to understand party intent. Also, other words such as "grant" or "demise" are absent from share cropping agreements. See, e.g. Taylor v. Bradley, 39 N.Y. 129 (N.Y. Ct. of App. 1868) and In re Strickland Estates, 32 N.Y.S. 171 (Surrogates Ct. Cattaraugus Cty., 1894).

23. The most recent edition of Blacks Law Dictionary defines "farm let" as meaning "to lease; to let land for rent...a phrasal verb that commonly appeared in real-property leases; it corresponds with its Latin root, *ad firmam tradidi*...the usual words of operation in it are, "demise, grant and to farm let". Black's Law Dictionary (7th ed. 1999). Consistent with this is

Words and Phrases, Volume 16, referring to "Farm let" along with "demise and lease" as "words of conveyance appropriate in a lease...technical words, well understood, and are the most proper that can be used in making a lease....it means clearly a lease for years in consideration of rent".

24. The use of "farm let" to mean a lease generally is understandable when the root of the word "farm" is explored. In Webster's New World College Dictionary the word "farm" has the obsolete meaning of "a fixed sum payable at regular intervals as rent or taxes...the letting out, for a fixed amount...the condition of being let out at a fixed rent". This meaning is retained in the expression "to farm out" meaning rent land, a business etc., in return for a fixed payment. Webster's Unabridged Dictionary gives "farm" the obsolete definition of "the rent of land—originally paid by reservation of part of its products." This indicates that historically leases and "farm" were synonymous or that traditionally leases were associated with renting out parts of farm land to tenants.

25. Upon information and belief, the subject premises has been used for railroad purposes to transload various types of good for over 100 years. Thus, Plaintiff's claim that the lease restricts the property to agricultural uses is without merit.

PLAINTIFF HAS NO STANDING TO CLAIM VIOLATIONS OF TOWN OF BABYLON ORDINANCES

26. It is respectfully submitted that COASTAL, if necessary, will establish in the proper forum at the proper time that either it is not subject to the Town of Babylon Zoning Ordinances by virtue of its railroad use, or that it complies with those ordinances.

27. In any event, the Plaintiff cannot speculate on what is or is not a violation of Town of Babylon Ordinances.

28. Therefore, the Court should give absolutely no merit to any such allegations.

THE PLAINTIFF DOES NOT HAVE CLEAR RIGHT TO THE RELIEF OF WHICH IT SEEKS.

29. A preliminary injunction will not issue unless the right thereto is plain from the undisputed facts and there is a clear showing of necessity and justification. Thus, a preliminary injunction would ordinarily be denied where the Plaintiff's showing is contested and the facts are in doubt or dispute, and the Order would weigh heavily on the Defendant or impose a burden upon him outweighing the benefit to the Plaintiff. The right to a preliminary injunction must be certain as to the law and the facts and the burden of establishing such an undisputed right is upon the party seeking it.

30. Although the Defendant believes that the following cases and principles of law will dictate the denial of Plaintiff's motion, the ultimate outcome of this case is

speculative at best since the affidavits submitted by the Plaintiff are entirely disputed regarding all relevant issues by the Defendants.

31. In Park Terrace Caterers v. McDonough, 9 A.D.2d 113, 191 N.Y.S.2d 1001, the Court stated:

> "The drastic remedy of temporary injunction is not to be granted unless a clear right to the relief demanded is established upon the moving papers. The burden of establishing such an undisputed right is on the plaintiff."

32. In Media International, Inc. v. Salzman, 24 A.D.2d 710, 263 N.Y.S.2d 12, the Court stated:

> "A temporary injunction is a drastic remedy and should not be granted unless a clear right thereto is shown upon undisputed facts."

33. In the case at bar, the facts are highly disputed and the Plaintiff has failed to establish a clear right to the relief on its moving papers.

PLAINTIFF HAS AN ADEQUATE REMEDY AT LAW AND THEREFORE A PRELIMINARY INJUNCTION SHOULD NOT BE GRANTED.

34. In Esi-Data Connections, Inc. v. Peter Proulx, et al., 185 A.D.12d 705, 587 N.Y.S.2d 888 (4th Dept., 1992), the Court stated as follows:

> "Because the record supports Supreme Court's determination that monetary damages will be adequate to compensate plaintiff for defendants' unlawful conduct should Plaintiff prevail at trial, Supreme Court did not abuse its discretion in denying preliminary injunctive relief."

35. A preliminary injunction should not be granted when Plaintiff has an adequate remedy at law. Chicago Research and Trading v. The New York Futures Exchange, Inc., et al., 84 A.D.2d 431, 446 N.Y.S.2d 280 (1st Dept., 1982); Instrument Systems Corp. v. LaRosa & Sons, Inc., 31 A.D.2d 766, 297 N.Y.S.2d 599.

36. All of the injuries that the Plaintiff claims that they might sustain can be adequately compensated by money damages. (Pinelawn's alleged increase in annual cost of maintenance for cleaning the cemetery, loss of revenue for unsold crypts, etc.) Plaintiff confirms this when Mr. Locke stated on Page 6 and 7 of his affidavit the following:

> "Pinelawn will be compelled to spend tens of thousand of dollars annually to clean the bronze plaques and granite and marble exposed to the Coastal generated grit, dust and grime."

37. The alleged increase in expenditures is simply monetary damages requiring a denial of Plaintiff's demand for injunctive relief.

PLAINTIFF HAS FAILED TO SHOW THAT A BALANCING OF THE EQUITIES TIPS DECIDEDLY IN ITS FAVOR.

38. In determining whether or not to grant a preliminary injunction, the Court must balance the equities, and before the injunction is granted, must determine that the equities tip decidedly in favor of the moving party. Forstmann v. Joray Holding Co., 244 N.Y. 11, 29-30, 154 N.E. 652 (1926);

Gilbert v. Burnside, 6 A.D.2d 834, 175 N.Y.S.2d 989 (2nd Dept., 1958).

39. In Gilbert (supra), the Court stated:

> "Under such circumstances, where it will do greater damage or create greater injury to a defendant to grant it than to a plaintiff to deny it, an injunction pendente lite should be refused."

40. In Schulwolf v. Cerro Corp., 86 Misc.2d 292, 380 N.Y.S.2d 957, the Court stated:

> "Where an injunction will do greater damage to a defendant to grant it than to a plaintiff to deny it, an injunction is unwarranted."

41. The building on the premises is completely built and only paving and some drainage remains to be done. To grant Plaintiff's motion will do greater damage to the Defendants than will the denial of Plaintiff's claim for the aforementioned relief, especially after the Plaintiff has sat on its hands and allowed the Defendants to construct the building prior to taking any legal action.

42. Based upon all of the above, it is respectfully submitted that the Plaintiff has not met is burden with regard to any of the required criteria for the granting of a preliminary injunction and its motion should be denied.

A PRELIMINARY INJUNCTION SHOULD NOT BE GRANTED WITHOUT REQUIRING PLAINTIFF TO GIVE AN UNDERTAKING.

43. The Court may not grant a preliminary injunction without requiring Plaintiff to give an undertaking. CPLR 6312 subd. (B), Litwa v. Litwa, 89 A.D.2d 581, 452 N.Y.S.2d 241.

44. Since Plaintiff's motion should be denied, the Court need not reach this issue. However, if an injunction is granted, an undertaking in the sum of $3,000,000.00 should be required. This sum represents the amount of business Defendant will lose as a result of its inability to finish construction and operate its facility.

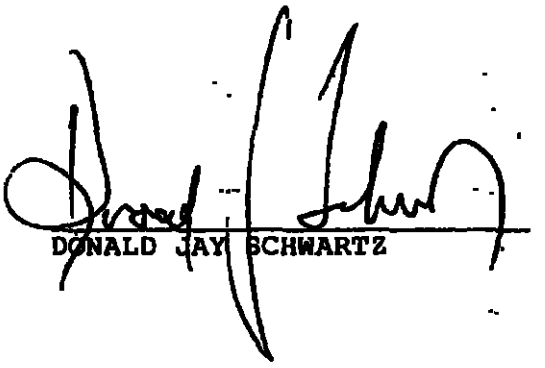
WHEREFORE, it is respectfully requested that the instant motion be denied in all respects.

DATED: Mineola, New York
May 10, 2004

DONALD JAY SCHWARTZ

The following documents are being served, filed or submitted in compliance with Section 130-1.1-a of the Rules of the Chief Administrator:

AFFIDAVIT AND AFFIRMATION IN OPPOSITION



DONALD JAY SCHWARTZ

A-1003

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

PINELAWN CEMETERY,

Plaintiff,

- against -

COASTAL DISTRIBUTION, LLC, METROPOLITAN TRANSPORTATION AUTHORITY, THE LONG ISLAND RAIL ROAD COMPANY, and THE NEW YORK AND ATLANTIC RAILWAY,

Defendants.

Index No. 04-8599

(Costello, J.S.C.)

DEFENDANTS MTA and LIRR MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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A-1004

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

PINELAWN CEMETERY,

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DEFENDANTS MTA and LIRR MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Metropolitan Transportation Authority (the "MTA") and The Long Island Rail Road Company (the "LIRR") (collectively, the "Railroad") respectfully submit this memorandum of law in opposition to Pinelawn Cemetery's ("Pinelawn") motion for a preliminary injunction.

Preliminary Statement

Pinelawn has utterly failed to meet the required elements for issuance of a preliminary injunction.

There is no likelihood of success on the merits: Pinelawn seeks to enjoin the Railroad from its continued use of property that the Railroad has for the past 100 years utilized for railroad related purposes, and which will continue to be utilized for railroad related purposes, with the addition of a freight transload facility, and its renewal and reinstatement of its leasehold for an additional ninety nine years. Pinelawn advances three fallacious arguments: first, it claims that the Railroad has no

right to use one of the two parcels because the lease allegedly expired, despite a signed writing by Pinelawn expressly reinstating the lease; second, Pinelawn, with no basis in fact, claims that co-defendants NYAR and Coastal intend on establishing a commercial trap rock and building material business on the site, when what is intended is a transload facility in support of Long Island's rail freight industry and; finally, Pinelawn erroneously claims that the construction on the site was performed without the necessary Town of Babylon building permits and that the intended use by NYAR and Coastal is in violation of the Town's zoning laws. Since the leaseholds are Railroad property, being used for railroad related purposes, jurisdiction over the facility, under New York Law is vested in the Railroad. As more fully discussed below, it is clear that the Railroad, by virtue of the long term leases, is the owner of the property and that the intended use as a transload facility is permitted under the law and not in anyway violative of Pinelawn's rights as a neighboring property owner. As such, the entirety of Pinelawn's claim of entitlement and success on the merits is baseless. Accordingly, since Pinelawn woefully fails in its burden to establish a likelihood of success on the merits, it is not entitled to any injunctive relief.

Pinelawn will not be irreparably harmed if the injunction is denied: Pinelawn fails to demonstrate that it will suffer irreparable harm absent the issuance of an injunction. None of the defendants have threatened to do anything that would cause irreparable harm to Pinelawn. Contrary to Pinelawn's overly dramatic conjecture, NYAR's and Coastal's use as a transload facility will not disturb its visitors, nor will the use cause any harm to its mausoleums and grave stone markers. Indeed, Pinelawn's claimed damages by dust and noise is completely belied by the fact that the entire surrounding area is comprised of heavy industrial businesses, e.g., an asphalt manufacturer, a stone and gravel processing plant and a cement plant are located across the street. More importantly, all

of Pinelawn's claims of damage would be completely compensable by an award of money damages. As such, Pinelawn will not suffer any irreparable harm if this Court were to allow NYAR and Coastal to operate a transload facility at the site. Since Pinelawn has failed to show irreparable injury, it is not entitled to injunctive relief.

The balancing of the equities tips decidedly in favor of the Railroad: Should a preliminary injunction be granted it would come at significant harm to the Railroad, since the subject property has become an important part of the freight operations of the railroad. Likewise, it appears that co-defendants NYAR and Coastal have expended considerable sums of money and invested considerable time in developing the property as a transload facility. More importantly, Pinelawn is seeking to enjoin conduct and activities that are entirely within the Railroad's rights as the lease owner of the property, entirely consistent with the surrounding commercial/industrial neighborhood and entirely allowed under the law. On the other hand, absent an injunction, Pinelawn does not stand to suffer any substantial loss. Moreover, Pinelawn is guilty of gross laches, having waited months, while the facility was constructed, before taking any action. Clearly, the equities tip decidedly in the Railroad's favor.

Accordingly, based upon the foregoing, and as more fully discussed below, Pinelawn has woefully failed to carry the particularly high burden imposed on those seeking injunctive relief. Therefore, the Railroad respectfully requests that this Court deny Pinelawn's motion.

Statement of Facts

On August 30, 1904 and November 1, 1905, the LIRR and Pinelawn entered into two long-term leases whereby Pinelawn leased two adjoining parcels of property, located in Farmingdale, New York, to the LIRR for a period of 99 years.

Each lease contained an option provision that permitted the LIRR to renew each lease for an additional 99 years. In order to exercise these options to renew, the LIRR was to provide written notice to Pinelawn of its intent to renew the leases "at any time not less than three months prior to the expiration of the term" of the lease. (See Leases, annexed as Exhibit 2 and 3, respectively, to the Complaint). By Letter Agreement, dated October 17, 2003, the MTA, on behalf of LIRR, exercised its option to renew the November 1, 1905 lease and by this same Agreement, the August 30, 1904 lease was reinstated and extended an additional 99 years. (See Letter Agreement, annexed to the Safar Aff., as Exhibit A). And, contrary to Pinelawn's allegations, as evidenced by the October 17, 2003 Agreement signed by its President and delivered to defendants, it explicitly agreed to reinstate and renew the August 30, 1904. In short, the LIRR is the long term leasehold owner of the two subject parcels. And, Pinelawn offers no credible evidence to the contrary.

Similarly Pinelawn's interpretation of the leases is equally misguided. Indeed, neither lease limits the LIRR's use of the property to "farm" purposes. In fact, since acquiring these leaseholds over one hundred years ago, the LIRR has used the property for railroad related purposes – and not for farm purposes. Equally erroneous is plaintiff's characterization of the intended use of the property by New York and Atlantic Railway's ("NYAR") sub-lessee Coastal Distribution LLC ("Coastal"). No one intends on using the property for the "operation of [a] trap rock and building material business" as repeatedly alleged by Pinelawn. (See generally Complaint and Plaintiff's Affidavits in support of motion). Rather, Coastal intends on utilizing the property as a transload facility[1] in support of freight operations on Long Island.[2] These intended transload services are

[1] A transload facility is a facility in which freight is off-loaded from freight cars onto trucks to be delivered to other destinations that are not accessible by rail. In this case, the transfer of the

important to the freight operation business of the LIRR and vital to the provision of freight services on Long Island. (See New York State Department of Transportation Letter, dated May 29, 2002, annexed to the Safar Affidavit, as Exhibit B (noting that "New York State is investing in rail infrastructure improvements that facilitate freight movement as a strategy for reducing truck traffic in the New York City (NYC) / Long Island area. Thus, the Department of Transportation (DOT) supports Coastal's efforts [i.e., to establish a construction materials transload facility] as an important step toward that objective.)).

On March 29, 2004, after Coastal made inquiry to it, and initially (and properly) finding that it had no jurisdiction over the subject property because it was LIRR property[3], the Town of Babylon issued a stop work order stating Coastal was performing work without the necessary Town approvals or permits. The stop work order has prevented Coastal from completing the transload facility, which at this time is nearly complete with only some minor items to be finished.

On April 8, 2004, Pinelawn commenced this action by order to show cause, and brought this motion for a preliminary injunction before the Court. Pinelawn's motion, inter alia, seeks a preliminary injunction restraining defendants from continuing construction on, development of and

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leasehold property. See Krsulic Aff., at ¶ 13.

[2] On or about November 18, 1996, by agreement, the LIRR transferred, among other things, its Long Island, New York freight operations and facilities (including the subject property) to New York Atlantic Railway's predecessor in interest. Subsequently the Railroad was informed, NYAR entered into an agreement with Coastal to sub-lease the subject properties for the purpose of establishing a freight transload facility at the site. See Krsulic Aff., at ¶¶ 9 - 11 (providing a full discussion of LIRR freight operations and transfer of those operations to NYAR).

[3] The Town of Babylon initially took the position that it had no jurisdiction over the property and that it did not need to review plans or issue building permits for the planned development of the property, since it was LIRR property. See Town of Babylon Letter, annexed as Exhibit C to the Safar Affidavit.

preliminary injunction restraining defendants from continuing construction on, development of and use of the two leased properties. In addition, Pinelawn, by its verified complaint, asserted two causes of actions; as follows: (1) the first cause of action seeks a declaratory judgment declaring that the defendants' actions are unauthorized by the leases and; 2) the second cause of action seeks a permanent injunction restraining defendants from constructing, developing or operating a trap rock and building material business on the two leased properties.

ARGUMENT

Pinelawn has woefully failed to establish any of the required elements that would entitle it to the drastic remedy of preliminary injunctive relief.

Defendants do not threaten nor are they poised to act in violation of Pinelawn's rights. Indeed, quite the opposite is true: should injunctive relief be granted, it would be at the expense of defendants' property rights, particularly NYAR and Coastal since the development of the transload facility was at their time and expense. More importantly, as more fully discussed below, the LIRR is clearly the "owner" of the properties by virtue of its long term leases. Pinelawn's eleventh hour attempt to renege upon its reinstatement and renewal of the August 1904 lease is simply without effect.

Moreover, Pinelawn's assertion that LIRR's use of the properties as a transload facility is in violation of the terms of the lease is simply preposterous. Indeed, the leases placeno conditions on the LIRR's use of the properties. Equally erroneous is Pinelawn's claim that the construction of the transload facility required, as a matter of law, Town of Babylon permits and that the Town's zoning prohibits the intended use by NYAR and Coastal. Under New York Public Authorities Law, the MTA/LIRR are not subject to local permitting or zoning requirements. In short, the intended

transload facility is a use clearly permitted under the terms of the leases, entirely consistent with the LIRR's use of the property for the previous one hundred years, and consistent with the surrounding neighborhood's industrial character. Accordingly, Pinelawn's motion for a preliminary injunction must be denied.

Under New York law, Pinelawn is required to establish three elements in order to demonstrate an entitlement to the extraordinary remedy of a preliminary injunction before trial: (1) a likelihood of success on the case's merits; (2) irreparable harm absent the court's grant of the injunction; and (3) a balancing of the equities that favors the its position. Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860, 862 (1990); L&G Hair Designers, Inc. v. Balestrieri, 716 N.Y.S.2d 602 (2d Dep't 2000); Clarion Assocs. v. D.F. Colby Co., 276 A.D.2d 461, 462, 714 N.Y.S.2d 99, 100 (2d Dep't 2000). Moreover, a preliminary injunction may only be granted where "the movant establishes a clear right to such relief under the law and the undisputed facts as set forth in the moving papers." Carman v. Congregacion De Mita of New York, Inc., 269 A.D.2d 416, 702 N.Y.S.2d 906 (2d Dep't 2000); Anastasi v. Maiopon Realty Corp., 181 A.D.2d 706, 707, 581 N.Y.S.2d 223, 224 (2d Dep't 1992). Thus, where the facts are in sharp dispute, a preliminary injunction should not be granted. Dental Health Assocs. v. Zangench, 267 A.D.2d 421, 701 N.Y.S.2d 106, 107 (2d Dep't 1999).

Point I

PINELAWN HAS FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS

Pinelawn has fallen far short of meeting its burden of establishing a likelihood of success on the merits of its action to entitle it to injunctive relief. Pinelawn fails to demonstrate it has any overriding interest in the property that gives it the right to enjoin the LIRR from fully utilizing its leasehold for railroad related purposes.

A. *The LIRR is the Leasehold Owner of the Property*

Contrary to Pinelawn's position, the LIRR is the leasehold owner of the subject two parcels of property. The subject property has been railroad property for one hundred years, has been utilized for railroad related purposes, including the provision of freight services, and in furtherance of the Railroad's freight operations transferred to NYAR, for purposes of constructing and operating a transload facility.

The operative renewal language contained in each of the leases is as follows:

> And the said party of the first part for and in consideration of the premises hereby promises and agrees to and with the said party of the second part, to execute unto it a new lease similar in all respects to this, except in regard to a renewal, to run for a similar period of ninety-nine years, for the premises aforesaid upon receiving from the party of the second part a notice in writing claiming such renewal, at any time not less than three months prior to the expiration of the term granted by these presents

See Leases, annexed as Exhibit 2 and 3 to the Complaint. Thus, both leases explicitly contemplated that the subject property would remain in the Railroad's possession, effectively in perpetuity.

It had been the Railroad's clear intention to renew both leases for an additional 99 year term. However, as of August 2003, the option to renew on the lease set to run as of August 30, 2003 had

not been exercised. This was completely inadvertent on the Railroad's part, and a pure oversight. See Krsulic Aff., at ¶ 18. Until this litigation, Pinelawn has never indicated anything but that it regarded the property as railroad property, [4] and certainly did not express any opposition or disagreement to the Property remaining in the Railroad's possession for an additional 99 year term. Id.

Since, with respect to the August 1904 lease, the time within which the Railroad was to exercise its option had, as a technical matter, passed, the Railroad and Pinelawn simply agreed to reinstate the August 1904 lease. Id. at ¶ 21. With respect to the November 1905 lease, the time within which to exercise the option had not yet run, so the Railroad merely exercised its option. Pinelawn readily agreed to reinstate and extend the 1904 Lease. Accordingly, by Letter Agreement dated October 17, 2003, and signed by Pinelawn's President on October 23, 2003, Pinelawn and the Railroad agreed to reinstate and extend the 1904 Lease. The Agreement recites that:

> [the Railroad is] hereby agreeing to reinstate and extend the Lease dated August 30, 1904 for 99 more years through July 31, 2102. Please have an authorized party concur by signing below .....

Pinelawn's President, Stephen Locke, executed the Agreement, specifically reciting as well that Pinelawn's concurrence "refers to August 30, 1904 Lease." (See Agreement, annexed to the Safar Aff., as Exhibit A).

Thus, as of October 23, 2003, the leases affecting the Property had been renewed and reinstated, in writing, by Pinelawn. It was certainly the Railroad's understanding, based upon discussions with Pinelawn, and the Letter Agreement, that both leases had been extended, and that

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[4] In fact, around this time, Pinelawn installed a barrier fence separating the leasehold properties from Pinelawn property.

the property would remain in the Railroad's possession, and used for railroad related purposes, for the ensuing one hundred years.[5]

It is disingenuous, at best, for Pinelawn to claim that it did not reinstate and renew the August 1904 lease. Indeed, Pinelawn knew that NYAR and Coastal were set to commence construction of the transload facility at the property site, and the issues involving the extensions of the leases needed to be resolved prior to such time. Moreover, Pinelawn actually delivered a copy of the Letter Agreement to NYAR and Coastal representatives at the Property, on October 23, 2003, when they met to discuss the further development of the site by NYAR and Coastal. Pinelawn examined the site and the proposed plans for the transload facility, and gave NYAR and Coastal its agreement signifying the renewed and extended long term leaseholds. Pinelawn's previous actions speak louder than its words. Indeed, only one conclusion can be reached: Pinelawn intended that Coastal and NYAR rely on the delivery of the lease extension so that construction of the transload facility could proceed.[6]

Accordingly, it is patently clear, by the terms of the Letter Agreement and execution by Pinelawn, that the Railroad has renewed the leases for an additional ninety nine years. As such, Pinelawn's assertion to the contrary must be rejected and its application denied.

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[5] As pointed out in the Krsulic Affidavit at paragraph 23, one lease extension without the other is senseless, and renders the property virtually useless to the railroad.

[6] Immediately after Pinelawn's delivery of the lease extension, NYAR and Coastal commenced construction of the transload facility, which was substantially complete before there was any objection by Pinelawn.

B. ***Pinelawn, in any Event, is Prevented By Equity From Reneging on its Reinstatement of the August 1904 Lease***

It is well settled under New York law that "equity will intervene to relieve a tenant of the consequences of an untimely notice of an option to renew where said failure resulted from an honest mistake or inadvertence, the non-renewal would result in a substantial forfeiture by the tenant and the landlord would not be prejudiced." Beltrone v. Danker, 228 A.D.2d 763, 643 N.Y.S.2d 720 (3d Dep't 1996); Tritt v. Huffman & Boyle Co., 121 A.D.2d 531, 503 N.Y.S.2d 842 (2d Dep't 1986); J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc., 42 N.Y.2d 392, 397 N.Y.S.2d 958 (1977) ("A tenant or mortgagor should not be denied equitable relief from the consequences of his own neglect or inadvertence if a forfeiture would result.").

Here, even assuming, arguendo, that the Letter Agreement did not reinstate and renew the August 1904 lease, equity would intervene to relieve the Railroad from any untimely notice. All of the above elements have been met: the Railroad's three month delay in notifying Pinelawn of its intent to renew the lease was due to inadvertence on its part; the non-renewal of the lease would cause substantial forfeitures by the defendants, particularly NYAR and Coastal since the construction of the transload facility was at their expense and; Pinelawn was not prejudiced or injured by the short delay in the Railroad's notice. Certainly it is beyond question that relieving the Railroad from its arguably late notice of renewal, in light of Pinelawn's affirmative acceptance of the renewal, its tacit approval of NYAR and Coastal's plan to utilize that property as a transload facility and its nearly six month delay in noting any objection to the planned use, is required under equitable principles of New York law.

Likewise, any argument by Pinelawn that it believed it was reinstating an unrelated "August" lease with the LIRR when it signed the Letter Agreement is laughable and incredulous. At the time Pinelawn executed the Letter Agreement it clearly understood it was accepting the Railroad's notice, reinstating the August 30, 1904 lease and renewing it for an additional term, and that the Railroad was exercising its option on the November 1905 lease – which parcels, together comprise of the subject property. Why else would Pinelawn have hand delivered the Letter Agreement to Coastal's president during a meeting at the subject site in which the intended transload facility and operation was discussed?

In short, Pinelawn offers no credible basis for its conduct and sudden change in position. Not only did Pinelawn renew the August 30, 1904 lease, it knew that the development of the transload operation would commence immediately after the lease renewals were in place and did nothing for many months to prevent the facility's construction. It was only after the transload facility was nearly complete that Pinelawn is attempting to renege upon its renewal of the August 1904 lease and prevent the Railroad from utilizing the property, as it has for the last century, for railroad related purposes. In short, granting an injunction would cause a forfeiture, with a loss so substantial that it is completely out of proportion to the harm – which is non-existent – caused to Pinelawn for any delay in notice. Accordingly, Pinelawn's application to enjoin defendants must be denied.

C. ***There is No Lease Condition Requiring the Land be Used For Farming***

Similarly, Pinelawn's argument that the lease limits the use of the property "to farm" and "to farm letten" purposes is equally absurd. Each of these terms are terms of art that were used in leases of that time to indicate a lease of the property for a term of years. Indeed, Black's Law Dictionary notes that the original meaning of the word "farm" was "rent; a term; a lease of lands; a leasehold

interest." Black's Law Dictionary, at p. 606 (6th Ed.). According to Black's the primary definition of "farm" and "farm let" is as follows:

> Farm, v. To lease or let; to demise or grant for a limited term and at a stated rental.
>
> Farm let. Technical words in a lease creating a term for years.

Id. at 606-07; see also The Atlantic Ave. RR. Co. v. Johnson, 134 N.Y. 375 (1892) (noting lease "farm let" property to railroad to operate a railroad in the city of Brooklyn).

Furthermore, Black's refers the reader to the definition of "fee-farm" for further guidance. The definition of "fee-farm" offers further proof that the subject leases do not limit the use of the property by the Railroad to farm purposes. "Fee-farm" is defined as follows:

> Fee-farm. A species of tenure, where land is held of another in perpetuity at a yearly rent, without fealty, homage, or other services than such as are specially comprised in the feeoffment. . . . Fee-farm is where an estate in fee is granted subject to a rent in fee of at least one-fourth of the value of the lands at the time of its reservation. . . . Fee-farms are lands held in fee to render for them annually the true value, or more or less; so called because a farm rent is reserved upon a grant in fee. Such estates are estates of inheritance. They are classed among estates in fee-simple. No reversionary interest remains in the lessor . . . .

Id. at p. 615.

Based upon these definitions, there can be no doubt that the inclusion of "farm" and "farm let" in the lease was not for the purpose of limiting the Railroad's use of the property for farming purposes, but referred to the lease of the land. Indeed, as one would expect when "farm letting" a parcel, the subject leases contained an annual rent of $1, which is far below the true value of the property, and granted in perpetuity the use of the land to the Railroad. Pinelawn's absurd position is further belied by its own admission that the Railroad has utilized the property for "non-farming"

purposes, without objection, for the purpose of transporting funeral parties coming to Pinelawn from New York City. (See Locke Affidavit at ¶ 9).

There is really no doubt that Pinelawn's interpretation of the lease language is unreasonable and contrary to the accepted meaning of the terms "farm" and "farm let." Accordingly, Pinelawn has failed to present any credible evidence in support of its position that the Railroad is in violation of the lease terms. As such, the Railroad's use of the property as a transload facility should not be enjoined and Pinelawn's motion denied.

D. ***The Town of Babylon is Without Jurisdiction Since the Property is LIRR Property***

Contrary to Pinelawn's position, the Railroad is not subject to the permitting requirements or other similar regulations of local municipal authorities. Section 1266 of the Public Authorities Law provides, in relevant part, that:

> the authority may do all things it deems necessary, convenient or desirable to manage, control and direct the maintenance and operation of transportation facilities, equipment or real property operated by or under contract, lease or other arrangement with the authority. Except as hereinafter specially provided, no municipality or political subdivision . . . shall have jurisdiction over any facilities of the authority or any of its activities or operations. The local laws . . . of a municipality or political subdivision . . conflicting with this title or any rule or regulation of the authority, shall not be applicable to the activities or operations . . . or the facilities of the authority . . . .

N.Y. Public Authorities Law § 1266(8).

This section is very broad in its application, and grants the MTA/LIRR the power to do all things necessary and convenient to manage its railroad operations, notwithstanding any local ordinances which may conflict with the provisions of the Public Authorities Law. People v. Metro North Commuter Railroad Co., 132 Misc.2d 1072, 506 N.Y.S.2d 389 (Criminal Ct., Bronx Cty 1986); People v. Long Island Railroad, 90 Misc.2d 269, 397 N.Y.S.2d 846 (2d Dep't 1976) aff'd 41

N.Y.2d 1039 (1977); see Long Island Rail Road Co. v. Public Service Comm., 30 A.D.2d 409; 292 N.Y.S.2d 167 (2d Dep't 1968) aff'd 23 N.Y.2d 852 (1969) (noting legislatures sweeping delegation of responsibility to MTA and broad powers under section 1266).

Here, NYAR and Coastal's operation and development of a transload facility on the property should enjoy immunity from local zoning and permitting requirements, since: 1) the property is leased by the Railroad; 2) a transload facility clearly relates to railroad's freight operation; 3) such use of the property bears directly on the governmental function for which the Railroad was created. Indeed, if the Railroad itself was constructing and operating the transload facility there would be no question that the local municipality would be without jurisdiction. Accordingly, the Railroad's sublessee should enjoy the same immunity. See People v. Witherspoon., 52 Misc.2d 320, 275 N.Y.S.2d 592 (Dist. Ct. Suffolk Cty 1966) (noting lessee of MTA property enjoyed immunity from local municipality's zoning laws to the extent the MTA has immunity).

Based upon the foregoing, it is patently clear that Pinelawn has completely and utterly failed to carry its burden of establishing its likelihood of success on the merits because it has absolutely no meritorious or credible argument to justify its application to enjoin the Railroad from its full enjoyment of the property. Accordingly, Pinelawn's motion for injunctive relief must be denied.

Point II

PINELAWN HAS FAILED TO DEMONSTRATE IRREPARABLE INJURY

On a motion for a preliminary injunction, the movant has the burden of establishing the right to this extraordinary equitable remedy. See Albini v. Solork Assoc., 37 A.D.2d 835 (2d Dep't 1971). The showing of irreparable injury "is the single most important prerequisite" for the issuance of injunctive relief. Reuters Ltd v. United Press Int'l, Inc., 903 F.2d 904, 907 (2d Cir. 1990).

Pinelawn has utterly failed in establishing that the defendants threaten or are about to do, or are doing or procuring or suffering to be done any act that would cause Pinelawn irreparable injury. See N.Y. CPLR § 6301. Indeed, Pinelawn's attempt to shock this Court into granting preliminary injunctive relief with claims of possible damage to its nearby mausoleums and plaques and possible impact on revenues, and the like, is not irreparable harm.

Indeed, not only are Pinelawn's assertions pure conjecture, but all of Pinelawn's claimed harm is completely compensable by money damages. For example, Pinelawn claims that "the constant exposure to material from the trap rock operation will immediately dramatically increase Pinelawn's annual cost of maintenance." Assuming arguendo this is accurate (which it is not), any increase in maintenance cost is compensable with an award of money damages. Likewise, Pinelawn's claim that its ability to market graves may be impacted is also compensable by an award of money damages. Finally, Pinelawn's claim regarding the disturbance of mourners is too speculative to be given credence. Moreover, to the extent any of NYAR or Coastal's operations disturbed mourners, any non-economic injury would be to the mourners, not to Pinelawn. As such, any such damages cannot constitute Pinelawn's claim of irreparable harm.

Therefore, contrary to Pinelawn's slanted portrayal, all the "harm" which Pinelawn believes would occur if this Court denied injunctive relief and permitted NYAR and Coastal to complete construction of the transload facility is compensable by money damages. In short, Pinelawn has not met its heavy burden of demonstrating "irreparable injury" absent a grant of injunctive relief. Accordingly, Pinelawn's motion must be denied.

Point III

A BALANCE OF THE EQUITIES FAVORS THE DEFENDANTS

The balance of the equities tips decidedly in favor of defendants. Pinelawn simply does not and cannot meet the particularly high burden of establishing an entitlement to injunctive relief.

As set forth above, Pinelawn has no likelihood of success on the merits since it is clear the Railroad is the long term lease holder of the subject property; the construction and operation of a transload facility is important to the freight operation of the Railroad; this use of the property is entirely consistent with the surrounding commercial/industrial property (and consistent with the prior hundred years use by the Railroad); NYAR and Coastal as sublessees of the Railroad, enjoy immunity from local authorities with respect to their construction and operation of the transload facility and; finally, Pinelawn's claim of damages is purely speculative and clearly compensable by money damages.

On the other hand, in reliance on Pinelawn's extension of the lease, by virtue of its hand delivery of the executed Letter Agreement, NYAR and Coastal obviously expended significant sums of money to develop and construct the transload facility. Despite its full understanding of the intended use of the property, Pinelawn waited until the transload facility was nearly complete before it expressed its opposition by commencing this litigation. Moreover, accepting Pinelawn's assertions as true (which they are not), if the Railroad was not the leasehold owner of the property, and Pinelawn did not intend that the property will remain in the Railroad's possession, why did Pinelawn construct a fence separating its land from the leasehold properties? Why didn't Pinelawn immediately reclaim the property for itself? In short, at this eleventh hour, and based upon its specious claims of "harm," Pinelawn cannot be allowed to enjoin the completion, and subsequent

operation of the transload facility when, for months, it silently watched NYAR and Coastal expend significant money and time in developing and constructing the facility on the leased property.

Similarly, if an injunction is granted it will effectively prevent the continued provision of freight services on Long Island by NYAR and Coastal. Not only does the Railroad have an interest in the successful continuation of these freight services, the State has also stated, in response to Coastal's efforts toward constructing the subject facility, that it "is investing in rail infrastructure improvements that facilitate freight movement as a strategy for reducing truck traffic in the New York City (NYC)/ Long Island Area. Thus, the Department of Transportation (DOT) supports Coastal's efforts as an important step toward that objective." See State Letter, dated May 29, 2002, annexed to the Safar Affidavit as Exhibit B.

Based upon the foregoing, it is clear that the equities tip in favor of the Defendants and that Pinelawn has failed to meet its burden in demonstrating its entitlement to injunctive relief. Accordingly, Pinelawn's motion must be denied.

Conclusion

Based upon the foregoing, the Railroad respectfully requests that this Court deny Pinelawn's motion for a preliminary injunction in all respects.

Dated: Central Islip, New York
May 10, 2004

Respectfully Submitted,

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Of Counsel:

Jay Safar
Jo Ann Bodemer

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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PINELAWN CEMETERY,

Index No 8599/04

Plaintiff,

-against-

COASTAL DISTRIBUTION, LLC, METROPOLITAN TRANSPORTATION AUTHORITY, THE LONG ISLAND RAILROAD COMPANY and THE NEW YORK AND ATLANTIC RAILWAY,

Refer to:
Honorable Ralph F. Costello

Defendants.

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MEMORANDUM OF LAW OF DEFENDANT THE NEW YORK AND ATLANTIC RAILROAD IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

RUBIN & PURCELL, LLP
Attorneys Defendant the New York and Atlantic Railroad
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(631) 952-5500

STATEMENT AND FACTS

The Defendant, The New York and Atlantic Railroad (hereinafter referred to as "NYA"), submits this Memorandum of Law and the accompanying affidavit of Fred L. Krebs with exhibits thereto in opposition to Plaintiff's motion for a preliminary injunction

NYA is a freight carrier by railroad and took over the freight operations of the defendant, the Long Island Railroad Company (hereinafter referred to as "LIRR"), in 1996 by virtue of a "Freight Transfer Agreement" that included a twenty-year lease of LIRR's freight properties. (Krebs Aff. ¶2). Among the freight properties leased to NYA is the Farmingdale Yard ("the Yard") near the Town of Babylon in Suffolk County. For many decades prior to 1996, the Yard was used by the LIRR as a railroad switching yard. Krebs Aff. ¶3). Since the time NYA assumed freight operations in 1996, it has used the Yard for several railroad purposes. The Yard contains NYA's only "wye" track, for turning around cars and locomotives, on Long Island east of Glendale NYA also uses that track for storing cars. In addition, NYA has used the Yard periodically to transload various commodities, including scrap metal, telephone poles, plastic pellets and large electrical transformers, from rail to trucks and from trucks to rail. (Krebs Aff. ¶4).

Since late 2000, NYA has subleased the Yard to companies performing additional transloading operations to and from railcars moving over NYA tracks. Those subleases have been subject to NYA's continuing right to use the "wye" track and to conduct related rail operations. (Krebs Aff ¶¶5-6). The current sublessee, the defendant, Coastal Distribution, LLC (hereinafter referred to as "Coastal"), sought to build a large structure to contain and protect the transfer operation and the transferred materials, and asked NYA's permission to do so. NYA consented, but pursuant to the Freight Transfer Agreement, it was necessary to obtain Long Island Railroad's

consent as well, LIRR did not object. Coastal also sought the approval of the Town of Babylon, but the city indicated that it did not review construction plans or issue building permits for Long Island Railroad property. (Krebs Aff. ¶¶6-7).

In or about October of 2003, NYA learned that part of the land beneath the Yard was not owned by Long Island Railroad, but rather, was leased to it by the plaintiff, Pinelawn Cemetery (hereinafter referred to as "Pinelawn"), under two long-term leases, both of which expired in 2003. NYA was greatly concerned by the possibility that its railroad operations in the Yard could somehow be jeopardized by this development, but the matter apparently was promptly resolved as reflected in a written lease extension, a copy of which was received by NYA shortly thereafter. (Krebs Aff. ¶¶8-9)(see Exhibit "C").

Pinelawn now claims that the so-called "August Lease," which pertained to a parcel of land laying in and surrounded by the Yard (hereinafter referred to as the "Parcel"), " was not renewed, and therefore, terminated The disputed parcel consists of a strip of land, about 100 feet wide and stretching about a half-mile, along the Long Island Railroad mainline; it encompasses the entire entrance to the Yard. Because of the Parcel's location, no rail access to the Yard (ingress or egress) is possible without traversing the Parcel. Pinelawn further claims that neither of the parcels may be used for purposes other than farming. If NYA were enjoined from using these parcel for its railroad purposes, the entire Yard would become inaccessible to rail service and would be effectively taken from the national railroad system. Such an injunction would prevent rail operations, impede NYA's continued rail service, and interfere with interstate commerce. (Krebs Aff. ¶12).

During the time the Yard has been subleased, NYA has continued to use the "wye" to turn cars and locomotives, and has continued to use the track from time to time to store rail cars. In

addition, NYA continues to use the Yard occasionally to transload materials from truck to rail and rail to truck, with the consent of the tenant. The Yard is a valuable and important yard for freight rail purposes, and NYA continues to use it for those purposes Also, NYA would use the Yard for additional railroad purposes if it were not subleased to Coastal. In fact, NYA was willing to sublease this property only because the tenants promised to conduct truck freight transfer operations that extend NYA freight rail service beyond the limit of its rails and ties. (Krebs Aff. ¶¶10-11).

ARGUMENT

POINT I

PLAINTIFF IS NOT ENTITLED TO A PRELIMINARY INJUNCTION

It is a well-established principle of New York law that a moving party is not entitled to the harsh remedy of a preliminary injunction without demonstrating by clear and convincing evidence, that.

> "(1) the movant will succeed on the merits of the action, (2) the movant will suffer irreparable injury absent the issuance of a preliminary injunction, and (3) the balance of equities is in favor of the movant***"

Price Paper and Twine Co v. Miller, 182 A.D.2d 728, 582 N.Y.S.2d 746, 748 (2nd Dep't 1992)(citations omitted); see also Walter Karl, Inc. v Wood, 137 A.D.2d 22, 528 N.Y S.2d 94 (2nd Dep't 1988).

Moreover, mere conclusory statements are simply not probative evidence to support a party's application for a preliminary injunction. Walter Karl, Inc. v Wood, 137 A D 2d 22, 528 N.Y.S.2d 94 (2nd Dep't 1988); Zurich Depository Corp. v. Gilenson, 121 A.D 2d 443, 503 N.Y.S 2d 415 (2nd Dep't

1986);

Here, Plaintiff has not provided any probative evidence to satisfy any of the prongs of the test for a preliminary injunction and is not entitled to the relief sought in the instant motion.

I. Plaintiff is Not Likely to Succeed on the Merits

A. The Disputed Lease was Renewed

The October 17, 2003 letter agreement between the defendant, the Metropolitan Transportation Authority (hereinafter referred to as the "MTA"), and Pinelawn unambiguously states:

> "We are also hereby agreeing to reinstate and extend the lease dated August 30, 1904 for 99 more years through July 31, 2102." In addition, the President of Pinelawn wrote in his own hand that, "This concurrence refers to Aug 30 1904 lease."

(See Exhibit "C"). Certainly, the written extension is irrefutable evidence that Pinelawn extended the August Lease and it is currently in effect.

Furthermore, in addition to the plain meaning of the language on the face of the extension agreement, the circumstances of its execution demonstrate that both parties intended to reinstate and extend the Lease for another 99 years. Plaintiff ignores the fact that in 1904, the Long Island Railroad simultaneously leased the mirror-image property to the parcel covered by the August Lease to Pinelawn – for an identical 99 year term and also for a nominal $1 rental The arrangement was plainly a mutual one for the respective benefit of both parties. Last year, when Pinelawn's President consented to the extension of the August Lease and the MTA exercised its option to extend the November lease, MTA also consented to extending its lease to Pinelawn for another 99 years.

The mutual extensions of the reciprocal leases was obviously intended as a mutual

arrangement. However, even ignoring the LIRR lease to Pinelawn, it is noteworthy that Pinelawn has not challenged the validity of the parties' extension of the so-called "November Lease," despite the fact that the very same October 17, 2003 letter agreement embodies MTA's written exercise of its option to extend. How can it be valid to extend the November lease, but not the August lease?

The extension agreement on its face reflects the parties' mutual agreement to extend both leases, and Pinelawn cannot now repudiate that agreements to the detriment of the defendants; all of whom including NYA, have reasonably relied on Pinelawn's agreement to extend the Lease to their detriment.

B. The Town of Babylon Zoning Requirements are Inapplicable

In this action, Pinelawn invokes its own interpretation of the Town of Babylon's zoning rules in aid of its request, but those regulations do not apply to the subject property. First, whatever zoning the Town of Babylon has subsequently enacted over the years, the Yard has been a railroad facility since 1904. As Mr. Krebs' Affidavit clearly establishes, the Yard continues to be used for railroad purposes. NYA continues to operate trains in and out of the Yard and over the disputed Parcel. The sublease to Coastal does not displace that use in any way, but rather augments the pre-existing railroad use by improving NYA's transloading capability and service offering to its customers.

Finally, there is a party whose absence in this case is conspicuous --the Town of Babylon. If the Town, which promulgated the zoning measures that Pinelawn now invokes, is not seeking enforcement, why is Pinelawn? Does Coastal's building comply with the zoning regulations? Does the Town exempt Long Island Railroad property from application of its zoning rules as the Town itself stated in its August 8, 2003 letter? (See Exhibit "B"). Certainly, the Town of Babylon has investigation and enforcement procedures available if it believes its ordinances are being violated.

This Court should not inject itself into the Town's concerns, especially when the Town itself is not seeking relief.

Thus, this Court should find that Pinelawn is unlikely to succeed on the merits of its claims.

II. Pinelawn Will Not Suffer Irreparable Harm

Pinelawn has not demonstrated that it will suffer irreparable harm in the absence of an injunction. To the contrary, it simply speculates that all manner of bad things might happen. Although it alludes to dust, fumes and noises wafting into the serenity of its cemetery, Pinelawn is trying to stop the construction and use of a building, whose very purpose is to contain and protect the operations on the site. There is no reason to suppose that the facility will be any more of a problem than the open-air operations that have preceded it for decades – and for which the cemetery itself leased these parcels to the railroad a hundred years ago. Further, Pinelawn speculates over-dramatically that mourners' sensibilities will be "offended" and its own sales will be "devastated" by continued operation. However, Pinelawn submits no facts or evidence in probative form showing that mourner's sensibilities were not equally offended and revenues devastated by the open-air rail operations taking place at the Yard for decades or by the open-air transloading operations conducted by NYA, CSX and Coastal since 2000.

Pinelawn simply cannot show that the enclosed structure being built by Coastal to house transloading operations will have any more adverse effect on it than the established open-air operations of the past and the balance of the equities favors the defendants herein.

III. The Balance of the Equities Favors the Defendants

Pinelawn requests this court to declare that, NYA has "no legal right to use the property for any use other than the use(s) specified under the leases" (farming), and to order that NYA be, "enjoined and restrained from construction and development" on both parcels (Complaint, p.7). This request would effectively prevent the defendants from continuing to use this vital railroad Yard and provide a necessary service to its customers. As the affidavit of Mr. Krebs establishes, such action would interfere with NYA's ability to turn locomotives and cars on its system in all of eastern Long Island. It would prevent NYA from using the Yard to store cars and to deliver goods. It would prevent NYA from providing railroad service to Coastal and other shippers. In addition, it would prevent Coastal from continuing to provide transloading services to NYA shippers, numerous contractors, builders and other enterprises all over Suffolk County who transport their goods over NYA via Coastal's transloading operation. Balanced against the speculative harm raised by Pinelawn, the equities favor withholding equitable relief.

POINT II

THIS COURT LACKS JURISDICTION TO REGULATE INTERSTATE COMMERCE BY RAIL

As noted above, granting the relief requested by Pinelawn would effectively force NYA to abandon its use of any railroad service to the Yard However, the United States Congress has granted exclusive jurisdiction over the service, operation and facilities of railroads to the U.S. Surface Transportation Board, and the courts of the State of New York are thereby pre-empted from taking the action sought by Pinelawn.

The Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. §10101 et seq, which amended the Interstate Commerce Act, contains an express limitation on the jurisdiction of state and local authorities over railroads

> "The [Surface Transportation] Board has exclusive jurisdiction over,
>
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange and other operating rules), practices, routes, services, and facilities of such carriers, and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law."

49 U S.C. §10501(b)(emphasis added). The statute further defines "transportation" to include:

> "(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
>
> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property."

49 U.S.C. §10102(9)(emphasis added). The U.S. Supreme Court has noted that the Interstate Commerce Act, predecessor of ICCTA, "is among the most pervasive and comprehensive of federal regulatory schemes" and that "[t]he breadth of the Commission's [now STB's] statutory discretion suggests a congressional intent to limit judicial interference with the agency's work." Chicago & N W. Transp'n Co. v. Kalo Brick & Tile Co., 450 U S. 311, 317-24 (1981).

Recognizing the preemptive effect of the federal statute, state and federal courts have

repeatedly held that disputes over the ownership and use of railroad facilities, including title, zoning, building code and related matters are subject to the exclusive jurisdiction of the STB and have dismissed legal actions brought to the state and federal judiciary E g., Boston & Maine Corp. v. Town of Ayer, 330 F.3d 12 (1st Cir. 2003)(building permit conditions preempted); Cedarapids, Inc. v. Chicago, C.&P.RR., 2003 WL 21246204 (N.D. Iowa, 2003)(action by lessee to enjoin railroad use of tracks preempted)(copy attached); Wisconsin Central Ltd. v. City of Marshfield, 160.F.Supp.2d 1009 (W.D Wis. 2000)(condemnation of passing track preempted), Village of Ridgefield Park v. New York, S.&W. Ry., 318 N.J. Super. 385, 724 A.2d 267 (App. Div. 1999)(local nuisance action against railroad fueling operation preempted). In Cedarapids, the Iowa district court, dismissing the plaintiff's state law lease interpretation complaint and resolving the property issue in favor of the non-rail plaintiff, noted that ruling in favor of the plaintiff would effectively constitute a forced abandonment of the track at issue and held:

> "The Court also finds the ICCTA preempts state regulation of the abandonment of lines of railroad. The ICCTA's grant of exclusive jurisdiction to the STB over the abandonment of tracks and its expansion of the types of tracks within this exclusive jurisdiction to include wholly intrastate spur and industrial tracks indicates that Congress intended for the abandonment of all types of tracks to be under the STB's jurisdiction.
>
> * * *
>
> Accordingly, to the extent that Cedarapid's state law claims seek to force CC&P to abandon the track in question, such claims are preempted by the ICCTA."

Id. at 2003 WL 21246204, *5-*6.

Because granting the relief sought by Pinelawn would not only burden, but would outright prevent, NYA's existing and future rail operations (and, following termination of the Freight Transfer

Agreement, Long Island Railroad's future rail operations) at the Yard, its complaint is preempted by the Interstate Commerce Commission Termination Act of 1995.

CONCLUSION

For all the reasons set forth above, Pinelawn's request for a preliminary injunction should be denied in all respects.

Dated: Hauppauge, New York
May 10, 2004

TODD M. RUBIN

A-1034

FORCHELLI, CURTO, SCHWARTZ, MINEO, CARLINO & COHN, LLP

COUNSELORS AT LAW

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MELVILLE, NEW YORK 11747
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PLEASE RESPOND TO: MINEOLA ■
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ROBERT T. REIMAN

May 11, 2004

Coastal Distribution, L.L.C.
1633 New Highway
Farmingdale, New York 11735

Att: Joseph Rutigliano
and
Marty Sternberg

Re: Pinelawn Cemetery v. Coastal Distribution, L.L.C., et al.
Motion presently returnable May 11, 2004

Dear Joe and Marty:

Enclosed for your records please find a copy of NYA's opposition papers to Plaintiff's motion for a preliminary injunction along with a copy of Plaintiff's Memorandum of Law in support thereof.

Very truly yours,

DONALD JAY SCHWARTZ

DJS:md
enclosures

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

----------X

PINELAWN CEMETERY,

Index No 8599/04

Plaintiff,

-against-

AFFIRMATION

COASTAL DISTRIBUTION, LLC, METROPOLITAN TRANSPORTATION AUTHORITY, THE LONG ISLAND RAILROAD COMPANY and THE NEW YORK AND ATLANTIC RAILWAY,

Refer to.
Hon. Ralph F. Costello

Defendants.

----------X

TODD M RUBIN, an attorney admitted to practice Law before the Courts of the State of New York affirms the following under penalty of perjury.

1. I am associated with the law firm of RUBIN & PURCELL, LLP, counsel for the defendant, The New York and Atlantic Railroad (hereinafter referred to as "NYA") and make this affirmation in opposition to Plaintiff's motion for a preliminary injunction.

2. The facts of this matter are set forth in detail in the accompanying Memorandum of Law and affidavit of Fred L. Krebs with exhibits annexed thereto.

3 It is clear from the facts of this matter that Pinelawn is not entitled to the harsh remedy of a preliminary injunction, which seeks to enjoin and restrain the defendants from completing the construction and development of a railroad transfer station on land that Pinelawn leased to the Long Island Railroad

4. In order for Pinelawn to establish that it is entitled to the demanded preliminary injunction it must establish that: (1) it will likely succeed on the merits of the action, (2) it will suffer

irreparable injury absent the issuance of a preliminary injunction, and (3) the balance of equities is in its favor. Here, neither the facts nor the law in this matter support the granting of the preliminary injunction

5. Firstly, it is submitted that the defendants will likely succeed on the merits, as Pinelawn duly executed an extension agreement extending the long-term leases upon which the transfer station is being built, and the purpose for which the transfer station is being built was contemplated by the leases and is within the bounds of the law.

6. Secondly, Pinelawn will not suffer irreparable harm if the construction of the transfer station were to be completed Pinelawn merely speculates as to the ultimate purpose of the facility and that it will result in dust, fumes and noise wafting into the cemetery In fact, Pinelawn has not submitted any probative evidence establishing that the enclosed structure being built by Coastal to house transloading operations will have any more adverse effect on it than the established open-air operations of the past and the balance of the equities favors the defendants herein.

7. Thirdly, the balancing of the equities favors the defendants, whose railroad operations must continue, as the sought preliminary injunction would interfere with NYA's ability to turn locomotives and cars on its system in all of eastern Long Island. Certainly, the public's interest in railroad shipping service should outweigh the speculative harm raised by Pinelawn.

8. Finally, Pinelawn has not established that it has no adequate remedy at law.

9 Additionally, Pinelawn's application should be denied, as it is submitted that this Court lacks the jurisdiction to regulate interstate commerce by rail, as the United States Congress has granted exclusive jurisdiction over the service, operation and facilities of railroads to the U. S. Surface Transportation Board and the courts of the State of New York are thereby pre-empted from

taking the action sought by plaintiff

WHEREFORE, this Court should issue an order denying the relief sought by the plaintiff in its entirety, together with such other and further relief to which this Court seems just and proper

Dated: Hauppauge, New York
May 10, 2004

TODD M. RUBIN

A-1038

CAPTION

Affidavit of Fred L. Krebs

Fred L. Krebs, being first duly sworn, states and deposes as follows:

1. I am President of the New York & Atlantic Railroad, and I have personal knowledge of the following facts.

2. New York & Atlantic Railroad ("NYA") is a freight carrier by railroad, operating over certain portions of the Long Island Rail Road by virtue of a Freight Transfer Agreement ("Transfer Agreement) entered into in 1996. Under the Transfer Agreement, NYA took over all LIRR freight activities and leased certain properties used for freight purposes for an initial term of 20 years and an optional extension for an additional 10 years.

3. Among the properties leased by NYA under the Transfer Agreement is the Farmingdale Yard ("the Yard") near Babylon in Suffolk County, New York. I understand that the Yard has been used as a railroad switching yard for decades.

4. From the time NYA took over freight operations in 1997, NYA has used the Farmingdale Yard for several purposes. First, the Yard contains the only "wye" (the "Y-shaped" track configuration) for turning cars around on Long Island east of Glendale. Thus, NYA uses the Farmingdale Yard regularly to reorient cars and/or locomotives. Similarly, it also uses the "wye" track to store cars. Second, NYA has used the Yard periodically to transload from rail to truck various commodities – including scrap metal, telephone poles, plastic pellets and large electrical transformers.

5. Between October 1, 2000 and December 16, 2001, NYA subleased the Farmingdale Yard to CSX TransFlo, a sister company of CSX Transportation Company, a major rail freight carrier in the eastern United States. The sole reason for NYA to sublease the Yard – a yard it had been using itself as an integral part of freight operations – was the prospect that CSX would generate substantial freight traffic at the Yard by *operating a rail/truck bulk transfer facility. During that sublease term*, CSX marketed through freight service for materials requiring transloading to and from the Yard and points on its system around the eastern United States. During the sublease term, however, NYA retained the right to use the "wye" and to pickup and deliver cars for CSX, and with the permission of CSX, NYA continued to use the Yard from time to time to transload materials other then those arranged by CSX . NYA did not renew the sublease after its initial term because CSX had failed to generate the expected traffic volume.

6. In 2002, NYA leased the Farmingdale Yard to Coastal Distribution, LLC ("Coastal") to continue the transfer operation started by CSX. A copy of that sublease is attached as Exhibit A hereto. It requires Coastal to generate a minimum volume of rail traffic in order to maintain the sublease. About six months after signing the sublease, Mr. Joseph Rutigliano, one of the members of Coastal, advised me that to be more successful Coastal needed to build a large structure to contain and protect the transfer operation and the transferred materials.

7. NYA had no objection to Coastal building such a structure if it would improve the throughput at the facility and not interfere with normal railroad operations at the Yard, so we consented to the construction. Pursuant to the terms of the Transfer Agreement, NYA

use the track from time to time to store rail cars. In addition NYA continues to use the Yard occasionally to transload materials from truck to rail and rail to truck, with the consent of the tenant.

11. The Farmingdale Yard is a valuable and important yard for freight rail purposes, and NYA continues to use it for those purposes. Further, NYA would use the Yard for additional railroad purposes if it were not subleased to Coastal. NYA was willing to sublease this property only because the tenants promise to conduct truck freight transfer operations that extend NYA freight rail service beyond the limit of the rails and ties.

12. I understand that Pinelawn Cemetery now seeks to enjoin NYA's use of the parcel whose lease briefly expired before it was reinstated. The disputed parcel consists of a strip of land, about 100-feet wide and stretching about a half-mile, along to the LIRR mainline; it encompasses the entire entrance to Farmingdale Yard. Because of that parcel's location, no rail access to Farmingdale Yard (ingress or egress) is possible without traversing the parcel. If NYA were enjoined from using that parcel, it would make the entire Farmingdale Yard – including the other parcel whose lease was extended in October, 2003 - inaccessible to rail traffic. Such an injunction would prevent rail operations, impede NYA's continued rail service, and interfere with interstate commerce.

Verification

Fred L. Krebs

The foregoing document was acknowledged before me this 22nd day of April, 2004

Notary Public

DANIEL T. RIVERA
Notary Public, State of New York
No. 01RI6064287
Qualified in Queens County
Commission Expires December 2, 20 06

Exhibit A

A-1042

LEASE AGREEMENT: FARMINGDALE - 1

THIS LEASE AGREEMENT ("Agreement") made and entered into this 11 day of July, 2002, by and between New York & Atlantic Railway Co., hereafter referred to as "NYA" and Coastal Distribution, LLC. (and any of its agents, licensees and/or assignees), hereafter referred to as "Lessee".

A. Premises. NYA hereby agrees to let and Lessee hereby agrees to hire of NYA certain property located at Farmingdale Team Yard (PW) as more particularly described by the drawing attached hereto as Exhibit A (the "Premises"), for Lessee's exclusive use, at the rate and for the term set forth herein.

B. NYA Warranties. NYA warrants it is the owner (or agent for the owner) of the Premises, that it is fully authorized to enter into this agreement and has the right to grant Lessee the use of the Premises and each and all of the rights herein granted. It is agreed to by the Lessee the rights conveyed by this lease are subject to, and limited by, the rights conferred to NYA by the Transfer Agreement between the Long Island Rail Road and NYA.

C. Agreements. It is mutually agreed by and between the parties hereto as follows:

1. Rent / Rebates. The rate for Lessee's use of the Premises as provided herein shall be $2,000.00 per month, payable in advance, as provided in section C.14 hereof. The NYA and Lessee hereby agree to the following payment/rebate arrangement regarding the movement of LIRR material from the premises:

   a. Lessee will make $115,000 in funds available to NYA

   NYA will contribute the following to achieve a $65,000 payment to Lessee, which is equal to one-half of total funds required.

   b. NYA will add $15,000 to figure in "1-a" above, and submit funds to the LIRR in the amount of $130,000.
   c. NYA will rebate Lessee in the amount of $10 per rail car shipped where "Coastal Distribution", or affiliates as specified, show as consignee, at the station of Farmingdale, NY. This rebate will remain in effect until the amount of $26,000 has been apportioned to the Lessee. The term of this rebate shall not exceed three years from the effective date.
   d. NYA will reduce the rent on premises for the first twenty-four months of the agreement, to the amount of $1000 per month. The security payment made by Lessee for the previously cancelled contract will be applied as the payment for September 2004 rent.

2. Improvements. Lessee shall have the right to make improvements to the premises. All investments, made by Lessee, including pavement, lighting, fencing, security of any kind, etc. shall be at the sole expense of Lessee with no reimbursement of any kind.

3 Term. This Agreement shall remain in effect for five (5) years from the date when the first railcar consigned to Lessee is brought to the Premises (the "Commencement Date"). The Agreement shall terminate five (5) years after the Commencement Date ("Termination Date"). The initial term of the volume commitment of the Agreement shall begin on the Commencement Date and shall end exactly one year later (i.e. if the Commencement Date is on August 1st, 2002, then the initial term shall end on August 1st, 2003). Each term following the initial term shall begin on the anniversary of the Commencement Date and

shall end the following year. After the initial term of the Agreement, Lessee shall automatically be entitled to another year until Termination Date provided that

I. Lessee will meet a volume commitment of 1,200 carloads in the initial term, 1,800 carloads in the second term, 2,400 carloads in the third term, and 3,200 carloads for each term thereafter.

II. Lessee has not been in any material breach of any of the provisions of this Agreement.

III. NYA agrees to work with Lessee to renew Agreement after its expiration based on adherence by Lessee to all of the statutes as laid forth in this Agreement over its five-year term. The Agreement cannot be renewed past March 31st, 2017.

4. Damage, Vandalism, Graffiti, etc. NYA will not be held responsible for any damage/vandalism/graffiti, etc. to any material or equipment stored on the premises.

5. Indemnification. Lessee hereby assumes, releases and agrees to protect, save harmless, defend and indemnify NYA, MTA and LIRR, and its respective officers, shareholders, directors, employees, agents and assigns from and against any and all claims and liability caused by, arising out of or resulting in any manner from the condition, existence, use or occupancy of the Premises and any adjoining lands used by Lessee during the term of this agreement, including but not limited to:

I. All loss and damage to any property whatsoever, including property of NYA, MTA, LIRR and of all other persons whomsoever placed or stored upon Premises and upon any temporary usage area(s), and the loss of interference with any use or service thereof;

II. All loss and damage on account of injury to or death of any person whomsoever, including but not limited to employees and patrons of the parties hereto and all other persons whomsoever on the Premises and upon such temporary usage area(s); and

III. All consequential loss or damage occurring off the Premises but arising from acts or events on the Premises.

Notwithstanding the foregoing, Lessee shall not be responsible for and will not indemnify NYA, MTA or LIRR from and against any claims or liability arising out of or in connection with the gross negligence or gross willful misconduct of NYA, MTA or LIRR.

6. Required Insurance. *Lessee shall maintain the following types of insurance with* insurance carriers having a current A.M Best rating of not less than A-VIII, in the amounts provided for below and otherwise in form and substance acceptable to NYA:

I. Comprehensive General Liability Insurance with minimum limit per any one occurrence of $5,000,000. All exclusions as relating to Railroad Right of Way must be deleted from the policy, if this is not

the case, then insurance as set forth in Section 6.IV shall be provided by the lessee.

II. Automobile Liability Insurance (covering owned, hired and non-owned vehicles) in minimum limits of $2,000,000 for injury to or death of any one person, of $5,000,000 for injury to or death of more than one person in any one accident, of $5,000,000 for damage to property in any one accident.

III. Workers Compensation Insurance in an amount not less than required by The State of New York and as follows:

Coverage A – Statutory Policy form

Coverage B – Employer's Liability

- Bodily Injury by Accident: $1,000,000 each accident
- Bodily Injury by Disease: $1,000,000 each employee & Policy Limit

IV. Railroad Protective Liability Insurance in the amount of at least $10,000,000. The form shall be on an occurrence basis and be executed in favor of NYA as a named insured.

V. Lessee and all of its insurer(s) agree to waive subrogation (including without limitation Worker's Compensation) against NYA, LIRR, MTA, their agents and employees, which waiver(s) by insurer(s) shall also be expressed and evidenced in the certificates of insurance (including without limitation Worker's Compensation).

VI. All of Lessee's insurance shall be primary insurance with respect to the additional insured and will not participate with any other available insurance (and upon NYA's request Lessee's certificates of insurance shall reflect the foregoing primary aspect). All deductibles shall require written consent of NYA. All of Lessee's insurance of any type shall be from insurer(s) approved by NYA. Failure by NYA to object to the lack or contents of any of the certificate(s) or coverage(s) to be provided by Lessee shall not serve to waive or limit NYA's rights or remedies nor to eliminate or effect Lessee's obligations, waivers or liabilities under this contract.

Lessee shall furnish NYA Certificates of Insurance, in duplicate, evidencing all required insurance to be in full force and effect and that the same will not be canceled without at least thirty (30) days advance written notice by Insurance Company to NYA. The New York and Atlantic Railway, the Metropolitan Transit Authority and the Long Island Rail Road shall be shown as additional insured.

7. Condition of Premises. NYA does not warrant the condition of its property, equipment and facilities for any purpose. Lessee assumes the risk of using the Premises for any purpose, and accepts all conditions and defects present thereon, or associated therewith.

8. Removal of Improvements. At the end of the project, Lessee shall have the right to remove all of its structures and other material and equipment from said premises at the sole cost and expense of Lessee if they so desire; provided, that removal of such structures and other material and equipment will not damage the Premises in any way.

9. Emergency Interruptions. When requested by NYA, Lessee agrees to stop any activity in which it is engaged whenever NYA deems an emergency, as necessary to insure the timely and safe operations of the railroad and in no event will train operations or safety be jeopardized.

10. Compliance with Procedures and Instructions. Lessee, its officers, employees, agents, contractors and invitees agree to comply with all NYA operating procedures, safety rules, and instructions from NYA personnel.

11. Liability. Lessee agrees that when railcars are placed for unloading/loading at Premises, the security of the railcars and their contents shall remain with Lessee.

12. Freight Payments. Lessee shall maintain good credit with NYA. Lessee shall pay freight bills within fifteen (15) days of receipt. If account of Lessee is in arrears at any time during the term of the Agreement, this will be considered a violation of the Agreement, and NYA will be entitled to terminate the Agreement as specified in section 13.I hereof.

13. Termination.

I. This Agreement is subject to immediate termination by either party in the event of violations by the other party of any of the terms and conditions of this Agreement. Lessee shall have been given sixty (60) days written notice to cure any breach of any obligations of the Agreement. However, Lessee shall have been given fifteen (15) days written notice to cure violations as proscribed in section C.12 hereof.

II. Lessee shall have the right to cancel this agreement on sixty (60) days written notice.

III. NYA shall have the right to cancel this agreement on sixty (60) days written notice provided the railcar volume commitments as stated in section C.3.I hereof are not met.

14. Effective Date. This Agreement shall not become effective until Lessee has returned a signed copy of this Agreement, furnished evidence of insurance as specified in section C.6 hereof. All rental payments are due on the first day of every month. Lessee shall have a ten-day grace period for payment of rent.

A-1046

AGREED AND ACCEPTED:

Lessee
Coastal Distribution, LLC.
30 A Glen Street
Glen Cove, New York 11542
Tel. 516-676-3700

By: _____
Joseph Quigley

DATED: July 11, 2002

Lessor
New York & Atlantic Railway Co.
68-01 Otto Road
Glendale, New York 11385
Tel. 718-497-3023

By: _____

Check Payable To:
New York & Atlantic Railway Co.
Accounting Office
53 West Jackson Boulevard, Suite 335
Chicago, IL 60604
Fed. I.D.#: 13-3926500

DATED: July 11, 2002

Exhibit B

A-1048

Town of Babylon

200 E. Sunrise Highway
Lindenhurst, New York 11757
(631) 957-3000

STEVEN BELLONE
SUPERVISOR

August 8, 2003

Oliver Wilhelm
Cybul & Cybul Architects
1064 River Road
Edgewater, New Jersey
07020

RE: Long Island Railroad Property

Dear Mr. Wilhelm:

As per our conversation, I am confirming that the Town of Babylon has no jurisdiction over the Long Island Railroad Property. The Town of Babylon does not review plans or issue a building Permits for the Long Island Railroad property.

Thank you for your attention to this matter. If you have any questions please don not hesitate to call my office (631) 957-7414.

Very truly yours,

Peter M. Casserly
Commissioner
Planning & Development

PMC:ck

Lindsay Patrick Henry, Councilman | Wayne R. Horsley, Councilman | Ellen T. McVeety, Councilwoman, Deputy Supervisor | Carol A. Quirk, Councilwoman | Corinne DiSemma, Receiver of Taxes | Janice E. Tinsley-Colbert, Town Clerk

An Equal Opportunity/ Affirmative Action Employer

Exhibit C

A-1050

New York, NY 10017-3779
212 878-7000 Tel

Metropolitan Transportation Authority
State of New York

October 17, 2003

Via: Certified Mail – Return Receipt Requested
Fax: 212-704-6288

Jonathan S. Gaynin
Jenkins & Gilchrist Parker Chapin LLP
405 Lexington Avenue
New York, NY 10174

RE. Land Lease Agreements Dated November 1, 1905, and August 30, 1904 Between The Pinelawn Cemetery and The Long Island Railroad Company (LIRR) for Use as a Railroad Yard and Auxiliary Services of the Railroad.

Dear Mr Gaynin:

On behalf of LIRR we are hereby exercising it's option to renew the above referenced lease dated November 1, 1905 for an additional ninety-nine (99) years thereby extending it through October 31, 2103.

We are also hereby agreeing to reinstate and extend the lease dated August 30, 1904 for 99 more years through July 31, 2102. Please have an authorized party concur by signing below, and return one original copy of this letter to my attention.

If you have any questions please call Mimi Fuhrman, of my staff, at (212) 878 – 7262.

Sincerely,

Roco Krsulic
Director of Real Estate

PINELAWN CEMETERY

Concurrence: President 10/23/03
Date

This concurrence refers to Aug 30 1904 lease.

Cc: S. Antman, F. Krebs
C. Malecchi, K. Rydzewski, Chron/file

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY,

Plaintiffs,

-against

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON and PINELAWN CEMETERY,

Defendants

----------x

DOCKET NO.:
05-CV-2032 (JS)(ETB)

DEFENDANTS', THE TOWN OF BABYLON THE TOWN OF BABYLON BOARD OF ZONING APPEALS, AND PETER CASSERLY, RETURN

PART III

TABLE OF CONTENTS

24) Letter dated September 9, 2004 to Hon. Louis D'Amaro, Chairman & Members of the Board of Appeals from Farrell Fritz, P.C. with enclosed Memorandum of Law in Opposition to Applicant's Appeal of Stop Work Order.

25) Interoffice Memorandum dated September 9, 2004 to Louis D'Amaro, Chairman, Zoning Board of Appeals from Steve Bellone, Supervisor with attached Article XXII of the Babylon Town Code.

26) Copies of Newspaper Articles submitted by Pinelawn at September 9, 2004 hearing.

27) Letter dated September 23, 2004 to Chairman D'Amaro and Members of the Board of Zoning Appeals from Farrell Fritz, P.C. with attached Reply Brief of Pinelawn and Affidavits of Michael Posillico, James Murphy and John Armentano.

28) Letter dated September 23, 2004 to Hon. Louis D'Amaro, Chairman and Members of the Board of Zoning Appeals from James F. Gaughran, Esq., with attached Reply Memorandum.

29) Letter dated September 30, 2004 to Hon. Louis D'Amaro, Chair Zoning Board of Appeals from James F. Gaughran

30) Letter dated October 4, 2004 to Hon. Louis D'Amaro, Chair Babylon Board of Zoning Appeals & Members of the Board from Farrell Fritz, P.C. with attachment.

31) Letter dated October 12, 2004 to John M. Armentano, Esq., Farrell Fritz, P.C. and to James F. Gaughran, Esq., from Louis D'Amaro, Chairman, Zoning Board of Appeals.

32) Letter dated October 15, 2004 to Hon. Louis D'Amaro, Chairman Babylon Board of Zoning Appeals from Farrell Fritz, P.C.

33) Letter dated October 20, 2004 to Hon. Louis D'Amaro, Chair Zoning Board of Appeals from James F. Gaughran, Esq.

34) Letter dated October 22, 2004 to Ms. Lorie Hollis, Zoning Board of Appeals from Farrell Fritz, P.C.

35) Letter dated November 3, 2004 to Rachel Scelfo, Esq., Babylon Town Attorney's Office from James F. Gaughran, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY,

Plaintiffs,

-against

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON and PINELAWN CEMETERY,

Defendants.

----------x

DOCKET NO.:
05-CV-2032 (JS)(ETB)

DEFENDANTS', THE TOWN OF BABYLON THE TOWN OF BABYLON BOARD OF ZONING APPEALS, AND PETER CASSERLY, RETURN

PART IV

TABLE OF CONTENTS

36) Letter dated November 3, 2004 to Mr. Matthew Kogan and letter dated November 4, 2004 to James F. Gaughran, Esq., from Rachel Scelfo, Esq., Town of Babylon Assistant Town Attorney with unofficial transcript of hearing.

37) Letter dated November 17, 2004 to Hon. Louis D'Amaro, Chair Zoning Board of Appeals from James F. Gaughran, Esq.

38) Letter dated November 24, 2004 to Coastal Distribution, LLC from Louis D'Amaro, Chairman, Zoning Board of Appeals.

39) Letter dated December 6, 2004 to Hon. Louis D'Amaro, Chair Zoning Board of Appeals from James F. Gaughran, Esq.

40) Letter dated December 8, 2004 to Town of Babylon Zoning Board of Appeals from Farrell Fritz, P.C. with attached Affidavit of Posting dated December 15, 2004.

41) Letter dated January 21, 2005 to Town of Babylon Zoning Board of Appeals from Mark A Cuthbertson, Esq.

42) Letter dated January 25, 2005 to Hon. Louis D'Amaro, Chairman Babylon Board of Zoning Appeals from Farrell Fritz, P.C.

43) Resume of Harry J. Jordan, Esq. submitted at "continued hearing" of 2/3/05.

44) Negative Declaration regarding New York City Department of Sanitation's (DSNY) w/ A.J. Recycling Inc. submitted at "continued hearing" of 2/3/05.

45) Surveillance Summary of Coastal Distribution, LLC. Farmingdale Multi-Modal Transload Facility located at 1633 New Highway, Farmingdale, New York submitted at "continued hearing" of 2/3/05.

46) Press Release - Agreement Reached on Rail Shipments of Solid Waste submitted at "continued hearing" of 2/3/05.

47) Letter dated February 15, 2005 to Mr. Joseph Rutigliano, Coastal Distribution, LLC from New York State Department of Environmental Conservation with enclosures.

48) Letter dated March 3, 2005 to Dennis Cohen, Esq., Town Attorney, Town of Babylon from John F. McHugh, Esq.

49) Town of Babylon Radius Map and Radius Map Report.

50) Suffolk County Tax Map.

51) Denial Decision and Findings for ZBA Case No. 04-267 dated April 21, 2005.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY,

Plaintiffs,

-against

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON and PINELAWN CEMETERY,

Defendants.

----------x

DOCKET NO.:
05-CV-2032 (JS)(ETB)

DEFENDANTS', THE TOWN OF BABYLON THE TOWN OF BABYLON BOARD OF ZONING APPEALS, AND PETER CASSERLY, RETURN

PART V

TABLE OF CONTENTS

52) Oversized Site Plan.

53) Oversized Architectural Site Plan.

54) Oversized Layouts of Pinelawn Park.

55) Oversized Architectural and Structural Drawings of Coastal Freight Handling Building.

Dated: Lindenhurst, New York
May 24, 2005.

Yours, etc.,

BY: DENNIS M. COHEN
Town Attorney, Town of Babylon
Attorney for Defendants
THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT

OF THE TOWN OF BABYLON,
Office & P. O. Address
200 E. Sunrise Highway
Lindenhurst, New York 11757
(631) 957-3029

TO: JAMES F. GAUGHRAN
Attorneys for Plaintiffs
191 New York Avenue
Huntington, New York 11743
(631) 385-7004

LAW OFFICE OF MARK CUTHBERTSON
Attorneys for Pinelawn Cemetery
434 New York Avenue
Huntington, New York 11743
(631) 351-3501

coastal distretum.doc

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY,

Plaintiffs,

-against

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON and PINELAWN CEMETERY,

Defendants.

----------x

DOCKET NO.: 05-CV-2032 (JS)(ETB)

ADDENDUM TO DEFENDANTS', THE TOWN OF BABYLON THE TOWN OF BABYLON BOARD OF ZONING APPEALS, AND PETER CASSERLY, RETURN

TABLE OF CONTENTS

56) Photographs of Site.

57) Affidavit of John J. Breslin, Jr. and attachments.

58) Letter dated September 8, 2004 to Mr. Joseph Rutigliano of Coastal Distribution, LLC from Galli Engineering P.C.

59) Engineering Report for Sound, Vibration and Particulate Emission Baseline Testing of Farmingdale Yard Prepared by Galli Engineering, P.C.

Dated: Lindenhurst, New York
June 2, 2005.

Yours, etc.,

BY: DENNIS M. COHEN
Town Attorney, Town of Babylon
Attorney for Defendants
THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, PETER

CASSERLY, AS COMMISSIONER OF
PLANNING AND DEVELOPMENT
OF THE TOWN OF BABYLON,
Office & P. O. Address
200 E. Sunrise Highway
Lindenhurst, New York 11757
(631) 957-3029

TO: JAMES F. GAUGHRAN
Attorneys for Plaintiffs
191 New York Avenue
Huntington, New York 11743
(631) 385-7004

LAW OFFICE OF MARK CUTHBERTSON
Attorneys for Pinelawn Cemetery
434 New York Avenue
Huntington, New York 11743
(631) 351-3501

A-1059

Coastal Ex. 1

STATE OF NEW YORK
DEPARTMENT OF TRANSPORTATION
ALBANY, N.Y. 12232
http://www.dot.state.ny.us

JOSEPH H. BOARDMAN
COMMISSIONER

May 29, 2002

GEORGE E. PATAKI
GOVERNOR

Mr. Joseph Rutigliano
Coastal Distribution, LLC
30A Glen Street
Glen Cove, NY 11542

Dear Mr. Rutigliano:

Thank you for your letter of April 26, 2002 regarding Coastal Distribution's efforts to establish a construction materials transload facility on Long Island. As you know, New York State is investing in rail infrastructure improvements that facilitate freight movement as a strategy for reducing truck traffic in the New York City (NYC) / Long Island area. Thus, the Department of Transportation (DOT) supports Coastal's efforts as an important step toward that objective.

I discussed your letter with President Bauer and Long Island Railroad's (LIRR) executive staff on May 24, 2002. LIRR is aware of Coastal's interest in establishing a transload facility in the vicinity of the East Farmingdale Yard and is willing to cooperate with you and the New York & Atlantic Railroad (NY&A) to accomplish that objective.

However, LIRR's position, is, essentially, that the area which Coastal proposes to occupy is not part of NY&A's leasehold and is currently utilized by it. Nevertheless, LIRR will vacate such property and permit Coastal's use if it is reimbursed for relocation costs. Toward that end, LIRR indicated a willingness to discuss options for reimbursement, such as reduced prices for purchases from Coastal.

Best wishes for success with your transload facility. Please keep me informed of your progress.

Sincerely,

John F. Guinan, Assistant Commissioner
Office of Passenger & Freight Transportation

cc K. Bauer, President Long Island Rail Road
D. George, Long Island Rail Road
F. Krebs, NY & Atlantic, Rwy.
R. Zerillo, NYS Office of the Governor
N. Schneider, Freight & Economic Development Division

A-1060

Coastal Ex. 2

Town of Babylon

200 E. Sunrise Highway
Lindenhurst, New York 11757
(631) 957-3000

STEVEN BELLONE
SUPERVISOR

August 8, 2003

Oliver Wilhelm
Cybul & Cybul Architects
1064 River Road
Edgewater, New Jersey
07020

RE: Long Island Railroad Property

Dear Mr. Wilhelm:

As per our conversation, I am confirming that the Town of Babylon has no jurisdiction over the Long Island Railroad Property. The Town of Babylon does not review plans or issue a building Permits for the Long Island Railroad property.

Thank you for your attention to this matter. If you have any questions please don not hesitate to call my office (631) 957-7414.

Very truly yours,

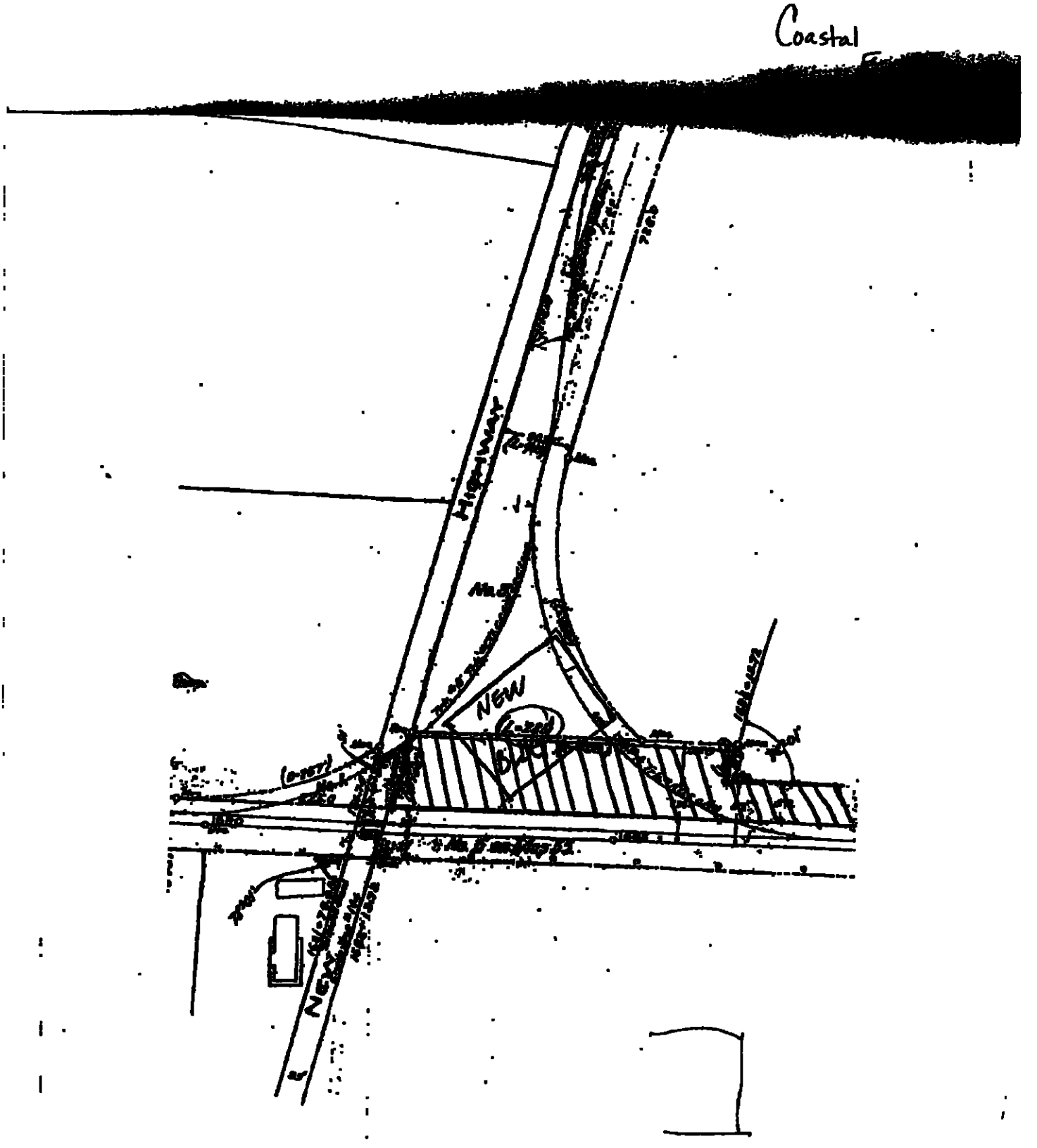
Peter M. Casserly
Commissioner
Planning & Development

PMC:ck

Lindsay Patrick Henry, Councilman | Wayne R. Hemley, Councilman | Ellen T. McVeety, Councilwoman, Deputy Supervisor | Carol A. Quick, Councilwoman | Corinne DiBenedetto, Receiver of Taxes | Janice E. Tinsley-Colbert, Town Clerk

An Equal Opportunity/Affirmative Action Employer

A-1061



Pl. 2A

A-1062

347 Madison Avenue
New York, NY 10017-3739
212 878-7000 Tel

Coastal Ex. 3

Metropolitan Transportation Authority
State of New York

October 17, 2003

Via: Certified Mail – Return Receipt Requested
Fax: 212-704-6288

Jonathan S. Gaynin
Jenkens & Gilchrist Parker Chapin LLP
405 Lexington Avenue
New York, NY 10174

RE. Land Lease Agreements Dated November 1, 1905, and August 30, 1904 Between The Pinelawn Cemetery and The Long Island Railroad Company (LIRR) for Use as a Railroad Yard and Auxiliary Services of the Railroad.

Dear Mr. Gaynin:

On behalf of LIRR we are hereby exercising it's option to renew the above referenced lease dated November 1, 1905 for an additional ninety-nine (99) years thereby extending it through October 31, 2103.

We are also hereby agreeing to reinstate and extend the lease dated August 30, 1904 for 99 more years through July 31, 2102. Please have an authorized party concur by signing below, and return one original copy of this letter to my attention.

If you have any questions please call Mimi Fuhrman, of my staff, at (212) 878 – 7262.

Sincerely,

Roco Krsulic
Director of Real Estate

PINELAWN CEMETERY

Concurrence: _____, President 10/23/03
Date

This concurrence refers to Aug 30 1904 lease.

Cc. S. Antman, F. Krebs,
C. Malocchi, K. Rydzewski, Chron/file

A-1063

Coastal Ex. 4

FARRELL FRITZ, P.C.

EAB Plaza
Uniondale, New York 11556-0120
PHONE: (516) 227-0700
FACSIMILE: (516) 227-0777
www.farrellfritz.com

200 Broad Hollow Road
Melville, NY 11747
Phone: (631) 547-8400
Fax: (631) 547-0501

2488 Montauk Highway
P.O. Box 1980
Bridgehampton, NY 11932
Phone: (631) 537-3100
Fax: (631) 537-3049

January 15, 2004

PHILIP C. KILLIAN
PARTNER
DIRECT DIAL: (516) 227-0749
DIRECT FAX: (516) 336-2217
pkillian@farrellfritz.com

OUR FILE NUMBER
16413-102

Coastal Distribution, LLC
30 A Glen Street
Glen Cove, New York 11542

Gentlemen:

We are special real estate counsel for Pinelawn Cemetery and write to you with respect to certain construction you are doing at the northeast corner of New Highway and the Long Island Railroad right-of-way in Pinelawn, New York.

I enclose a sketch in which our client has estimated the location of the structure we understand you are building.

The land shown in yellow is the subject of a lease from Pinelawn to the L.I.R.R. dated November 1, 1905 for 99 years which was renewed by the Metropolitan Transportation Authority ("MTA") last year. The land shown in red had been leased by Pinelawn to the L.I.R.R. by lease dated August 30, 1904 which such lease expired August 30, 2003 and was not renewed by the MTA. That Lease has expired and Pinelawn will not reinstate it.

Accordingly, the building appears to Pinelawn to be being constructed on land owned by Pinelawn which is no longer leased to the L.I.R.R.

On behalf of Pinelawn, if this is the case, we hereby demand that you immediately: (1) cease construction on or use of this land outlined in red; and (2) remove all buildings, structures or other facilities on the red-outlined land. Your use of this land is a trespass and if you fail to immediately cease construction and remove your property, we will have no choice but to immediately institute a lawsuit to compel you to do so and to seek appropriate damages, as well.

In addition, we are advised by the Town of Babylon that no building permit has been issued for the construction of this building and, accordingly, we have demanded that the Town issue a "stop work" order immediately.

Very truly yours,

Philip C. Kilian

PCK:hp
Enclosure

cc: Jonathan S. Gaynin, Esq.

FFDOCS1\[illegible]

A-1065

04/07/2005 11:20 FAX 022

Coastal Ex. 5

STOP ALL WORK IMMEDIATELY

WARNING OF VIOLATIONS

OF

BUILDING CODE REQUIREMENTS

Eddie Mullen

957-3157

631-

MARTY STEINBURG

Jo R

CALL (516) 957-3058

Please Call Between 8:00am and 4:30pm

RE: SCTM # _____

DIVISION OF BUILDING

TOWN OF BABYLON

200 EAST SUNRISE HIGHWAY

LINDENHURST, N.Y. 11757

1633 New Hwy

CONTACT BLDG Dept Immediately

DATE ISSUED: 3/29/04

BY: Timothy Besemer

LOCATION: Conklin & New Hwy

REMARKS: Working without a Permit

A-1066

STEVEN BELLONE, Supervisor

Coastal Ex. 6

Town of Babylon

(Founded 1872)

200 East Sunrise Highway, Lindenhurst, L.I., N.Y. 11757-2597
(631) 957-3029 • FAX (631) 957-3146

DENNIS M. COHEN
TOWN ATTORNEY

March 31, 2004

Coastal Distribution LLC
1633 New Highway
East Farmingdale, New York 11735

Attn: Joseph Rutigliano

Said only operation was at to building

Re: Coastal Distribution LLC
N/E/C of New Highway and Conklin Street, E. Farmingdale
SCTM #0100-35-1-2

Dear Mr. Rutigliano:

As you are aware, the issue of whether the facility under construction at the above referenced location must comply with Town Zoning Laws or is exempt under Public Authorities Law has arisen.

In order for the Town to reach a determination, it is necessary that a thorough explanation of the proposed use of the site be provided. To date it has been alleged that the site will be utilized for several types of uses, including rock crushing, a solid waste transfer station, or building and construction material sales.

However, in conversations with you, it has been asserted that the site will merely be utilized for a freight depot associated with the railroad.

Kindly provide a detailed description of the proposed use of the site, along with any supporting documentation, in order that the Town may make seasoned determination as to whether the facility is subject to our Zoning Code, or exempt under the Public Authorities Law.

Thank you for your assistance in this matter.

Very truly yours,

Frank J. Alberti
Sr. Assistant Town Attorney
FJA:dmh
[illegible]

A-1068

Coastal Ex. 7

INTER-OFFICE MEMORANDUM
TOWN OF BABYLON

TO: Louis D'Amaro, Chairman, Zoning Board of Appeals

FROM: Steve Bellone, Supervisor

DATE: September 9, 2004

RE: Zoning Board of Appeals Application No. 04-267, Coastal Distribution LLC

In reference to the above-mentioned application which asks the Board of Appeals to annul and vacate a stop work order issued by Building Inspector Tim Bessemer on or about March 29, 2004 on property located at 1633 New Highway, East Farmingdale, New York ("The Premises"), I respectfully request the Board to uphold the stop work order.

It is my understanding that the stop work order was issued to Coastal Distribution LLC ("Coastal) to prevent Coastal from completing a building on the premises without obtaining a building permit. It is my further understanding that despite the issuance of the stop work order, Coastal completed the building in violation of the stop work order and without obtaining any permits from the Town of Babylon.

I have been advised that Coastal challenges the issuance of the stop work order based on a provision in the Public Authorities Law which provides that the Town does not have authority over any facilities of the Metropolitan Transit Authority ("MTA") or any of its activities or operations except if such facilities are devoted to purposes other than transportation or transit.

I have been advised that since filing the subject application, Coastal has commenced operating a transfer station on the premises without applying for or obtaining any permits from the Town of Babylon and in violation of Article XXII of the Babylon Town Code. As you know, the Town of Babylon restricts transfer stations to industrial zoned properties and only with a special exception permit granted by the Board of Appeals.

The operation of a transfer station involves, but is not limited to, the dumping and processing of solid waste on the premises. The obvious adverse impacts of such an operation include but are not limited to odor, excessive noise, environmental impacts, dust, etc. Clearly, the State Legislature did not intend that purely private business could circumvent a local municipalities right to protect the quality of life of its residents and businesses though its zoning powers by virtue of the private business using property owned or leased by the MTA.

Furthermore, the premises are not located within an industrial zone. In fact, the premises are located in an A Residence District. While the premises do not adjoin any other residences, should the Board grant Coastal's application, the precedent will have been established allowing transfer stations, or any other use for that matter, anywhere in the Town of Babylon, including residential neighborhoods, as long as it is contained on property owned or leased by the MTA.

Because of the obvious adverse impacts associated with the operation of a transfer station, the Town has adopted a comprehensive application and review procedure prior to the granting of a special permit pursuant to Article XXII of the Town Code. I am attaching a copy of Article XXII for your convenience. Coastal's operation of a transfer station without the necessary review and in an area that is not conducive to the operation of a transfer station has a negative impact on all businesses and property owners in close proximity to the subject transfer station.

The present application currently acts as a stay against any enforcement action undertaken by the Town of Babylon. Therefore, I urge the Board of Appeals to deny Coastal's attempt to circumvent the Babylon Town Code immediately so that the Town may continue in its efforts to enforce its code and prevent the operation of an illegal transfer station.

Thank you for your consideration in this matter.

A-1070

New York State Department of Environmental Conservation
Division of Solid & Hazardous Materials, Region One
Building 40 - SUNY, Stony Brook, New York 11790-2356
Phone: (631) 444-0375 • FAX: (631) 444-0231
Website: www.dec.state.ny.us

Denise M. Sheehan
Acting
Commissioner

Coastal
Ex. 8

February 15, 2005

Mr. Joseph Rutigliano
Coastal Distribution, LLC.
1633 New Highway
Farmingdale, N.Y. 11735

Re: Farmingdale Multi-Modal Transload Facility

Dear Mr. Rutigliano:

A decision has been made relative to the question as to whether New York State's Solid Waste Regulations, 6 NYCRR Part 360 (Part 360) regulations are preempted by the Surface Transportation Board (STB) in regard to the Coastal Distribution, LLc's (Coastal) rail haul facility, named Farmingdale Multi-Modal Transload Facility, located at 1633 New Highway, Farmingdale, N.Y. 11735.

It is the New York State Department of Environmental Conservation's(the Department) understanding that Coastal has been contracted by New York & Atlantic Railway (NY&A Railway) to operate transloading operations that NY&A Railway offers to its customers. Pursuant to the contract between the parties, NY&A Railway has control of the facility and the operations. The Department's Regional Staff have raised the question as to whether or not Part 360 regulations are preempted by the STB.

Based on a review of this specific case, it has been determined that the Department is preempted from requiring a Part 360 transfer station permit since: (1) the transloading operations are considered transportation pursuant to 49 U.S.C. 10102(9)(A),(B); and (2) the transportation activities are performed by a rail carrier pursuant to 49 U.S.C. 10102(5). The STB has found that transloading activities fall within the definition of transportation. In this case, while the transportation activities are not directly performed by NY&A Railway, Coastal is acting on behalf of NY&A Railway, and the Coastal's activities are part of the railroad service that is being offered to NY&A Railway's customers. The Department continues to retain police powers to control odor, noise and vermin complaints.

If you have any questions regarding this issue, please feel free to contact me at your convenience. Thank you for your patience in this matter.

Sincerely,

Anthony J. Ciavi, P.E.
Regional Engineer for Environmental Quality

cc: Peter A. Scully, Regional Director, Region One, NYSDEC
Jeffrey C. Schmitt, P.E., Bureau Director, Bureau of Solid Waste, Reduction and Recycling
James B. Crane

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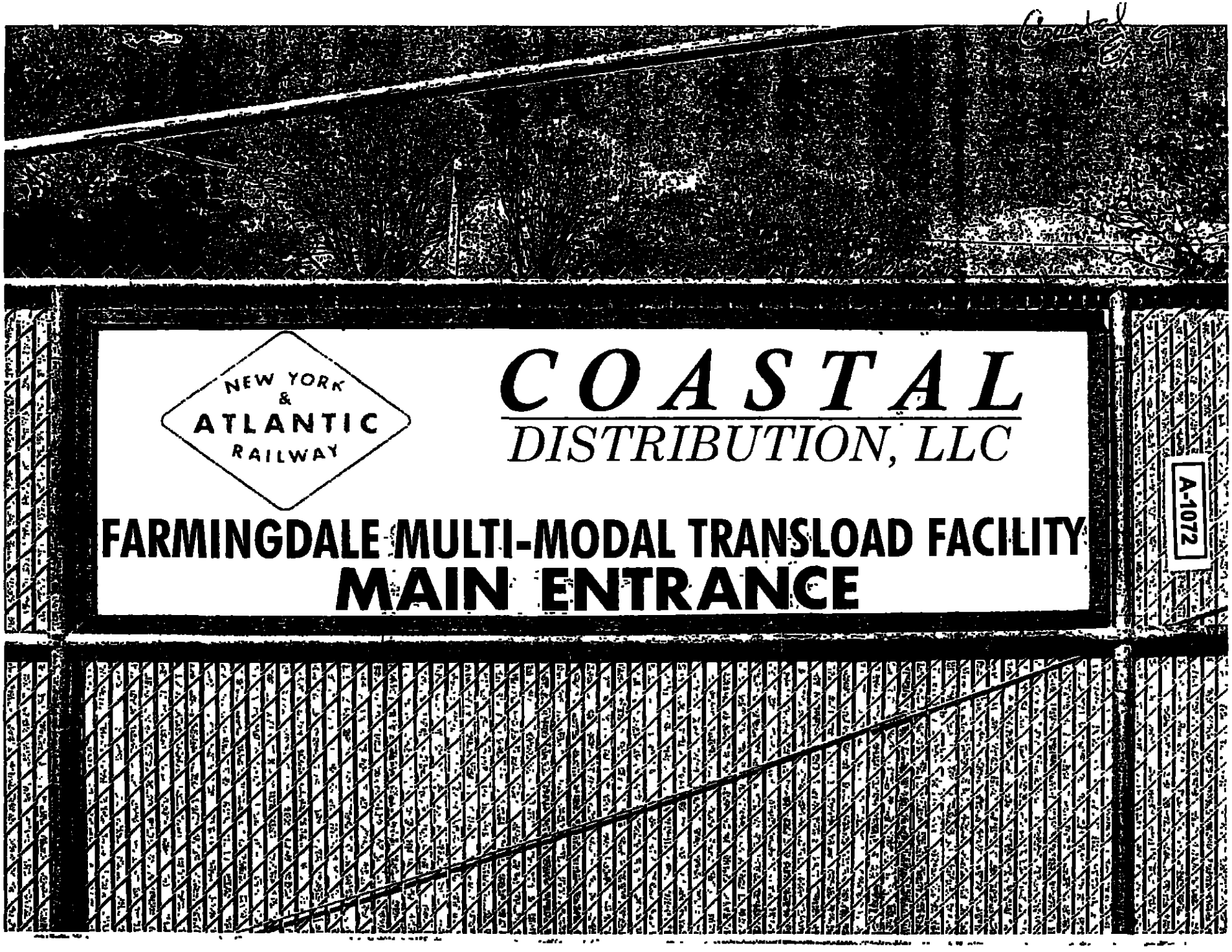
NEW YORK
&
ATLANTIC
RAILWAY
COASTAL
DISTRIBUTION, LLC
A-1072
FARMINGDALE MULTI-MODAL TRANSLOAD FACILITY
MAIN ENTRANCE

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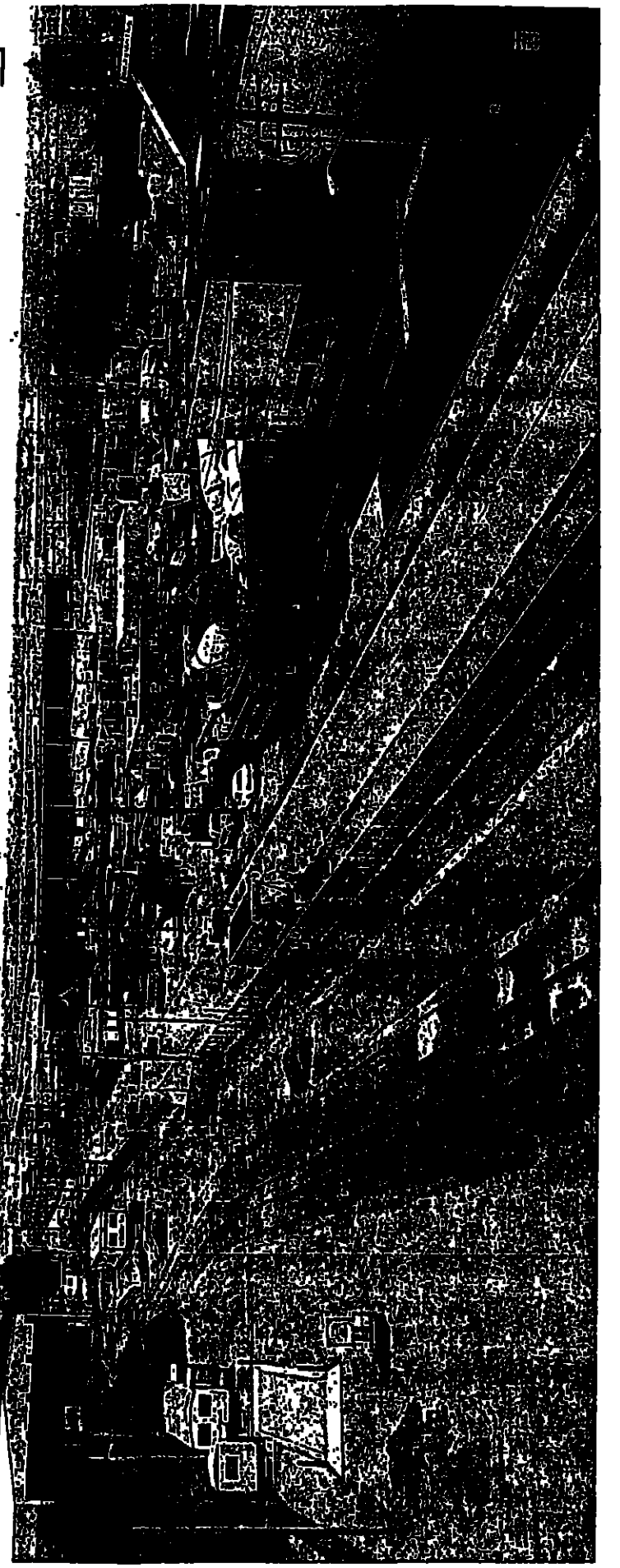

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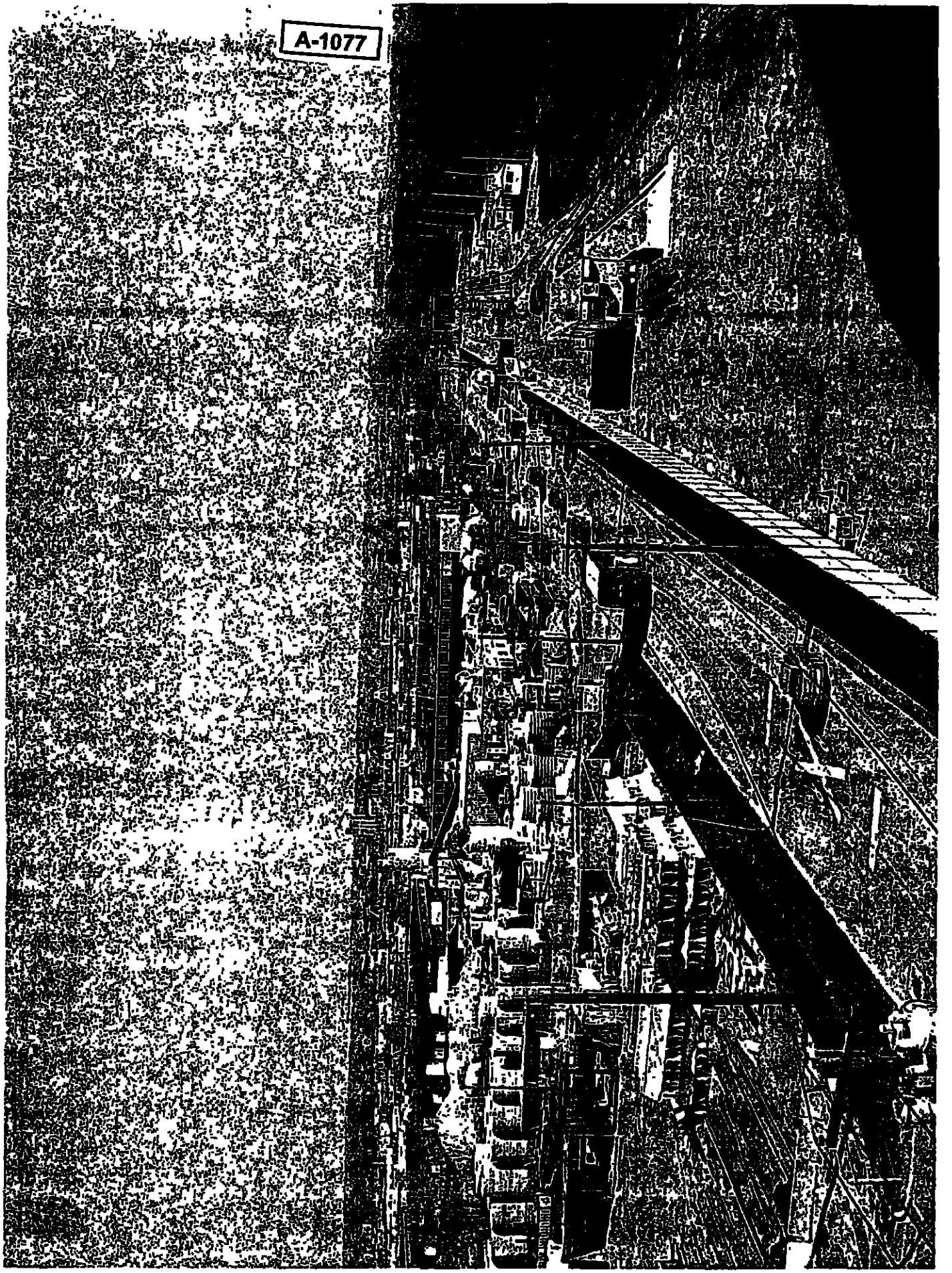
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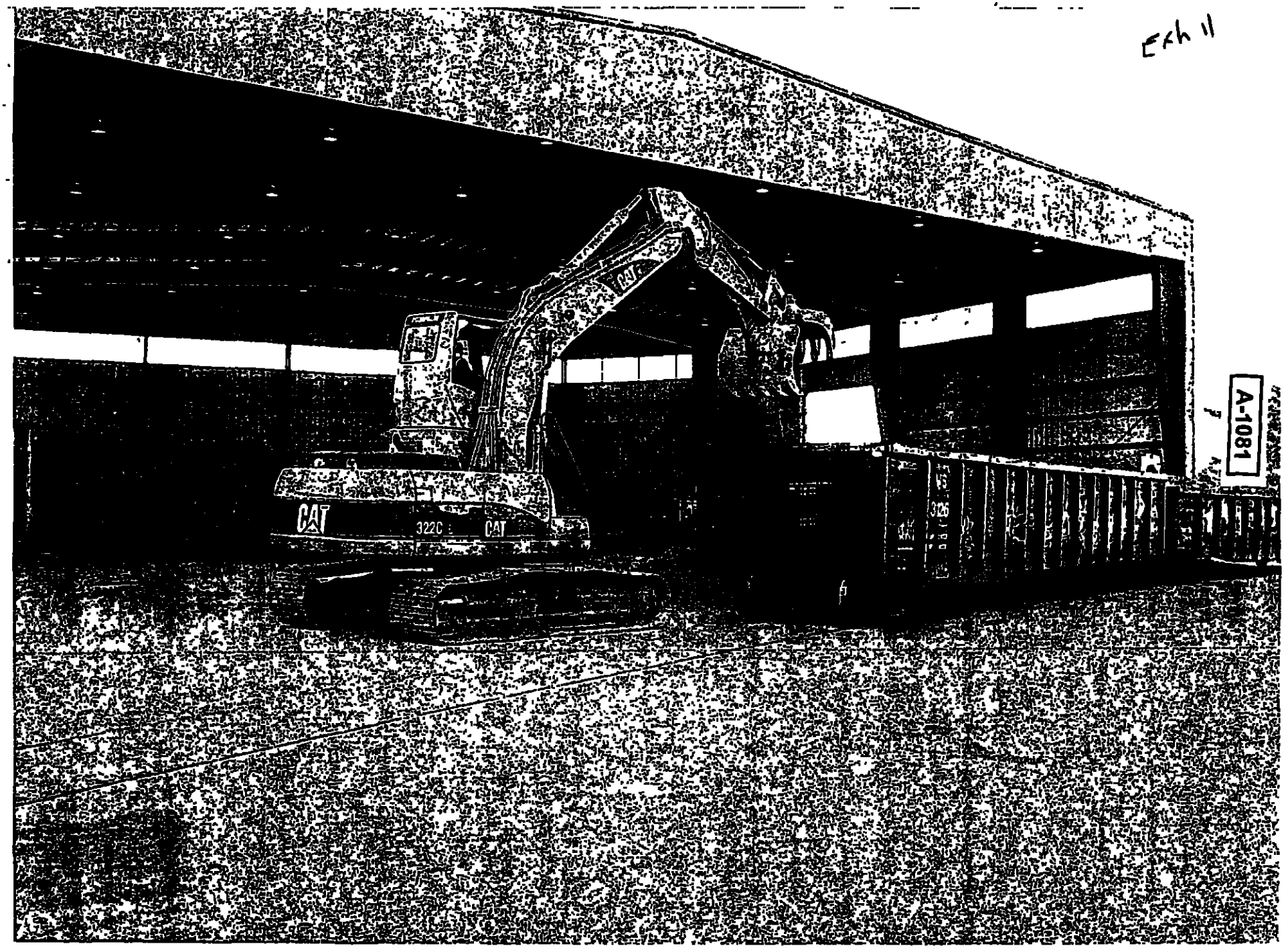
Exh 11



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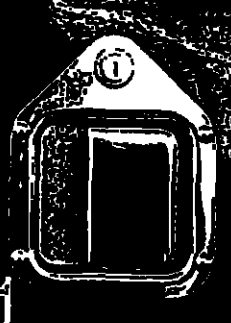

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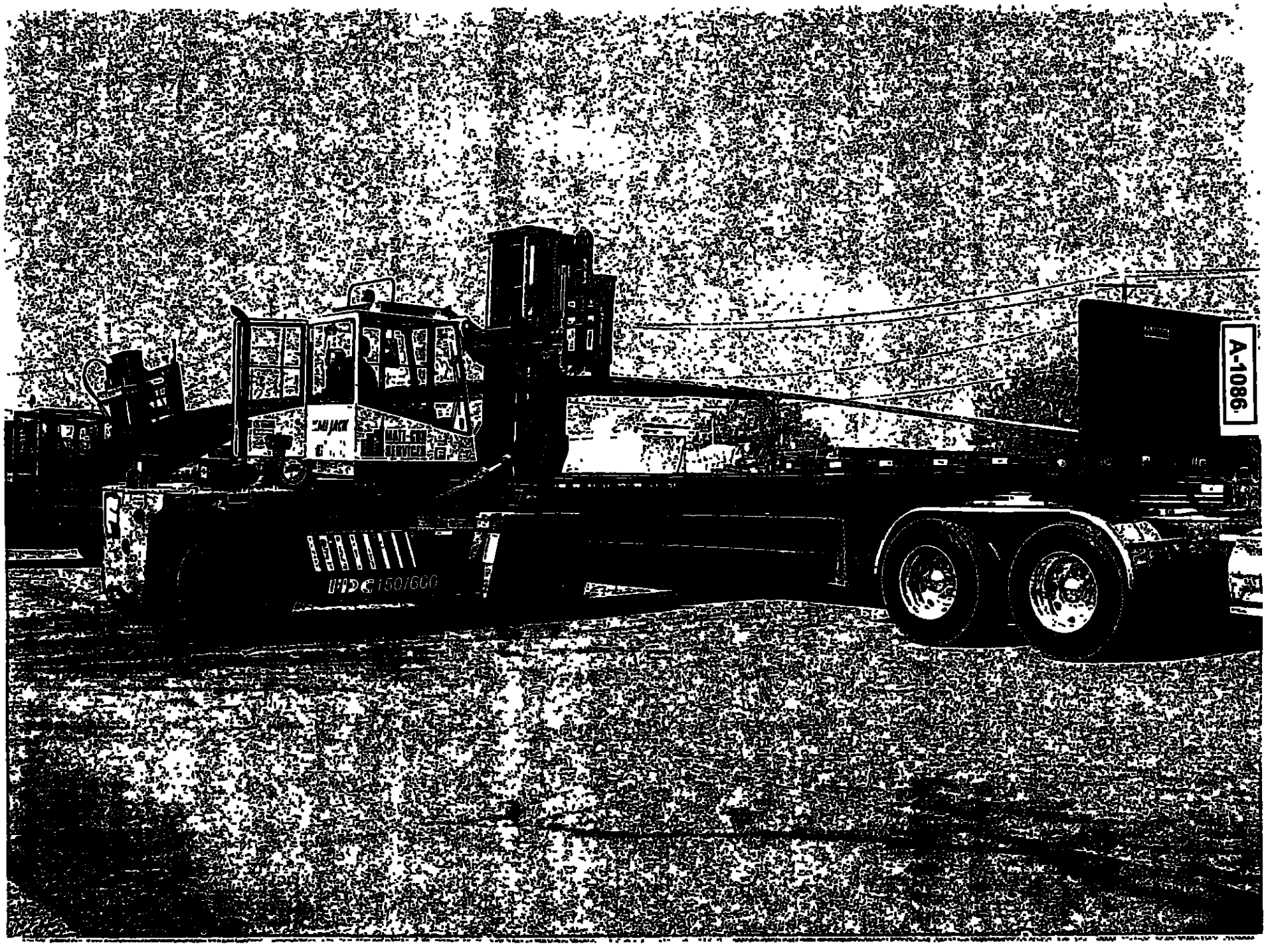
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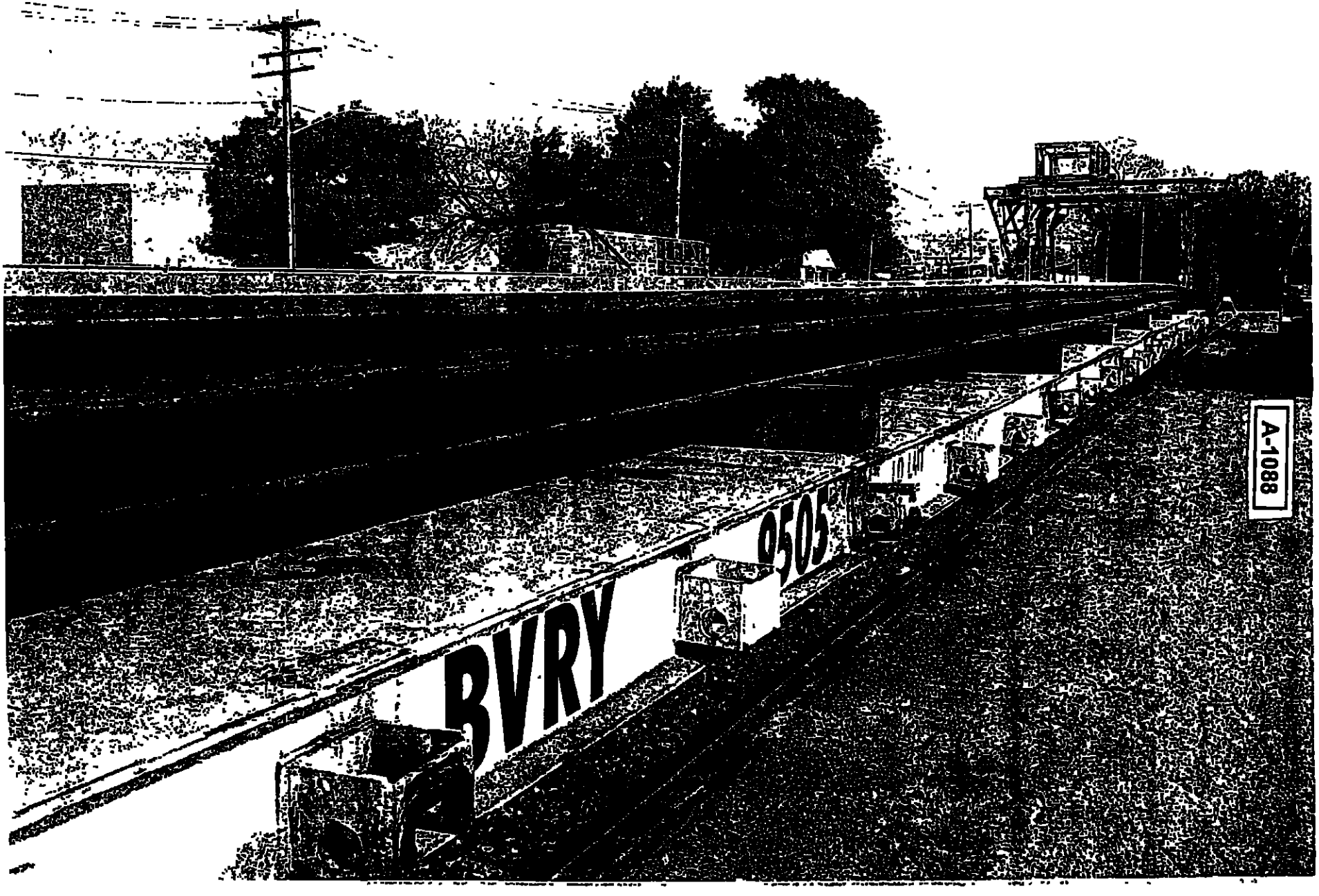
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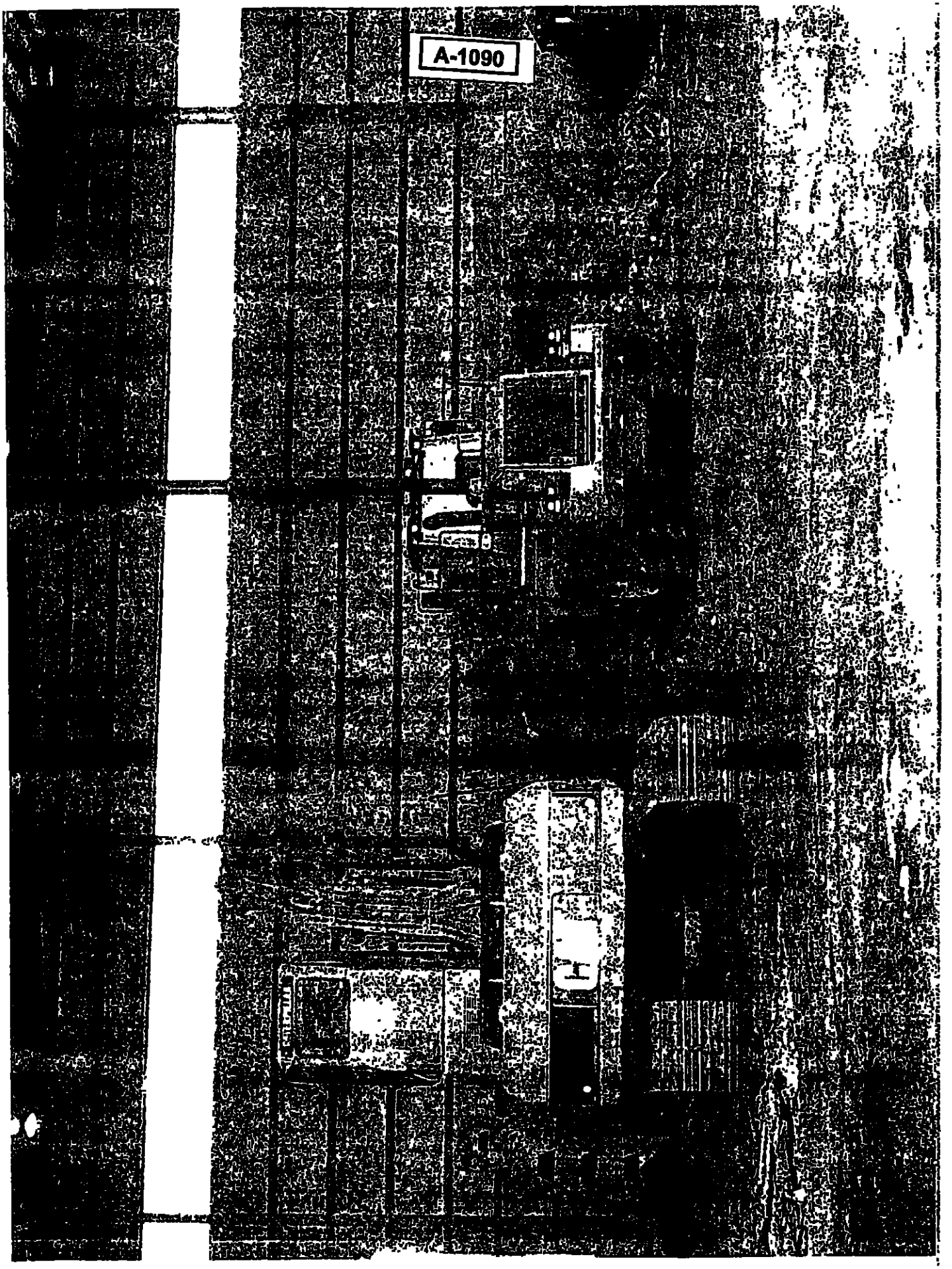
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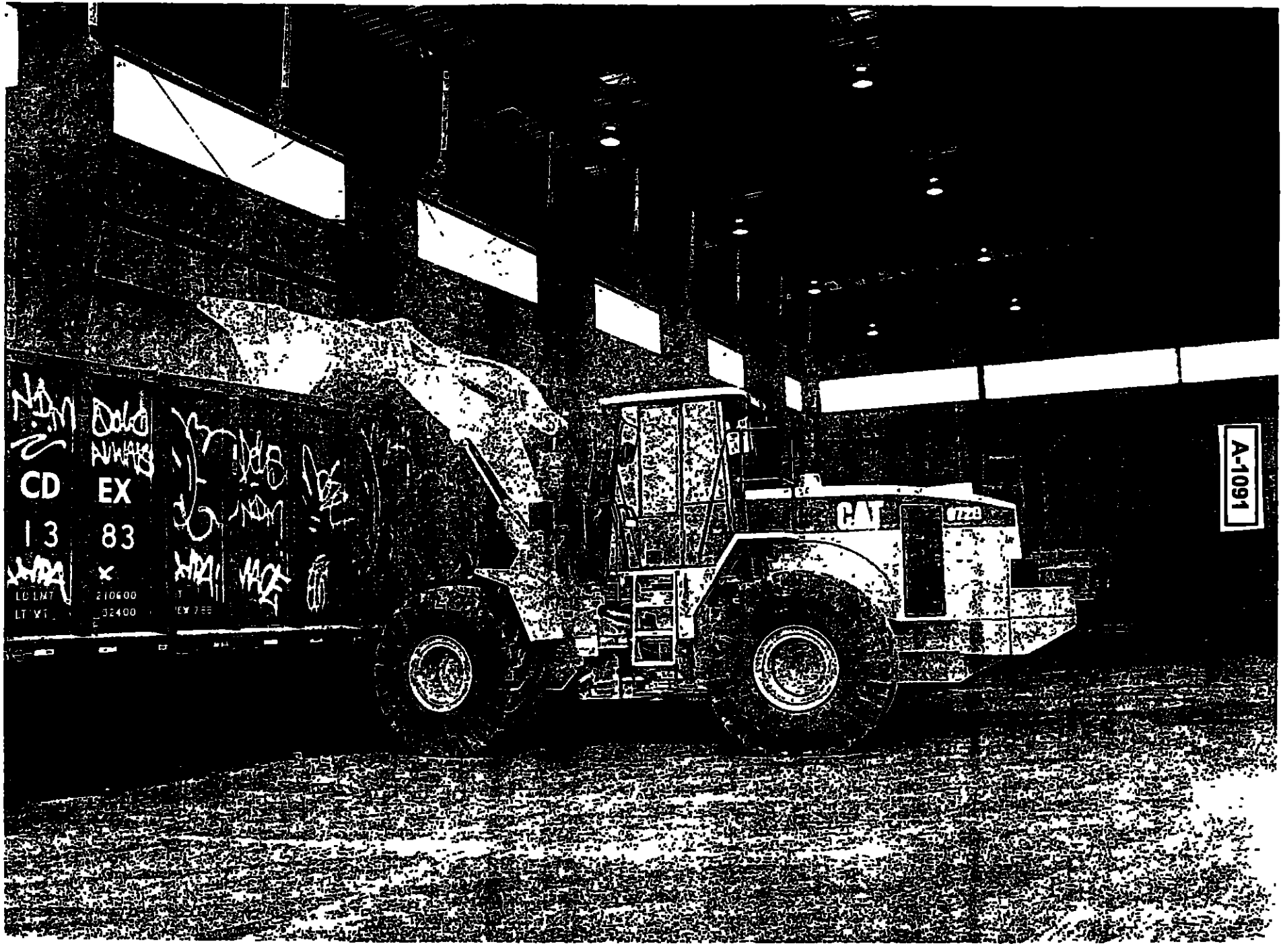
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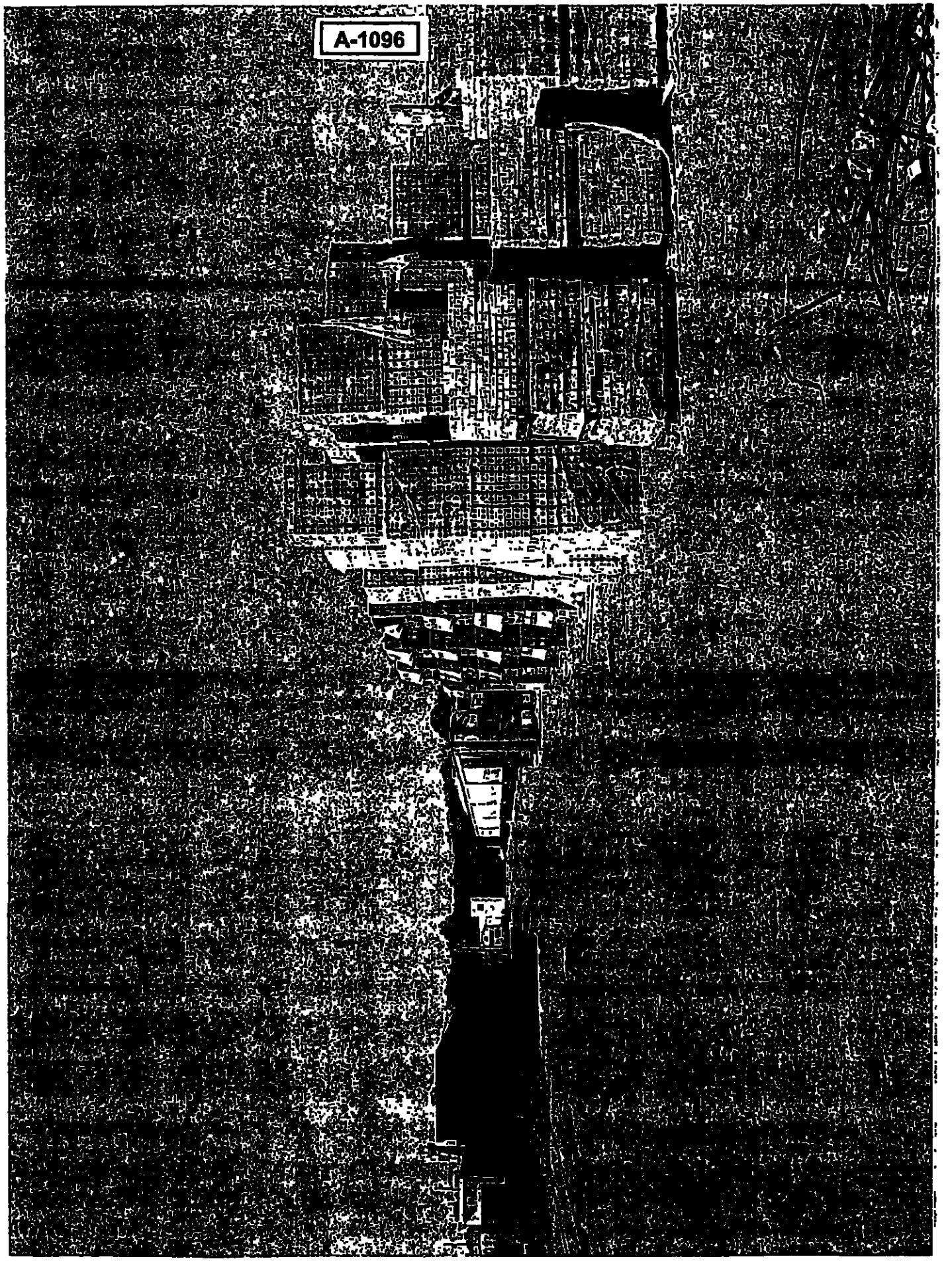
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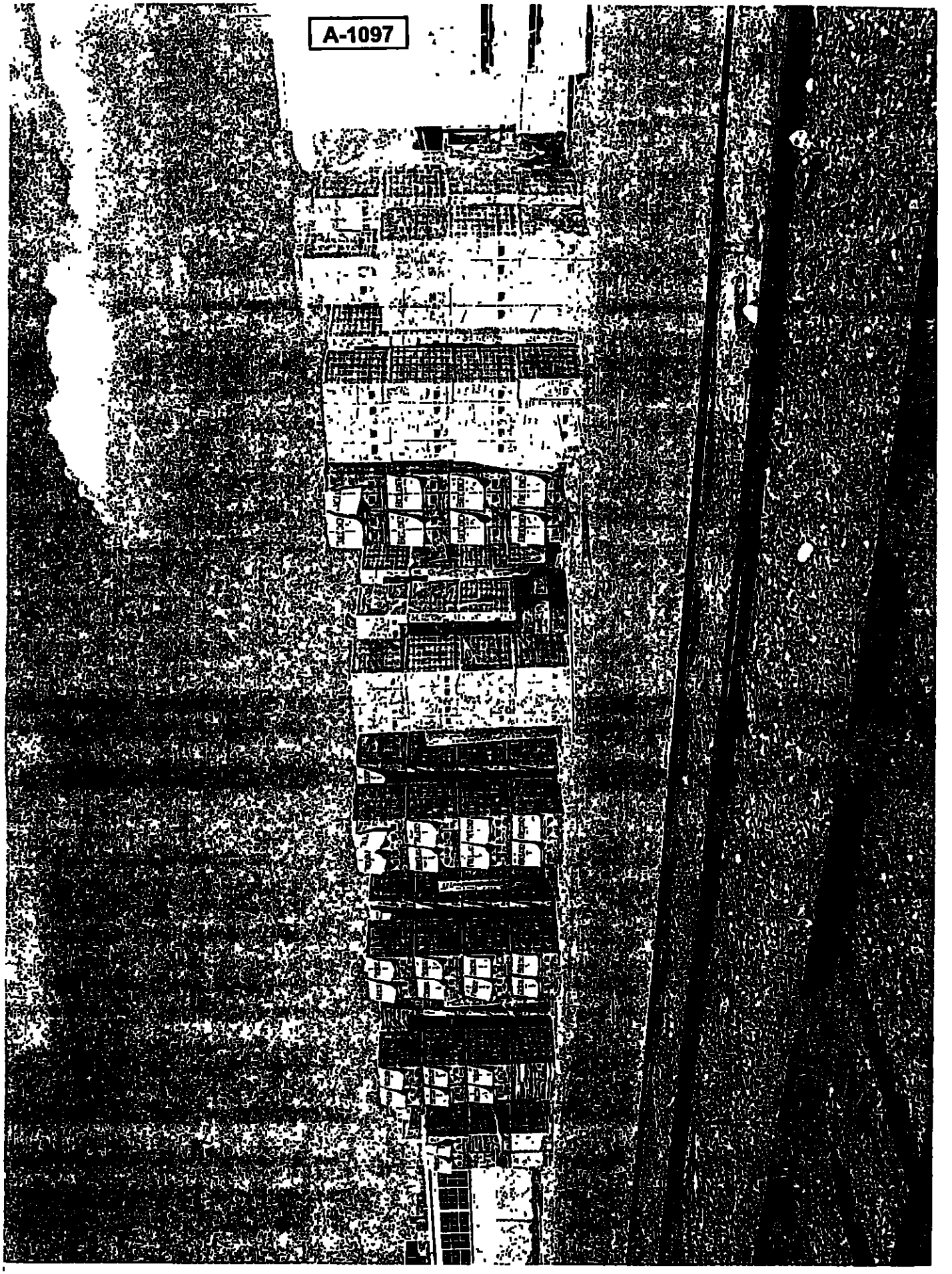
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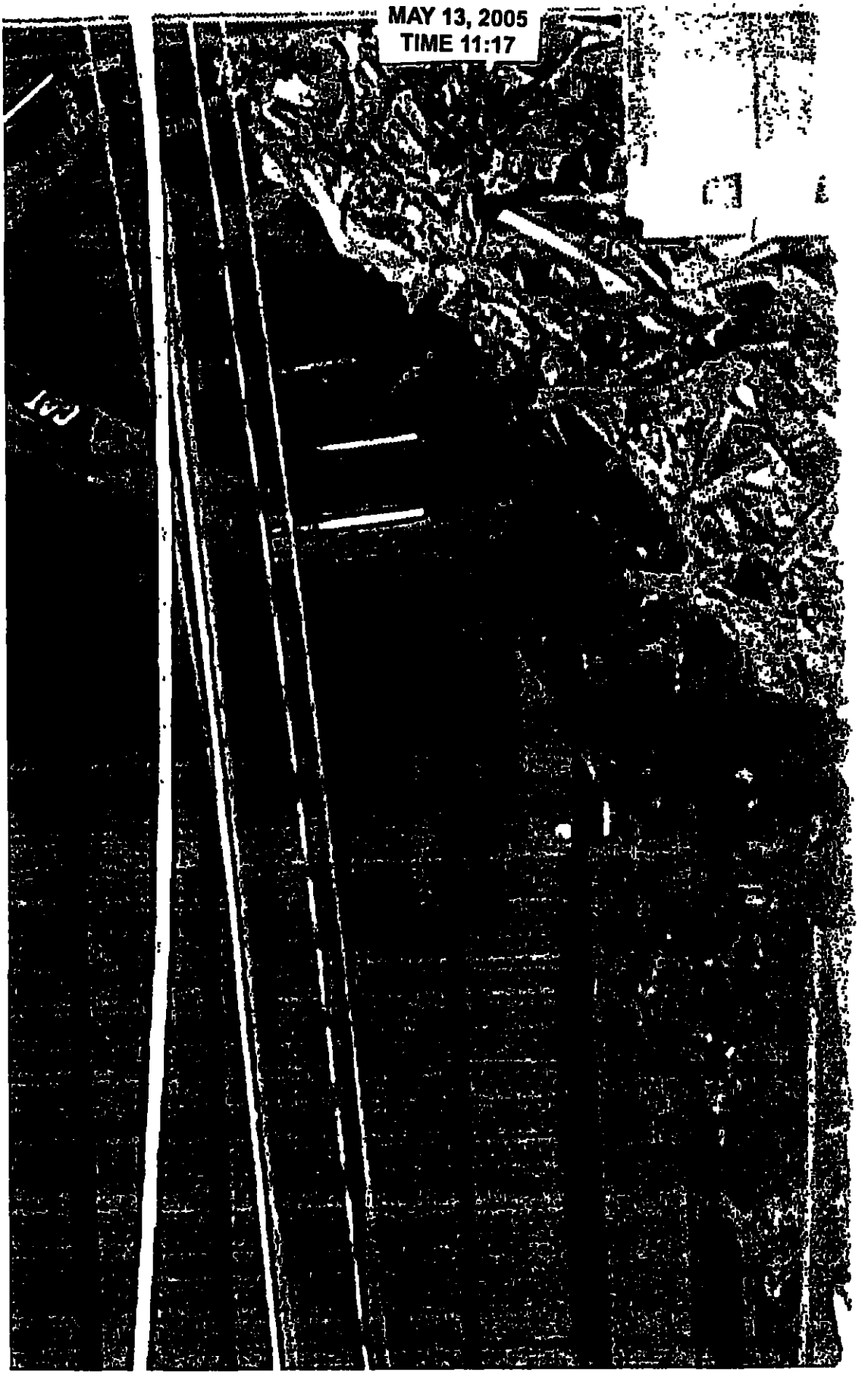

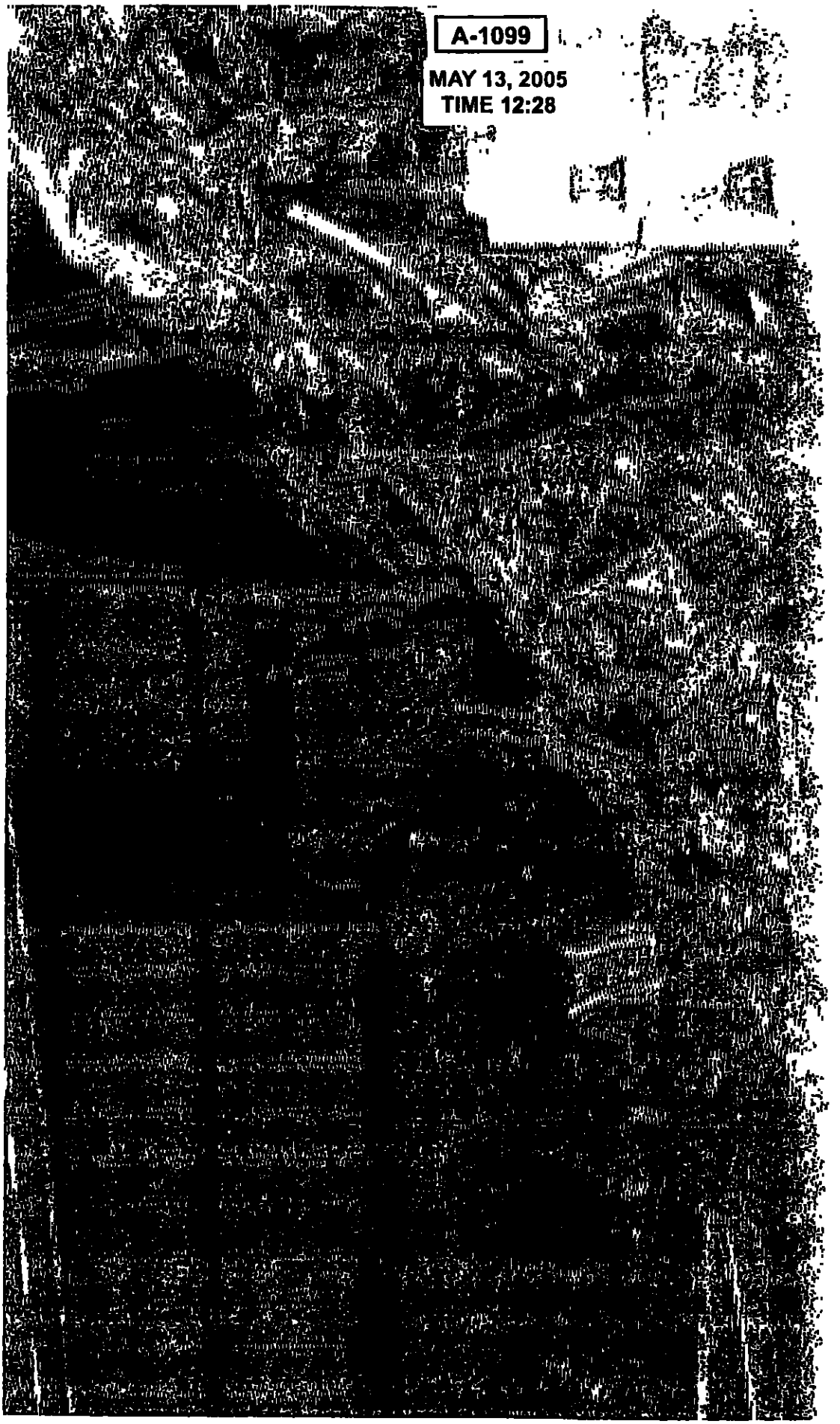
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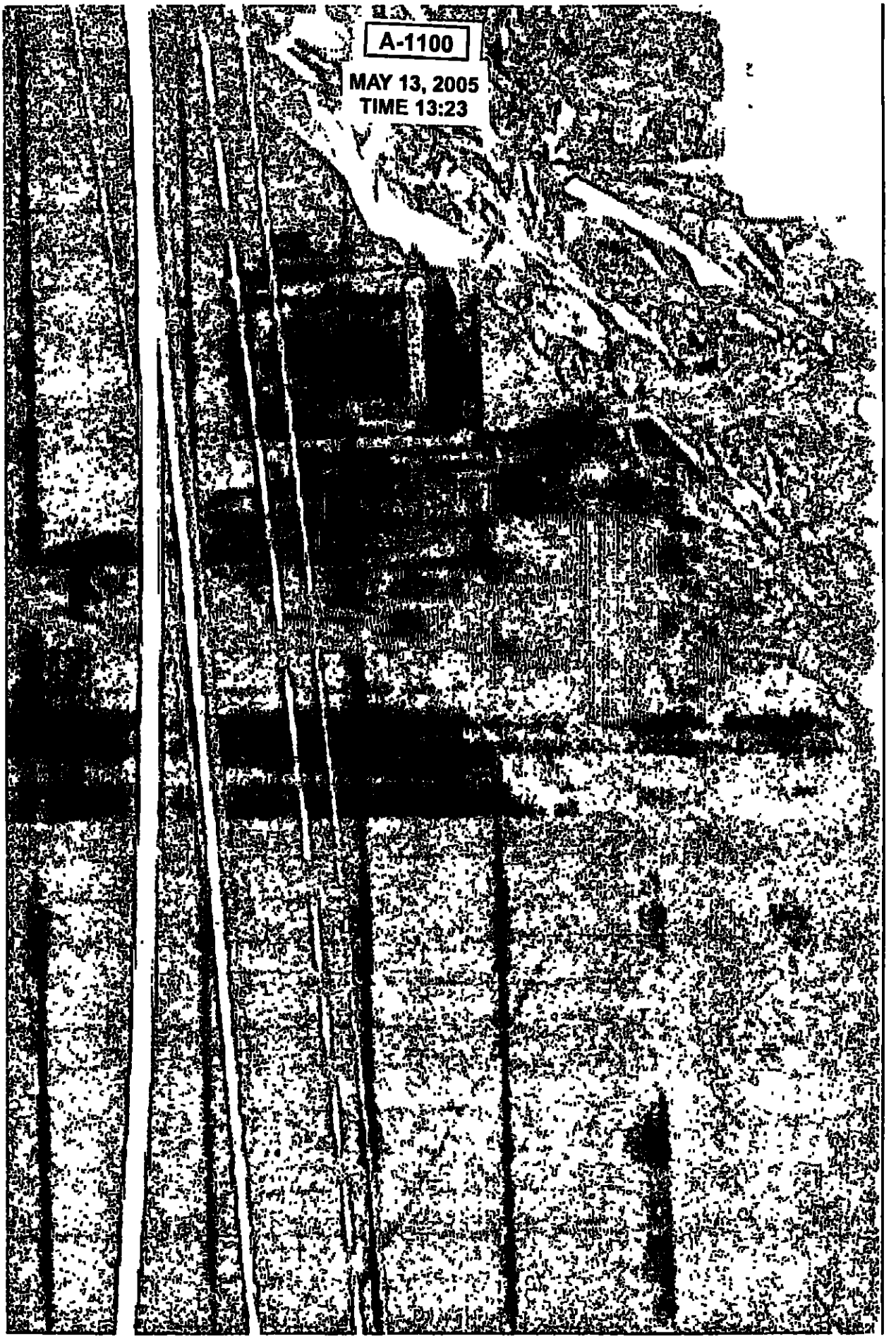
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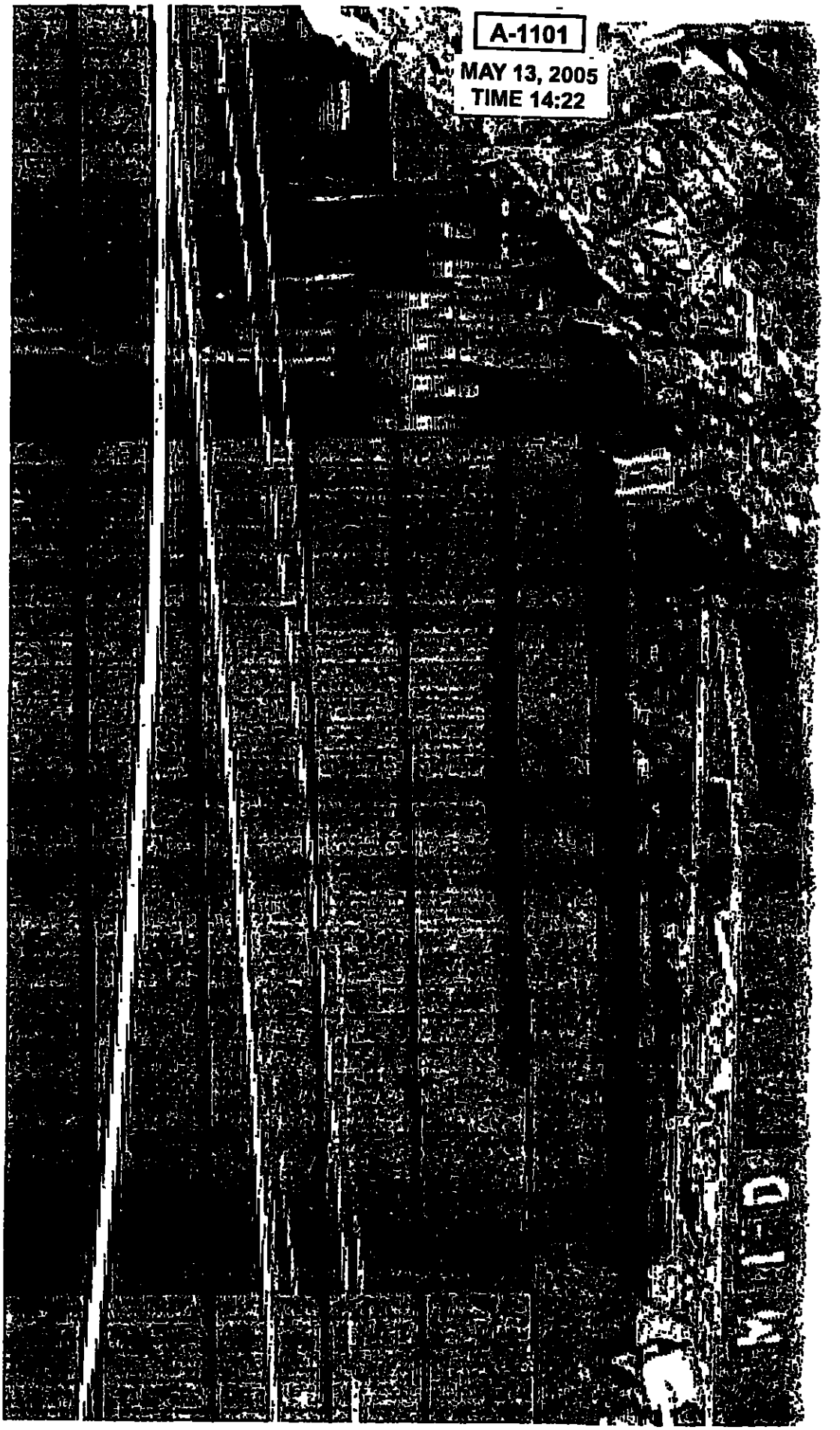
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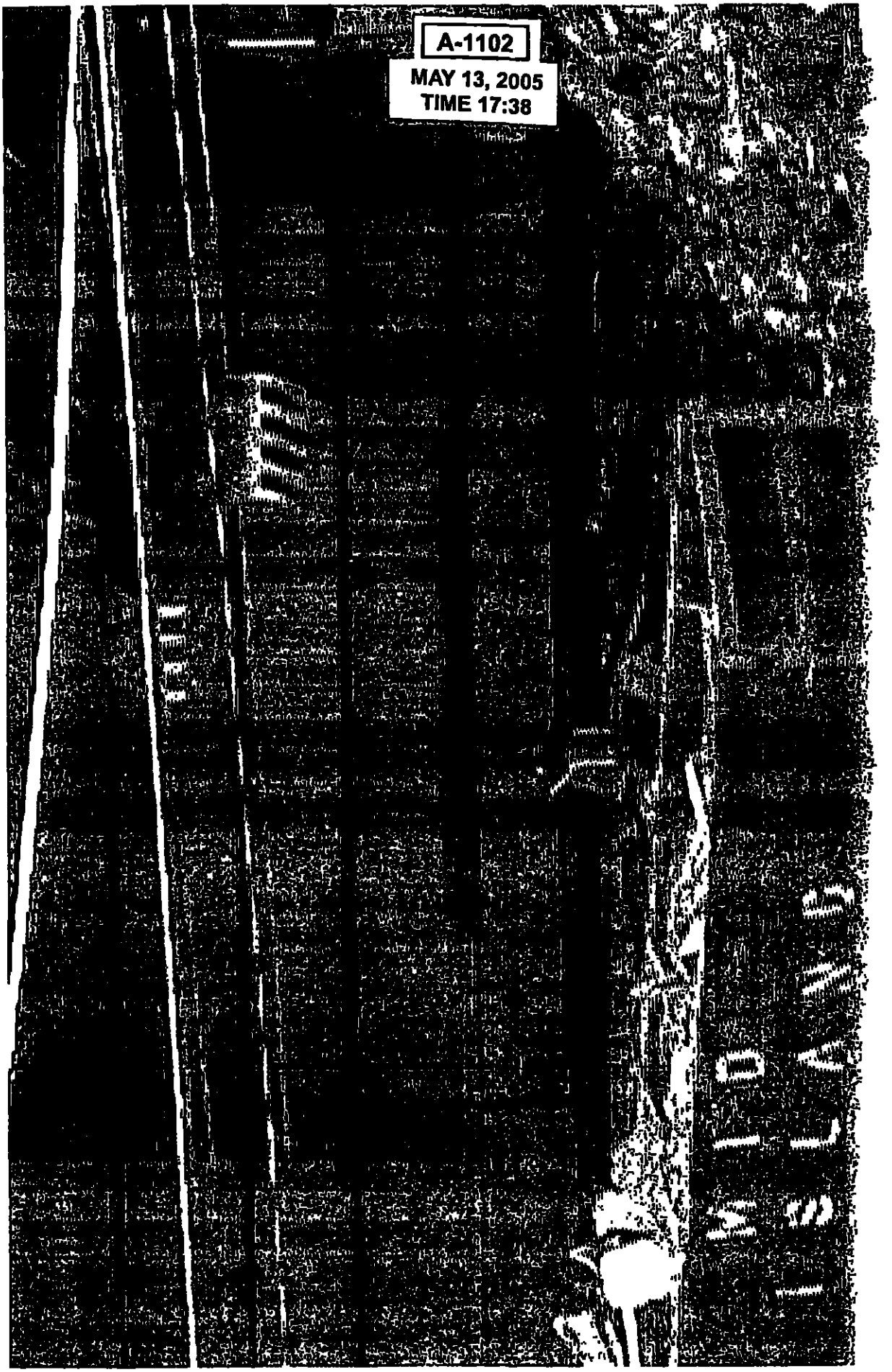
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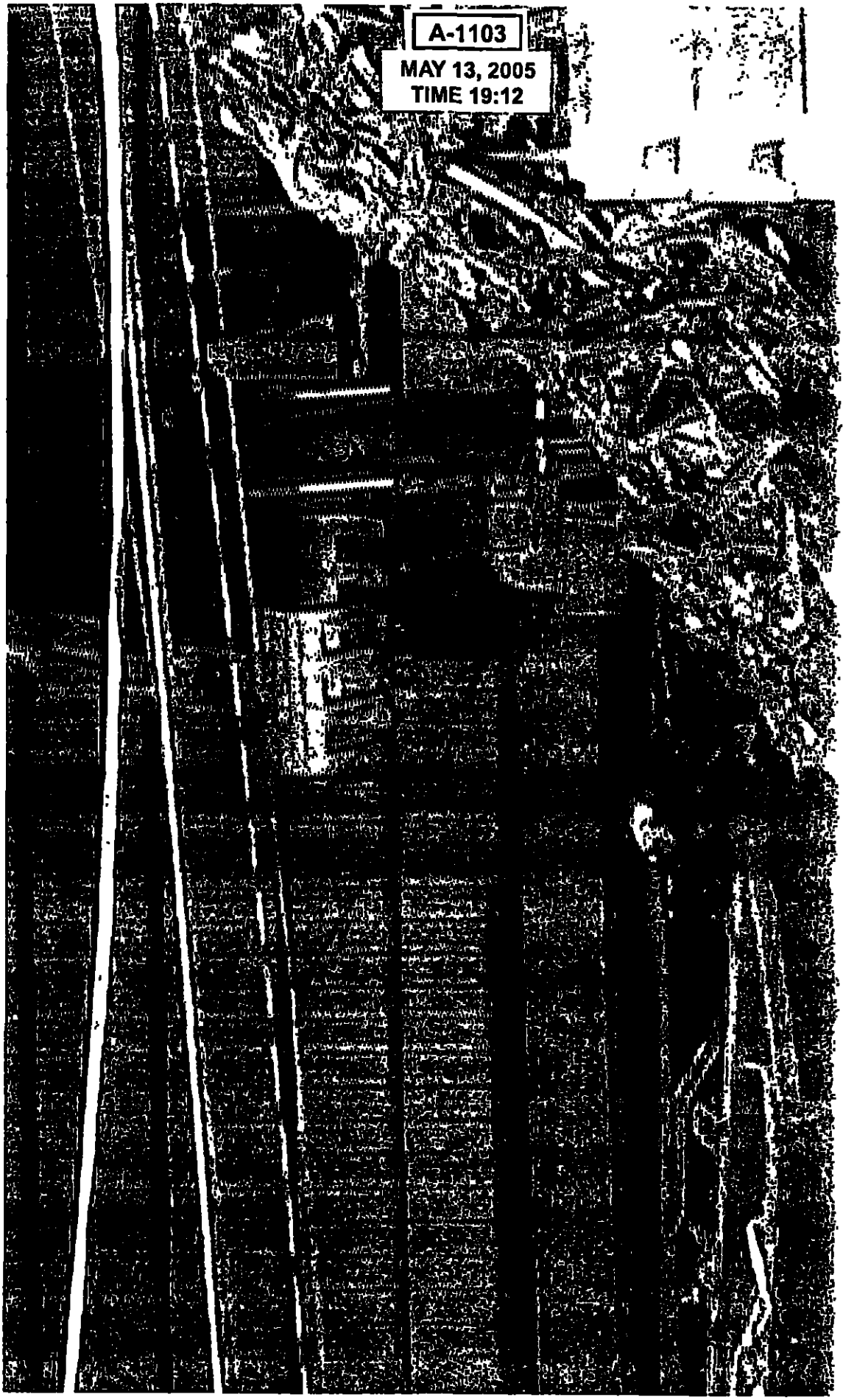
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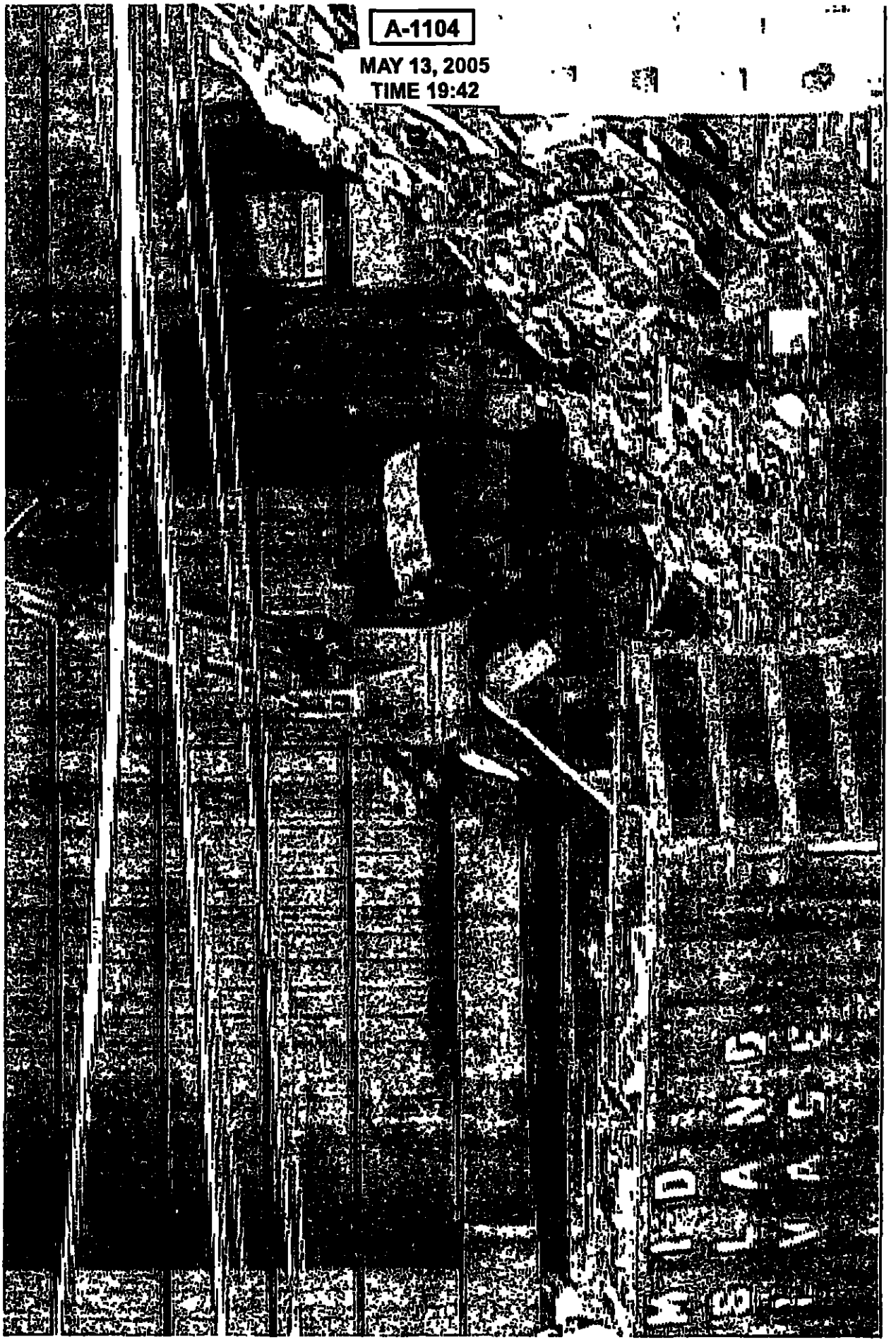
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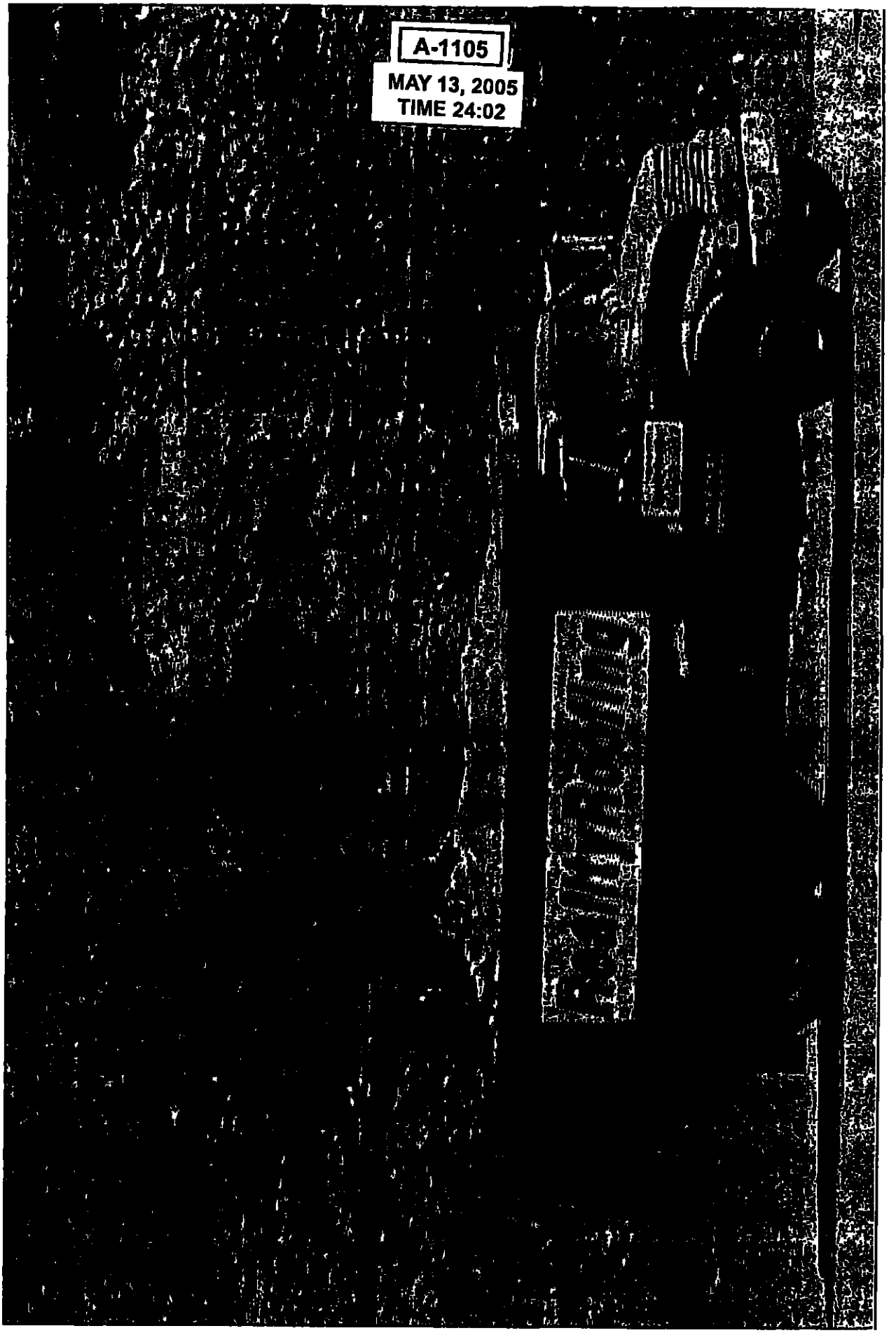
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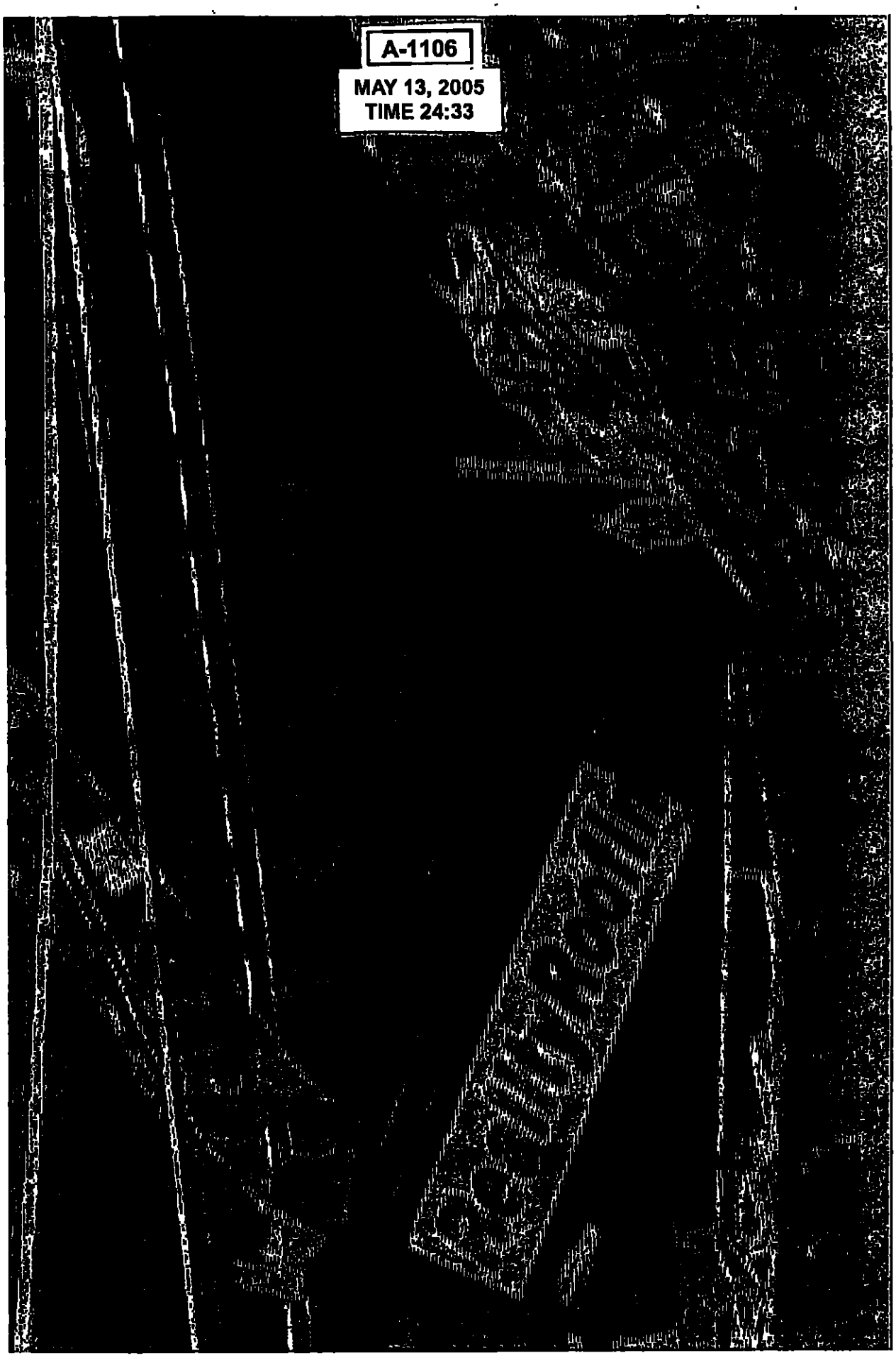
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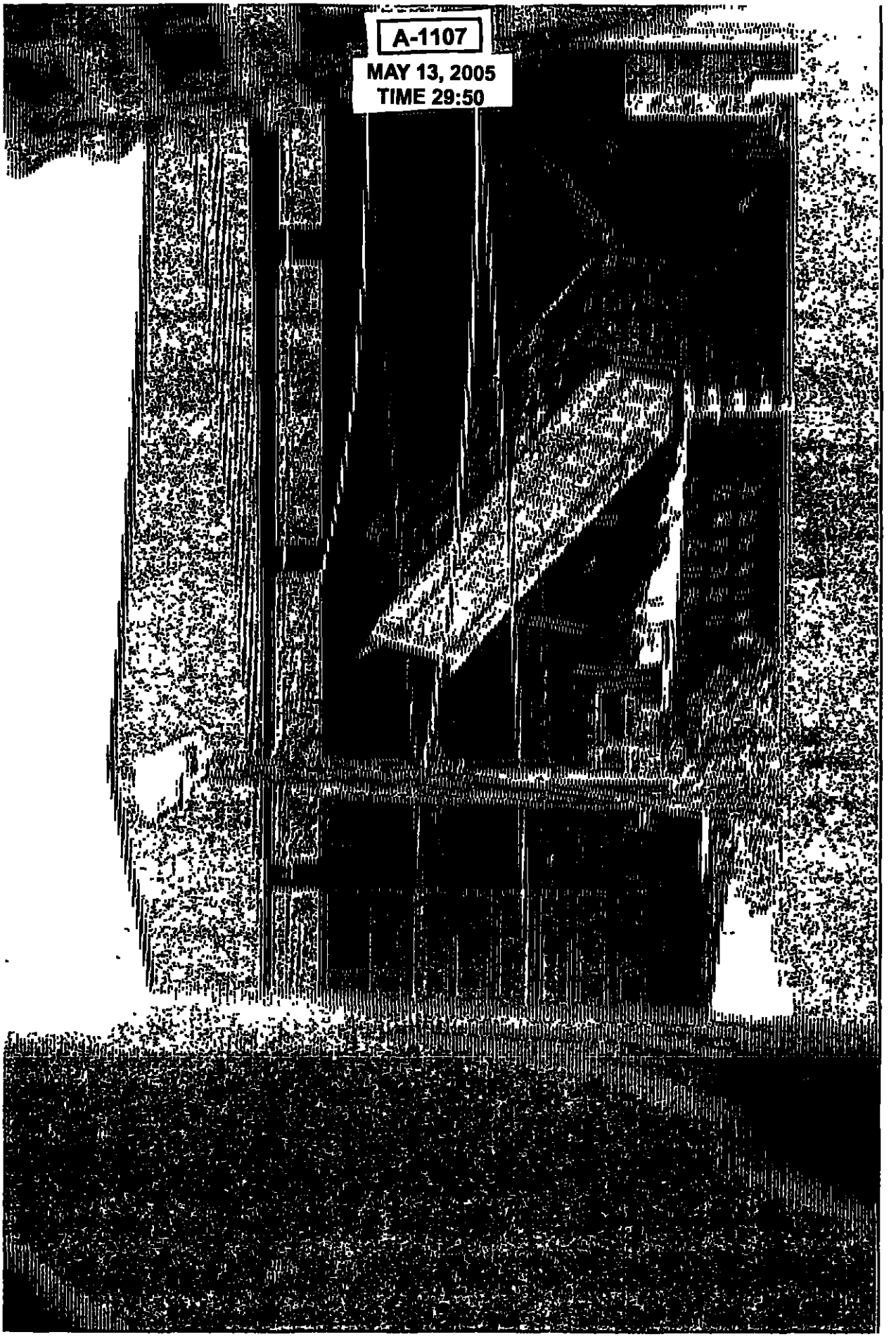
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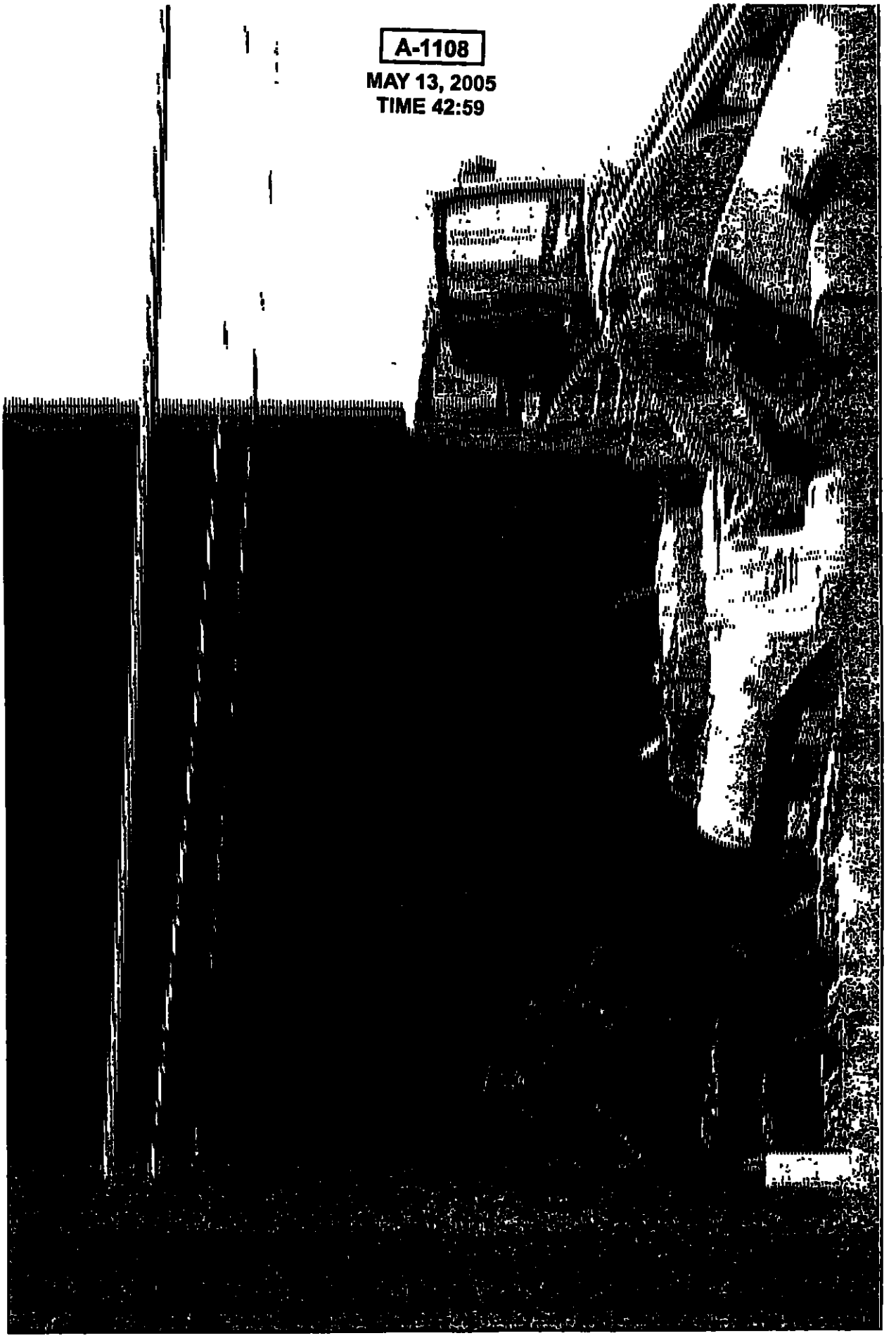
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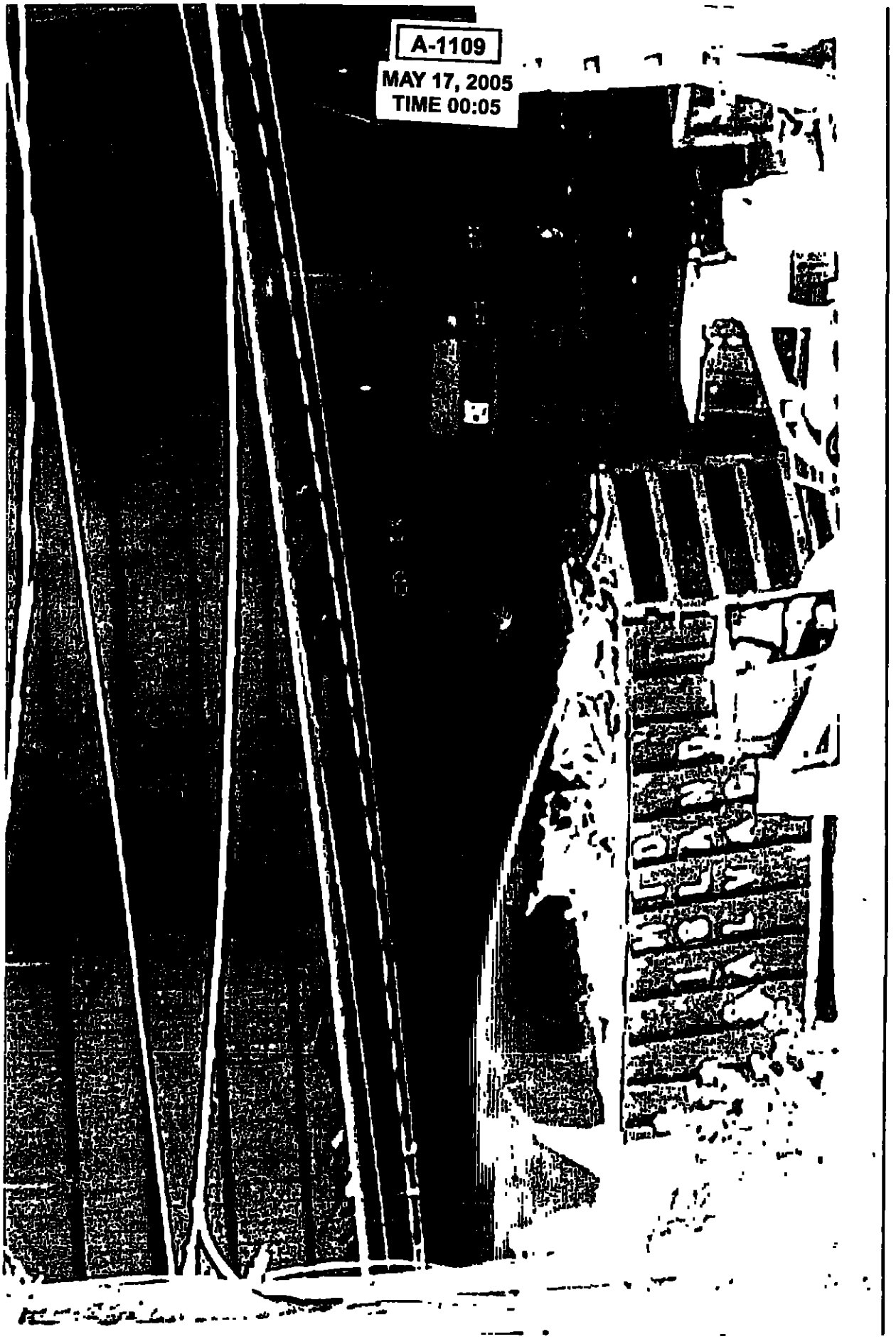
A-1109
MAY 17, 2005
TIME 00:05

A-1110

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK -X COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY, Plaintiffs, v. THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, and PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON, and PINELAWN CEMETERY Defendants. -X	**ANSWER SUBMITTED ON BEHALF OF DEFENDANTS TOWN OF BABYLON, TOWN OF BABYLON BOARD OF ZONING APPEALS, AND PETER CASSERLY** 05-CV-2032 (JS) (ETB)

Defendants TOWN OF BABYLON, TOWN OF BABYLON BOARD OF ZONING APPEALS, and PETER CASSERLY, hereby appear by and through their attorneys Bond, Schoeneck & King, PLLC, and answer the complaint as follows:

1. DENY the truth of the allegations set forth in paragraph 1 of the Complaint and respectfully refer all questions of law to the Court.

2 DENY knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 2 of the Complaint, except ADMIT that Coastal presently operates at 1633 New Highway, Farmingdale, New York.

3. DENY knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 3 of the Complaint, except ADMIT upon information and belief that New York & Atlantic Railway is a common carrier authorized to operate by the Surface Transportation Board.

4. ADMIT the truth of the allegations contained in paragraph 4 of the Complaint.

5. ADMIT the truth of the allegations contained in paragraph 5 of the Complaint.

6. DENY the truth of the allegations contained in paragraph 6 of the Complaint, except ADMIT that Mr. Casserly is the Commissioner of Planning and Development.

7. DENY knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 7 of the Complaint, except ADMIT that Pinelawn is now a party to this action.

8. DENY knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 8 of the Complaint, except ADMIT that the LIRR is not a party to this action and is a necessary party.

9. DENY the truth of the allegations contained in paragraph 9 of the Complaint, except ADMIT that NY&A and Coastal executed a Transload Facility Operations Agreement in August 2004.

10. DENY the truth of the allegations contained in paragraph 10 of the Complaint, except ADMIT that NY&A and Coastal had an association by lease which was entered into in 2002.

11. DENY knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 11 of the Complaint.

12 DENY knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 12 of the Complaint, except ADMIT that Coastal contacted the Town prior to construction.

13. DENY knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 13 of the Complaint, except ADMIT that Mr. Casserly indicated that the Town had no jurisdiction over the project based upon a mistaken understanding

of the relevant facts and law. Defendants further ADMIT that New York State Department of Environmental Protection has issued a letter disclaiming jurisdiction over the site.

14. DENY knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 14 of the Complaint, except ADMIT that Coastal commenced construction at the site.

15. DENY the allegations contained in paragraph 15 of the Complaint, except ADMIT that a Stop Work Order was issued on March 29, 2004.

16. DENY the allegations contained in paragraph 16 of the Complaint.

17. ADMIT, upon information and belief, the allegations contained in paragraph 17 of the Complaint.

18. DENY knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 18 of the Complaint, except ADMIT that an appeal was filed with the ZBA.

19. DENY the truth of the allegations contained in paragraph 19 of the Complaint, except ADMIT that NY&A and Coastal entered into a Transload Facility Operations Agreement in August 2004.

20. ADMIT the truth of the allegations contained in paragraph 20 of the Complaint.

21. DENY the truth of the allegations contained in paragraph 21 of the Complaint.

22. DENY the truth of the allegations contained in paragraph 22 of the Complaint, except ADMIT that at the ZBA hearings Plaintiffs claimed that their facility was exempt from local regulation and that they provided a copy of a letter from the DEC regarding jurisdiction to the Board.

23. DENY the truth of the allegations contained in paragraph 23 of the Complaint, except ADMIT that the ZBA denied the appeal and upheld the Stop Work Order.

24. DENY the truth of the allegations contained in paragraph 24 of the Complaint.

25. DENY the truth of the allegations contained in paragraph 25 of the Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

26. Plaintiffs have failed to state a claim under the Interstate Commerce Commission Termination Act.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

27. Plaintiffs have failed to state a claim under 42 U.S.C. §1983.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

28. Plaintiffs have failed to exhaust their administrative remedies.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

29. Plaintiffs' claims are barred by the doctrine of *res judicata*.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

30. Plaintiffs' claims are barred by the doctrine of collateral estoppel.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

31. Plaintiffs have failed to state a claim against Mr. Casserly in his official capacity.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

32. The Court should abstain from exercising jurisdiction over this matter in accordance with *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971).

WHEREFORE, Defendants Town of Babylon, Town of Babylon Board of Zoning Appeals, and Peter Casserly, in his official capacity, request that judgment be rendered against Plaintiffs dismissing this action in its entirety as against them and awarding them costs, disbursements and such other and further relief as the Court deems to be appropriate.

Respectfully submitted,
BOND, SCHOENECK & KING, PLLC

By: James P. Clark (JC 0824)
Attorneys for Defendants
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Garden City, New York 11530
(516) 267-6314

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY	CV 05-2032 Seybert, J. Boyle, M
Plaintiffs,	AMENDED COMPLAINT
v.	
THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, AND PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON,	
Defendants,	
and	
PINELAWN CEMETERY CORPORATION	
Intervenor Defendant.	

Plaintiffs by and through their attorneys, complain of the defendants as follows:

JURISDICTION

1. This action arises under the Interstate Commerce Commission Termination Act, one of the laws of the United States giving this court jurisdiction pursuant to 28 U.S.C. 1331 and 1337. Further, as this action seeks to enjoin a violation of that act, this court has jurisdiction pursuant to 49 U.S.C. 11704(c) (1). This court also has pendant jurisdiction over related State law claims. Venue is proper due to the principal place of business of all parties.

PARTIES

2. Plaintiff, Coastal Distribution, LLC (Coastal) is a Limited Liability Company organized under the laws of the State of New York having its principal place of business at 1633 New Highway, Farmingdale, N.Y. 11735

3. Plaintiff, New York & Atlantic Railway Company (NY&A) is a common carrier by railroad duly organized and subsisting under the laws of the State of New York, duly authorized to operate as a rail common carrier by the United States Surface Transportation Board (STB). In November of 1996 NY&A was granted exclusive freight operating authority on the lines of the Long Island Railroad (LIRR), a subsidiary of the New York State Metropolitan Transportation Authority. Pursuant to the transfer of freight operating authority from the LIRR to NY&A, certain property bordering on New Highway in Farmingdale, within the Town of Babylon owned by defendant Pinelawn Cemetery Corp. and leased to the LIRR was included in the freight operations granted to NY&A. LIRR, as now known, is the successor to a railroad which commenced construction of its rail line from Brooklyn to Greenport in 1836. It completed that line in 1844 but reached Farmingdale and commenced service to that point in 1841. Since that year it has served that area as a common carrier by railroad. The railroad was acquired by the State of New York in the 1950's with full responsibility for general rail transportation services and is operated by the Long Island Railroad Corp., a corporation wholly owned by the New York State Metropolitan Transportation Authority. While the NY&A has been authorized to fulfill the common carrier obligations of the LIRR as to freight, the LIRR remains a common carrier by rail without limitation.

4. The Town of Babylon is, on information and belief, a municipal corporation duly organized, subsisting and acting under or under color of the laws of the State of New York.

5. The Town of Babylon Board of Zoning Appeals is an entity created pursuant to § 267 of the New York Town Law with a mandate to provide initial review of decisions of town officials in zoning matters, in this case the actions of the Department of Planning and Development.

6. Peter M. Casserly is the Commissioner of Planning and Development for the Town of Babylon and is responsible for the actions all municipal employees and agents within that Department. He is named here in his official capacity only as his department improperly issued the Stop Work Order here in issue.

7. Pinelawn Cemetery Corp. (Pinelawn), the intervening defendant is a not for profit corporation duly organized under the laws of the State of New York which owns certain parcels of land, leased by it to the LIRR in 1904 and 1906 for ninety nine year terms, each with the right to renew for an additional ninety nine year term. LIRR used these two parcels of land as a team track where freight could be transferred between rail cars and highway vehicles from approximately 1904 until NYA took over freight operations in 1997.NY&A continued that use until management was transferred to contract operators, including most recently Coastal,

8. The Long Island Railroad is not a party here; it is a rail carrier and a corporation duly organized under the laws of the State of New York that has a leasehold interest in the area encompassing the Farmingdale facility.

COUNT I

AS AND FOR A CAUSE OF ACTION

AGAINST THE TOWN OF BABYLON TO PREEMPT ENFORCEMENT OF THE WORK ORDER

9. In August of 2004, the NY&A entered into a Transload Facility Operations Agreement wherein NY&A retained Coastal to develop and operate a certain team track facility in Farmingdale, N.Y. within the town of Babylon, as a rail-highway transload facility for bulk materials.

10. Coastal and NY&A had a prior association by lease for the same property entered into in 2002 which lease was for the purpose of developing the facility as a bulk material transload facility between highway vehicles and NY&A rail operations.

11. Pursuant to the earlier agreement, Coastal obtained the approval of NY&A and NYA and Coastal obtained the approval of the LIRR for certain improvements to be made on the property to handle the transloading of freight between freight rail cars and highway vehicles.

12. Prior to any construction, Coastal approached the landowner, Pinelawn Cemetery as well as the defendant Town of Babylon and sought a review of Coastal's plans for compliance with municipal building and fire codes as well as to determine if any environmental or other concerns were presented by the project in the view of either party.

13. On several occasions between early 2002 and August of 2003 defendant Peter M. Casserly, his predecessor and other officials of the Planning and Development Department of the Town of Babylon declined to review the plaintiffs' project stating that the town had no jurisdiction over a railroad property. When the plaintiffs' architect

attempted to file the plans with the Town's Planning and Development Department the plans were rejected with a letter dated August 8, 2003, signed by said Peter M. Casserly as Commissioner of the Department asserting that the Town had no jurisdiction over a railroad facility. The New York State Department of Environmental Protection, after site inspections and a full review of the plaintiffs' operation, determined that the State had no jurisdiction over the facility as it was a railroad facility engaged in rail transportation services.

14. On October 23, 2003 at a meeting at which Pinelawn reviewed plaintiffs' plans, Pinelawn presented Coastal with a document signed by Pinelawn's president renewing Pinelawn's lease of a portion of the Farmingdale Yard to LIRR for a second 99 year term. In late October of 2003, after presenting its plans to the defendants, Coastal commenced construction of its facilities based upon the approval of the plans by NY&A and LIRR and in reliance on the actions of the Town in disclaiming jurisdiction over the railroad yard and the actions of Pinelawn in renewing the underlying lease and approving the construction plans. On January 15, 2004, the facilities, including a truck scale, a rail car scale, a large structure to protect transloading operations from weather and a perimeter fence were nearing completion. On that date Pinelawn, for the first time, notified the plaintiffs that it deemed its lease of 1904 of one of the two parcels on which the Farmingdale facility was operating, to have expired, that it would not renew the lease and demanding that the plaintiffs remove themselves from the premises.

15. On March 29, 2004, due exclusively to the political influence of Pinelawn, the Town of Babylon issued a Stop Work Order asserting that plaintiff was "working without a permit", and directing the plaintiffs to cease working at the premises.

16. On March 29, 2004 the building inspector who had issued the Stop Work Order stated that it was issued solely at the insistence of Pinelawn.

17. In April of 2004 Pinelawn brought an action in the Supreme Court of the State of New York, County of Suffolk, claiming that the lease it had entered into in 1904 with the LIRR had not been properly renewed.

18. Coastal with the approval of the LIRR and the NY&A filed an appeal with the Town of Babylon Zoning Board of Appeals of the building inspector's Stop Work Order.

19. In August of 2004 the Plaintiffs cancelled the lease between themselves and entered into the current Transload Facility Operating Agreement. In that agreement, NY&A explicitly retained control over the facility and appointed Coastal as its agent for the purposes of developing the facility, selling NY&A services to be provided via the Farmingdale facility and conducting the day to day operation of that facility. A copy of that agreement was submitted to the Board of Zoning Appeals.

20. On September 9, 2004, just prior to the first hearing held by the defendant, Zoning Board of Appeals of the Town of Babylon, the members of which are appointed by the Town Supervisor and the other four members of the Town Board, the Town Supervisor requested that the Board deny the plaintiff's appeal and enforce the Stop Work Order.

21. On information and belief the Town Supervisor was acting in concert with Pinelawn and others and instructed his appointees to determine the matter in favor of Pinelawn's position without regard to the law.

22. At that hearing and a subsequent hearing, the Town was informed by NY&A and Coastal of the nature of the facility and of the fact that as a railroad facility Pinelawn's claims did not affect the Farmingdale facility's status as an active railroad facility, which is outside the Town's regulatory jurisdiction. Further, before the decision of the Zoning Board of Appeals was issued, a determination by the New York State Department of Environmental Conservation, the agency authorized under New York State Law to license waste transfer facilities, was delivered to the Board confirming that the State of New York's regulatory authority over the Farmingdale facility was pre empted by Federal Law.

23. On April 22, 2005 the Zoning Board of Appeals, consistent with the directive of the Town's Supervisor, affirmed the Stop Work Order. At that time the defendants, and the Town were fully aware that the plaintiffs' facilities and operations were exempt from State regulation and that no basis for their attempt to exercise local jurisdiction existed.

24. Pursuant to the Constitution and laws of the United States, including 49 U.S.C. §10501, the Town of Babylon has no authority to require the plaintiffs to seek Town approval of the construction of facilities to be used for railroad operations.

25. Plaintiffs have made no prior application for the relief herein requested and have no adequate remedy at law. Plaintiffs are entitled to a judgment permanently enjoining the Town of Babylon from taking any action to interfere with the location or construction of the Farmingdale facility or from taking any action to interfere with access to the rail transportation services of NY&A and Coastal, including but not limited to attempting to enforce the Stop Work Order giving immediate rise to this action.

COUNT II -

AS AND FOR A SECOND AND PENDANT CAUSE OF ACTION AGAINST THE TOWN OF BABYLON TO SET ASIDE THE ZONING BOARD OF APPEALS DECISION

26. Plaintiffs reallege and restate each and every allegation contained in paragraphs 1-25 above as if set forth here in full.

27. The defendant Zoning Board of Appeals of the Town of Babylon is bound to determine all matters before it based upon the applicable law, the record before it and also to take into consideration the effect of the actions of town officials on which an applicant relied in good faith. The Zoning Board of Appeals heard all the evidence in this matter submitted at two hearings, it opened the record to receive and consider information offered by defendant Pinelawn. When a determination by the New York State Department of Environmental Conservation, the agency in the State of New York with expertise in this field was submitted to the Board, which State Department, after a full investigation, found that the plaintiffs and their operations conducted at the Farmingdale facility were a railroad operation, exempt from State and therefore local regulation, the Board refused to take this evidence under consideration. The Board was directed to find the plaintiffs by the Town Supervisor and did find against the plaintiffs, notwithstanding the evidence, legal precedents and the expert opinion of the New York State Department of Environmental Conservation.

28. The Zoning Board of Appeals, without factual or legal justification, due solely to the political influence of Pinelawn and those persons unknown who were acting in concert with Pinelawn and for purposes unrelated to the building code and zoning

interests of the Town of Babylon, upheld the issuance of the Stop Work Order by the Town of Babylon.

29. The April 22, 2005 determination of the Zoning Board of Appeals of the Town of Babylon was arbitrary or capricious, without a rational basis in the administrative record and was issued due to the political influence of Pinelawn and for no other reason.

30. The April 22, 2005 determination of the Zoning Board of Appeals should be annulled, vacated and set aside pursuant to §267 of the Town Law of the State of New York.

Wherefore, plaintiffs demand judgment in their favor and against the defendants,

1. permanently enjoining the Town of Babylon, the Town of Babylon Board of Zoning Appeals and Peter Casserly as Commissioner of Planning and Development of the Town of Babylon and all representatives, agents and/or employees of the Town of Babylon or any of its agencies and/or departments from attempting to enforce any Stop Work Order or from taking any action which could interfere with the location and construction of the plaintiffs' transload facility bordering on New Highway, Farmingdale, Town of Babylon, County of Suffolk, State of New York on the first cause of action;

2. annulling, vacating and setting aside the April 22, 2005 determination of the Town of Babylon Board of Zoning Appeals denying the Appeal filed by the plaintiffs on the grounds that said determination is arbitrary and capricious, without a rational basis and contrary to law and therefore a nullity on the second cause of action.

Together with such further relief as shall seem appropriate to this court or which is allowed by law.

Dated, New York, N.Y.
May 20, 2005

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY

05-CV-2032 (JS)(ETB)

Plaintiffs,

ANSWER TO AMENDED COMPLAINT

v.

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON and PINELAWN CEMETERY

Defendants,

Defendant Pinelawn Cemetery, (referred to herein as "Pinelawn"), by its attorneys, Law Offices of Mark A. Cuthbertson, as and for its answer to the Amended Complaint, sets forth the following:

1. Denies the allegations contained in paragraph 1 of the Amended Complaint and refers all questions of law to the Court at the trial of this action.

2. Denies knowledge or information sufficient to form a belief as to the allegations in paragraph 2 of the Amended Complaint.

3. Denies knowledge or information sufficient to form a belief as to the allegations in paragraph 3 of the Amended Complaint.

4. Denies knowledge or information sufficient to form a belief as to the allegations in paragraph 4 of the Amended Complaint.

5. Denies knowledge or information sufficient to form a belief as to the allegations in paragraph 5 of the Amended Complaint.

6. Denies knowledge or information sufficient to form a belief as to the allegations in paragraph 6 of the Amended Complaint.

7. Admits that Pinelawn Cemetery is a New York not-for-profit corporation originally organized in 1902 by Order of the Supreme Court of the State of New York and that owns certain parcels of land that were leased to the Long Island Railroad ("LIRR") in 1904 and 1905 for ninety-nine years, each with a right to renew for another term which, in the case of the lease executed in 1904, was not renewed for another term, and, except as so admitted, denies the remaining allegations in paragraph 7 of the Amended Complaint.

8. Admits that the LIRR is not a party to this action and admit that they are a necessary party and otherwise denies the remaining allegations in paragraph 8 of the Amended Complaint.

9. Denies that the facility is a term track facility and/or a rail-highway transload facility and other denies knowledge or information sufficient to form a belief as to the remaining allegations in paragraph 9 of the Amended Complaint.

10. Denies that the lease was for the purpose of developing the facility as a general service common carrier transload facility and otherwise denies knowledge or information sufficient to form a belief as to the remaining allegations in paragraph 10 of the Amended Complaint.

11. Denies that the facility is handling the transloading of freight and otherwise denies knowledge or information sufficient to form a belief as to the remaining allegations in paragraph 11 of the Amended Complaint.

12. Denies the allegations contained in paragraph 12 of the Amended Complaint and refers all questions of law to the Court at the trial of this action.

13. Denies knowledge or information sufficient to form a belief as to the allegations in paragraph 13 of the Amended Complaint.

14. Denies the allegations contained in paragraph 14 of the Amended Complaint and refers all questions of law to the Court at the trial of this action.

15. Denies the allegations contained in paragraph 15 of the Amended Complaint and refers all questions of law to the Court at the trial of this action.

16. Denies the allegations contained in paragraph 16 of the Amended Complaint and refers all questions of law to the Court at the trial of this action.

17. Admits that on April 6, 2004, Pinelawn commenced an action in the Supreme Court of the State of New York, and the claims made by Pinelawn in that action, which include a claim that the lease Pinelawn entered into with the LIRR was not properly renewed, and respectfully refers the Court to the Amended Complaint in that action dated May 19, 2004, in which Pinelawn's claims are fully set forth.

18. Denies knowledge or information sufficient to form a belief as to the allegations in paragraph 18 of the Amended Complaint.

19. Denies the allegations in paragraph 19 of the Complaint.

20 Admits that a letter from Town Supervisor Bellone was read into the record at the September 9, 2004 meeting and, except as so admitted, denies knowledge or information sufficient to form a belief as to allegations contained in paragraph 20 of the Amended Complaint.

21. Denies the allegations contained in paragraph 21 of the Amended Complaint and refers all questions of law to the Court at the trial of this action.

22. Admits that the New York State Department of Environmental Conservation ("DEC") has sent a letter to Coastal, which letter was sent at Coastal's request. Upon information and belief, the letter was based on ex parte information provided only by Coastal and DEC's beliefs as to the operations maintained by Coastal at the Farmingdale facility are based only on these ex parte communications and otherwise denies the allegations in paragraph 22 of the Amended Complaint.

23. Denies the allegations contained in paragraph 23 of the Amended Complaint.

24. Denies the allegations contained in paragraph 24 of the Amended Complaint.

25. Denies the allegations contained in paragraph 25 of the Amended Complaint.

26. Pinelawn repeats and realleges their answer to paragraphs "1" through "26" of the Amended Complaint as if fully set forth herein.

27. Admits that the Zoning Board of Appeals of The Town of Babylon is bound to determine all matters before it based upon applicable law and the record before it and that the Zoning Board heard evidence at two hearings in this matter, and, except as so admitted, denies the allegations set forth in paragraph 27 of the Amended Complaint.

28. Denies the allegations in paragraph 28 of the Amended Complaint.

29. Denies the allegations in paragraph 29 of the Amended Complaint.

30. Denies the allegations in paragraph 30 of the Amended Complaint and respectfully refers all questions of law to the Court at the trial of this action

AFFIRMATIVE DEFENSES

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

Plaintiffs have failed to state a claim upon which relief may be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the applicable statute of limitations.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

This Court lacks subject matter jurisdiction over all or some of the claims in this action.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the doctrines of waiver, estoppel and laches.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

Plaintiffs lack standing to sue

AS AND FOR AN SIXTH AFFIRMATIVE DEFENSE

Plaintiffs failed to comply with the jurisdictional prerequisites required to maintain this action

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs may not maintain this action due to their failure to exhaust their administrative remedies.

AS AND FOR A EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs' action is barred on the grounds that they are parties to an action that was instituted prior to the instant action and seeks the same relief sought herein.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

The Complaint does not state a violation of the due process under the Fifth and Fourteenth Amendments.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to join parties that are necessary to this action.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE

The Court lacks subject matter over all or some of the claims in this action based on the doctrine of abstention set forth in *Younger v. Harris*, 401 U.S. 37, (1971) and *Burford v. Sun Oil Co.*, 319 U S. 315 (1943)

AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the doctrine of *res judicata*.

AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are based by the doctrine of collateral estoppel.

WHEREFORE, Defendant Pinelawn Cemetery requests that Judgment be rendered against Plaintiffs dismissing this action in its entirety and against them and awarding Defendant Pinelawn Cemetery costs, disbursements and such other and future relief as the court deems appropriate.

Dated: Huntington, New York
June 13, 2005

LAW OFFICES OF MARK A. CUTHBERTSON

/s/ Mark A. Cuthbertson

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UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK -X COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY, Plaintiffs, v. THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, and PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON, and PINELAWN CEMETERY Defendants. -X	**ANSWER TO AMENDED COMPLAINT SUBMITTED ON BEHALF OF DEFENDANTS TOWN OF BABYLON, TOWN OF BABYLON BOARD OF ZONING APPEALS, AND PETER CASSERLY** **05-CV-2032 (JS) (ETB)**

Defendants TOWN OF BABYLON, TOWN OF BABYLON BOARD OF ZONING APPEALS, and PETER CASSERLY, hereby appear by and through their attorneys Bond, Schoeneck & King, PLLC, and answer the amended complaint as follows:

1. DENY the truth of the allegations set forth in paragraph 1 of the Amended Complaint and respectfully refer all questions of law to the Court.

2. DENY knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 2 of the Amended Complaint, except ADMIT that Coastal presently operates at 1633 New Highway, Farmingdale, New York.

3. DENY knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 3 of the Amended Complaint, except ADMIT upon information and belief that New York & Atlantic Railway is a common carrier authorized to operate by the Surface Transportation Board.

4. ADMIT the truth of the allegations contained in paragraph 4 of the Amended Complaint.

5. ADMIT the truth of the allegations contained in paragraph 5 of the Amended Complaint.

6. DENY the truth of the allegations contained in paragraph 6 of the Amended Complaint, except ADMIT that Mr. Casserly is the Commissioner of Planning and Development.

7. DENY knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 7 of the Complaint.

8. ADMIT that the LIRR is not a party to this action and is a necessary party, and DENY knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in paragraph 8 of the Amended Complaint..

9. DENY the truth of the allegations contained in paragraph 9 of the Amended Complaint, except ADMIT that NY&A and Coastal claim to have executed a Transload Facility Operations Agreement in August 2004.

10. DENY the truth of the allegations contained in paragraph 10 of the Amended Complaint, except ADMIT that NY&A and Coastal appear to have had an association by lease which was entered into in 2002.

11. DENY knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 11 of the Amended Complaint.

12. DENY knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 12 of the Amended Complaint, except ADMIT that Coastal contacted the Town prior to construction.

13. DENY knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 13 of the Amended Complaint, except ADMIT that Mr. Casserly indicated that the Town had no jurisdiction over the project based upon a mistaken

understanding of the relevant facts and law. Defendants further ADMIT that New York State Department of Environmental Protection has issued a letter disclaiming jurisdiction over the site.

14. DENY knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 14 of the Amended Complaint, except ADMIT that Coastal commenced construction at the site.

15. DENY the allegations contained in paragraph 15 of the Amended Complaint, except ADMIT that a Stop Work Order was issued on March 29, 2004.

16. DENY the allegations contained in paragraph 16 of the Amended Complaint.

17. ADMIT, upon information and belief, the allegations contained in paragraph 17 of the Amended Complaint.

18. DENY knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 18 of the Amended Complaint, except ADMIT that an appeal was filed with the ZBA.

19. DENY the truth of the allegations contained in paragraph 19 of the Amended Complaint, except ADMIT that NY&A and Coastal purportedly entered into a Transload Facility Operations Agreement in August 2004.

20. ADMIT the truth of the allegations contained in paragraph 20 of the Amended Complaint.

21. DENY the truth of the allegations contained in paragraph 21 of the Amended Complaint.

22. DENY the truth of the allegations contained in paragraph 22 of the Amended Complaint, except ADMIT that at the ZBA hearings Plaintiffs claimed that their facility was exempt from local regulation and that following the close of the hearing they provided a copy of a letter from the DEC regarding jurisdiction to the Board.

23. DENY the truth of the allegations contained in paragraph 23 of the Amended Complaint, except ADMIT that the ZBA denied the appeal and upheld the Stop Work Order.

24. DENY the truth of the allegations contained in paragraph 24 of the Amended Complaint.

25. DENY the truth of the allegations contained in paragraph 25 of the Amended Complaint.

26. REPEAT and REALLEGE their answers to the allegations contained in paragraphs 1 through 25 of the Amended Complaint as if fully set forth herein.

27. DENY the truth of the allegations contained in paragraph 27 of the Amended Complaint, except ADMIT that the ZBA is bound to determine all matters before it based upon the applicable law and that it held two hearings on this matter prior to issuing a decision.

28. DENY the truth of the allegations contained in paragraph 28 of the Amended Complaint.

29. DENY the truth of the allegations contained in paragraph 29 of the Amended Complaint.

30. DENY the truth of the allegations contained in paragraph 30 of the Amended Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

31 Plaintiffs have failed to state a claim under the Interstate Commerce Commission Termination Act.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

32. Plaintiffs have failed to state a pendent claim to set aside the decision of the Zoning Board of Appeals.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

33. Plaintiffs have failed to exhaust their administrative remedies.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

34. Plaintiffs' claims are barred by the doctrine of *res judicata*.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

35. Plaintiffs' claims are barred by the doctrine of collateral estoppel

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

36. Plaintiffs have failed to state a claim against Mr. Casserly in his official capacity.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

37. The Court should abstain from exercising jurisdiction over this matter in accordance with *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971).

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE

38. Plaintiffs' claims are barred, in whole or in part, by the applicable statutes of limitations.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE

39. The Court lacks subject matter jurisdiction over some or all of Plaintiffs' claims.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE

40. Plaintiffs have failed to comply with the jurisdictional prerequisites required to maintain this action.

WHEREFORE, Defendants Town of Babylon, Town of Babylon Board of Zoning Appeals, and Peter Casserly, in his official capacity, request that judgment be rendered against Plaintiffs dismissing this action in its entirety as against them and awarding them costs, disbursements and such other and further relief as the Court deems to be appropriate.

Respectfully submitted,
BOND, SCHOENECK & KING, PLLC

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
COASTAL DISTRIBUTION, LLC, and THE NEW YORK AND ATLANTIC RAILWAY COMPANY,

Plaintiffs,

-against-

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, PETER CASSERLY, in his capacity as Commissioner of Planning and Development of the Town of Babylon, and PINELAWN CEMETERY,

Defendants
----------X

REPORT AND RECOMMENDATION

CV 05-2032 (JS) (ETB)

TO THE HONORABLE JOANNA SEYBERT, UNITED STATES DISTRICT JUDGE:

Plaintiffs bring this action pursuant to the Interstate Commerce Commission Termination Act ("ICCTA"), 28 U.S.C. § 1331 and § 1337, ordering the defendants to show cause why the Town of Babylon should not be enjoined from enforcing a stop work order served on plaintiff Coastal Distribution, LLC on March 29, 2004, stating that Coastal Distribution, LLC was working without a permit. The Town of Babylon also contends that Coastal Distribution is illegally operating a commercial facility in a residential zone.[1]

On May 2, 2005, the action was referred to the undersigned to conduct a preliminary injunction hearing and issue a report and recommendation. An evidentiary hearing was held on May 19, 2005.

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[1]This issue was not raised by the Town in any pre- or post-evidentiary papers submitted on this application. While it was mentioned by counsel for the Town of Babylon at the evidentiary hearing (Tr. at 11), the Town has submitted no evidence on this issue.

I. BACKGROUND

Plaintiffs in this action, the New York and Atlantic Railway ("NYA"), and its contractor, Coastal Distribution, LLC ("Coastal") operate a transloading facility in Farmingdale, New York, at which cargo is transferred from rail to truck or vice versa. The transloading facility is located in the Town of Babylon ("Town"), on land leased by defendant Pinelawn Cemetery ("Pinelawn") to the New York State Metropolitan Transportation Authority ("MTA").

This action arises from the Town's issuance of a stop work order to plaintiff Coastal, declaring that Coastal was "working without a permit" by constructing a storage shed at the Farmingdale facility. Coastal had approached Town officials prior to commencement of any work on the storage shed, and was advised in writing by Town officials that the Town had no jurisdiction over the project because the facility was under the exclusive control of the Long Island Railroad ("LIRR"). Plaintiffs brought this action seeking to enjoin the Town from enforcing the stop work order as against Coastal on the ground that the Interstate Commerce Commission Termination Act ("ICCTA"), 28 U.S.C. § 1331 and § 1337, gives exclusive jurisdiction over rail operations to the Surface Transportation Board ("STB"), a Congressionally-created Board which plaintiffs argue preempts state and municipal authority to regulate railroad operations.

II. FINDINGS OF FACT

A. Relationship between New York and Atlantic Railway and the Long Island Railroad

Plaintiff New York and Atlantic Railway ("NYA") is a common carrier by railroad duly authorized to operate as a rail common carrier by the United States Surface Transportation Board ("STB"). (Tr. at 10, 27.) In November 1996, NYA (then known as "Southern Empire State Railroad Company") entered into a transfer agreement with the Long Island Railroad ("LIRR"), a

subsidiary of the New York State Metropolitan Transportation Authority ("MTA"). (See NYA Ex. 2.) Under the agreement, NYA was granted the exclusive right to handle rail freight on the lines of the LIRR. (Tr. at 25; Affidavit of Fred L. Krebs ("Krebs Aff"), President of NYA, ¶ 4.) Fred Krebs, the president of NYA, testified that the agreement stemmed in part from the governor's initiative in the mid-nineties to privatize the freight industry, thereby moving freight traffic off of the highways and onto the rails. (Tr. at 28.) The agreement between NYA and the LIRR is a twenty year franchise with an automatic ten-year renewal, provided that NYA meets certain volume requirements and comports with safety standards. (Tr. at 25.) Pursuant to the agreement, the subject rail facility located in Farmingdale, New York (the "Farmingdale facility") in the Town of Babylon (the "Town") was made available for NYA's use. (Krebs Aff. ¶ 3.) The Farmingdale facility is located on two parcels of land owned by Pinelawn Cemetery ("Pinelawn"), and leased to the MTA for use by the LIRR. (Coastal Ex. 3C)

B. Relationship between Pinelawn Cemetery and the Long Island Railroad

The two parcels of land on which the Farmingdale facility sits were leased by Pinelawn to the MTA for 99 year terms. (Coastal Ex. 3C) In a letter dated October 17, 2003 to an attorney at the law firm of Jenkins & Gilchrist Parker Chapin LLP, Roco Krsulic ("Krsulic"), Director of Real Estate at the MTA, stated that on behalf of the LIRR, the MTA is "hereby exercising it's [sic] option to renew the above-referenced lease dated November 1, 1905 for an additional 99 years, thereby extending it through October 31, 2103." (Id.) In the same letter, Krsulic stated that the MTA is "also hereby agreeing to reinstate and extend the lease dated August 30, 1904 for 99 more years, through July 31, 2102." (Id.) The letter includes the signature of the President of Pinelawn, next to the word "Concurrence." (Id.) Beneath his signature is a handwritten note stating "This concurrence refers to Aug 30 1904 lease." (Id.)

A dispute subsequently has arisen between Pinelawn and NYA as to the lease renewal of the parcel of land covered under the 1905 lease. (Tr. at 13-14.) This dispute is presently the subject of ongoing litigation in the Suffolk County Supreme Court, which reportedly has refused to issue Pinelawn a preliminary injunction against Coastal. (See Coastal Distribution LLC's Post Hearing Memorandum ("Coastal Post-Hearing Mem.") at 23 n.3.) The validity of the renewal of the lease(s) is not at issue in this action however. It is undisputed that the shed was constructed by Coastal in reliance on the validity of the lease renewal to the MTA and LIRR.

C Relationship between New York and Atlantic Railway and Coastal Distribution

In 2002, NYA entered into an agreement (the "Lease Agreement" or "Lease") with co-plaintiff Coastal by which NYA leased the Farmingdale facility to Coastal for $2,000 per month (Tr. at 48; NYA Ex. 7.) The Lease Agreement was formed for the purposes of developing the Farmingdale facility into a successful rail-truck transloading facility where freight would be transferred from truck to rail and vice versa. (Tr. at 48.) The Lease required that Coastal meet certain volume requirements over the course of the leasehold period. (Tr. at 48; Krebs Aff. at ¶ 3; NYA Ex. 7.) Specifically, the Lease specified that NYA would have the right to terminate the contract if Coastal failed to handle 1200 carloads of freight in the first contract year, 1800 carloads in the second contract year, 2400 carloads in the third contract year, and 3200 carloads for each year thereafter. (NYA Ex. 7 ¶ C.3.)

In the fall of 2003, NYA and Coastal learned that the LIRR leased the land where the Farmingdale facility was situated from Pinelawn. (Tr. at 152.) In August of 2004, NYA and Coastal entered into another agreement, the Transload Facility Operations Agreement (the "Operations Agreement" or "Agreement"), which encompassed and superceded the 2002 Lease Agreement. The Operations Agreement did not significantly alter the nature of the operations at the

Farmingdale facility. (Tr. at 98; see also NYA Ex. 8.) The Operations Agreement provides that Coastal is responsible for the loading of freight at the Farmingdale facility, and NYA is responsible for the transportation of the freight. (Tr. at 33, 61; NYA Ex. 8.) Under the Agreement, Coastal is responsible for the marketing and customer service at the Farmingdale facility, setting the loading fees, and supplying the equipment. (Tr. at 67, 99; NYA Ex. 8.) Coastal pays NYA a usage fee of twenty dollars per car, and Coastal is required to meet the same minimum volume requirements set forth in the Lease Agreement. (Tr. at 122; NYA Ex. 8.) NYA is responsible for transporting the freight on rail cars after the cars have been loaded. (Tr. at 61; NYA Ex 8) NYA is also responsible for setting the rules governing how the loading and off loading are performed, and for assuring that the loaded cars comport with LIRR and federal safety standards. (Tr. at 62.) To this end, NYA employees check the condition of the cars and the loads each night, and periodically inspect the track, the yard, and the switch. (Id.)

D. Plaintiffs' Testimony Concerning the Operations at the Farmingdale Facility

The plaintiffs called two witnesses to testify to the daily operations at the Farmingdale facility. Fred Krebs, president of NYA, and Joseph Rutigliano, a Coastal principal, testified that the Farmingdale facility conducts two types of operations. Krebs and Rutigliano testified that the in-coming aspect of Coastal's operations involves handling "homogeneous loads" of freight, such as lumber, sheetrock, and steel, which individual businesses transport via rail using the services of Coastal and NYA. (Id. at 56, 165-66.) This use of the facility, whereby members of the public can utilize the railroad for transportation of freight, dates back to the 1900's, when the railroad provided "team tracks" for members of the public to unload cargo from teams of horses onto the rails for transport. (Id. at 31.)

The other aspect of Coastal's business– out-going freight– involves handling construction

and demolition debris ("C&D") C&D is comprised of pieces of concrete that have been removed from construction sites, and may also include construction debris such as insulation, wood, metal, or glass. (Id. at 52, 56, 69.) The C&D arrives by truck from transfer stations where the material has been processed and sorted, and Coastal and NYA facilitate the outbound shipment of the material to an Ohio landfill. (Id. at 56, 165.) When the C&D arrives at the site, it has already been processed through a transfer station. (Id. at 166.) After the C&D is delivered, Coastal workers conduct a visual inspection of the materials and remove any remaining "contaminate" items that are prohibited from going to the landfill, such as metal, tires, and mattresses. (Id. at 103-104, 114.) Coastal employees then load the C&D onto the rail cars. (Id. at 115.) After the cars are loaded, NYA employees check to ensure the cars are loaded correctly, and then NYA transports the freight cars to the Ohio landfill. (Id. at 116.) Coastal collects the extracted metal for sale to a local scrap dealer, and returns any contaminates, such as tires or mattresses, to the customers who brought them. (Id. at 105-106.)

Rutigliano testified that prior to Coastal's involvement with the Farmingdale facility, "[t]he property was derelict, littered with abandoned vehicles [and] illegal dumps." (Tr. at 155.) Fred Krebs, president of NYA, testified that NYA and Coastal wanted to improve the Farmingdale facility to make it "safe and presentable and good for the entire neighborhood." (Id. at 52-53.) Coastal cleaned up the facility and in late 2003, Coastal began erecting a storage structure (the "shed") on the property. (Id. at 52-53, 155-56.) The shed that Coastal built is an open-sided structure which rises over a section of the tracks and provides a shelter beneath which cargo can be loaded and unloaded. (Id. at 56.) The shed also contains a misting system used to control dust created by the C&D. (Id.) Rutigliano testified that the purpose of the building is to house freight that needs to be protected from the weather, and to help keep dust levels to a minimum. (Id. at

156.)

Pursuant to the Transfer Agreement between NYA and the LIRR, Coastal obtained the approval of the LIRR before constructing the shed. (Tr. at 54; Declaration of Joseph Rutigliano, ("Rutigliano Decl.") ¶ 5.) Coastal also consulted with the Town of Babylon Department of Planning and Development on several occasions in 2003 to discuss Coastal's plans for the Farmingdale facility, including the construction of the shed. (Tr. at 148-52.) Rutigliano testified that Town officials repeatedly advised him that the Town had no jurisdiction over LIRR property, and the Town repeatedly refused to review the proposal for the shed. (Id.) In response to the attempts by Coastal's architect to formally file the plans with the Town, Peter Casserly, Commissioner of the Town of Babylon Planning & Development, signed a letter dated August 8, 2003 in which the Town of Babylon stated that it had no jurisdiction over the property. (Id. See also Rutigliano Decl. Ex. D, Correspondence from Peter M. Casserly to Oliver Wilhelm, dated August 8, 2003 ("As per our conversation, I am confirming that the Town of Babylon has no jurisdiction over the Long Island Railroad Property.").) Additionally, prior to beginning construction on the shed, Coastal sought and received confirmation from Pinelawn that Pinelawn intended to reinstate LIRR's lease on the two parcels for a new 99 year term. (Tr. at 152; Rutigliano Decl. ¶ 8.) Rutigliano testified that in October 2004, he was provided a letter by Steven Locke, an officer of Pinelawn, signed by the president of Pinelawn, specifically reinstating LIRR's lease of the parcels. (Tr. at 154; See also Rutigliano Decl. Ex. E, Correspondence from Roco Krsulic, MTA Director of Real Estate, to Jonathan S. Gaynin, dated October 17, 2003, stating that LIRR is exercising its option to renew the leases between the LIRR and Pinelawn. The letter is counter-signed by the president of Pinelawn Cemetery.) The court credits Rutligliano's testimony

In late October 2003, Coastal began construction on the shed. (Rutigliano Decl. ¶ 7.) The shed was virtually completed in January 2004. (Id. ¶ 8.) On January 15, 2004 Coastal received a letter from attorneys for Pinelawn stating that Pinelawn deemed the lease for the northern parcel of the Farmingdale site to have terminated, and directing Coastal to remove their facilities, including the shed, from that parcel. (Id.) On March 29, 2004, the Town of Babylon issued a stop work order. (Id. ¶ 9) The stop work order stated that Coastal was working without a permit, but did not identify any code or ordinance which Coastal was deemed to have violated. (Id. See also Order to Show Cause Ex. A.) On March 29, 2004, Rutigliano met with Acting Commissioner Timothy Bessemer ("Bessemer"), who had issued the stop work order. (Rutigliano Decl. ¶ 7.) According to Rutigliano, Bessemer stated that he had been instructed to issue the stop work order based on Pinelawn's claim that the LIRR's lease had expired and that Pinelawn owned the land. (Id. ¶ 9.) Rutigliano testified that Bessemer additionally stated that the order was issued just to "get Coastal's attention," and that it applied only to the construction of the shed, and not to Coastal's operation or occupancy of the site. (Tr. at 190-91; Rutigliano Decl. ¶ 7.) This testimony, which was not disputed by the Town at the evidentiary hearing conducted herein, is credited by the Court.

On March 31, 2004, the Town wrote a letter to Coastal indicating that the stop work order had been issued because Coastal had failed to obtain a building permit before constructing the shed. (Id.) The stop work order does not include a reference to any code or ordinance Coastal was deemed to have violated, and to date, Coastal has never been apprised of the code or ordinance under which the stop work order was issued. The Town attorney also asserted at the hearing that the Farmingdale facility is in a residential zone, but the railroad facility has been in continuous operation, notwithstanding the zoning, since 1904. The Town has submitted no

evidence or written argument addressing this issue.

With the approval of the LIRR and NYA, Coastal appealed the stop work order to the Zoning Board of Appeals ("ZBA") of the Town of Babylon. (Id. ¶ 12.) The ZBA is comprised of members appointed by the town supervisor, Steve Bellone ("Bellone"). (Id.) In an inter-office memo dated September 9, 2004, the date of the first public hearing, Bellone requested that the ZBA deny Coastal's appeal of the stop work order. (Id. See also Rutigliano Decl. Ex. F.) After two public hearings on the matter, on April 22, 2005, the BZA denied Coastal's appeal. (Rutigliano Decl. ¶ 12. See also BZA Findings.) Thereafter, on April 26, 2005, Coastal and NYA filed the complaint in the instant action. The Town consented not to enforce the stop work order during the pendency of this motion for a preliminary injunction. (Tr. at 15.)

E Defendants' Testimony Concerning the Operations at the Farmingdale Facility

Defendants claim that Coastal is operating a transfer facility, as opposed to a transload facility, at which Coastal sorts, processes, and transports municipal solid waste ("MSW") deposited at the site. (Tr. at 201, 205, 211; Post-Hearing Mem. Of Law in Opp'n to Mot. for Prelim. Injunction Submitted by Town of Babylon ("Town Post-Hearing Mem."), at 20.) The defendants' proof is woefully inadequate.

The defendants called two witnesses to testify to Coastal's activity at the Farmingdale facility. The first defense witness, Michael J. Posillico ("Posillico"), is the owner and operator of a construction, environmental, and development business located across the street from Coastal in an adjacent industrial zoned area. (Tr. at 222.) One aspect of Posillico's business involves recycling contaminated soil. (Tr. at 233.) Posillico has a variety of New York State Department of Environmental Conservation ("DEC") permits for handling hazardous materials, and he testified that he has experience running a waste facility and transporting waste. (Tr. at 224.) Posillico

testified that obtaining a permit to operate a transfer facility is very difficult, and that the transfer permit is the "holy grail of permits to obtain in New York State." (Tr. at 228.) Posillico acknowledged that he does not hold such a permit. (Id.)

Posillico opined that based on his previous experience with transfer and transload facilities, Coastal is operating a transfer, as opposed to a transload, facility. (Id. at 223, 226.) He bases his opinion on his observations of Coastal employees, from his business across the street, dumping materials on the ground, separating them, and then loading the materials onto the rail cars. (Id. at 222-223.) Posillico testified that his concern is that Coastal is operating a transfer facility "with no regulation or permits for safety, concern of human health." (Id. at 223.)

I place little weight in Mr. Posillico's testimony. Posillico has never visited the Coastal site. (Id. at 230.) He was unable to specify types of material he observed being dumped and separated at the facility, nor was he aware of hazards present at Coastal. (Id. 232.) Further, Posillico testified that he has no knowledge of the kind of paperwork that accompanies the loads delivered to Coastal, nor does he know where the trucks come from that deliver materials to Coastal. (Id. at 229-30.) Even if his testimony was credited, it fails to establish that Coastal is operating a transfer, as opposed to a transload, facility at the Farmingdale site. As discussed further, infra Part III.B.1.b(i), the New York State Department of Environmental Conservation ("NYDEC"), which has jurisdiction over municipal solid waste and the operation of a transfer facility in the State of New York, has inspected the Farmingdale facility and issued a written certification that Coastal is engaged in transloading operations on behalf of NYA, and that the NYDEC is preempted from exercising jurisdiction over the facility. (See Rutigliano Decl. Ex. I.)

The defendants' second witness, John Ahearn ("Ahearn") is a private investigator who conducted undercover videotape surveillance of Coastal on May 13 and May 17, 2005. (Id. at

244-245.) Ahearn observed Coastal from various locations, including the rooftop of Posillico's building, for approximately eight hours over the course of the two days. (Id. at 260-261; 266-67.) Ahearn narrated three portions of the surveillance tape, totaling approximately five minutes, which the defendants considered to be the relevant portions. (Id. at 247, 249.) Ahearn testified that on May 13, 2005 at 10:36 a.m. he observed a load being dumped inside the shed at the Farmingdale facility, and workers examining and removing black plastic bags from the load. (Id. at 249-251; Pinelawn Ex. A.) On May 17, 2005, Ahearn testified that at 11:58 a m., he observed a small machine placing aluminum scrap into a container labeled "Mid-Island Salvage." (Tr. at 252-53; Pinelawn Ex B.) In the background, he observed a large machine picking debris from one large pile and loading it into the rail cars. (Tr. at 252-253.) Finally, Ahearn testified that on the same day, at 11:58 a.m. and 12:05p.m., he observed a machine and a worker throwing small amounts of aluminum into a pile. (Id. at 252-253, 263.) Ahearn testified that, apart from the incidents he narrated, the rest of the time conducting surveillance he observed routine operations of trucks dumping material on the ground in the shed and Coastal employees loading the material into the railroad cars (Id. at 264.)

The witnesses' testimony is consistent with Coastal's operation of a transloading facility. As discussed supra, Part II.D, the plaintiffs' witnesses testified that when trucks arrive at Coastal, they discharge their cargo onto the asphalt floor inside the shed, Coastal employees inspect the load and remove materials prohibited by the Ohio landfill, and then Coastal employees load the C&D into the rail car. (Id. at 104-06, 167-169.) The Court credits the testimony of the plaintiffs' witnesses. The undercover surveillance videotapes taken by defendants of the Farmingdale facility fail to establish that municipal solid waste is being processed there, or that the facility is a transfer facility.

Notably, neither of defendants' witnesses has ever set foot onto the Coastal site. Further, neither witness testified to observing any MSW being handled at the site. Posillico testified that in his opinion, Coastal is a transfer facility because the material that is delivered to Coastal is dumped on the ground and inspected before being loaded into the rail cars, however, Krebs testified that this type of inspection is necessary to ensure that only permissible material is transported to the landfill in Ohio. (Id. at 103-04.) Furthermore, the surveillance video taken by defendants' witness supports the testimony of plaintiffs' witnesses, in that it shows workers visually inspecting the piles of dumped material and periodically removing non-C&D material from the debris. The video certainly does not evidence the extensive sorting and processing that would need to take place on a continuous basis if Coastal was in fact operating a transfer, as opposed to a transload, facility.

Based on the testimony of all of the witnesses, I find that the Farmingdale facility is a transload facility which is not engaged in transporting municipal solid waste.

III. DISCUSSION AND CONCLUSIONS OF LAW

A. Federal Jurisdiction

The defendants in this action argue that this complaint should be dismissed under the Younger abstention doctrine for lack of federal jurisdiction. (Town Mem. Of Law in Opp'n to Mot. For Prelim. Injunction ("Town Pre-Hearing Mem in Opp'n") at 4-7.) The plaintiffs contend that Younger abstention does not apply and this matter is ripe for consideration by the federal court because the Town Zoning Board of Appeals has rendered its final decision and no action is pending in the state court. (Pls.' Mem. of Law in Support of a Preliminary Injunction ("Pls.' Mem. in Supp.") at 8, NYA Post-Hearing Mem. at 23-25.)

Abstention is a judicially created doctrine by which the court "is primarily concerned, in

an equitable setting, with considerations of comity and federalism, both as they relate to the State's interest in pursuing an ongoing state proceeding, and as they involve the ability of the state courts to consider federal constitutional claims in that context." City Partners, Ltd. v. Jamaica Sav. Bank, 454 F Supp. 1269, 1271 (E.D.N.Y. 1978) (citing Ohio Bureau of Employment Servs. v. Hodory, 431 U.S. 471, 477, 97 S. Ct. 1898, 1902-03, 52 L. Ed. 2d 513 (1977)). Under the Younger abstention doctrine, derived from the Supreme Court's holding in Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746 (1971), federal courts are generally required "to abstain from taking jurisdiction over federal constitutional claims that involve or call into question ongoing state proceedings." Diamond D Constr. Corp. v. McGowan, 282 F.3d 191, 198 (2d. Cir. 2002) (citing Younger, 401 U.S. 37, 43-44, 91 S.Ct. 746, 27 L. Ed.2d 669). The Younger abstention doctrine applies to state administrative proceedings, such as the ZBA proceedings which preceded this federal action. See Ohio Civil Rights Comm'n v. Dayton Christian Schs, 477 U.S 619, 106 S. Ct. 2718 (1986). Younger abstention is appropriate if: "(1) there is an ongoing state proceeding; (2) an important state interest is implicated in that proceeding; and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of the federal constitutional claims." Diamond D, 282 F.3d at 198. Still, "[d]espite the strong policy in favor of abstention, a federal court may nevertheless intervene in a state proceeding upon a showing of 'bad faith, harassment or any other unusual circumstance that would call for equitable relief.'" Id. (citing Younger, 401 U.S. at 54, 91 S. Ct. 746).

Here, Younger abstention is not required because there is no ongoing state proceeding. The ZBA rendered its final decision, denying Coastal's appeal, on April 22, 2005. Following the ZBA's final decision, neither party commenced an action in state court. Accordingly, this Court is entitled to exercise federal jurisdiction over this matter. See Hawaii Housing Auth. v. Midkiff,

467 U.S. 229, 239 (1984) ("Younger is not a bar to federal court action when state judicial proceedings have not themselves commenced.").

B. Legal Standard for a Preliminary Injunction

The purpose of a preliminary injunction is to prevent legal harm and preserve the status quo until final determination of the action. WarnerVision Entm't v. Empire of Carolina, Inc., 101 F.3d 259, 261- 62 (2d Cir. 1996). Generally, in order to prevail on a motion for preliminary injunctive relief, the movant must show "(a) irreparable harm and (b) either (1) likelihood of success on the merits, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Forest City Daly Housing, Inc. v. Town of North Hempstead, 175 F.3d 144, 149 (2d Cir. 1999); Jackson Dairy Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir.1979). However, "where a preliminary injunction is sought against government action taken in the public interests pursuant to a statutory or regulatory scheme, the less-demanding 'fair ground for litigation' standard is inapplicable, and therefore a 'likelihood of success' must be shown." Forest City Daly Housing, 175 F.3d at 149 (citing International Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 70 (2d Cir. 1996). See also No-Spray Coalition, Inc. v. City of New York, 252 F.3d 148, 150 (2d Cir. 2001). Additionally, if the injunction "'will alter rather than maintain the status quo,' the movant must show 'clear' or 'substantial' likelihood of success." No-Spray Coalition, 252 F.3d at 150 (citing Rodriguez v. DeBuono, 175 F.3d 227, 233 (2d Cir. 1999)). The movant must carry the burden of persuasion by a clear showing, and the harm must be imminent or certain, not merely speculative. Tom Doherty Assoc., Inc. v. Saban Entm't, Inc., 60 F.3d 27, 37 (1995). Further, it has long been held that "[w]here there is an adequate remedy at law, such as an award of money damages, injunctions are unavailable except in extraordinary circumstances." Id. (citing Morales v. Trans

World Airlines, Inc., 504 U.S. 374, 381, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992); Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees & Rest. Employees Int'l Union, 239 F.3d 172, 177 (2d Cir. 2001)).

1. Likelihood of Success on the Merits

The legal issue in this case is whether the Town's building code permit requirements and zoning laws are preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), and if so, whether Coastal and its operations fall within the purview of the ICCTA. In order to demonstrate a likelihood of success on the merits, the plaintiffs must demonstrate that upon review, the Court will likely find: (1) that the Town's building permit requirements and zoning laws are preempted by the ICCTA, (2) that Coastal's transloading operations fall within the category of rail "transportation" for purposes of the ICCTA; and (3) that Coastal, by virtue of its relationship with NYA, is considered a rail carrier under the ICCTA.

a. Preemption

Where Congress has enacted an express preemption provision, the scope of *the preemption is determined by the language of the preemption provision and the surrounding* statutory framework. Medtronic, Inc. v Lohr, 518 U.S. 470, 486 (1996). The statute at issue here, the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10101, et seq., was enacted by Congress in 1995. 49 U.S.C. § 10101. The statute states that the remedies provided by the ICCTA "with respect to rail transportation are exclusive and preempt the remedies provided under Federal or State law." Id. Further, the legislative history indicates that the principal purpose of the ICCTA was to eliminate the remaining areas where states retained regulatory authority over railroad facilities and operations. See H.R. 104-311, 104th Cong., 1st Sess. 82-83 (1995) reprinted in 1995 U.S.C.C.A.N. 793, 807-08. ("This provision replaces the railroad portion of

former Section 10501. Conforming changes are made to reflect the direct and complete pre-emption of State economic regulation of railroads. . . The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system. Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive.")

In general, courts have consistently held that the ICCTA preempts state and local regulations. See, e.g., R.R. Ventures, Inc. v. Surface Transp. Board, 299 F.3d 523, 562-63 (6th Cir. 2002); Friberg v. Kansas City S. Ry. Co., 267 F.3d 439 (5th Cir. 2001); City of Auburn v. United States, 154 F.3d 1025, 1030 (9th Cir. 1998), cert denied 527 U.S 1022 (1999); Dakota, Minnesota, & E. R.R. Corp. v. South Dakota, 236 F. Supp. 2d 989, 1005 (D. South Dakota 2002), aff'd in part & rev'd in part on other grounds, 362 F.3d 512 (8th Cir. 2004). But see Florida E. Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324, 1330-1332 (11th Cir. 2001) (holding that the ICCTA did not preempt a municipal zoning regulation).

In Green Mountain R.R. Corp. v. Vermont, a case involving facts similar to those herein, the Second Circuit recently stated: "[T]he plain language of Section 10501 reflects clear congressional intent to preempt state and local regulation of integral rail facilities. 'It is difficult to *imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad* operations.'" 404 F.3d 638, 645 (2d Cir. 2005) (quoting CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581 (N.D. Ga.1996)).

Additionally, the Surface Transportation Board ("STB"), the Board that Congress vested with exclusive jurisdiction over transportation by rail carriers, has stated that although state and local regulations which protect public health and safety are not preempted by the ICCTA, "[l]ocal

land use restrictions, like zoning requirements, can be used to frustrate transportation-related activities and interfere with interstate commerce. To the extent that they are used in this way (e.g., that restrictions are placed on where a railroad facility can be located), courts have found that the local regulations are preempted by the ICCTA." Borough of Riverdale, STB Finance Docket No. 33466, 1999 WL 715272, at *6 (S.T.B. September 10, 1999).

Of particular relevance to this case is the STB's finding that

> local entities such as the Borough can not require that railroads seek building permits prior to constructing or using railroad facilities because of the inherent delay and interference with interstate commerce that such requirements would cause. . . Specifically, under the law enacted by Congress, as interpreted by the courts, it appears to us that state and local entities can enforce in a non-discriminatory matter electrical and building codes, or fire and plumbing regulations, so long as they do not do so by requiring the obtaining of permits as a prerequisite to the construction or improvement of railroad facilities.

Id

Here, the Town seeks to enjoin Coastal from conducting business at the Farmingdale transloading facility due to Coastal's alleged violation of Town zoning[2] and building codes. I find that the plaintiffs will likely succeed in establishing on the facts here that the Town's authority to enforce its building codes, as applied to facilities on the property leased by NYA through the LIRR, is preempted by the ICCTA.

b. The Definition of Transportation Under the ICCTA

Prior to ICCTA, the Interstate Commerce Commission ("ICC") had

[2]There is no evidence in this case that any portion of the Farmingdale facility is in a residential zone. It is discussed here only because it was raised orally by counsel for the Town. The issue was not briefed or otherwise raised by the Town in any of its written submissions. Accordingly, the argument is without merit, based on the lack of any proof.

exclusive and plenary jurisdiction over interstate railroad transportation. To replace the authority of the ICC, the ICCTA created the Surface Transportation Board ("STB"), which was granted *exclusive jurisdiction over*

> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.

49 U.S.C. § 10501(b).

As the jurisdiction of the STB is limited to "transportation by rail carrier," 49 U.S.C. § 10501(a), the scope of the STB's jurisdiction relies on the statutory definitions related to rail carrier transportation.

In the ICCTA, Congress defined "transportation" to include:

> (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
>
> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(9) (emphasis added).

The statute defines a "rail carrier" as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5).

Finally, the definition of a "railroad" includes

> (A) a bridge, car float, lighter, ferry, and intermodal equipment used

> by or in connection with a railroad;
>
> (B) the road used by a rail carrier and owned by it or operated under an agreement; and
>
> (C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation.

49 U.S.C. § 10102 (emphasis added).

In this case, the defendants argue that Coastal's operation at the Farmingdale facility does not fall within the scope of "transportation by rail carrier," and consequently, that Coastal's activities do not fall within the exclusive federal jurisdiction of the STB. (Pinelawn Mem. in Opp'n at 10.)[3]

The defendants rely heavily on the Third Circuit Court of Appeals ruling in Hi Tech Trans, LLC v. State of New Jersey, 382 F.3d 295 (3d Cir. 2004). In that case, Hi Tech entered into a license agreement with a railroad company whereby Hi Tech would operate a C&D transloading facility at a rail yard. Hi Tech, 382 F.3d at 298-299. As in the instant case, the contracting company was responsible for loading the C&D into the rail cars, and the railroad company was responsible for transporting the cars to an out-of-state disposal facility. Id. at 299. Unlike the instant case, however, the agreement between the rail carrier and Hi Tech disclaimed the creation of an employment or an agency relationship between the parties, and specifically provided that neither party could represent that such a relationship existed. Id. at 308; Hi Tech Trans, LLC, Petition for Declaratory Order, STB Finance Docket No. 34192, 2003 WL 21952136, at *2 (S.T.B. Aug. 14, 2003). Additionally, unlike the present case, in Hi Tech the New Jersey

[3]Although Pinelawn Cemetery was permitted to intervene as a party defendant in this action on consent of all parties, at the evidentiary hearing and in post-hearing submissions it has made no contentions unique to its position as landowner of the property at issue, but instead simply argues those issues that are applicable to the defendant Town of Babylon.

Department of Environmental Protection ("NJDEP") investigated the site and concluded that Hi Tech was operating it as a transfer, as opposed to a transload, station, and was illegally handling solid waste. Id. at 300. The NJDEP had issued an Administrative Order stating that Hi Tech was operating in violation of state laws, and ordered Hi Tech to cease solid waste operations within twenty days. Id. Those are the predicate facts giving rise to that action. Hi Tech then filed a complaint seeking a declaration that the state laws requiring solid waste transfer stations to obtain certain permits were preempted by the ICCTA. Id. at 301.

The court ultimately held that the Hi Tech operation did not involve "transportation by rail carrier," but rather, transportation "to rail carrier." Id. at 308 (emphasis in original). The court noted that, "[T]he mere fact that the [railroad] ultimately uses rail cars to transport the C&D debris Hi Tech loads does not morph Hi Tech's activities into 'transportation by rail carrier.'" Id. at 309. The court rejected Hi Tech's preemption claim. Id. at 310.

(1) Hi Tech is Distinguishable and Not Applicable

The facts of Hi Tech are distinguishable from the facts in the instant case because here: (1) the relationship between the railroad and the transloading company is of a different nature than that in Hi Tech; (2) the New York State Department of Environmental Conservation has investigated the Farmingdale facility and concluded that Coastal is operating a transloading facility and falls within the definition of transportation under the ICCTA; (3) the defendants have failed to establish that Coastal is operating a transfer facility or handling municipal solid waste; and (4) plaintiffs have adequately established that the Farmingdale facility is being used and operated as a transloading facility related to the transportation of freight by rail carrier

The relationship between NYA and Coastal differs from the relationship between the

railroad and the contractor in Hi Tech because in Hi Tech, the railroad had no responsibility for Hi Tech's operations, and the railroad and Hi Tech explicitly disclaimed any agency or employment relationship. Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295, 308 (3d Cir. 2004). More pointedly, the agreement between Canadian Pacific Railway ("CPR") and Hi Tech specifically provided that "neither party may represent that such a relationship exists." Hi Tech Trans, LLC, Petition for Declaratory Order, STB Finance Docket No. 34192, 2003 WL 21952136, at *2 (S.T.B. Aug. 14, 2003). Based on the language of the contract, the court found that the agreement between Hi Tech and CPR "essentially eliminates CPR's involvement in, and responsibility for, the operation of Hi Tech's facility." Hi Tech, 382 F.3d 295 at 308.

Here, the plaintiffs agree that by entering into the Operations Agreement, "NY&A retain[ed] Coastal as its agent to operate the Farmingdale facility as part of NY&A's common carrier services. . . ." (Pls.' Mem. In Supp. at 2.) Still, the defendants argue that Coastal is not an agent of NYA because the Farmingdale facility is wholly under the control of Coastal. The defendants point to the testimony of the plaintiffs' witnesses, which established that Coastal uses its own employees and equipment, decides how to run the facility, sets the rates, and handles all customer interaction (Town Post-Hearing Mem at 18.)

The Court of Appeals has defined agency as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." In re Shulman Transp. Enters., Inc., 744 F.2d 293, 295 (2d. Cir. 1984) (citing Restatement (Second) of Agency § 1(1) (1958)) (additional citation omitted). The factual elements required to establish the existence of an agency relationship are: "the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in

control of the undertaking." Cabrera v. Jakabovitz, 24 F.3d 372, 386 (2d Cir. 1994) (citing Restatement (Second) of Agency § 1 cmt. b (1958)). It is essential to an agency relationship that the principal exercise control over the agent. In re Shulman, 744 F.2d 293 at 295. Additionally, "A person's statement that he was an agent of another may not establish that relationship as an incontrovertible fact, but it can help establish that that individual himself believed that he was acting on another's behalf and under another's control." Cabrera, 24 F.3d 372 at 387 (citing Slotkin v. Citizens Casualty Co. of N.Y., 614 F.2d 301, 316 (2d Cir. 1979); Restatement (Second) of Agency § 285 cmt. a (1958)).

Here, while Coastal conducts many of the operations at the Farmingdale facility, I conclude that it is not autonomous and does so "for and on behalf of [NYA]," within the terms of the Operations Agreement. (NYA Post-Hearing Mem. at 13; NYA Ex. 8 ¶ 1.01.) The Operations Agreement specifies that "RAILROAD shall control the Facility's operations," and shall have the right to review and audit Coastal's records and inspect Coastal's facility. (NYA Post-Hearing Mem. at 14; NYA Ex. 8 ¶ 1.02 (capitals in original).) Moreover, the contract specifies that Coastal's services shall include only those "commodities, movements and equipment . . approved by RAILROAD," and that Coastal is required to immediately cease and desist from any operation which is found to be "in violation of any contractual or other obligation of RAILROAD upon notice from Railroad." (NYA Post-Hearing Mem. at 14; NYA Ex. 8 ¶ 1.04 (capitals in original).) The Operations Agreement further specifies that Coastal must obtain NYA's advance written approval of all written marketing materials used by Coastal, and that any such marketing material and signage must prominently indicate NYA's name and/or logo. (NYA Post-Hearing Mem. at 14; NYA Ex. 8 ¶ 1.04.) Further, while Coastal sets and collects the loading fees, Coastal is required to pass a portion of the fee on to NYA in the form of a usage fee for each car loaded. (NYA Post-

Hearing Mem. at 15; NYA Ex. 8 ¶ 3.02.) Finally, under the Operations Agreement, Coastal is required to develop increasing levels of traffic at the Farmingdale facility or face termination of the contract. (NYA Post-Hearing Mem. at 15; NYA Ex. 8 ¶ 5.01.) Notably, the Hi Tech court's review of the agreement between the Canadian Pacific Railroad and Hi Tech did not reveal any provisions analogous to those stated herein.

Furthermore, Krebs, the president of NYA, testified that he visits the Coastal facility regularly, a "minimum of two times a week." (Tr. at 57.) He testified that there are NYA personnel regularly check the condition the tracks and the switch. (Id. at 62.) Moreover, regular inspections are conducted by NYA personnel to ensure that the freight cars are properly loaded and balanced. Whereas the railroad in Hi Tech "disclaim[ed] any liability for Hi Tech's operations," and in fact, did not join Hi Tech in any of the litigation arising from the state's attempt to regulate Hi Tech's facility, here NYA and Coastal have joined as party plaintiffs in this action and both testified to the interests each company has in insuring the success of the Farmingdale facility. (Tr. at 46-47; 183-84.)

Based on the foregoing, I find that the language of the contract and the conduct of the plaintiffs establishes an agency relationship between NYA and Coastal. While Coastal has autonomy in many aspects of its operation at the Farmingdale facility, Coastal is obliged to operate and does operate within the confines of the delegation of responsibility in the Agreement wherein NYA retains ultimate control over Coastal. Coastal's entire operation is subject to NYA's authority to: (1) inspect Coastal's books and operations, (2) order Coastal to cease and desist any unapproved operations at the Farmingdale site, (3) set minimum volume requirements for Coastal, and (4) approve the commodities and equipment handled by Coastal.

A further important distinguishing factor is that in Hi Tech, the New Jersey Department of

Environmental Protection ("NJDEP") determined that Hi Tech was operating a transfer station and that the site was a "solid waste facility," and issued the cease and desist order since Hi Tech was operating the facility without required permits, registration, or design approvals, in violation of several state laws. Hi Tech, LLC v. New Jersey, 382 F.3d 295, 300 (3d Cir. 2004). Furthermore, the Surface Transportation Board found that Hi Tech had "'muddied the waters' by seeking and receiving multiple informal staff opinions under various hypothetical factual situations favorable to Hi Tech and then using them or parts of them to its advantage." Hi Tech Trans, LLC, Petition for Declaratory Order, STB Finance Docket No. 34192, 2003 WL 21952136, at *3 (S.T.B. Aug. 14, 2003).

In sharp contrast, here, Coastal has made every effort to operate in accordance with state and local law. See discussion supra, Part II.D. Most significantly, in summer 2004, an inspector from the New York State Department of Environmental Conservation ("NYDEC") toured the Coastal facility, presumably to determine compliance to New York State laws as well as applicable NYDEC regulations. (Tr. 165.) In a subsequent writing the DEC concluded that the operation of the Farmingdale facility constituted a transloading operating subject to the exclusive jurisdiction of the ICCTA. The DEC letter, dated February 15, 2005, from Anthony J. Cava at the NYDEC, states:

> It is the New York State Department of Environmental Conservation's (the Department) understanding that Coastal has been contracted by the New York and Atlantic Railway (NY&A Railway) to operate transloading operations that NY&A Railway offers to its customers. Pursuant to the contract between the parties, NY&A Railway has control of the facility and the operations. The Department's Regional Staff have raised the question as to whether or not Part 360 regulations are preempted by the STB. Based on a review of this specific case, it has been determined that the Department is preempted from requiring a Part 360 transfer stating permit, since: (1) the transloading operations are considered

> transportation pursuant to 49 U.S.C. 10102(9)(A), (B); and (2) the transportation activities are performed by a rail carrier pursuant to 49 U.S.C. 10102(5). The STB has found that transloading activities fall within the definition of transportation. In this case, while the transportation activities are not directly performed by NY&A Railway, Coastal is acting on behalf of NY&A Railway, and the Coastal's activities are part of the railroad service that is being offered to NY&A Railway's customers. The Department continues to retain police powers to control odor, noise and vermin complaints.

Rutigliano Decl. Ex. I.

It is clear from the language of this letter that the state is unequivocal in its finding that Coastal is operating a transloading facility on behalf of NYA, and that the state is preempted from exercising jurisdiction over the facility, apart from controlling odor, noise and vermin complaints. The position of the NYDEC here stands in stark contrast to New Jersey's position in the Hi Tech litigation.

Finally, the facts of Hi Tech diverge even more significantly from the facts here when one considers the scarcity of evidence defendants have to offer in support of their allegations that Coastal is operating a transfer facility and handling municipal solid waste ("MSW"). In Hi Tech, the state determined that Hi Tech was illegally operating a transfer station and handling solid waste based on a site visit by New Jersey Department of Environmental Protection investigators. Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295, 299-300 (3d Cir. 2004). Neither Hi Tech nor the court disputed the state's findings Id. at 298.

In this case, both the state and Coastal characterize the Farmingdale facility as a transload, as opposed to a transfer, station. Defendants attempt to refute this characterization by relying on testimony from Posillico, the owner of a competing waste recycling company across the street, who stated that he had never been on Coastal's site, and had never observed any solid waste at the

site. (Tr. at 223.) The innocuous nature of Coastal's operation was further confirmed by the private investigator, Ahearn, who spent two days observing Coastal and whose observations are discussed more fully supra, Section II.E.

Lastly, if this facility was being operated as a transload facility involving municipal solid waste, as the Town claims, it would fall within the exclusive jurisdiction of the NYDEC. The Town of Babylon has no authority to enforce the applicable provisions of state law. See N.Y. Environmental Conservation Law § 27-0707, § 71-0201 (McKinney 1997). Thus, unlike the plaintiff in Hi Tech, the Town here has no standing to enforce the provisions that it alleges the plaintiffs have violated.

For all of the foregoing reasons, Hi-Tech is clearly distinguishable and inapplicable to the facts presented here.

(ii) The Second Circuit Held in Green Mountain that Operations at a Transloading Facility were Considered "Transportation" for the Purposes of the ICCTA

In Green Mountain R.R. Corp. v. State of Vermont, 404 F.3d 638 (2d Cir. 2005), the Green Mountain Railroad proposed to build a transloading facility on its property in Vermont. Id. at 639. Vermont argued that the construction of the facility was subject to Act 250, a Vermont environmental land use statute that mandates preconstruction permits for land development. Id. The state had granted the railroad and its lessee a building permit for a portion of the facility, but refused to grant the railroad a permit for the construction of a storage shed on the site. Id. at 640-41. When the railroad constructed the shed without the permit, the State of Vermont issued a notice of violation, and the railroad ultimately filed suit seeking a declaration that the ICCTA preempts the state land use statute. Id. The court ruled in favor of the railroad, holding that "Act 250's pre-construction permit requirement is preempted for two

reasons: (I) it 'unduly intefere[s] with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations'; and (ii) it can be time-consuming, allowing a local body to delay construction of railroad facilities almost indefinitely." Id. at 643 (quoting Town of Ayer, STB Finance Docket No. 33971, 2001 WL 458685, at *5 and citing Green Mountain R.R. Corp.v. State of Vermont, 404 F.3d 438, 2003 U.S. Dist. LEXIS 23774 at *13). The court went on to note that "[The Railroad] serves industries that rely on trucks to transport goods from the rail site for processing; so the proposed transloading and storage facilities are integral to the railroad's operation and are easily encompassed within the *Transportation Board's exclusive jurisdiction over 'rail transportation.'*" Id. at 644. The Second Circuit's conclusion in Green Mountain comports with the decisions of several other courts, which have held that the activities which take place at transload facilities are "transportation" within the purview ICCTA. See, e.g., Canadian Nat'l Ry. Co. v City of Rockwood, 2005 WL 1349077, at *4 (E.D. Mich. June 1, 2005), Grafton & Upton R.R. Co. v. Town of Milford, 337 F. Supp. 2d 233, 239 (D. Mass. 2004); Norfolk S. Ry. Co. v. City of Austell, 1997 WL 113647, *6 (N.D. Ga. 1997).

Based on the foregoing, I find that the Farmingdale facility is a transload facility and that the plaintiffs are likely to succeed on the argument that the Farmingdale facility falls within the definition of "transportation" under the ICCTA.

c. The Definition of "Rail Carrier" for Purposes of the ICCTA

While the Green Mountain court squarely addressed the scope of the ICCTA's definition of "transportation," it was not required to interpret the ICCTA's definition of "rail carrier," since in Green Mountain, the railroad itself conducted the transloading operations. Green Mountain R.R. Corp. v State of Vermont, 404 F.3d 638, 640 (2d Cir. 2005).

Here, the defendants contend that even if the Court finds that the Farmingdale transloading facility is included in the scope of "transportation" under the ICCTA, the ICCTA is still inapplicable to Coastal because Coastal is not a rail carrier. The defendants argue that Coastal not a rail carrier and not even an agent of NYA, the rail carrier here. Instead, defendants maintain that Coastal is "nothing more than a customer of NY&A." (Town Post-Hearing Mem. at 18.) The defendants makes this argument based on the testimony of the plaintiffs' witnesses which established that NYA has limited involvement in the operation of the Farmingdale facility. The facts do not support the defendants' claims.

The ICCTA defines a "rail carrier" as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). Crucial to the interpretation of this definition is Congress' definition of "transportation" under the ICCTA, which specifies that "transportation" includes services and equipment "of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use." 49 U.S.C. § 10102(9) (emphasis added).

I conclude that when the ICCTA granted the Surface Transportation Board exclusive jurisdiction over transportation by rail carriers, it intended that the term "rail carrier" include any entity or person providing "service and equipment" related to the movement of freight by rail, pursuant to contract with a rail carrier. This reading comports with other courts' interpretations of "rail carrier" under the ICCTA.

For example, even prior to the enactment of ICCTA, in City of Chicago v. Atchison, Topeka & Santa Fe Ry. Co., 357 U.S. 77, 78 S. Ct. 1063, 2 L. Ed. 2d 1174 (1958), the Supreme Court interpreted the definition of "rail carrier" under the Interstate Commerce Act to include a private bus corporation that contracted with the railroad as its agent to provide passenger transfer

services between railway stations. 357 U.S. at 88-89. The Court stated:

> We believe the [Interstate Commerce Act] authorizes the railroads to engage in this transfer operation themselves or to select such agents as they see fit for that purpose without leave from local authorities.. . . National rather [than] local control of interstate railroad transportation has long been the policy of Congress. It is not at all extraordinary that Congress should extend freedom from local restraints to the movement of interstate traffic between railroad terminals. Serious impediments to the efficient and uninterrupted flow of this traffic might well result if the City could deny the railroads the right to transfer passengers by their own vehicles or by those of their selected agents.

357 U S. 77 at 87-88. While the statute under review in City of Chicago was the Interstate Commerce Act ("ICA"), which preceded the ICCTA, the ICCTA was intended to broaden– not narrow– the pre-emptive scope of the ICA. Thus, the Court's holding in City of Chicago still provides an accurate reading of Congressional intent when it comes to the federal preemption of state regulation of railroads See e.g., H.R Conf. Rep. No. 104-2539, at 14993 (December 18, 1995) ("This provision replaces the railroad provision of former Section 10501. Conforming changes are made to reflect the direct and complete pre-emption of State economic regulation of railroads. . . The former disclaimer regarding residual state police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system.").

Other courts around the country that have confronted facts similar to those presented here have concluded that the ICCTA applies to third-party contractors engaged in activities closely tied to the movement of passengers or freight by rail. See, e g., Canadian Nat'l Ry. Co. v. City of Rockwood, 2005 WL 1349077, at *6 (E.D. Mich. June 1, 2005) (holding that the ICCTA applied to the activities of a third-party contractor which provided transloading services to the railroad because the contractor was working "under the auspices of a rail carrier"); Grafton & Upton R.R

Co. v. Town of Milford, 337 F. Supp 2d 233 (D. Mass. 2004) ("Although the Milford Yard will clearly have a trucking component, an examination of the analogous scenarios discussed in the cited case law demonstrates that such a non-rail component is still subject to the preemptive effect of the ICCTA.").

The defendants rely on the Eleventh Circuit Court of Appeals decision in Florida E. Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001), for the argument that the activities of railroad contractors doing transloading are not within the scope of the ICCTA. However, the Florida E. Coast court reached its holding after finding that, based on the statute's full definition of "transportation," the clause broadening the scope of the definition to include things "regardless of ownership or an agreement concerning use" applies only to equipment related to the movement of passengers or property by rail and not to services related to such movement.[4] Id. at 1332-33. However, the terms "warehouse," "yard," and "facility," as related to the movement of property by rail, would all seem descriptive of the Farmingdale facility that is at issue here. The terms are all included in that portion of the definition to which, according to the Eleventh Circuit opinion, preemption applies.

In addition, the Eleventh Circuit's interpretation is not consistent with the interpretation of

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[4]The full definition of "transportation" under the ICCTA is:

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(9).

the Second Circuit in Green Mountain, discussed supra. In Green Mountain, the Second Circuit noted that under ICCTA, "'[t]ransportation' is expansively defined. . . Certainly, the plain language [of the statute] grants the Transportation Board wide authority over the transloading and storage facilities undertaken by Green Mountain." Green Mountain Railroad Corp. v. Vermont, 404 F.3d 638, 642 (2d Cir. 2005).

Based on the foregoing, the Court finds that the plaintiffs are likely to succeed in establishing that Coastal falls within the scope of the "rail carrier" provision of the ICCTA, and therefore will likely prevail in this action.

d. Considerations of Equitable Estoppel

In its post-hearing memorandum, NYA argues that the Town should be estopped from enforcing the stop work order because Coastal invested millions of dollars in site improvements at the Farmingdale facility in reliance on the Town's repeated assertions that it did not have jurisdiction over the LIRR property. (NYA Post-Hearing Mem. at 21) There is no dispute as to the facts. The defendants argue that the Town cannot be estopped from enforcing its zoning code against the plaintiffs based on the general policy against relying on the doctrine of estoppel to prevent a municipal agency from discharging its statutory duties. (Pinelawn Post-Hearing Mem. at 23.)

The New York Court of Appeals has stated that, "[G]enerally, estoppel may not be invoked against a municipal agency to prevent it from discharging its statutory duties." Parkview Assocs v. City of New York, 71 N.Y.2d 274, 282 (1988) (citations omitted). Nevertheless, in certain situations, a local government may be estopped from taking inconsistent positions where a citizen has relied to his detriment on the government's earlier position. For example, in In re Faymore Development Co., Inc. v. Bd. of Standards & Appeals, City of New York, 45 N.Y.2d 560 (1978),

the New York Court of Appeals addressed a situation in which the city revoked a developer's building permit one and a half years after granting it, when the community planning board and community groups objected to the proposed development. 45 N.Y.2d at 563. Between the time the permit was granted and later revoked, the developer in Faymore spent in excess of $1,380,000 developing the site. Id. at 564. The Court of Appeals reinstated the building permit, noting, "At the outset the building department revoked the permit on technical grounds. The defect, if there was one, had been evident on the face of the plans for over a year and a half and was only acted upon when community opposition to the project was heard." Id. at 566. The court held that a municipality may "be estopped from claiming the benefit of its own inaction, whether intentional or merely negligent." Id. See also In re 15555 Boston Road Corp. v. Finance Administrator, City of New York, 61 A.D.2d 187, 192 (N.Y. App. Div. 2d Dept 1978) ("A municipality may be estopped by its misleading nonfeasance if there would otherwise be a manifest injustice.")

Here, it is undisputed that Coastal made repeated requests to comply with any applicable Town provisions, only to be told that none apply. The Town so stated in writing. I further note that the facility here had been operating for many years as a transload facility, prior to Coastal's involvement, with no objections from the defendants. (Tr. at 40.) Moreover, this property has been in continuous use by the Long Island Railroad pursuant to 99 year leases, recently renewed among the parties. There is no evidence that at any time in the past the Town of Babylon attempted to exercise any jurisdiction over the property.

The Town unequivocally expressed no regulatory interest in the operations of the Farmingdale facility. The plaintiffs went ahead and made substantial improvements to the site. The plaintiffs have relied on the oral and written disclaimer of jurisdiction by Town officials to their extreme detriment. Therefore, I find that the Town should be equitably estopped from

asserting any jurisdiction (assuming arguendo that such jurisdiction exists) over the Farmingdale facility at this time.

2. Coastal and NYA Have Suffered Irreparable Harm, and Will Continue to Suffer Irreparable Harm, without the Preliminary Injunction

In order to prevail on their motion for a preliminary injunction, plaintiffs must not only demonstrate a likelihood of success on the merits, but must also demonstrate irreparable harm. Jackson Dairy Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979). Here, Coastal asserts that it has suffered irreparable harm because as a start-up business, Coastal's ability to invest in needed equipment and to market its services to potential clients has been curtailed by the stop work order. (Coastal Post-Hearing Mem. at 15; Tr. at 183-184.) NYA argues that it has demonstrated irreparable harm because NYA has committed the use of its Farmingdale facility to Coastal for the purpose of conducting transloading operations, and the stop work order is frustrating that purpose. (NYA Post-Hearing Mem. at 25.) Further, both Coastal and NYA argue that they have suffered irreparable harm in the form of loss of customers, goodwill, and reputation.[5] (Coastal Post-Hearing Mem. at 17; NYA Post-Hearing Mem. at 25-26.)

Defendants contend that plaintiffs' motion for preliminary injunction should be denied

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[5]Plaintiffs argue in the alternative that they have suffered irreparable harm as a matter of law because the Town has denied them the constitutional right to participate in interstate commerce. (Pls.' Mem. in Supp. at 23.) Based on the Court's findings with respect to the plaintiffs' primary arguments, the Court finds it unnecessary to examine the merits of this alternative argument. Moreover, the cases cited by the plaintiffs appear to be distinguishable from the situation here. See, e.g., Molloy v. Metropolitan Transportation Authority, 94 F.3d 808, 810 (2d Cir. 1996) (discussing merits of plaintiffs' claim that a Metropolitan Transit Authority plan to reduce staff violates the American with Disabilities Act); Gerling Global Reinsurance Corp. of America v. Quackenbush, 2000 WL 777978, at *1 (E.D.Cal. Jun 09, 2000) (discussing merits of plaintiffs' claim that portions of California's Holocaust Victim Insurance Relief Act and accompanying regulations are unconstitutional).

because plaintiffs have not demonstrated irreparable harm, since plaintiffs' injuries are largely tied to their claims of lost revenue. (Town Mem. in Opp'n at 13; Pinelawn Mem. in Opp'n at 8-9) Defendant Pinelawn further notes that Coastal's claims of lost revenue are merely speculative, as Coastal has never stopped operations at its facility (Pinelawn Post-Hearing Mem. at 11. See also Tr. at 72, 127.)

It has been long held that expenditures of money, time, and energy, in the absence of an injunction, are not enough to demonstrate irreparable harm. Jayaraj v. Scappini, 66 F.3d 36, (2d Cir. 1995) (citing Sampson v. Murray, 415 U.S. 61, 90, 94 S.Ct. 937, 953, 39 L. Ed.2d 166 (1974)) Under certain circumstances, loss of goodwill and damage to reputation may constitute irreparable injury. John B. Hull, Inc. v. Waterbury Petroleum Products, Inc., 588 F.2d 24, 29 (2d Cir. 1978) (citing Interphoto Corp v. Minolta Corp., 417 F.2d 621 (2d Cir. 1969)). Further, "[a]n anticipated loss of market share growth may suffice as an irreparable harm." Freedom Holdings Inc. v. Spitzer, 408 F.3d 112, 114-15 (2d. Cir. 2005) (citing Register.com Inc. v. Verio, Inc., 356 F.3d 393, 404 (2d Cir.2004) (additional citations omitted)). Additionally, the court may consider the effect a denial or grant of preliminary injunctive relief will have on the public interest, though this consideration does not obviate the need to demonstrate irreparable injury. Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944); United States v. City of New Haven, 447 F.2d 972 (2d Cir. 1971). Overall, "in exercising its equity power, the court must weigh the equities, balancing conveniences and injuries." Crossbow, Inc. v. Dan-Dee Imports, Inc., 266 F. Supp. 335, 341 (S.D.N.Y. 1967) (granting a preliminary injunction to a manufacturer alleging trademark infringement, where plaintiffs demonstrated the likelihood that defendant's continued deceptive practices would cause irreparable injury in terms of loss of customers, goodwill, and reputation).

To a limited extent, business losses which Coastal and NYA would undoubtedly incur under the enforcement of the stop work order could be calculated and compensated by money damages. However, the plaintiffs' testimony established that Coastal and NYA will both suffer additional irreparable harm in the form of loss of goodwill from existing customers, loss of future contracts, and the loss of market opportunities, if a preliminary injunction is not granted. Rutigliano testified that Coastal has refrained from entering a contract with a scrap metal company which would be a very large customer. (Tr. at 183-84.) It has also delayed signing contracts with other new customers, due to the uncertainty caused by the stop work order and the present application. In addition, Coastal has refrained from making investments that would enhance services for existing customers, and has refrained from entering long-term contracts with existing customers (Id. at 178, 184.)

The court credits the testimony of the plaintiffs' witnesses and finds that Coastal and NYA have suffered, and will continue to suffer, the loss of customers, goodwill, and reputation if a preliminary injunction is not granted. Critical to this Court's determination is the fact that Coastal is a start-up company attempting, with NYA, to establish a market in the developing industry of moving freight on and off Long Island on the LIRR lines. Transloading is almost 100 percent of NYA's growth, and just as NYA's contract with Coastal requires Coastal to meet certain volume requirements, the LIRR's contract with NYA requires NYA to grow the freight business. (Id. at 25, 30, 48, 49.) The irreparable harm here is unique to this fledgling industry. Once a client contracts with Coastal, that client has in essence agreed to abandon its relationship with the trucking industry in exchange for reliance on transportation by rail. (Id. at 183-84.) The unrebutted testimony is that it is difficult to re-establish a "dedicated" trucking contract once those trucking ties are severed. (Id.) Here, any potential client must contend with the uncertainty of the

outcome of this litigation and Coastal's future. (Id.) Coastal has adequately established that potential clients have been especially reluctant to give up their rights to the security of a "dedicated haul" by truckers, particularly in light of the difficulty of establishing good trucking arrangements, due to the issuance of the stop work order. (Id.) These damages cannot be adequately determined for purposes of liquidated damages.

Consequently, based on the loss of goodwill, future contracts and market opportunities, I conclude that both Coastal and NYA, by virtue of their co-dependency, will suffer irreparable injury unless the preliminary injunction sought here is issued. At least one other court recently faced with similar facts has come to this same conclusion. See Canadian Nat'l Ry. Co. v. City of Rockwood, 2005 WL 1349077, at *9 (E.D. Mich. June 1, 2005) (holding that, upon review of facts very similar to the instant case, "[t]he loss of future contracts and the loss of the opportunity to enter a market, here the market for transportation of [construction and demolition debris], are inherently speculative, making these damages too difficult to calculate. Hence, these loses (sic) are also irreparable.").

Lastly I note that the public will benefit from the continued use of the Farmingdale facility as a transload operation throughout the pendency of this action. The cargo that is transported off Long Island by rail by NYA through Coastal's transload operation is cargo that would otherwise be transported by truck on congested roadways throughout Long Island and the City of New York. The decrease in heavy truck traffic loaded with construction debris undoubtedly furthers the public health and safety of the millions of drivers who daily utilize the roadways within the Eastern District of New York.

IV. CONCLUSION

Based on the foregoing, I find that the plaintiffs have suffered, and will continue to suffer,

irreparable harm if a preliminary injunction is not granted. The plaintiffs will likely succeed on the merits of their claims that: (1) the Town's zoning laws are preempted by the ICCTA; (2) transloading operations fall within the category of rail "transportation" for purposes of the ICCTA; (3) Coastal, by virtue of its relationship with NYA, is considered a rail carrier under the ICCTA; and (4) the Town of Babylon is estopped from asserting jurisdiction based on Coastal's detrimental reliance on the Town's assertion that it held no jurisdiction over the property. The undersigned recommends that the plaintiffs be granted a preliminary injunction to enjoin the Town from enforcing the stop work order and any applicable zoning regulations against Coastal.

OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Any objections to this Report and Recommendation must be filed with the Clerk of the Court with a copy to the undersigned within ten (10) days of the date of this report. Failure to file objections within ten (10) days will preclude further appellate review of the District Court's order. 28 U.S.C. § 636(b)(1); Fed R. Civ. P. 6(a), 6(e), and 72(b); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993), cert. denied, 513 U.S. 822 (1994); Frank v. Johnson, 968 F.2d 298 (2d Cir. 1992), cert. denied, 506 U.S. 1038 (1992); Small v. Sec'y of Health and Human Servs., 892 F.2d 15, 16 (2d Cir. 1989) (per curiam).

Plaintiffs' counsel is directed to notify all parties of this report upon receipt.

SO ORDERED

Dated: Central Islip, New York
July 15, 2005

/s/ E. Thomas Boyle
E. THOMAS BOYLE
United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -X

COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY,

Plaintiffs,

05-CV-2032 (JS) (ETB)

v.

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, and PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON and PINELAWN CEMETERY,

Defendants.

- -X

OBJECTIONS TO THE REPORT AND RECOMMENDATION SUBMITTED BY TOWN OF BABYLON

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SUMMARY OF ARGUMENTS

The Report and Recommendation issued by the Magistrate Judge can only be described as an egregious example of result-oriented jurisprudence. As will be shown herein, the Magistrate Judge has ignored dispositive evidence, misapplied and/or ignored controlling caselaw, and raised and credited substantive, waivable arguments that were not even advanced by the plaintiffs in order to reach the desired result. Additionally, in his Report and Recommendation, the Magistrate has interpreted the term "rail carrier" under the Interstate Commerce Commission Termination Act ("ICCTA"), more expansively than any other court in the country. More significantly, the Magistrate's interpretation of that term directly contradicts the interpretation of the Surface Transportation Board ("STB"), the agency created by Congress for the purpose of regulating rail carriers under the ICCTA. Any meaningful *de novo* review in this matter will conclude that the Magistrate's legal and factual findings are clearly erroneous. In a case that will undoubtedly be ultimately resolved at the Second Circuit, the Magistrate disregarded that Court's precedent on the standards for granting the extraordinary remedy of a preliminary injunction. In doing so, the Magistrate is recommending that this Court permit Coastal to operate free of *any* regulation – local, state, or federal. Neither the law nor common sense support such a result.

The primary legal issue before this Court is whether plaintiff Coastal Distribution, LLC ("Coastal"), a company engaged in the business of receiving and disposing of construction and demolition debris, is entitled to the extraordinary remedy of a preliminary injunction exempting it from state and local regulation under the ICCTA. That statute provides an exemption solely to rail carriers that are in the business of providing transportation by rail. As will be demonstrated below, despite the Magistrate's conclusion to the contrary, the evidence adduced at the hearing demonstrates that this is not even a close case.

First, there is plainly no irreparable harm. To the extent that any evidence of harm was produced, the plaintiffs' own witnesses speculated that any potential harm would be monetary in nature, which can be readily calculated. As was pointed out to the Magistrate in defendants' post-hearing

Memorandum, the Second Circuit, in a case involving the Town of Babylon, has made it clear that it is reversible error to grant a preliminary injunction in such circumstances.

Second, there is virtually no chance that when this case is ultimately resolved, that plaintiffs will succeed on the merits. The ICCTA exempts *rail carriers* engaged in rail transportation. Coastal is admittedly not a rail carrier. The record demonstrates beyond cavil that Coastal in no way, shape or form operates a business that provides transportation by rail so as to be considered a rail carrier within the meaning of the ICCTA. Indeed, as will be shown herein, the Magistrate's findings of fact are clearly erroneous because the evidence demonstrates that Coastal is nothing more than a *customer of a rail carrier* that subleases space on property leased by a rail carrier, Plaintiff New York and Atlantic Railway Company ("NY&A").

In his Report and Recommendation, the Magistrate disregarded the teachings of the Second Circuit and elected to ignore the testimonial evidence from plaintiffs regarding the true nature of their relationship, and instead, relied upon certain portions of their Operating Agreement as support for his conclusion that NY&A controls Coastal. The Magistrate's conclusions are clearly erroneous, however, because the testimonial evidence presented demonstrates, *inter alia*, that Coastal built and paid for the Farmingdale facility and that *Coastal retains all revenues and profits generated by the operation*! NY&A pays Coastal nothing, and it has no control over or involvement in any material aspect of the facility. The Magistrate elected to simply ignore this undisputed evidence in reaching his Recommendation. The following are undisputed facts from the record, most of which were simply ignored by the Magistrate in reaching his clearly erroneous Recommendation:

- Coastal contracts with its own customers to dispose of its customer's C & D debris;
- Coastal's customers have no contact, contract or relationship with NY&A and NY&A is never even made aware of the identity of Coastal's customers;
- NY&A does not bill Coastal's customers, nor does it collect money from them;
- NY&A does not quote rates to Coastal's customers, nor does it know or even care about the rate that Coastal charges its customers;
- Coastal is solely contractually and financially responsible for arranging for the debris to be delivered to a landfill in Ohio;
- Coastal pays NY&A a $20 per rail car "usage fee" for use of the Farmingdale property based on an annual minimum guarantee of 1,200 cars.

- Coastal generates between $4,000-$5,000 in revenue from its customers per rail car;
- NY&A does not receive any percentage of Coastal's revenues or profits, rather it is paid only a fixed $20 per car usage fee;
- In each contract year, Coastal will receive between $4,800,000- $6,000,000 in revenues from its customers to dispose of their C&D debris ($4,000-$5,000 per rail car x 1,200 rail cars);
- In each contract year, Coastal pays NY&A only $24,000 ($20 per car for 1,200 cars).
- Coastal is solely responsible for loading the rail cars;
- The rail cars are owned by Coastal;
- The equipment used to load the cars is owned by Coastal;
- The employees who work at the facility are employed by Coastal;
- NY&A contractually disclaims any responsibility for Coastal's operations;
- Coastal is contractually required to indemnify NY&A and hold it harmless for any damages arising out of Coastal's operations;
- NY&A has no involvement in Coastal's operations (unloading trucks and loading rail cars) other than being paid a small per car usage fee;
- Coastal is not certified as a rail carrier by the Surface Transportation Board and is therefore not under that agency's regulatory jurisdiction.

The bottom line is that this is a very straight-forward and the Magistrate missed it: preemption applies to a *rail carrier* "providing common carrier railroad transportation for compensation." 49 U.S.C. Sec. 10102(5). Coastal is not a rail carrier nor does it provide railroad transportation for compensation. It is a private commercial shipping business that receives, processes, and loads debris and materials into its own rail cars and then arranges for NY&A to transport those cars to other disposal sites. Coastal is no more a rail carrier than the trucking company that owns the trucks that are delivering the debris to its facility. The Farmingdale facility is Coastal's separate business from which Coastal reaps all of the profits. Coastal's "agency" argument is a transparent sham.

Similarly, the Magistrate's Recommendation that the Town be equitably estopped from exercising jurisdiction over Coastal's operations must also be rejected. As will be discussed herein, the equitable estoppel argument was never advanced by plaintiffs in this case. It did not appear in their pleadings, their papers in support of their motion for a preliminary injunction, or even in Coastal's post-hearing brief. This was an argument that was raised and advanced exclusively by the Magistrate, himself, *after* the hearing had been closed. (Tr. 275). Thus, not only is the argument legally unsupportable, but it

was also improper for the Magistrate to raise and credit an argument that has *never* even been advanced or adopted by Coastal – the only party who might possibly have standing to even assert such a claim.

STATEMENT OF FACTS

The following are undisputed facts from the record many of which were either ignored or misrepresented by the Magistrate in his Report and Recommendation:

NY&A is a rail carrier licensed to operate by the federal Surface Transportation Board ("STB"). (Tr. 27, 81). NY&A is regulated by the STB. (Tr. 27). Coastal is not a licensed rail carrier by the STB. (Tr. 82). Coastal is not regulated by the STB. (Tr. 83).

On or about March 22, 2002, NY&A entered into a lease Agreement with Coastal, whereby Coastal agreed to lease the East Farmingdale premises from NY&A. (NY&A Ex. 6). Under the terms of its lease with NY&A, Coastal was required to pay Two Thousand Dollars ($2,000) per month rent. (Tr. 48). Coastal's original business plan called for it to receive, via rail, and sell aggregates (rocks, stone, gravel) at the Farmingdale site. (Tr. 51-52, 144). After operating as an aggregate receiver and wholesaler, Coastal later revised its business plan for the site to include the operation of a construction and demolition (C&D) debris receiving, processing and loading operation. (Tr. 52).

On or about August 6, 2004, approximately one month before the hearing conducted by the Babylon Zoning Board of Appeals, NY&A and Coastal terminated their lease agreement and entered into a "Transload Facility Operations Agreement." (NY&A Ex. 8; Tr. 97). As will be shown below, under the terms of their Agreement, and in reality, NY&A does not have any responsibility for anything that happens at the Coastal facility. (Tr. 116; NY&A Ex. 8).

Moreover, despite entering into a new "Agreement," there was no change in the way Coastal operated its facility after entering into the Operations Agreement as compared to how it had been operated under the prior lease agreement. (Tr. 99). During the ZBA hearing, Coastal's expert witness, Mr.

McHugh, testified that Coastal would not have been entitled to NY&A's rail carrier exemption while operating under its prior lease agreement. (Town Ex. G, (Ex. 1 p. 33)).

In or about 2002, Coastal approached NY&A and proposed constructing a facility on the Farmingdale site so as to enable it to receive, process, and load C&D debris.[1] (Tr. 52-53, 93, 148). C&D debris consists of materials that are taken from a construction site other than asbestos. It can include wood, metal, glass, and concrete. (Tr. 69-70). Coastal paid for the construction of the facility at the Farmingdale site. (Tr. 194, 197). NY&A did not pay any of the costs or expenses associated with the construction of the Coastal facility. (Tr. 93). Under the terms of its Agreement with NY&A, Coastal has the right to remove its facility from the Farmingdale property when the Agreement expires. (Tr. 94).

As part of its operations, Coastal contracts with customers to receive and ship C&D debris to out-of-state landfills via the Farmingdale site. (Tr. 165). NY&A has no on-site supervisors at the Coastal facility. (Tr. 125). NY&A exercises no control over Coastal's employees. (Tr. 125).

NY&A has no involvement in the marketing of the Coastal facility or in the contracting with customers for shipment of C&D debris. (Tr. 107, 110). NY&A has no control over what companies Coastal elects to contract with for loading and disposal services. (Tr. 112). NY&A has no knowledge as to the identity of the customers who are delivering the C&D debris to the Coastal facility. (Tr. 112). NY&A has no knowledge as to the locations from which the C&D debris is delivered to the Coastal facility. (Tr. 112). Contrary to the Magistrate's finding, the C&D shipments received by Coastal do not all come from transfer stations – nor have they all been pre-sorted and processed. (Tr. 165-66).

Coastal sets the loading fees that are charged to its customers. (Tr. 67, 107-08). NY&A has no involvement in, or control over, the setting of the loading fees charged by Coastal. (Tr. 67, 107-08, 110). NY&A does not quote Coastal's loading fees to its customers. (Tr. 108, 110). Coastal also enters

[1] The Magistrate's finding that the "use of the facility, whereby members of the public can utilize the railroad transportation of freight, dates back to the 1900's" is clearly erroneous as it is clear that the facility at issue in this case was not built until 2003. Similarly, the Court improperly relied upon Mr. Krebs' testimony regarding the historical use of the Pinelawn property in light of his admission that he only had personal knowledge of such use going back to 1997. (Tr.138). Moreover, the Magistrate's finding directly conflicts with Mr. Rutigliano's testimony that the property was "derelict" when Coastal took over in 2002. (Tr. 155).

into disposal agreements with the out-of-state landfills where the debris is shipped. (Tr. 109). NY&A has no involvement in, or control over, the negotiation of the disposal agreements entered into by Coastal. (Tr. 109-10).

Trucks deliver C&D debris to the Coastal facility where it is dumped and sorted by Coastal employees. (Tr. 166-69). NY&A does not own the trucks that are used to deliver C&D debris to the site. (Tr. 110). NY&A employees do not operate the trucks delivering C&D debris to the site. (Tr. 111). NY&A does not exercise control over the operation of the trucks delivering debris to the Coastal facility. (Tr. 111). NY&A has no involvement in the receipt of the C&D debris at the Coastal facility. (Tr. 113, 200). NY&A has no knowledge of the contents of the trucks dumping at the Coastal facility. (Tr. 113).

The C&D debris is sorted and processed by Coastal employees. (Tr. 104-05, 168-69). Coastal extracts, *inter alia*, scrap metal from the C&D debris that is sorted at the site and sells it as a recyclable. (Tr. 105, 252-55). Coastal employees engage in sorting and processing of the debris using Coastal-owned equipment and tools. (Tr. 114-15, 168-69). NY&A does not control the methods or means by which Coastal sorts and extracts the C&D debris at its facility. (Tr. 114). NY&A does not provide any tools or machinery to Coastal for use at its facility. (Tr. 115).

The C&D debris is loaded onto railcars by Coastal employees using Coastal-owned tools and equipment. (Tr. 115, 200). The railcars into which the C&D debris is loaded are owned by Coastal. (Tr. 115). Coastal has sole responsibility for properly loading its railcars. (Tr. 116). NY&A does not direct Coastal as to the methods or means used in loading the railcars. (Tr. 125). Coastal incurs all expenses relating to the loading of debris onto its railcars. (Tr. 116, 202). NY&A makes no financial contributions towards any aspect of the operation of the Coastal facility. (Tr. 117, 202). NY&A has no involvement in the loading process, other than to check that the cars have been properly loaded. (Tr. 115, 200). NY&A employees make a visual check of the cars after they have been loaded by Coastal. (Tr. 118). NY&A employees do not check, and are not concerned about, the contents of the loaded railcars. (Tr. 119).

The NY&A employees generally conduct their visual inspections of the loaded railcars at night. (Tr. 118). Coastal does not operate its facility at night. (Tr. 198).

NY&A has no responsibility for the maintenance of the Coastal facility. (Tr. 125). NY&A has no responsibility for maintaining the equipment or tools used at the Coastal facility. (Tr. 125). Coastal is solely responsible for billing all customers for the loading and transport of the C&D debris. (Tr. 65, 120). Coastal is solely responsible for collecting fees from customers. (Tr. 121).

NY&A does not receive any portion of the loading or disposal fees charged by Coastal. (Tr. 122). Under the terms of their Operations Agreement, Coastal is obligated to pay NY&A a $20 per car usage fee. (Tr. 122). The usage fee paid by Coastal is for use of the facility and in recognition of previous contributions made by NY&A. (Tr. 123). The usage fee is not tied to or dependent upon the loading fees charges by Coastal. (Tr. 123). Under the terms of their Agreement, Coastal guarantees NY&A a minimum of 1,200 railcars per year. (Tr. 123). Under the terms of their Agreement, Coastal guarantees to pay a minimum of $24,000 annually to NY&A in usage fees. (Tr. 124).

Coastal's loading fees are set either by the yard or the ton. (Tr. 201-02). The per yard loading fee charged by Coastal is $27 per cubic yard. (Tr. 202). The per ton loading fee charged by Coastal is $57 per ton. (Tr. 202). Average-sized railcars can hold anywhere from 70 to 100 tons of debris, and are 4,400 cubic feet in size. (Tr. 202). Based upon its 1,200 car contractual minimum, Coastal's annual revenue from its loading fees is between approximately $4.8 million and $6.0 million. (Tr. 202). NY&A does not pay Coastal any money for the services Coastal provides to the customers. (Tr. 124).

ARGUMENT

POINT I

THIS CASE SHOULD BE DISMISSED ON THE BASIS OF YOUNGER ABSTENION

This action arises out of the denial by the Town of Babylon's Zoning Board of Appeals of an appeal by Coastal and NY&A of a "Stop Work Order" that was issued by the Town in March 2004 regarding Coastal's operations located at 1633 New Highway in Farmingdale, New York. Following the

issuance of the Stop Work Order, Coastal and NY&A sought to stay its enforcement by complying with Town Code procedures and appealing the issuance of the Order to the ZBA.[2] Hearings were conducted by the ZBA on September 9, 2004 and February 3, 2005. Plaintiffs were represented by counsel at those hearings and had a full and fair opportunity to, and did, litigate the federal preemption issue that is presently before this Court. On April 21, 2005, the ZBA issued its decision denying plaintiffs' preemption claim and upholding the Stop Work Order. Rather than exhaust its remedies by pursuing an Article 78 challenge to that decision, as would have been appropriate, Coastal and NY&A brought the instant action seeking to re-litigate the federal preemption issue before this Court.

The complaint should be dismissed based on *Younger* abstention. *See Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746 (1971). When Coastal was served with the Stop Work Order, it could have gone straight into federal court for declaratory relief. It did not. Instead, it elected to participated in administrative proceedings before the Zoning Board and, as a result, could have sought review of that decision in state court.

Younger "requires federal courts to abstain from taking jurisdiction over federal constitutional claims that involve or call into question ongoing state proceedings." *Diamond D Construction Corp. v. McGowan*, 282 F.3d 191, 198 (2d Cir. 2002). "When *Younger* applies, abstention is mandatory and its application deprives the federal court of jurisdiction in the matter." *Id.* The doctrine applies to state administrative proceedings. *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619, 106 S. Ct. 2718 (1986).

The United States Supreme Court has established a three-prong test to determine when *Younger* abstention is appropriate. According to the Court, abstention is proper ". . . if (1) there are ongoing state proceedings that are judicial in nature; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise federal claims." *Middlesex*

[2] Town Code § 267-a(6) provides for a stay of enforcement of a Stop Work Order pending appeal to the ZBA. Coastal took advantage of that provision and, as a result, enforcement has been stayed since the filing of its appeal to the ZBA. Following the filing of the instant action, the parties agreed to maintain the status quo pending resolution of plaintiffs' motion for preliminary injunction. Accordingly, despite the issuance of the Order, Coastal has continued to enjoy uninterrupted operations at the facility.

County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 432 (1982). All of these factors are present in this case.

1. The Ongoing State Proceeding is Judicial in Nature

The Supreme Court has held that, in a *Younger* analysis, a reviewing court should look to whether the state administrative proceeding "began before any substantial advancement in the federal action took place." *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619, 627, n.2 (1986). The instant state administrative proceeding was initiated by the Town by its work stop order. Coastal appealed that order to the Zoning Board and participated in the hearing. The Board's decision was rendered prior to plaintiffs' commencing this action. Because plaintiffs could have availed themselves to an Article 78 proceeding in state court to review the Board's decision, this condition has been met. Indeed, in *Diamond D*, the Second Circuit vacated a preliminary injunction on abstention grounds finding that an ongoing state proceeding exists where a plaintiff "could have gone to the State courts" to challenge an administrative determination, but elected not to. *Diamond D*, 282 F. 3d at 31-32; *Moore v. City of Asheville*, 396 F.3d 385, 395 (4th Cir. 2005) (*Younger* abstention applies despite fact that plaintiff did not avail himself of state-provided avenues of review).

The Magistrate erred in relying upon *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 239 (1984), in an effort to avoid recommending that this action be dismissed based upon *Younger*. In *Midkiff*, the Supreme Court explicitly found that although administrative proceedings had been commenced prior to the federal court action, *Younger* did not apply because the Act at issue in the case "clearly state[d] that th[ose] administrative proceedings [we]re not part of, and [we]re not themselves, a judicial proceeding" *Id.* at 238-239. Because there is no such statutory restriction in the case at bar, *Midkiff* is inapplicable and the Second Circuit's reasoning in *Diamond D* must control.

2. The State Proceeding Implicates Important State Interests

The second prong of the *Younger* test is satisfied "if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the states

and the National Government." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 95 (1987). Clearly, the State's interests in this proceeding are important. Plainly the collection, disposal and utilization of solid waste is a matter of grave concern to all citizens and is an activity thoroughly affected with the public interest. *See Richards "Of Course" Inc. v. Town of DeWitt*, 1985 WL 669278 (N.D.N.Y. 1985) (enforcement of zoning ordinances significant state interest warranting *Younger* abstention). As stated by the Fourth Circuit in dismissing on abstention grounds a constitutional challenge to fines imposed pursuant to local noise ordinances, notwithstanding that the agency determination had not been appealed in State Court:

> to the extent that Moore in this case seeks to annul or trample on the results of state administrative proceedings, he interferes with the State's interest in enforcing its substantive laws as well as its interest in enforcing those laws through available administrative procedures and in its own courts.

Moore v. City of Asheville, 396 F.2d 385, 395 (4th Cir. 2005).

3. **The State Proceeding Provides a Forum Within Which Federal Claims May Be Raised.**

The third *Middlesex* prong is also met here. Plaintiffs had the ability to raise their federal claims in an Article 78 proceeding. *See, e.g., Richards "Of Course" Inc.*, 1985 WL 669278 (dismissing section 1983 claim alleging Commerce Clause violation on abstention grounds).

POINT II

THE COURT SHOULD NOT HAVE CONDUCTED AN EVIDENTIARY HEARING BECAUSE THE ZONING BOARD'S FINDINGS OF FACT ARE ENTITLED TO PRECLUSIVE EFFECT

Even assuming, *arguendo*, that the Court agrees with the Magistrate's recommendation that *Younger* abstention is inapplicable, the law is clear that a preliminary hearing should not have been conducted prior to a decision on the merits in this case. In their Memoranda in Opposition to the instant motion, submitted to the Magistrate prior to the hearing, defendants argued that Supreme Court precedent dictated that no evidentiary hearing should have been conducted in this matter in light of the prior administrative proceedings conducted by the Zoning Board of Appeals. The argument and authority were

again raised by defendants at the start and conclusion of the hearing and the Magistrate erred in electing to ignore the argument and go forward with the hearing. (Tr. 16-18, 273-75).

The law is well-settled that a federal court *must* give preclusive effect to findings of fact made by an administrative tribunal where the parties before it had a full and fair opportunity to litigate the issues at hand. As the Supreme Court held in *University of Tennessee v. Elliott*, 478 U.S. 788, 799, 106 S.Ct. 3220, 3226 (1986), "when a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,' federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." *Id*

Here, there is no question that plaintiffs had an adequate opportunity to, and did, litigate all of the issues relating to their claim of federal preemption before the ZBA. There is also no question that, under New York law, a reviewing court may not interfere with a zoning board's determinations as long as those determinations find a rational basis in the record. *See Matter of Doyle v. Amster*, 79 N.Y.2d 592, 595-96, 584 N.Y.S.2d 417 (1992). Thus, under the controlling authority of *Elliott*, the Magistrate was, and this Court is, required to give preclusive effect to the findings of fact made by the ZBA in support of its decision to deny plaintiffs' appeal of the Stop Work Order on federal preemption grounds provided those findings have a rational basis in the record from the ZBA hearing. *See D.R. Evans v. Board of County Commissioners*, 994 F.2d 755, 761 (10th Cir. 1993) (court must give due deference to findings made by municipal board in determining whether local regulations are preempted by federal law).

A review of the findings made by the ZBA, and the record upon which those findings are based, establishes that the rational basis standard is easily met. (Town Ex. G). Accordingly, the defendants respectfully submit that it was improper as a matter of law for the Magistrate to have conducted an evidentiary hearing in this matter. Under the teachings of *Elliott*, this Court need only

determine whether, based upon the facts as found by the ZBA, Coastal is entitled to an exemption from local regulation under the ICCTA. *See D.R. Evans*, 994 F.2d at 761 (upon review, court "need only determine whether the County's application of its local regulations to the facts as they interpreted them are preempted by federal law."). As shown, the facts found by the ZBA make it clear that Coastal is not entitled to any such exemption. (Town Ex. G).

POINT III

PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION

The Second Circuit has made it clear that a preliminary injunction is "an extraordinary and drastic remedy which should not be routinely granted." *Medical Society of the State of New York v. Toia*, 560 F.2d 535, 538 (2d Cir. 1977). The burden is on the movant to establish: (1) irreparable harm or injury; and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of the hardships tipping decidedly in favor of the movant. *Jackson Dairy, Inc. v H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979).

A. Plaintiffs have not established irreparable harm

It is axiomatic that irreparable injury is the "*sine qua non* for the grant of preliminary injunctive relief." *USA Recycling v Town of Babylon*, 66 F.3d 1272, 1294-1295 (2d Cir. 1995). The Second Circuit has repeatedly made it clear that a showing of irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction." *Bell & Howell: Mamiya Co. v Masel Supply Co.*, 719 F.2d 42, 45 (2d Cir. 1983).

To establish irreparable harm, the moving party must demonstrate an injury that is "actual and imminent," not "remote nor speculative." *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989). In addition, the harm must be an "injury for which a monetary award cannot be adequate compensation." *Jayaraj v. Scappini*, 66 F.2d 36, 39 (2d Cir. 1995). As the U.S. Supreme Court

has emphasized, "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Sampson v Murray*, 415 U.S. 61, 90 (1974). "Therefore, where monetary damages may provide adequate compensation, a preliminary injunction should not issue." *Jayarai*, 66 F.2d at 39.

Plaintiffs' entire evidentiary submission on the issue of irreparable harm consist of less than two pages of testimony. Mr. Rutigliano testified at pages 173-74 of the transcript that the Town's Stop Work Order, in the absence of an injunction, may disrupt potential long term contractual commitment with one of Coastal's customers. (Tr. 173-74). That is the full extent of plaintiffs' offer on irreparable harm. The Magistrate's recommendation of irreparable harm is directly contrary to the Second Circuit's holding in *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70 (2d Cir. 1979); *See also Jayarai*, 66 F.2d at 39. Put simply, no matter how sympathetic the Magistrate might have been towards the plaintiffs, it was clearly erroneous for him to have found irreparable harm on this record. *See USA. Recycling, supra* (reversing lower court's issuance of injunction in the absence of evidence of irreparable harm).

The Magistrate's focus on alleged loss of good will and reputation as the basis for his finding of irreparable harm was clear error. Under the facts of this case, the law does not support such an assertion, nor does the Magistrate find support for his position in *John B. Hull, Inc. v. Waterbury Petroleum Products, Inc.*, 588 F.2d 24 (2d Cir. 1978), a case upon which he relies. Similarly, the Magistrate's reliance upon an alleged "anticipated loss of market share growth" as the basis for his finding of irreparable harm also finds no support in the record or in the law.

B. Plaintiffs Are Not Likely To Succeed on the Merits

1. Preemption Does Not Apply

a. The Magistrate's interpretation of the term "rail carrier" under the ICCTA is contrary to other courts and the Surface Transportation Board.

The legal question before this Court is whether a non rail carrier operating an independent, autonomous waste disposal business can be deemed to be engaged in "transportation by rail carrier,"

thereby placing it under the exclusive jurisdiction of the Surface Transportation Board. *See* 49 U.S.C. §10501(b).

In reaching his clearly erroneous recommendation in this matter, the Magistrate has interpreted the term "rail carrier" in the ICCTA to "include *any entity or person* providing 'service and equipment' related to the movement of freight by rail, pursuant to contract with a rail carrier." (R&R p. 28) (emphasis added). Despite the Magistrate's attempt to justify this expansive interpretation by summarily stating that it "comports with other courts' interpretations of 'rail carrier' under the ICCTA," the fact of the matter is that *no other* court has interpreted the ICCTA so broadly. In fact, the STB has explicitly rejected the argument that "any entity or person" that simply provides service and equipment pursuant to a contract with a rail carrier is deemed to be a rail carrier. *See, e.g., Hi Tech Trans.*, 2003 WL 21952136 (STB 2003) (rejecting argument that "any third party or noncarrier that even remotely supports or uses rail carriers would come within the statutory meaning of transportation by rail carrier"). Taken to its logical, or illogical, conclusion, the Magistrate's interpretation would permit, for example, a company like Motorola to claim it is a "rail carrier" and, thus exempt from any state or local regulation, because by providing radios for trains it is providing "services and equipment" related to the movement of freight pursuant to a contract with a rail carrier. Clearly, the Magistrate's interpretation of the ICCTA is incorrect and unsupported and should not be adopted by this Court.

b. Coastal is Not a Rail Carrier Engaged in Rail Transportation

The STB has made it clear that "local regulations related to transportation facilities [are] preempted only when those facilities *have been operated or controlled by a rail carrier*." *Hi Tech*, 2003 WL 21952136 at *3-4. Thus, as the Court conducts its *de novo* review of this matter, it need only focus on those two issues: (1) whether NY&A operates or controls the operations of the Farmingdale facility; and (2) whether the Farmingdale facility is a transportation facility under the ICCTA.

Contrary to the findings of the Magistrate, this case does not even remotely involve "facts similar to those" in *Green Mountain R.R. Corp. v. State of Vermont*, 2005 WL 851705 (2d Cir. 2005). The

facts in that case established that the Green Mountain Railroad, *a rail carrier*, was operating a transloading facility that it had financed and built. *See Green Mountain*, 2005 WL 851705. The undisputed evidence in the record here, however, establishes that the Farmingdale facility is none of those things. It is not owned, operated, or financed by a rail carrier. Thus, the Magistrate's reliance upon *Green Mountain* as a case "involving facts similar to those herein," (R&R p. 16) is clearly erroneous.

Further, the facts of this case are clearly distinguishable from those in *Canadian National Railway Co. v. City of Rockwood*, 2005 WL 1349077 (E.D. Mich June 1, 2005), another case relied upon by the Magistrate. There, the facts established that the *rail carrier* directly entered the waste hauling industry by owning, financing and constructing a transloading facility, and then engaged the services of a contractor to operate the facility. Despite contracting out the operations of its facility, the rail carrier retained responsibility for: directly contracting with the transloading customers; setting the rates which comprised the private contractor's compensation; determining the equipment and personnel used at the facility; directly billing and collecting loading fees from the customers; and remained directly liable to the customers. *See City of Rockwood*, 2005 WL 1349077. Again, because the undisputed evidence in the record establishes that NY&A did not do any of those things with regard to the Farmingdale facility's operations, the Magistrate's reliance upon *City of Rockwood* as support for his Recommendation is clearly erroneous.

As will be shown, the facts of the present case are *nothing* like those in *Green Mountain* or *City of Rockwood*.

Krebs Testimony

Here, the undisputed evidence, although ignored by the Magistrate, establishes that NY&A has not entered into the waste hauling and loading business. It has no interaction with customers whose waste is transported to and from the Farmingdale facility. NY&A does *not* quote rates to Coastal's customers, nor does it contract with, bill or collect fees from them. The Magistrate simply ignored this evidence. The Court need look no further than the telling admissions of NY&A President Fred Krebs to

conclude that NY&A had not entered the waste hauling and loading business by way of the operation of the Farmingdale facility. In attempting to explain why NY&A did not set Coastal's loading fees, Mr. Krebs testified as follows:

> Q: Why doesn't New York and Atlantic Railroad set that fee?
>
> A: Well, because we don't know all the things that go into loading the materials and moving it around and that sort of thing.

(Tr. 67). Thus, Mr. Krebs' candor regarding NY&A's lack of knowledge of Coastal's operations makes it clear that NY&A has not entered the loading business itself, nor is it controlling Coastal's business.

Additionally, the testimony of Mr. Krebs, made it crystal clear that NY&A does not have any control over or responsibility for Coastal's actual operations.[3] (Tr. 112-126). The evidence in the record simply could not be any more convincing on this point. The equipment used at the facility is Coastal's, the personnel are Coastal's and all of the construction and operational costs are borne by Coastal. NY&A does not know what Coastal bills its customers, has no control over Coastal's billing rates, and has no knowledge of Coastal's customers. There is no on-site supervision by NY&A over Coastal's operations and NY&A does not hold itself out to Coastal's customers as the entity that is providing the loading services. NY&A has absolutely no contractual or other obligations to Coastal's customers. Again, the Magistrate failed to acknowledge any of this evidence in his recommendation.

Mr. Krebs made it clear that the Farmingdale facility is not a business of NY&A, the operation of which it contracted out to a private company under an agency relationship. As discussed above, unlike a true agency relationship, NY&A, the purported principal, pays no fee whatsoever to Coastal, its purported agent. NY&A did not construct or finance Coastal's facility. Neither NY&A's personnel or equipment are used in the operation. Coastal decides how to run the facility, who its

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[3] The Magistrate's reliance upon Mr. Krebs' testimony that he "visits" the Coastal facility a "minimum of two times per week," as support for his conclusion further underscores the flaws in his reasoning. (R&R p. 23). In relying upon that testimony, the Magistrate neglected to mention that in describing those twice weekly "visits," Mr. Krebs testified that "sometimes" he actually goes in the facility and "*sometimes [he] just drives by it.*" (Tr. 57). Clearly, Mr. Krebs is not controlling the operations of the facility from the front seat of his car while driving down New Highway. The more relevant testimony was Mr. Krebs' acknowledgment that there is no on-site supervision by NY&A at the Coastal facility. (Tr. 124-25). That testimony was again ignored by the Magistrate in his Report and Recommendation.

customers are and, most significantly, how much to charge its customers. *Cf. William Stevens, Inc. v. Kings Village Corp.*, 234 A.D.2d 287, 650 N.Y.S.2d 307 (2d Dep't 1996) ("The basic tenet of a principal-agent relationship is that the principal retains control over the agent with respect to matters entrusted to the agent, and the agent acts in accordance with the direction and control of the principal.").

As stated above, the Magistrate ignored virtually all of the testimony regarding the *actual* relationship between the plaintiffs, and instead simply relied upon select provisions of the plaintiffs' Operating Agreement as justification for his recommendation that Coastal is an agent of NY&A and thus entitled to its rail carrier exemption. Clearly, the testimony of Mr Krebs establishes unequivocally that, regardless of what the Agreement might say, NY&A does not operate or control Coastal's Farmingdale facility. (Tr. 112-26). That has been the nature of the relationship between the plaintiffs since its inception. In fact, the Magistrate accurately found, based upon Krebs' testimony, that there was no change in the operations of the Farmingdale facility as a result of the execution of the Operating Agreement in August 2004. (R&R 4-5). That finding is significant in light of the fact that at the Zoning Board hearing, Coastal's railroad expert, Mr. McHugh, testified that the parties' relationship prior to the execution of the Operating Agreement would not have been sufficient to extend NY&A's federal exemption to Coastal. Mr. McHugh testified specifically that where there *was just a lease and no control by the railroad no exemption applied.* In a transparently concocted effort at making an end run around this conclusion, Coastal and NY&A then entered the purported agency Agreement.

The Operating Agreement

A review of the more material provisions of the Operating Agreement, none of which were addressed by the Magistrate, reveals that it does not create an agency relationship and is, in fact, nothing but a sham. (Town Ex. C). Paragraph 1.05 of the Agreement provides that "*New York [and] Atlantic's responsibility and liability for the cars and their contents bound to or from the facility end when the cars are uncoupled from New York [and] Atlantic's locomotive at the facility and the railroad's responsibility and liability is resumed when the cars are coupled to the locomotives.*" (Town Ex. C (¶1.05); Tr. 119-20)

(emphasis added). By the Agreement's express terms, consequently, NY&A, the certified railroad, is not responsible for, or involved in, the loading activity and operation of the site. Its responsibility and involvement only begins at the point when the rail cars are connected to New York and Atlantic's locomotive and ends when the railcars are disconnected from the locomotive.

Additionally, the following provision also serve to confirm the lack of any true agency relationship. Paragraph 1.03 entitled "RAILROAD OBLIGATIONS" sets forth that the railroad (NY&A) must provide the existing facility "as is, where is." The railroad does not warrant the condition of the facility or the surrounding areas, the yard or its equipment for any purpose. Paragraph 1.03 states that Coastal has examined the premises and assumes the risk of using the premises for any purpose, and accepts all conditions and defects present thereon.

Under Section 1.04(c) of the Operating Agreement, Coastal must provide, at its own cost, all equipment necessary to operate the Farmingdale facility. (NY&A Ex. 8). Under Section 1.08(a) of the Operating Agreement, Coastal has the "sole responsibility, at its sole expense" for loading all commodities at the facility. (NY&A Ex. 8).

Under Sections 4.02(b) and 4.04 of the Agreement, Coastal is solely responsible for the maintenance and upkeep of the Farmingdale facility. (NY&A Ex. 8). Under Section 6.01 of their Operating Agreement, Coastal must indemnify NY&A for any damages occurring after coupling which were caused by Coastal's negligence. (Tr. 116; NY&A Ex. 8). Article VI contains a broad indemnification clause obligating Coastal to indemnify NY&A from any claims arising out of Coastal's use or occupancy of the premises. Again, this is exactly like the license agreement in *Hi Tech*. Paragraph 1.04(c) provides that Coastal at its sole cost shall acquire or provide any additional loading equipment and that it has the right to install and remove such equipment as the market shall dictate."

Most telling, paragraph 1.12 provides: "Coastal acknowledges that Railroad may use the tracks and other yard facilities from time to time for railroad purposes so long as that use does not

unreasonably interfere with *Coastal's operation.*" (emphasis added). This paragraph makes it crystal clear that the facility sought to be regulated by the Town is not one that is operated by a rail carrier, nor is it operated by the agent of a rail carrier. It is axiomatic that if Coastal were a true agent of the railroad, the operation would be that of NY&A *not* Coastal, and the railroad would not need to worry about interfering with its own operations. The Magistrate elected to ignore all of these provisions of the Agreement.

Finally, while the Magistrate found that the terms of the Agreement serve to immunize Coastal from local regulation, the Agreement itself indicates otherwise. Paragraph 4.01 requires Coastal, "at its sole cost and expense, [to] obtain any applicable required permits, licenses, waivers, consents or other governmental authority required for it to operate the Facility. Any costs incurred by Railroad in the process of obtaining and permits or operating authority for Coastal will be paid by Coastal . . . ." Further, paragraph 4.01(e) provides: "Should RAILROAD'S operations be interrupted by any government agency, public authority or any entity authorized to do so, due to any deficiency in COASTAL'S permits or as the result of COASTAL's failure to obtain or comply with same, COASTAL shall defend, indemnify and hold RAILROAD harmless from any and all costs, including attorney's fees."

Put simply, despite the label of an agency agreement, not only is NY&A not "intimately involved" in Coastal's operations, but rather it expressly disclaims all responsibility for those operations. Moreover, the Agreement does not alter the fact that Coastal is not certified by the Surface Transportation Board. It is NY&A, and not Coastal, who went through the arduous procedure of becoming a licensed rail carrier. In its most basic sense, Coastal unloads trucks. It does not engage in transportation by common carrier.

"Follow the Money"

Further, and perhaps most significantly, the Magistrate elected to ignore the startling evidence regarding the plaintiffs' financial arrangement in reaching his recommendation. If the Court were simply to follow the money involved in this operation it would lead to the inescapable conclusion that no agency relationship exists between the plaintiffs. It is undisputed that *all* revenues and profits gained from

the Farmingdale facility are kept by Coastal – and all expenses of operating the facility are borne by Coastal. (Tr. 122-24). The Magistrate was simply wrong in his finding that Coastal must pay a portion of its loading fees to NY&A in the form of a usage fee. (R&R p. 22). Both the Operating Agreement and the testimony of Mr. Krebs refute this finding. (Town Ex. C (¶3.02); Tr. 122-23). The "usage fee" is simply a different way by which NY&A charges Coastal rent for its use of the property and it is not tied to the loading fees charged by Coastal. (Tr. 123-24). Coastal reaps between $4.8 million and $6.0 million in revenues per year from the facility and pays NY&A *absolutely none of it*. *Cf. In re Shulman Transp.*, 744 F.2d 293, 295-96 (2d Cir. 1984) (lack of concern by alleged principal about how alleged agent handled monies it collected indicates lack of direction and control). Instead, Coastal pays NY&A only a $24,000 annual user fee, which is the equivalent of the annual rent paid by Coastal under its prior lease agreements with NY&A.

Thus, despite the plaintiffs' attempted machinations to the contrary, the Farmingdale facility is not a NY&A operation. If it were, as a matter of law and common sense, NY&A would "know all the things that go into" that operation and would most certainly receive the lion's share of the revenue and profits and would only pay Coastal a fixed dollar amount to operate the facility. *Cf. City of Rockwood, supra*. That NY&A is content allowing Coastal to make millions of dollars operating the facility while it receives a mere $24,000 simply underscores the fact that NY&A does not operate or control that facility.

***Hi Tech* and Other Relevant Cases**

Contrary to the conclusion reached by the Magistrate, this case falls squarely within the holding of *Hi Tech Trans LLC v. New Jersey*, 382 F.3d 295 (3rd Cir. 2004). Although the Magistrate went through a tortured exercise in an attempt to distinguish the facts of this case from those in *Hi Tech*, a review of that case makes it clear that the relevant facts are indistinguishable. In *Hi Tech*, the plaintiff, through a license agreement with a rail carrier, operated a transload facility similar to the one at issue here: trucks hauled construction and demolition bulk waste to the facility; the trucks then discharged the waste into a hopper that Hi Tech provided at the facility; and the waste was then loaded directly into rail cars from the

hoppers; waste was neither stored nor processed at the facility; and once the rail cars were full, the railroad (CPR in that case) removed the material to an out-of-state disposal facility. Despite the fact that Hi Tech, like Coastal, was not certified by the STB as a "rail carrier," it nonetheless claimed to be exempt from local regulation and under that agency's exclusive jurisdiction. The Third Circuit flatly rejected Hi Tech's arguments, holding that: "the most cursory analysis of Hi Tech's operations reveals that its facility does not involve 'transportation by rail carrier.' The most it involves is transportation *to* rail carrier." *Id* at 308. In language that should be dispositive here, the Third Circuit held:

> Accordingly, it is clear that Hi Tech simply uses CPR's [the rail carrier] property to load C & D debris into/onto CPR's railcars. The mere fact that the CPR ultimately uses rail cars to transport the C & D debris Hi Tech loads does not morph Hi Tech's activities into "transportation by rail carrier." Indeed, if Hi Tech's reasoning is accepted, any nonrail carrier's operations would come under the exclusive jurisdiction of the STB if, at some point in a chain of distribution, it handles products that are eventually shipped by rail by a rail carrier. The district court could not accept the argument that Congress intended the exclusive jurisdiction of the STB to sweep that broadly, and neither can we.

Id. at 309.[4]

The issues in *Hi Tech* were the same as the issues before this Court, i.e., (1) was Hi Tech a rail carrier; and, if so, (2) was it engaged in transportation under the ICCTA. *Hi Tech*, 382 F.3d at 308. The Magistrate's attempts to distinguish *Hi Tech* simply miss the boat.

First, the Magistrate attempts to distinguish the cases by asserting that the relationship between the plaintiffs is "of a different nature" than that in *Hi Tech*. The undisputed evidence, however, refutes that assertion. For example, the Magistrate found that "[t]he relationship between NY&A and Coastal differs from the relationship between the railroad and contractor in *Hi Tech* because in *Hi Tech*, the railroad had no responsibility for Hi Tech's operations, and the railroad and Hi Tech explicitly disclaimed any agency or employment relationship." (R&R p. 21). Other than the fact that they are

[4] Clearly, had the Third Circuit employed the Magistrate's expansive interpretation of the term "rail carrier," Hi Tech would have been considered a rail carrier under the Act.

"asserting" an agency relationship,[5] an accurate review of the record in this case reveals that no such distinctions exist between the relationship between NY&A and Coastal and the relationship at issue in *Hi Tech*.

The Magistrate's reliance upon the fact that, in their Operating Agreement, the plaintiffs have dubbed their relationship an "agency" relationship as being dispositive here is in direct conflict with the teachings of the Second Circuit. In *In Re Shulman*, the Second Circuit rejected the existence of an agency relationship, despite the fact that the parties' agreement stated, as here, that one was the "agent" of the other. *Id.*, 744 F.2d at 295. In so holding, the Court recognized that "the district court was not bound by that terminology." *Id.* According to the Court, "where the public interests or the rights of third parties are involved, the relationship between contracting parties *must be determined by its real character rather than by the form and color that the parties have given it.*" *Id.* (emphasis added). Despite citing *In Re Shulman* in his Report and Recommendation, the Magistrate somehow ignored this clear directive and, instead, did precisely what the Second Circuit instructed trial courts *not* to do in these situations. Consequently, the Magistrate erred in relying upon the "form" of plaintiffs' relationship rather than the "real character" of it.

With respect to the "real character" of the plaintiffs' relationship, the evidence that NY&A exercises no direction or control over Coastal's operations is both undisputed and overwhelming. As set forth above, NY&A explicitly disclaims any responsibility for Coastal's operations in the parties' Operating Agreement. (Town Ex. C, ¶1.05). This is the identical relationship that the rail carrier in *Hi Tech* had with its licensee. As stated, although the Magistrate relied upon a number of provisions of the Operating Agreement, the application of which there was little or no testimony about during the hearing, in an effort to justify his Recommendation (including, for example, the provision stating that NY&A had the right to review marketing materials), he somehow failed to even address the fact that NY&A explicitly

[5] The Third Circuit recognized in *Hi Tech* that a party cannot "contractually determine its status as a railroad carrier for regulatory purposes." *Hi Tech*, 382 F.3d at 308, n.19. Thus, the mere fact that plaintiffs have dubbed their relationship an "agency" relationship does not automatically make it so and does not automatically bestow NY&A's rail carrier status upon Coastal. *See In Re Shulman*, 744 F.2d 293, 295 (2d Cir. 1984).

disclaimed responsibility for Coastal's operations. Similarly, despite the undisputed evidence that no employment relationship existed between NY&A and Coastal, he relied upon the fact that no such relationship existed in *Hi Tech* as a distinguishing factor. Clearly, as in *Hi Tech*, the Agreement between the plaintiffs "essentially eliminates [NY&A's] involvement in, and responsibility for, the operation of [Coastal's] facility." *Hi Tech*, 382 F.3d at 308.

In a further effort to distinguish *Hi Tech*, the Magistrate incorrectly relied upon an opinion letter issued, at Coastal's request, by an engineer from the New York State Department of Environmental Conservation as in some way being dispositive on the issues in this case. The Magistrate's reliance upon this letter is misplaced. In the first instance, the existence of this letter lends nothing to the Magistrate's attempts to distinguish *Hi Tech*. Further, the letter, on its face, purports to provide nothing more than a "legal opinion" offered by a DEC *engineer* based upon his "understanding" of what Coastal told him about the nature of its operations and it relationship with NY&A. It simply has no legal relevance to this Court's analysis of whether Coastal is engaged in "transportation by rail carrier" under the ICCTA.

The Magistrate also attempted to distinguish *Hi Tech* from the facts of the present case based upon his conclusion that "defendants have failed to establish that Coastal is operating a transfer facility or handling municipal solid waste." (R&R p. 20). This assertion is incorrect on several grounds. First, as was established in *Hi Tech*, the nature of Coastal's operations are irrelevant because it is not a "rail carrier." As recognized by the Third Circuit, even if the facility is engaged in "transportation," that "satisfies only part of the equation," because the "STB [only] has exclusive jurisdiction over 'transportation by *rail carrier*.'" *See Hi Tech*, 382 F.3d at 308 (emphasis added). Further, the Town need not establish that Coastal is "handling municipal solid waste" in order to show that it is not engaged in transportation under the Act. And, finally, as will be shown below, the evidence in the record established that Coastal's activities at the Farmingdale site are not simply transloading activities but rather constitute transfer station activities which are not considered to be "transportation" under the Act.

Simply stated, the Magistrate's efforts to distinguish *Hi Tech* are unavailing. As set forth above, the analysis offered by the Third Circuit in finding that Hi Tech was not a rail carrier is equally applicable to the facts of this case. In addition to improperly distinguishing *Hi Tech*, the Magistrate also failed to properly consider several other cases with facts analogous to the case at bar.

For example, in *Florida East Coast Railway Co. v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001), Florida East Coast Railway Co. ("FEC") leased property containing an office building and switching and loading/unloading tracks in West Palm Beach, to a company in the business of supplying "aggregate," the primary feedstock for cement. The company hired FEC to transport the aggregate by rail from quarries to the leased property. Once the aggregate entered the leased property, FEC's involvement ended. At that point, the company's employees loaded trucks, owned or hired by the company, and dispatched them to other company plants or customers. The City of West Palm Beach issued cease and desist orders to FEC and the company for violating zoning ordinances and operating without a business license.. FEC then filed a complaint in federal court seeking a declaratory judgment that West Palm Beach's actions were preempted by the ICCTA.

The Court held that the broad preemption applicable to state laws (*Cf. Green Mountain Railroad Corp., supra*) is far more narrow when it comes to local municipal regulation. *Id.* 266 F.3d at 1330-1331. Consequently, according to the Court, the ICCTA displaces only those regulations that may be said to have the effect of managing or governing rail transportation. *Id.* Here, as in *Florida East Coast Railway Company*, the mere fact that it is under a lease/operation agreement with a railroad does not "thoroughly disable" the Town of Babylon's ability to regulate Coastal. Critical to this Court's analysis, and apparently overlooked by the Magistrate, should be that, in this case as in *Florida East Coast Railway Company*, it is the non-rail company, Coastal, that is being regulated, not the actual rail carrier.

In yet another decision demonstrating the lack of merit of plaintiffs' claims, *CFNR v. City of American Canyon*, 282 F. Supp.2d 1114 (N.D.Ca. 2003), the Court held that the sublessee (Apex), of a

common carrier that operated a bulk transfer facility was not entitled to a preliminary injunction after the City denied it a conditional use permit. Employing a well-reasoned analysis, the Court explained:

> In fact, Apex does not appear to be involved in activities integrally related to rail transportation at the subject property. At the hearing, plaintiffs argued that because Apex hauls goods from its facility at the railroad terminal to the customer who ordered the goods, it completes the process of transporting goods by rail and so is subject only to ICCTA regulation. Taken to its logical conclusion, plaintiffs' argument would mean that any trucking company who picks up goods from a railroad terminal for delivery to a customer would be free from local regulation. Congress, however, could not have intended such an expansive interpretation of the ICCTA's reach. *See, e.g*, *Florida East Coast Railway Co.*, 266 F.3d at 1328-31.

As with the non-rail carriers in all of these cases, Coastal's sole involvement with transportation by rail is that it delivers freight to a true rail carrier, NY&A. It is undisputed that NY&A has no involvement with Coastal's operations and no relationship with Coastal's customers. The Farmingdale facility, consequently, is not exempt from state and local regulation. Such a finding is consistent with the Surface Transportation Board's decision in the *Hi Tech* matter:

> A careful analysis of Hi Tech's actual operations, however, leads to the conclusion that its truck-to-rail transloading operations do not fall within the Board's exclusive jurisdiction over rail transportation. . . . To be preempted, the transportation activities must be performed by a rail carrier. . . . Hi Tech does not argue that it is a rail carrier. Instead, it contends that the test to determine whether its facility is considered transportation by rail carrier is whether it is integrally related to interstate rail service. Hi Tech argues that its facility is integrally related to CP's interstate rail service because its transloading activities benefit CP and because C&D debris cannot be transported by rail without first being loaded into rail cards. Essentially, Hi Tech maintains that there is no legal distinction between a transloading facility operated by a noncarrier licensee and one operated by a rail carrier. By Hi Tech's reasoning, any third party or noncarrier that even remotely supports or uses rail carriers would come within the statutory meaning of transportation by rail carrier. . . . ***In every case, jurisdiction was found and local regulations related to transportation facilities preempted only when those facilities have been operated or controlled by a rail carrier.*** *See Green Mountain; Ayer; Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna and Western Railway Corporation*, STB Finance Docket No. 33466 (STB served Sept. 10, 1999); *Growers Marketing Co. v. Pere Marquette Ry.*, 248 I.C.C. 215, 227 (1941); *see also Norfold S. Ty. V. City of Austell*, No. 1:97-CV-1081-RLV, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. Aug. 18, 1997). Here Hi Tech's activities are not performed by a rail carrier. . . . Moreover, CP disclaims any agency or

> employment relationship with Hi Tech and, under the License Agreement, the parties all but eliminate CP's involvement in the operation of the transloading facility and its responsibility for it. There is no evidence that CP quotes rates or charges compensation for use of Hi Tech's transloading facility. Thus, CP's level of involvement with Hi Tech's transloading operation at its Oak Island Yard is minimal and insufficient to make Hi Tech's activities an integral part of CP's provision of transportation by rail carrier.

Hi Tech Trans., 2003 WL 21952136 at *3-4 (STB 2003) (emphasis added).

Thus, the Magistrate's failure to rely upon the Third Circuit's reasoning in *Hi Tech* or the STB's reasoning in its *Hi Tech* decision was clearly erroneous, as it is clear that Coastal is not entitled to the rail carrier exemption from local regulation under either case. Although ignored by the Magistrate, the STB, the agency with exclusive jurisdiction over rail carriers, has consistently held that local regulation over third party facilities has been preempted "*only when those facilities have been operated or controlled by a rail carrier.*" As amply set forth herein, the undisputed evidence in this record establishes that Coastal's Farmingdale facility is neither operated nor controlled by NY&A.

The plaintiffs were keenly aware of the STB's decision in *Hi Tech*. For that reason, they chose not to apply for ICCTA pre-emption from that agency. If this Court were to adopt the Magistrate's recommendations, Coastal would obtain "rail carrier" immunity despite the fact that the STB has never, and will never, license it as a rail carrier. As a result, Coastal would be immune from local, state, and federal regulation – because the STB's jurisdiction is limited to licensed "rail carriers." Put another way, if an injunction is granted, Coastal will operate in a residential area[6] free from regulation by *anyone*. Not the Town, not the DEC, and not the STB. This Court would thus be the only court in the country to have granted a rail carrier pre-emption to an autonomous, non-rail business

[6] Although the Magistrate made repeated reference to his belief that there is no evidence in the record establishing that the Farmingdale facility is located in a residential zone, the record from the ZBA hearings (Town Ex. G), is replete with evidence of that fact. *See, e.g.* Town Ex. G (Exs. 1, 3). In fact, plaintiffs acknowledged that the property was located in "Residential A" zoning in their application to the ZBA. (Town Ex. G (Ex. 3)). Moreover, it was not the Town's burden to justify the issuance of the Stop Work Order during the hearing. Rather, it was plaintiffs' burden to establish their entitlement to a preliminary injunction based upon their claim of federal preemption. The Magistrate, once again, erred in finding that the Town somehow failed to satisfy a burden that it did not have.

that retains all of the profits from its own freight transfer operation. Such a decision would place the Court in direct conflict with every other court that has addressed similar facts and with the STB itself.

C. Coastal's Operations involve more than transloading

The testimony at the hearing established that "transloading" is the moving of commodities "from one mode of traffic to the other," *i.e.*, from truck to rail or rail to truck. (Tr. 33, 228). The testimony further established that, rather than simply moving materials from trucks to rail cars, Coastal is sorting, processing, and storing for disposal the materials that are deposited at the site. Such operations are more akin to a transfer station (Tr. 228) and not only violate the terms of Coastal's purported agreement with NY&A, which limits the use of the property to transloading operations, but they also clearly fall outside the scope of any possible ICCTA preemption. *See, e.g., Florida E. Coast Ry.*, 266 F.3d at 1329-39 (ICCTA did not preempt zoning regulations governing the operation of an aggregate distribution center on property owned by railway); *In re Appeal of Vermont Ry.* , 769 A.2d 648, 655 (Sup. Ct. Vermont 2000) (ICCTA did not preempt local regulation of salt shed facility on railroad's property). The Magistrate erred in concluding that the evidence in the record established that the operations conducted at the Coastal facility constitute transloading.[7] The evidence clearly establishes that Coastal does more than simply move freight from truck to rail and vice versa. Moreover, the Magistrate's discounting of the testimony of Michael Posillico, a witness for Pinelawn cemetery, regarding the nature of Coastal's operations based on his characterization of Mr. Possilico as "the owner of a competing waste recycling company across the street" was clearly erroneous. (R&R 25). That characterization is directly refuted by the unrebutted testimony of Mr. Possilico, provided *in response to the Magistrate's questions*, that his company did not compete with Coastal in any way. (Tr. 233).

[7] The Magistrate's assertion that the Town would be without standing to enforce its laws if, in fact, the facility is a transfer station is also without any support in the law. (R&R p. 26). The Town is not pre-empted from enforcing its own zoning or building codes by any provision of the New York ECL.

POINT IV

THE TOWN IS NOT ESTOPPED FROM ENFORCING ITS ZONING AND BUILDING CODES

As stated above, the plaintiffs did not raise an estoppel argument before the Zoning Board, nor did they allege such an argument or claim in their Complaint, at the hearing (Tr. 275), in their post-hearing Amended Complaint, or in any of their motion papers, and, in the case of Coastal, *did not even raise the argument in its post-hearing brief*. The plaintiffs have thus waived any right to argue this issue now. *See Wertheimer v Town of Huntington Zoning Board of Appeals*, 287 A.D.2d 511, 731 N.Y.S.2d 80 (2d Dep't 2001) (failure to raise argument before zoning board precludes raising it on appeal of board's decision); *see generally NLRB v. The Newton-New Haven Company*, 506 F.2d 1035 (2d Cir. 1974) ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."). Moreover, the fact that Coastal has *never* even raised an estoppel argument clearly warrants a finding that any such argument has been waived. This is especially so in light of the fact that, based upon the evidence in the record, Coastal was the *only* party who allegedly relied to its detriment upon any communications from the Town. (R&R p. 32). Again, however, in an effort to reach the desired result, the Magistrate disregarded the fact that Coastal has never argued that the Town should be estopped from exercising jurisdiction over the facility and simply went ahead and made such a finding anyway. In doing so, the Magistrate criticized the Town's failure to produce any evidence during the hearing on this issue and credited plaintiffs' testimony as "unrebutted." This was again improper in light of the fact that the Town did not put on any evidence on the issue of estoppel because *it was not an issue until the Magistrate raised it after the hearing*. (Tr. 275) The Magistrate thus punished the Town for not producing evidence regarding a claim that had never been raised by the plaintiffs.

Despite the argument not having been raised by the plaintiffs at any point prior to or during the hearing, the Magistrate *sua sponte* raised an estoppel argument for the plaintiffs after the hearing

closed, and has now compounded that error by using that argument as justification for his recommendation. *Cf. Davis v. Bryan*, 810 F.2d 42 (2d Cir. 1987) (reversible error for district court to raise waivable defense on behalf of a party). Assuming, *arguendo*, that this issue is properly before the Court, the Magistrate erred, as a matter of law, in finding that the Town is estopped from enforcing its laws against Coastal.

It is well settled that "estoppel may not be invoked to prevent a municipality from disclaiming the unauthorized acts of its officers." *Kelly v. The Chester Fire District*, 95 A.D.2d 799, 463 N.Y.S.2d 518 (2d Dep't), *aff'd*, 60 N.Y.2d 660, 467 N.Y.S.2d 832, 455 N.E.2d (1983). It is in fact an axiomatic principle of law in New York that "the doctrine of estoppel should only be applied when the failure to do so would operate to defeat a right legally and rightfully obtained. *It cannot operate to create a right.*" *Dell v. Regan*, 186 A.D.2d 336, 587 N.Y.S.2d 800 (3d Dep't 1979) (emphasis added), *aff'd*, 51 N.Y.2d 917 (1980). Further, estoppel cannot "operate to relieve one from the mandatory operation of a statute." *Scheurer v. NYC Employees' Retirement System*, 223 A.D.2d 379,, 636 N.Y.S.2d 291 (4th Dep't 1996). Additionally, "estoppel may not be invoked against a municipal agency to prevent it from discharging its statutory duties nor for the purpose of ratifying an administrative error." *Town of Putnam Valley v. Sacramone*, 16 A.D.3d 669, 792 N.Y.S.2d 191 (2d Dep't 2005).

The foregoing principles have been applied with particular stringency in the context of zoning board determinations. Indeed, even when there has been the affirmative grant of a building permit, a Town cannot, as a matter of law, be barred from subsequently determining that the permit was granted in error and thereafter revoking the permit. *See Town of Putnam Valley, supra.* This point was made crystal clear by the New York Court of Appeals in *Matter of Parkview Associates v. the City of New York*, 71 NY2D 274, 525 N.Y.S.2d 176 (1988). There, the Court held that a municipality was not estopped from revoking a building permit even though the plaintiff property owner had already completed substantial construction. In language that will likely be followed by the Second Circuit, the Court of Appeals held:

> In particular, *"[a] municipality, it is settled, is not estopped from enforcing its zoning laws either by the issuance of a building permit or by laches"* and "[t]he prior issue to petitioner of a building permit could not 'confer rights in contravention of the zoning laws'" . . . *estoppel is not available to*

> *preclude a municipality from enforcing the provisions of its zoning laws and the mistaken or erroneous issuance of a permit does not estop a municipality from correcting errors, even where there are harsh results*

71 N.Y.2d at 282 (emphasis added); *See also Waste Recovery Enterprises, LLC v. Town of Unadilla*, 294 A.D.2d 766 (3rd Dep't 2002) (statements by Town representatives did not serve to estop the Town from subsequently enforcing its local law). The Magistrate erred in disregarding the ample caselaw discussed herein, and instead in relying upon *Faymore Dev. Co., Inc. v. Bd. of Standards & Appeals*, 45 N.Y.2d 560 (1978), to support his findings of estoppel.

Put simply, the plaintiffs did not raise an estoppel or laches argument at any point in this proceeding because they knew of the overwhelming case law defeating such an argument. Notwithstanding that overwhelming caselaw and plaintiffs' failure to make the argument, the Magistrate found that the Town should be "estopped from asserting *any* jurisdiction" over the Farmingdale facility. Such a finding is wrong on the law and contrary to principles of equity and should not be sustained by this Court.

CONCLUSION

For the foregoing reasons, the Court should reject the Report and Recommendation issued by the Magistrate and dismiss this case on abstention grounds or, in the alternative, deny plaintiffs' motion for a preliminary injunction.

Dated: Garden City, New York
July 29, 2005

Respectfully Submitted,

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A-1212

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

X

COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY, 05-CV-2032 (JS)(ETB)

Plaintiffs,

v.

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON and PINELAWN CEMETERY,

Defendants.

X

DEFENDANT PINELAWN CEMETERY'S OBJECTIONS TO THE JULY 15, 2005 REPORT AND RECOMMENDATIONS OF THE HONORABLE E. THOMAS BOYLE PURSUANT TO FED. R. CIV. P. 72(b)

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Defendant Pinelawn Cemetery ("Pinelawn"), by their undersigned attorney, submit Objections to the Report and Recommendation issued by Magistrate Judge E. Thomas Boyle dated July 15, 2005.

PRELIMINARY STATEMENT

Plaintiff Coastal Distribution, LLC ("Coastal") and Plaintiff New York and Atlantic Railway Company ("NYA") (collectively "Plaintiffs") seek a preliminary injunction against Defendant Town of Babylon ("Town") to enjoin the Town from enforcing a stop work order against Coastal on the grounds that the Interstate Commerce Commission Termination Act ("ICCTA") preempts local regulation of Coastal's operations. Pinelawn, as owner of the property in question and as the owner of hundreds of adjoining acres of land, has intervened in this action. Pinelawn's adjoining property is the resting place for tens of thousands of people and Pinelawn is seeking to protect the rights of the next of kin and loved ones that come to visit their deceased loved ones, as well as the employees that face day-to-day exposure to environmental hazards and toxins that may emanate from the Coastal facility. Pinelawn has gone to the considerable length and expense of intervening in this action because the operations of the Coastal facility present significant harms to the environment and the tens of thousands of people that visit its grounds each year.

On July 15, 2005, Magistrate E. Thomas Boyle issued a Report and Recommendation (the "Report") recommending that Plaintiffs' motion for a preliminary injunction be granted.

SUMMARY OF ARGUMENTS

Pursuant to FRCP 72(b), the Court is required to conduct a de novo determination upon the record of any portion of the Report to which specific objection has been made. To adopt the recommendations of the Report would be reversible error because of the Report includes "a clear error in judgment in weighing relevant factors or exercise[ing] its discretion based upon an error of law or clearly erroneous factual findings." *Polymer Technologies, Inc. v. Bridwell*, 103 F. 3d 970, 973 (Fed. Cir. 1996), citing *Novo Nordisk of North Am. Inc. v. Genentech, Inc.*, 77 F. 3d 1364, 1367 (Fed Cir. 1006).

Pinelawn specifically objects to the Report because:

(i) it completely ignores the possibility of harm to other interested parties and the public interest at large;

(ii) it grants a preliminary injunction in the absence of any showing of irreparable harm;

(iii) it incorrectly concludes that *Hi Tech Trans., LLC v. New Jersey*, 382 F.3d 295 (3d Cir. 2004) is inapplicable

(iv) it misinterprets the term "rail carrier" as defined under the ICCTA;

(v) it ignores the relevant exhibits and testimony adduced at trial that conclusively establish that Plaintiffs have not established an agency relationship which is necessary for Coastal to be considered a "rail carrier" under ICCTA;

(vi) it ignores the fact that Coastal is engaged in more than "transloading" at the site and therefore its activities are beyond the definition of "transportation" in ICCTA;

(vii) it misapplies the law of equitable estoppel as adopted by the courts of the State of New York; and

(viii) it misapplies the *Younger* abstention doctrine.

The Magistrate failed to consider the public's interest in being protected from the potential harmful release of lead and asbestos from the Coastal facility. The net effect of the adoption of this Report would be to allow Coastal to operate in a regulatory "No Man's Land" where it would be free from federal, state and local regulations. To adopt the Report, would also mean that Coastal could obtain "rail carrier" status (and immunity from state and local regulation) even though it has not been licensed by the STB as a rail carrier.

The *sine qua non* for the grant of a preliminary injunctive relief is irreparable harm. The Magistrate eschewed this requirement and has recommended a preliminary injunction based on sparse and speculative testimony.

The prime issue in this case is whether Coastal, a company that receives and disposes of construction and demolition ("C&D") material qualifies for preemption under ICCTA based on its status

as a rail carrier engaged in the business of providing transportation by rail. The Third Circuit's decision in *Hi Tech Trans, LLC v. State of New Jersey*, 382 F.3d 295 (3d Cir. 2004) is factually and legally identical to this case.

Despite the Magistrate's tortured efforts to distinguish *Hi Tech*, it is clear that this case is dispositive of the main issues herein. Plaintiffs hoped to avoid the dictates of the *Hi Tech* case by entering into a sham agreement, which they allege creates an agency relationship. If this Court were to rely solely on selective portions of this agreement and the testimony cited by the Magistrate, it might be inclined to agree that an agency relationship exists. However, to do so would be to ignore the true nature of the Coastal/NYA relationship, including the complete lack of supervision of Coastal by NYA and the amazing disparity in the financial arrangements between NYA and Coastal. Coastal earns between $4.8 million and $6.0 million in revenues per year from the facility and pays none of it to NYA. NYA receives only a $24,000 annual user fee. When this Court conducts its de novo review of the true nature of the Coastal/NYA relationship, it will quickly be apparent that no agency relationship exists.

Perhaps the most troubling aspect of the Report is that the Magistrate has interpreted the term "rail carrier" for purposes of ICCTA more broadly than any court in the country. In addition, this interpretation is directly contrary to the decisions of all circuit and district courts that have addressed this issue and the applicable decisions of the Surface Transportation Board ("STB"), the federal regulatory agency charged with regulating transportation by rail carriers.

After the hearing was concluded and all testimony and evidence had been heard, the Magistrate, sua sponte, raised the defense of equitable estoppel on Coastal's behalf. While Coastal declined the invitation to brief this issue in its post-trial submissions, the Magistrate nonetheless incorrectly decided that this extraordinary doctrine was applicable in this case.

Lastly, the Complaint in this action should be dismissed based on the *Younger* abstention.

OBJECTIONS TO THE MAGISTRATE'S REPORT AND RECOMMENDATION

POINT I

THE REPORT COMPLETELY IGNORES THE POSSIBLITY OF HARM TO OTHER INTERESTED PARTIES AND TO THE PUBLIC INTEREST

"Whenever a request for preliminary injunction implicates public interests, a court should give consideration to the balance of such interests in deciding whether a plaintiff's threatened irreparable injury and probability of success on the merits warrants injunctive relief." *Brody v. Vill. of Port Chester*, 261 F.3d 290 (2d Cir. 2001) (*quoting Time Warner Cable v. Bloomberg L.P.*, 118 F.3d 917, 929 (2d Cir. 1997)). Generally, this rule applies in situations where a plaintiff seeks preliminary injunction against a government action taken in furtherance of a regulatory statutory scheme, which is presumed to be in the public interest. *Wright v. Giuliani*, 230 F.3d 543, 547 (2d Cir. 2000). In this case, the public interest should be considered because Coastal is seeking an injunction against the Town of Babylon's actions in furtherance of enforcement of its zoning code, which is clearly a regulatory statutory scheme and presumed to be in the public interest.

1. The Coastal Facility Presents a Serious Potential For Environmental Harm

The danger of allowing an entity such as Coastal to operate in a regulatory "No Man's Land" was described in depth at the hearing by Mr. Michael Posillico, an adjoining landowner and an individual with vast experience in environmental clean-up operations and solid waste management. Posillico's testimony underscored the importance of processing C&D materials at a regulated transfer station as a means of ensuring that hazardous materials, such as lead and asbestos, are not allowed to become airborne or to leach into the ground water.

Mr. Posillico received a degree in civil engineering and has experience in transporting solid waste and running a solid waste facility. Tr. 224. He has certifications for handling hazardous and radioactive materials, and, at the time of the hearing, his company holds the only recycling permit for handling contaminated soils in New York State. Tr. 224.

Posillico explained that, based on his observations of the Coastal facility from a two-story office building across the street, C&D materials were being "sorted" at the Coastal facility and that such sorting was consistent with the activities of a transfer station. Tr. 225-228. Posillico testified that, based on his experience, Coastal was operating as a transfer station and not a transload facility, explaining that at a transload facility materials are basically changing from one mode of transportation to another whereas at a transfer station materials are sorted and broken down into recyclable components. Tr. 228. At the hearing, evidence was presented to demonstrate that materials were being broken down into recyclable components. Tr. 252-53.

A transfer station, where C&D materials are sorted, has far more potential environmental impacts than a transload facility. The sorting that takes place at a transfer station can cause hazardous materials, such as lead and asbestos to become airborne. Tr. 226. Posillico noted that before asbestos could be dumped at a permitted transfer station, a certification letter would have to be received from an asbestos engineer. Tr. 227. He also stated that air and water monitoring facilities would be present at a permitted transfer station. Tr. 228. Posillico testified that he has never seen any indicia of air or water monitoring at the Coastal facility. Tr. 229.

Posillico explained the rigorous process required to receive a permit for a transfer station as follows:

> It's a very difficult permit, requires air monitoring, ground water monitoring, recordkeeping, insurance, training. It's probably – it's the holy grail of permits to obtain in New York State. And it is difficult because there is a lot of benchmarks to meet for public safety because the more unknown a substance has, the more undefinable a source is.
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> If you are taking aggregate from a mine say, aggregate or stone from a quarry, you know where it's coming from. If you are taking boxed of lumber or crates of lumber, you know where it's coming from. When you are taking demolition debris, there is a complete set of unknowns and the higher the amount of uncertainty, the greater amount generally of regulation or regulation controls for public safety.
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> Tr. 228-29. (emphasis added).

The unknown origin and hazards of C&D materials are what make them subject to such strict regulation and environmental monitoring. Posillico explained the regulatory process is designed to monitor and control such hazards. Tr. 226. In the normal course of events, if these regulations are not observed, economic loss or penalties are imposed. Tr. 226.

Coastal conceded at the hearing that it was processing certain materials that had not come from transfer stations, including roofing materials. Tr. 165-60. The Magistrate chose to ignore this admission (it is notably absent from the Report). Instead, the Magistrate only mentioned and credited that portion of the testimony describing that when C&D arrives at the site, it has already been processed through a transfer station. Plaintiffs presented absolutely no documentary evidence to substantiate their claim that the materials that come to their site are processed at a transfer station. Posillico testified that the processing of roofing materials presents a potential for the release of asbestos, particularly when the materials come from older buildings. Tr. 226-27. In addition, Coastal has announced its intention to purchase an expensive piece of metal equipment to accommodate a scrap metal company. Tr. 183. This raises the real possibility that, in addition to asbestos, Coastal will be releasing lead and other hazardous metal particles into the air and surrounding environment.

As explained below, if the Report is adopted, Coastal will not be subject to any regulation. Therefore, no one will monitor whether lead and asbestos become airborne or leach into the groundwater and Coastal will face no penalties if such events occur. However, Pinelawn, as the fee owner of the property, may ultimately be responsible if toxins and other hazards are discovered. Moreover, Pinelawn's interests also extend to its employees and the approximately one hundred thousand people who visit the cemetery grounds each year.

The Magistrate chose to place "little weight" on Posillico's testimony because Posillico had "no knowledge of the kinds of paper work that accompanies the loads delivered to Coastal. . . ." Report, p. 10. If such records exist Coastal could have easily produced them. Posillico, a non-party witness, could

not be expected to have access to such information, particularly at this early stage of the litigation where no discovery has been conducted.

Unfortunately the Magistrate not only placed "little weight" on Posillico's testimony, he also mischaracterized it. During the hearing the Magistrate asked Posillico the following questions about whether his company competed with Coastal:

> **The Court:** Is this a competitor or yours?
> **The Witness:** No.
> **The Court:** No aspect of the Coastal Distribution operation competes with any aspect of your operation?
> **The Witness:** None.

Despite these direct answers from Posillico and the absence of any other testimony indicating that Posillico's company competed with Coastal, the Magistrate made the following mischaracterization in the Report: "Defendants attempt to refute this characterization [of the Coastal facility as a transload station] by relying on testimony from Posillico, the owner of a competing waste recycling company from across the street..." Report, p. 25 (emphasis added). There is no basis in the record for this characterization.

Further evidence of the lengths to which the Magistrate went to justify the result in this case is the portion of the Report where the Magistrate actually touts the Coastal facility's benefits:

> Lastly I note that the public will benefit from the continued use of the Farmingdale facility as a transload operation throughout the pendency of this action. The cargo that is transported off Long Island by rail by NYA through Coastal's transload operation is cargo that would otherwise be transported by truck on congested roadways throughout Long Island and the City of New York. The decrease in heavy truck traffic loaded with construction debris undoubtedly furthers the public health and safety of the millions of drivers who daily utilize the roadways within the Eastern District of New York.

Report, p. 36.

Unfortunately the Magistrate's proclamation of the public benefits of the Coastal Facility is completely unfounded. In fact, just the opposite is true. There was extensive testimony and evidence submitted to the Town Zoning Board that the C&D materials that were being transported to the Coastal

facility were coming from New York City eastward onto Long Island. Exhibit G, Item 2, p. 40. At the zoning board hearing, private investigators who conducted surveillance of the trucks coming to the Coastal facility concluded that the majority of the C&D materials were coming from the City of New York. Exhibit G, Item 2, p. 40. In reaching its decision to uphold the stop work order issued to Coastal, the Town Zoning Board credited this testimony. Exhibit G, Item 51, p. 9. Thus, contrary to the Magistrate's conclusion, the operations at the Coastal facility will produce an increase in truck traffic on Long Island and thereby further diminish the health and safety of the millions of drivers in the Eastern District.

2. If The Report Is Adopted, There Will Be No Federal, State or Local Regulation of the Coastal Facility

If the Report is adopted, there will be no governmental regulation of the Coastal Facility.

Solid waste regulation is normally the province of state regulatory agencies such as the New York State Department of Environmental Conservation ("NYSDEC"). Congress has explicitly found that the field of solid waste collection and disposal is properly the subject of state regulation. See 42 U.S.C. § 6901 (a)(4) (stating that the "collection and disposal of solid waste should to continue to be primarily the function of state, regional and local agencies"). However, if the Report is adopted, NYSDEC will not regulate the Coastal facility because such regulation will be preempted by federal law. In reaching his conclusions on the issue of preemption, the Magistrate improperly relied upon a letter from a low-level engineer at NYSDEC's regional office, which stated that NYSDEC was preempted by federal law from regulating the Coastal facility. This letter, which is dated February 15, 2005 from Mr. Anthony Cava, an engineer in the NYSDEC Region 1 Office. Declaration of Joseph Rutigliano, Exhibit I.

Mr. Cava, is an engineer, not an attorney, and therefore is not competent to draw the legal conclusions set forth in his letter. Moreover, there was absolutely no testimony at the hearing as to what facts Coastal disclosed to Mr. Cava in forming his opinion. As discussed below, the issue of what constitutes transloading and qualifies for preemption under ICCTA is the subject of significant discussion

and debate among federal circuit and district courts. However, the Magistrate was willing to credit the legal opinion of an engineer, who, at Coastal's request, opined that NYSDEC was preempted from regulating Coastal's activities by federal law. The issue of whether Coastal qualifies for federal preemption is one that should be committed to the sole competence of a court of law. Accordingly, the Magistrate's reliance on Cava's letter was clearly in error.

If the Report is adopted, both the state and local regulation will be interpreted to be prohibited. By default, the only level of government that could regulate Coastal is the federal government. However, it was conceded at the preliminary injunction hearing that Coastal has not been licensed as a rail carrier by the STB. Tr. 82. Since the STB only regulates those entities that have been recognized as rail carriers under ICCTA, it would have no jurisdiction over Coastal. Further, there is no environmental enforcement arm of the STB and, as such, the adoption of the Report will create a total vacuum of environmental enforcement.

Given the potential hazards presented by the Coastal facility, its operation in the absence of regulations will be extremely detrimental to the public interest. The Report completely failed to consider this aspect of the public interest, including the interests of the approximately one hundred thousand people that visit Pinelawn Cemetery each year.

POINT II

THE REPORT RECOMMENDS A GRANT OF A PRELIMINARY INJUNCTION IN THE ABSENCE OF A SHOWING OF IRREPARABLE HARM.

The Second Circuit has repeatedly emphasized that "[i]rreparable harm is the single most important prerequisite for the issuance of a preliminary injunction. Accordingly, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered". *Rodriguez v. DeBuono*, 175 F.3d 227, 233-234 (2d Cir. 1999).

The record in this case is devoid of proof that plaintiff will suffer irreparable harm from the denial of their motion. The Magistrate concluded that Coastal will lose "goodwill, future contracts and market

opportunities". Report, p. 35. The testimony presented by Plaintiffs does not support such a finding, and, as such, the Magistrate abused his discretion by making this clearly erroneous finding of fact.

The Magistrate's findings of fact on irreparable harm were based on the following limited and speculative testimony from Joseph Rutigliano, Coastal's Managing Member:

> **Q. What uncertainty are you talking about?**
> A. With the proceedings today, it's uncomfortable – we have invested millions of dollars, and these pieces of equipment are a couple hundred thousand apiece. We need to invest more money to make the yard more comfortable, but I'm uncomfortable in signing more mortgage agreements as my existence is threatened.
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> ****
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> **Q. Has the stop work order had any effect on your ability to conduct business?**
> A. It hasn't affected in a way I can't really let someone exchange their whole business to rely on rail and not to let them know definitively I'll be here in six months. When they upset their trucking routes, I need to make sure I'm there or I wouldn't be doing him a good service or damage his business. We have a scrap metal company that is banging on the door to come in, and I'm holding it off because it will require us to make an investment of about $400,000 of a special piece of magnetic equipment, and let his truck fleet to go to other customers, and once he comes on rail we need to serve him.
>
> **Q. Can you tell us, since all of us are not in the business, we know what you are talking about, what about training arrangements?**
> A. When you are building up a fleet there is a relationship between the shipper, the generator of the cargo and the trucking company. Once a trucker loses a dedicated haul, he goes to put that truck somewhere else. It's very difficult these days to get trucking and once you have a good trucking arrangement, you try not to damage it by not giving him his freight.
>
> This steel company will displace probably seven tractor-trailers, owner/operators that currently haul steel back to Pennsylvania for him, they will come up on the rail.
>
> **Q Has this happened with other customers, other customers who could not come to you because you could not give them assurances that you will be there?**
> A. The steel one is very big. And the smaller customers, I let them know we'll do a few cars for you but I can't give you a long-term arrangement until I'm sure we'll be here long-term.
>
> **Q. Have you had any discussions with major customers who are not presently using the yard who are interested?**
> A. Again, the steel customer is a very large customer that will take up a considerable portion of our day.

Tr. 178, 183-84.

This limited testimony formed the basis for the Magistrate's sweeping finding of irreparable harm based on a loss of "good will, future contracts and market opportunities." Coastal could only point to the potential loss of one customer due to the "uncertainty" created by these proceedings. Incredibly, after investing millions of dollars at the site (Tr. 178), Coastal is now supposedly unwilling to invest $400,000.00 for a piece equipment to accommodate this customer. Tr. 183.

The above testimony represents the type of speculative assertions that have been consistently rejected by the Second Circuit. *Tom Doherty Associate, Inc v. Saban Entertainment, Inc*, 60 F.3d 27, 37 (2d Cir. 1995). The Second Circuit has reversed a finding of irreparable harm where the "facts demonstrate no loss of goodwill, but only probable money damages from the loss of a profitable line of business." *Jack Khan Music Co. v. Baldwin Piano & Organ Co.*, 604 F.2d 755, 763 (2d Cir. 1979). All that Coastal's testimony demonstrates is its inhibition about investing $400,000.00 in a piece of equipment in order to allow it to enter into a potentially profitable business relationship with a scrap metal dealer. This does not amount to a loss of good will. Rather, at best, it equates to the loss of a potentially profitable line of business, the damages from which can be compensated with money damages determined on the basis of past sales and future market conditions. *See e.g., Jack Khan*, 640 F.2d at 63; *Marisa Christina, Inc. v. Freis*, 646 F. Supp. 252, 254 (SDNY 1986).

The Magistrate notes that, under certain circumstances, a loss of good will and reputation may constitute irreparable injury. However, none of the cases cited in the Report support such a finding in this case. The Magistrate's reliance on *John B. Hull, Inc v. Waterbury Petroleum Products, Inc* 588 F. 2d 24. (2d Cir. 1978) is misplaced. In *John B. Hull*, the Second Circuit upheld a grant of a preliminary injunction based on a finding of irreparable harm because the defendant failed to object to this finding in the magistrate's report and recommendation. *John B. Hull*, 588 F.2d at 29. In the absence of such a waiver, the Second Circuit explained that an argument that a loss of good will and reputation does not constitute irreparable harm had "considerable force" and explained that issuing a preliminary injunction based on an alleged loss of good will and reputation "would destroy the preliminary injunction's status as

an extraordinary remedy." *Id.* It further noted that the cases "in which loss of good will previously has been held to constitute irreparable injury have involved the termination of franchise or distributor relationships." *Id.* (citing cases).

The Magistrate also cites to *Freedom Holdings Inc. v. Spitzer* 408 F. 3d 112, 114-115 (2d Cir. 2005) for the proposition that "[a]n anticipated loss of market share growth may suffice as irreparable harm". In *Freedom Holdings Inc.*, the Court found there was no irreparable harm. Moreover, all of the cases cited in *Freedom Holdings Inc.* in support of the proposition that an anticipated loss of market share growth may suffice as irreparable harm involved disputes between private parties, where the affirmative acts of the defendants were causing a potential loss of business. Here, there have been no affirmative actions taken by defendant Town of Babylon. The only potential action that the Town of Babylon may take is to enforce the stop work order it previously issued.

In sum, the Magistrate's finding that Coastal's potential damages were impossible to calculate constitutes clear error.

POINT III

THE REPORT INCORRECTLY CONCLUDES THAT THE *HI TECH* CASE IS NOT APPLICABLE

Despite the Magistrate's tortured attempts to distinguish *Hi Tech Trans, LLC v. State of New Jersey*, 382 F.3d 295, 308 (3d Cir. 2004), it is clear that that case is directly applicable and dispositive of this case. In *Hi Tech* an operator of a solid waste facility, Hi Tech, entered into a License Agreement with a railroad company wherein it operated a C&D bulk waste loading facility on a rail yard. *Hi Tech*, 382 F.3d at 298-299. Hi Tech operated its transload facility as follows: "(1) trucks hauling C&D waste arrive at the facility; (2) the trucks discharge C&D into a hopper that Hi Tech provides at the facility; and (3) the C&D waste is then loaded directly into rail cars from the hoppers. C&D waste is neither stored nor processed at the facility. Once the rail cars have been filled, [the railroad company] transports them exclusively to out-of-state disposal facilities." *Id.* at 299

The *Hi Tech* Court held that Hi Tech's facility does not involve "transportation by rail carrier [but rather] [t]he most it involves is transportation '*to* rail carrier.' *Id.* at 308 (emphasis in original). In support of this decision, the Third Circuit noted that trucks bring the C&D debris to Hi Tech's facility where it is put in Hi Tech hoppers; that the railroad company *transports* the C&D debris "by rail" to disposal facilities; that Hi Tech is only permitted to use the rail yard for transloading; that Hi Tech is responsible for constructing and maintaining the facility; that the railroad company disclaims liability for Hi Tech's operation; that Hi Tech does not claim an agency or employment relationship with the railroad; and that the railroad does not set or charge a fee to individuals who bring C&D debris to Hi Tech's transloading facility. *Id.* (emphasis in original).

The facts in *Hi Tech* are on point here. As in that case, Coastal operates a C&D operation on a rail yard. NYA (not Coastal) transports the C&D debris by rail to disposal facilities; NYA disclaims liability for Coastal's operation; and NYA does not set or charge a fee to individuals who bring C&D debris to Coastal's facility. As such, Coastal's C&D operation involves — at most — transportation to a rail carrier. In *Hi Tech*, unlike this case, the C&D was not being stored or processed at the site and it was being operated as a true transload facility.

The Magistrate completely missed the mark when he attempted to distinguish the *Hi Tech* based on the following:

> (1) The relationship between the railroad and the transloading company is of a different nature than in Hi Tech; (2) the New York State Department of Environmental Conservation has investigated the Farmingdale facility and concluded that Coastal is operating a transloading facility and falls within the definition of transportation under the ICCTA; (3) the defendants have failed to establish that Coastal is operating a transfer facility or handling municipal solid waste; and (4) plaintiffs have adequately established that the Farmingdale facility is being used and operated as a transloading facility related to the transportation of freight by rail carrier.
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> Report, p. 20

The Magistrate concluded that a key factor that distinguishes this case from *Hi Tech* is the fact that in *Hi Tech*, the railroad and Hi Tech disclaimed any agency or employment relationship, while, in this case, Plaintiffs' Operations Agreement purports to create an agency relationship. In *Hi Tech*, the

Third Circuit emphasized that, in citing the license agreement between Hi Tech and the rail carrier, it was not suggesting that parties *could contractually determine their status* "*as a rail carrier for regulatory* purposes. Rather the agreement was cited because it reflected the nature of Hi Tech's activities and relationship to the rail carrier. *Hi Tech*, 382 F. 3d at 308, n.19. Even if this Court were to assume that rail carrier status could be conferred by contract, the Magistrate was required to look beyond the self-serving label the parties gave to their agreement and analyze the true nature of the relationship to determine whether Coastal is truly NYA's agent. When that analysis is undertaken below, it is clear that Coastal is not NYA's agent.

Equally unavailing is the Magistrate's attempt to distinguish the *Hi Tech* case based on the involvement of the New Jersey Department of Environmental Protection ("NJDEP") in *Hi Tech* and the lack of involvement of NYSDEC in this case. In short, this is a distinction without difference. Whether it is NYSDEC or the Town of Babylon that seeks to enforce local regulations, the legal analysis under the ICCTA is exactly the same and involves examining whether Coastal activities qualify as transportation by rail carrier. The fact that a low-level engineer at NYSDEC issued a legal opinion on this issue does not *aid in that analysis.*

The Magistrate also seeks to distinguish *Hi Tech* based on the fact that the *Hi Tech* facility was handling municipal solid waste ("MSW"). Report, p. 25. Yet again, this is a distinction without difference. It is clear that the focus of the Court's analysis in *Hi Tech's* was not concerned with whether Hi Tech was transporting MSW or C&D. In *Hi Tech*, the Third Circuit was concerned with whether what the entity that was transporting the material was a "rail carrier" and whether their activities qualified as "transportation" under the ICCTA.

Despite the Magistrate's insistence to the contrary, this Court is not asked to review facts that are similar to those in *Green Mountain R.R. Corp. v. State of Vermont*, 404 F.3d 638 (2d Cir. 2005). In that case, Green Mountain Railroad, *a rail carrier*, was operating a transloading facility that it owned, financed and built. *See Green Mountain*, 404 F.3d at *1. Here it is undisputed that none of those factors

exist. NYA, the rail carrier, did not own, operate, or finance the Coastal facility. Accordingly, the Magistrate's reliance on *Green Mountain* is clearly erroneous.

In this case, as in *Florida East Coast Railway Co. v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001), it is the non-rail company, Coastal, that is being regulated, not the actual rail carrier. In *City of West Palm Beach*, Florida East Coast Railway Co. ("FEC") leased property containing an office building and switching and loading/unloading tracks in West Palm Beach, to a company in the business of supplying "aggregate," the primary feedstock for cement. The company hired FEC to transport the aggregate by rail from quarries to the leased property. Once the aggregate entered the leased property, FEC's involvement ended. At that point, the company's employees loaded trucks, owned or hired by the company, and dispatched them to other company plants or customers. The City of West Palm Beach issued cease and desist orders to FEC and the company for violating zoning ordinances and operating without a business license. FEC then filed a complaint in federal court seeking a declaratory judgment that West Palm Beach's actions were preempted by the ICCTA.

The Court held that the broad preemption applicable to state laws is far more narrow when it comes to local municipal regulation and ICCTA displaces only those regulations that may be said to have the effect of managing or governing rail transportation. 266 F.3d at 1330-1331.

In sum, the Magistrate's attempts to distinguish *Hi Tech* and to rely on *Green Mountain* are in error. The *Hi Tech* case provides a well-reasoned analysis of preemption under ICCTA that was applied to very similar facts. As such, *Hi Tech*, not *Green Mountain*, should dictate the outcome of this case.

POINT IV

THE REPORT INCORRECTLY CONCLUDES THAT THE PLAINTIFFS HAVE ESTABLISHED AN AGENCY RELATIONSHIP

Ultimately, the Magistrate concluded, based on a selective reading of the Operations Agreement and the testimony concerning Coastal's operations that the Plaintiffs established an agency relationship. Report, p. 23. However, when this Court undertakes a complete reading of the Operations Agreement and

the testimony regarding Coastal's operations in its de novo review, it will be clear that there is no agency relationship. In conducting this review, this Court should consider that when the public interest or the rights of third parties are involved, the relationship between contracting parties "must be determined by its real character rather than the form and the color that the parties have given it". *In Re Shulman Transport Enters., Inc*, 744 F.2d 293, 295 (2d Cir. 1984); *Royal Insurance Company of America v. RU-VAL Electric Corp.*, 918 F.Supp. 647, 653 (E.D.N.Y. 1996)(in determining agency, court looks for the exertion of actual control and not the indicia of control). When the selective facts on which the Magistrate relied in determining an agency relationship are contrasted with a complete and comprehensive summary of the relevant portions of the Operations Agreement and testimony, this Court will undoubtedly find that an agency relationship did not exist.

2. The Selective Facts Relied Upon by the Magistrate to Establish NYA's Control

a. The Operations Agreement

While the Magistrate conceded that Coastal conducts many of the operations at the site, he nonetheless incorrectly concluded that Coastal conducts these operations "for and on behalf of "NYA based on the following provisions of the Operations Agreement:

- Paragraph 1.02 which provides "RAILROAD shall control the Facility's operations," and shall have the right to review and audit Coastal's records and inspect Coastal's facility.
- Paragraph 1.04 which provides Coastal's services shall include only those "commodities, movements and equipment....approved by RAILROAD," and that Coastal is required to immediately cease and desist from any operation which is found to be "in violation of any contractual or other obligation of RAILROAD upon notice from Railroad." and that Coastal must obtain NYA's advance written approval of all written marketing materials used by Coastal, and that any such marketing material and signage must prominently indicate NYA's name and/or logo.
- Paragraph 3.02 which provides that Coastal sets and collects the loading fees, Coastal is required to pass a portion of the fee on to NYA in the form of a usage fee for each car loaded.
- Paragraph 5.01 which provides Coastal is required to develop increasing levels of traffic at the Farmingdale facility or face termination of the contract.

b. The Testimony

In making his findings on agency, the Magistrate relied upon the following few items from the testimony of Mr. Fred Krebs, NYA's President: (a) [Krebs] visits the Coastal facility a "minimum of two times a week; (b) NYA personnel regularly check the conditions of the track and the switch; (c) regular inspections are conducted by NYA personnel to ensure that the freight cars are loaded properly and balanced; and (d) that unlike *Hi Tech* where the railroad did not join in the litigation arising from the state's attempt to regulate Hi Tech, here the parties have both joined as plaintiffs. Report, p. 23.

2. A comprehensive review of the facts evidences NYA's Lack of Control over Coastal

a. The Operations Agreement

When the Plaintiffs' self-proclaimed agency agreement (*i.e.*, the Operations Agreement) is examined in its entirety, the following provisions, which are Plaintiffs' own negotiated description of their relationship, clearly evidences NYA's lack of control over Coastal:

- Under the terms of the Operations Agreement, NYA does not have any responsibility for anything that happens at the Coastal facility. (Tr. 116; NYA Ex. 8).
- Under Section 1.05 of the Operating Agreement, NYA's responsibility for the loaded railcars only commences once they are coupled to the NYA locomotive. (NYA Ex. 8; Tr. 116, 119).
- Under Section 1.04(c) of the Operating Agreement, Coastal must provide, at its own cost, all equipment necessary to operate the Farmingdale facility. (NYA Ex. 8).
- Under Section 1.08(a) of the Operating Agreement, Coastal has the "sole responsibility, at its sole expense" for loading all commodities at the facility. (NYA Ex. 8).
- Under Section 1.12 of the Operating Agreement, Coastal authorizes NYA to use the tracks and yard facilities on the Farmingdale property, "so long as that use does not unreasonably interfere with *Coastal's operation*." (NYA Ex. 8).
- Under Section 4.01(d) of the Agreement, Coastal has the obligation, at its sole expense, to obtain all required permits, licenses, and/or governmental authority required to operate the Farmingdale facility. (NYA Ex. 8).
- Under Sections 4.02(b) and 4.04 of the Agreement, Coastal is solely responsible for the maintenance and upkeep of the Farmingdale facility. (NYA Ex. 8).

- Under Section 6.01 of their Operating Agreement, Coastal must indemnify NYA for any damages occurring after coupling which were caused by Coastal's negligence. (Tr. 116; NYA Ex. 8).

In reviewing the provisions of the Operations Agreement, the Court should bear in mind that it was signed just prior to the zoning board meeting. Tr. 96-97. At that meeting, Plaintiffs argued that they were entitled to federal preemption based on the terms of the Operations Agreement. The Court should also consider that prior to the Operations Agreement Plaintiffs' relationship was governed by a lease dated July 11, 2002, which lease contained almost all of the same provisions of the Operations Agreement. *Compare* Exhibit NYA7 and Exhibit NYA8. While the title of the agreement between Plaintiffs changed, none of the real business terms did. Nor, as the Magistrate acknowledged, did the Operations Agreement alter the nature of the operations at the Coastal facility. Report, p. 4-5. In other words, this was a sham transaction because, as counsel for Coastal has acknowledged, if Plaintiffs were parties to a lease agreement, they could not qualify for federal preemption. Exhibit G, Item 1, p. 33. The bottom line is that Plaintiffs had initially negotiated a lease and the business relationship which embodied their intended business relationship and investment in the property. When faced with the prospect of truly changing that relationship to one of agent and principal, they refused. This refusal is evidenced by the similarity in the business terms of the lease and the Operations Agreement and the fact that, the execution of the Operations Agreement did nothing to change the operations at the Coastal facility.

b. The Testimony

While it is clear based just on the above provisions of the Operations Agreement that Coastal operates independently of NYA and NYA does not exercise "day-to-day control over the physical performance" of Coastal, Krebs' testimony, as completely summarized below, conclusively established the site in question is completely under Coastal's independent and autonomous control. Krebs testified to the following:

- Coastal paid for the construction of the facility at the Farmingdale site. (Tr. 194, 197). NYA did not pay any of the costs or expenses associated with the construction of the Coastal facility. (Tr. 93).

- As part of its operations, Coastal (not NYA) contracts with customers to receive and ship C&D debris to out-of-state landfills via the Farmingdale site. (Tr. 165).

- NYA has no on-site supervisors at the Coastal facility. (Tr. 125). NYA exercises no control over Coastal's employees. (Tr. 125).

- NYA has no involvement in the marketing of the Coastal facility or in the contracting with customers for shipment of C&D debris. (Tr. 107, 110). NYA has no control over what companies Coastal elects to contract with for loading and disposal services. (Tr. 112).

- NYA has no knowledge as to the identity of the customers who are delivering the C&D debris to the Coastal facility. (Tr. 112). NYA has no knowledge as to the locations from which the C&D debris is delivered to the Coastal facility. (Tr. 112).

- Coastal sets the loading fees that are charged to its customers. (Tr. 67, 107-08). NYA has no involvement in, or control over, the setting of the loading fees charged by Coastal. (Tr. 67, 107-08, 110).

- NYA does not quote Coastal's loading fees to its customers. (Tr. 108, 110).

- Coastal also enters into disposal agreements with the out-of-state landfills where the debris is shipped. (Tr. 109). NYA has no involvement in, or control over, the negotiation of the disposal agreements entered into by Coastal. (Tr. 109-10).

- Trucks deliver C&D debris to the Coastal facility where it is dumped and sorted by Coastal employees. (Tr. 166-69). NYA does not own the trucks that are used to deliver C&D debris to the site. (Tr. 110). NYA employees do not operate the trucks delivering C&D debris to the site. (Tr. 111). NYA does not exercise control over the operation of the trucks delivering debris to the Coastal facility. (Tr. 111).

- NYA has no involvement in the receipt of the C&D debris at the Coastal facility. (Tr. 113, 200). NYA has no knowledge of the contents of the trucks dumping at the Coastal facility. (Tr. 113).

- The C&D debris is sorted and processed by Coastal employees. (Tr. 104-05, 168-69). Coastal extracts, *inter alia*, scrap metal from the C&D debris that is sorted at the site and sells it as a recyclable. (Tr. 105, 252-55). Coastal employees engage in sorting and processing of the debris using Coastal-owned equipment and tools. (Tr. 114-15, 168-69).

- NYA does not control the methods or means by which Coastal sorts and extracts the C&D debris at its facility. (Tr. 114). NYA does not provide any tools or machinery to Coastal for use at its facility. (Tr. 115).

- The C&D debris is loaded onto railcars by Coastal employees using Coastal-owned tools and equipment. (Tr. 115, 200). The railcars into which the C&D debris is loaded are owned by Coastal. (Tr. 115).

- Coastal has sole responsibility for properly loading its railcars. (Tr. 116). NYA does not direct Coastal as to the methods or means used in loading the railcars. (Tr. 125). Coastal incurs all

expenses relating to the loading of debris onto its railcars. (Tr. 116, 202). NYA makes no financial contributions towards any aspect of the operation of the Coastal facility. (Tr. 117, 202).

- NYA has no involvement in the loading process, other than to check that the cars have been properly loaded. (Tr. 115, 200). NYA employees make a visual check of the cars after they have been loaded by Coastal. (Tr. 118).

- NYA employees do not check the contents of the loaded railcars. (Tr. 119). NYA employees are not concerned about the contents of the loaded railcars. (Tr. 119).

- The NYA employees generally conduct their visual inspections of the loaded railcars at night. (Tr. 118). Coastal does not operate its facility at night. (Tr. 198).

- NYA has no responsibility for the maintenance of the Coastal facility. (Tr. 125). NYA has no responsibility for maintaining the equipment or tools used at the Coastal facility. (Tr. 125).

- Coastal is solely responsible for billing all customers for the loading and transport of the C&D debris. (Tr. 65, 120). Coastal is solely responsible for collecting fees from customers. (Tr. 121).

- NYA does not receive any portion of the loading or disposal fees charged by Coastal. (Tr. 122).

- Under the terms of their Operations Agreement, Coastal is obligated to pay NYA a $20 per car usage fee. (Tr. 122). The usage fee paid by Coastal is for use of the facility and in recognition of previous contributions made by NYA. (Tr. 123). The usage fee is not tied to or dependent upon the loading fees charges by Coastal. (Tr. 123).

- Under the terms of their Agreement, Coastal guarantees NYA a minimum of 1,200 railcars per year. (Tr. 123). Under the terms of their Agreement, Coastal guarantees to pay a minimum of $24,000 annually to NYA in usage fees. (Tr. 124).

- Coastal's loading fees are set either by the yard or the ton. (Tr. 201-02). The per yard loading fee charged by Coastal is $27 per cubic yard. (Tr. 202). The per ton loading fee charged by Coastal is $57 per ton. (Tr. 202).

- Average-sized railcars can hold anywhere from 70 to 100 tons of debris, and are 4,400 cubic feet in size. (Tr. 202). Based upon its 1,200 car contractual minimum, Coastal's annual revenue from its loading fees is between approximately $4.8 million and $6.0 million. (Tr. 202).

- NYA does not pay Coastal any money for the services Coastal provides to the customers. (Tr. 124).

Perhaps nothing better demonstrates the lengths to which the Magistrate went to justify the result in this case than the absence of the above testimony from his very brief version of the events in this case.

When this Court reviews the above comprehensive analysis of the facts of this case in light of the well-established principles of agency, it is clear that NYA does not control Coastal and therefore no agency

relationship exists. "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. . . . An essential characteristic of an agency relationship is that the agent acts subject to the principal's direction and control." *Id.* (emphasis added)(*citing Restatement (Second) of Agency* §§ 1(1) & comment b, § 14 and *Nelson v. Serwold*, 687 F.2d 278,282 (9th Cir. 1982)). The most critical element in determining agency is that the principal exercises "day-to-day control" over the "detailed physical performance" of the agent. *Jurgens v. Poling Transportation Corporation*, 113 F.Supp.2d 388 (E.D.N.Y 2000)(*quoting United States v. Orleans*, 425 U.S. 807, 814-16 (1976)).

Among the factors to be considered in determining whether any agency relationship exists are the degree of control the employer exercises over the manner in which the work is done, the method of payment of compensation, the independent nature of the alleged agent's business and the extent to which the alleged principal is responsible for hiring and supervising assistants and for supplying materials and tools. *Royal Insurance*, 918 F.Supp. at 653 (*citing Restatement (Second) of Agency* § 220(2)).

Control over Work

Coastal is solely responsible for loading the rail cars at the site and these rail cars are owned by Coastal. All of the equipment used to load the cars is owned by Coastal and all of the employees who work at the facility are employed by Coastal. NYA has no on-site supervisors and, as noted above its contractual responsibilities end the moment that rail cars are uncoupled at the site and do not resume until the cars are re-coupled.

Method of Payment of Compensation

Basically, Coastal gets all of the money. The relationship between Coastal and NYA bears no relationship to a normal agency relationship where the agent gets a small portion of the principal's proceeds from a sale or delivery of services.

Coastal contracts with its own customers to dispose of its customer's C & D debris and these customers have no relationship with NYA and NYA is never even made aware of the identity of Coastal's

customers. NYA does not bill Coastal's customers, nor does it collect money from them. NYA does not quote rates to Coastal's customers and it has no knowledge of the rate that Coastal charges its customers. Coastal pays NYA $20 per rail car for NYA to transport Coastal's customers' debris to a landfill in Ohio based on an annual minimum guarantee of 1,200 cars. Coastal generates between $4,000-$5,000 in revenue from its customers per rail car and NYA does not receive any percentage of Coastal's revenues or profits. Rather, it is paid only a fixed $20 per car usage fee. Notably, in each contract year, Coastal will receive between $4,800,000- $6,000,000 in revenues from its customers to dispose of their C&D debris ($4,000-$5,000 per rail car x 1,200 rail cars). By contrast, Coastal pays NYA only $24,000 ($20 per car for 1,200 cars) in each contract year.

Independent Nature of the Business

Coastal paid for the construction of all improvements at the site and gets all revenues and profits generated by the operation of the Site. NYA pays Coastal nothing has no significant involvement with the operation of the site.

Expertise

NYA had previously entered into an agreement with CSX to conduct a transload operation at the site. Tr. 84-85. NYA terminated its relationship with CSX because Mr. Krebs did not believe that "traditional railroad personnel," such as CSX, had the necessary skills to develop the potential of the site. Mr. Krebs conceded at the hearing that Coastal had special skills to market and develop the site that CSX did not possess. Tr. 84-86.

POINT V

THE REPORT ADOPTS A DEFINITION OF "RAIL CARRIER" WITHOUT ANY NO LEGAL BASIS

The Magistrate interpreted the term "rail carrier" under ICCTA to include "any person or entity or person providing 'service and equipment' related to the movement of freight by rail, pursuant to a contract with rail carrier". Report, p. 28. No court has adopted such an expansive definition of "rail carrier" and, in fact, the

STB has specifically rejected the notion that "any third party or non carrier that even remotely supports or uses rail carriers would come within the statutory meaning of transportation by rail carrier". *Hi Tech Trans.*, 2003 WL 21952136 (STB 2003). Such an interpretation of a rail carrier has been rejected because of the absurd results that it would allow.

For example, in *Hi Tech*, the Third Circuit dismissed this explaining:

> Accordingly, it is clear that Hi Tech simply uses CPR's [the rail carrier] property to load C & D debris into/onto CPR's railcars. The mere fact that the CPR ultimately uses rail cars to transport the C & D debris Hi Tech loads does not morph Hi Tech's activities into "transportation by rail carrier." Indeed, if Hi Tech's reasoning is accepted, any nonrail carrier's operations would come under the exclusive jurisdiction of the STB if, at some point in a chain of distribution, it handles products that are eventually shipped by rail by a rail carrier. The district court could not accept the argument that Congress intended the exclusive jurisdiction of the STB to sweep that broadly, and neither can we.
>
> *Id.* at 309.

The identical concern was expressed by the Court in *CFNR v. City of American Canyon*, 282 F.Supp.2d 1114 (N.D. Ca. 2003). In that case, the Court held that Apex, a sublessee of a rail carrier that operated a bulk transfer facility, was not entitled to a rail carrier status and exemption from local regulation:

> In fact, Apex does not appear to be involved in activities integrally related to rail transportation at the subject property. At the hearing, plaintiffs argued that because Apex hauls goods from its facility at the railroad terminal to the customer who ordered the goods, it completes the process of transporting goods by rail and so is subject only to ICCTA regulation. Taken to its logical conclusion, plaintiffs' argument would mean that any trucking company who picks up goods from a railroad terminal for delivery to a customer would be free from local regulation. Congress, however, could not have intended such an expansive interpretation of the ICCTA's reach. *See, e.g., Florida East Coast Railway Co.*, 266 F.3d at 1328-31.

Id. at 1119-1120.

A recent case decided by the United State District Court in Michigan emphasized the importance of the second half of the statutory equation, that being that the transportation must be provided by a "rail carrier" or under its auspices. *See Canadian National Railway Co. v. City of Rockwood*, 2005 WL 1349077 (E.D. Mich June 1, 2005).

In *Canadian National Railway*, the District court examined whether a C&D facility was entitled to preemption from local law under ICCTA. In that case, the rail carrier, Canadian National Railway Co. and its

subsidiary ("CN") owned, financed and constructed a transloading facility. *Id.* at *1. CN directly contracted with the transloading customers for the shipment of C&D, set the rates with its customers and was responsible for all billings and collections. *Id* CN engaged the services of a contractor to operate the site but, notably, that contractor was required to "use equipment and personnel approved by CN, must meet the requirements set by CN in their shipping contacts, must perform the transloading services to CN's satisfaction, and must comply with CN's safety and behavior rules and guidelines." *Id.* Under these circumstances, where the rail carrier, CN, entered into the transloading and waste hauling business the Court found that the activities of CN's contractor were not preempted by ICCTA.

In reaching its decision the Court in *Canadian National Railway* emphasized that in order to qualify for preemption, the transportation of goods must be "performed by a rail carrier or under the auspices of a rail carrier holding itself out as providing those services." *Id.* at *5 (*citing Hi Tech Trans.*, STB Finance Docket No. 24192, at 5.). It agreed with the conclusion of the *Hi Tech* case, which found that Hi Tech's activities were not exempt from local regulation, based on "the fact that that the railroad had virtually no involvement or control over the facility." *Id.* at *6 (emphasis added). It further reasoned that the lack of involvement of the railroad in the C&D facility in *Hi Tech*, made Hi Tech nothing more than a "shipper". *Id.* at *5.

Unlike *Canadian National Railway*, NYA has not entered into the transloading and waste hauling business. NYA has no interaction with customers whose waste is transported to and from the Farmingdale facility. NYA does not quote rates to Coastal's customers, does not enter into contracts, nor does it bill or collect fees from Coastal's customers. The equipment used at the facility is Coastal's, the personnel are Coastal's and all of the construction and operational costs are borne by Coastal. NYA does not know what Coastal bills its customers, has no control over Coastal's billing rates, and has no knowledge of Coastal's customers. There is no on-site supervision by NYA over Coastal's operations and NYA does not hold itself out to Coastal's customers as the entity that is providing the loading services. Instead of being paid as a subcontractor Coastal earns gross revenues between $4.8 million and $6.0 million per year from the operations

at the site and pays NYA none of that revenue. Coastal pays NYA the paltry sum of $24,000 a year as a user fee, which is the equivalent of the annual rent paid by Coastal under its prior lease agreements with NYA.

POINT VI

THE REPORT IGNORES THAT COASTAL IS PERFORMING MORE THAN TRANSLOADING AT THE FACILITY

Coastal is not just engaged in transloading at the site. Rather, the evidence adduced at the preliminary injunction hearing is that Coastal was operating a transfer station and sorting at the site. The testimony at the hearing established that "transloading" is the moving of commodities "from one mode of traffic to the other," *i.e.*, from truck to rail or rail to truck. (Tr. 33, 228). The testimony further established that, rather than simply moving materials from trucks to rail cars, Coastal extracts scrap metal from the C&D debris that is sorted at the site and sells it as a recyclable. Such operations are more akin to a transfer station (Tr. 228) and not only violate the terms of Coastal's purported agreement with NYAR, which limits the use of the property to transloading operations, but they also clearly fall outside the scope of any possible ICCTA preemption. Ancillary activities, such as sorting, do not qualify for preemption under ICCTA because they are not part of transportation by rail carrier. *See, City of West Palm Beach*, 266 F.3d. at 1329-1339. (ICCTA does not preempt City's application of its zoning and licensing ordinances to lessee of rail property that was operating an aggregate distribution center) *CFNR Operating Company, Inc. v. City of American Canyon*, 282 F.Supp. 2d 1114 (N.D.Cal. 2003) (a sublessee that operated a bulk transfer facility was subjected to the local zoning regulations and not protected by the doctrine of preemption in federal law).

The United States District Court for the Eastern District of Washington in *Flynn v. Burlington Northern Santa Corporation*, 98 F.Supp.2d 1186, 1190 (2000) instructed that:

> Ancillary facilities also are not regulated by the STB. In *Borough of Riverdale*, the STB observed that "many rail construction projects are outside of the Board's regulating jurisdiction. For example, railroads do not require authority from the Board to build or expand facilities such as truck transfer facilities, weigh stations, or similar facilities ancillary to their railroad operations, or to upgrade an existing line or to construct unregulated or industrial team tracks." (citations omitted)

Notably, in *Hi Tech*, the court specifically found that there was no storing or processing of C&D material at the site and that it was being operated as a transload facility. *Hi Tech*, 382 F.3d at 299. While Coastal's operation is factually analogous to *Hi Tech*, there is one very notable exception to that analogy. Coastal is storing and processing materials at the site. Coastal's facility is more than just a "transload facility", it is "sorting" materials at the site. Thus, the activities at Coastal's facility are even more ancillary to a railroad use than those considered by the Third Circuit in *Hi Tech*.

POINT VII

THE REPORT MISAPPLIES THE DOCTRINE OF EQUITABLE ESTOPPEL

"Under New York law, estoppel may be applied to governmental entities only in those 'exceptional cases' in which failing to apply estoppel would result in 'manifest injustice.'" *In Re Albion Inc. v. Town of Albion*, 217 B.R. 394 (WDNY 1997)(*citing Landmark Colony v. Bd. of Sup'rs*, 113 A.D.2d 741, 493 N.Y.S.2d 340, 343 (2d Dep't 1985); *1555 Post Road Corp. v. Finance Admin.*, 61 A.D 187, 401 N.Y.S.2d 536 540 (2d Dep't 1978). The facts presented in this case do not warrant the invocation of this exceptional doctrine.

"Generally, estoppel may not be invoked against a municipal agency to prevent it from discharging its statutory duties." The doctrine of equitable estoppel is generally not applicable to municipalities. *A.B.C Home Furnishings v. Town of East Hampton*, 947 F.Supp. 635 (EDNY 1996)(*citing E.F.S Ventures Corp. v. Foster*, 71 N.Y.2d 274, 282, 526 N.Y.S.2d 56 (1988); *Parkview Associates v. City of New York*, 71 N.Y.2d 274, 282 (1988)). Of particular importance in this case is the New York State Court of Appeal's statement in *Parkview Associates* that a municipality cannot be "estopped from enforcing its zoning laws, either by issuance by issuing a building permit or by laches." *Id. (quoting City of Yonkers v. Rentways, Inc*, 304 N.Y. 499, 505 (1952)).

It should be noted that Plaintiffs did not argue equitable estoppel at the hearing and this issue was only raised, *sua sponte*, by the Magistrate at the end of the hearing. Tr. 275. Moreover, Coastal did not brief the issue of equitable estoppel in its post-hearing submittal.

The Magistrate analogized this case to *Faymor Development Co. Inc v. Board of Standards and Appeals of the City of New York*, 45 N.Y.2d 560 (1978). *Faymor Development* was a truly exceptional case in which a developer spent a substantial sum on a project, had his permit revoked, and was prevented from completing the project by the illegal mob action of area residents, who physically blocked entry to the construction site. The mob action was aided by the inaction of city law enforcement officials who ignored written requests for assistance from the developer, after the developer obtained Court orders directing the protesters to cease interference with construction. Clearly this case does not present the extraordinary circumstances warranting the application of equitable estoppel that are set forth in *Fraymor Development*.

The Magistrate highlighted the expenditures of money by Coastal and its alleged reliance written disclaimer of jurisdiction by town officials. However, New York Courts have ruled, under similar circumstances that equitable estoppel is not applicable. *Waste Recovery Enterprises, LLC v. Town of Unadilla*, 294 A.D.2d 766 (App. Div., 3d Dep't 2002). In *Town of Unadilla*, a waste operator constructed a transfer station and landfill and argued that the town should be estopped from enforcing a local law that regulated such facilities based on conversations its representatives had with town officials, each of whom indicated that the town had no interest in the project. *Id.* at 767-68. The Court noted that "the import of such statements, however, is significantly diminished by the fact that the Town officials apparently believed that DEC was charged with the authority to make any determinations regarding the proposed construction". *Id.* at 768. Ultimately, the Third Department ruled that under such circumstances estoppel could not be invoked to "operate to relieve one from the mandatory operation of a statute and may not be invoked where reasonable diligence by a good-faith inquirer would have disclosed the existence of the site." *Id.* at 768-69.

As in *Town of Unadilla*, a Town of Babylon official in this case advised Coastal that the Town had "no jurisdiction over the Long Island Railroad Property. The Town of Babylon does not review plans or issue building permits for the Long Island Railroad property." Coastal Exhibit 2. When the Town later discovered that Long Island Railroad was not the fee owner of the property and that the uses to which the

property was being put had been misrepresented, it issued a stop work order, reversing its prior determination that the Town had no jurisdiction. Coastal Exhibit 6. Under such circumstances, estoppel cannot be invoked to relieve Coastal from the mandatory operation of the Town Zoning code, which prohibits the erection of the structure in question and the use to which Coastal has put the subject property.

POINT VII

THE REPORT MISAPPLIES THE *YOUNGER* ABSTENTION DOCTRINE

The complaint merits dismissal based on *Younger* abstention. *See Younger v. Harris*, 401 U.S. 37 (1971). The *Younger* abstention doctrine provides that, absent extraordinary circumstances justifying intrusion, federal courts should refrain from taking any action in cases where the federal plaintiff, in effect, asks the court to interfere with state proceedings. See *Moore v. Sims*, 442 U.S. 415, 423 (1979). The United States Supreme Court in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 432 (1982), established the following: three-prong test for *Younger* abstention "...if (1) there are ongoing state proceedings that are judicial in nature; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise federal claims." When this test is applied to the facts of this case, it is clear that this Court should exercise its discretion in favor of abstention.

1 The Ongoing State Proceeding is Judicial in Nature.

The proceeding before the ZBA was initiated by Coastal in April, 2004 when it appealed the issuance of a stop work order to the ZBA. The Supreme Court has held that, in a *Younger* analysis, a reviewing court should look to whether the state administrative proceeding "began before any substantial advancement in the federal action took place." *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619, 627, n. 2 (1986). Here, Coastal availed itself to appeal proceedings before the ZBA ("ZBA Proceeding") before it commenced this action. The ZBA Proceeding took place over the course of almost one year and involved extensive testimony by fact and expert witnesses, and the submission of

comprehensive legal briefs. Plaintiffs willingly participated in that proceeding and had a full and fair opportunity to litigate the federal preemption issue that is currently before the Court.

Thus, Plaintiffs availed themselves to the appeal process of the ZBA. The ZBA is a quasi-judicial board whose proceedings and standards are dictated by New York State Town Law. *Jewish Reconstructionist Synagogue of N. Shore v. Incorporated Village of Roslyn Harbor*, 40 N.Y.2d 158, 162, 386 N.Y.S.2d 198 (1976). Coastal is free to challenge the ZBA's decision in an Article 78 Proceeding in New York States Supreme Court. Therefore, the first prong of the *Younger* abstention test has been satisfied.

2. The State Proceeding Implicates Important State Interests

The second prong of the *Younger* test is satisfied "if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the states and the national government. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 95 (1987). Clearly, the Town's interests in this proceeding are important. "State zoning regulations and local land use decisions have repeatedly been held to be issues of local concern." *Northeast Mines, Inc. v. Town of Smithtown*, 584 F.Supp. 112 (E.D.N.Y. 1984) (citing *Louisiana Power & Light Company v. City of Thibodaux*, 360 U.S. 25 (1959).

In *Northeast Mines*, the regulations in question were identified as necessary to "protect and to prevent serious and irreparable damage to the public health, safety and general welfare as well as to make effective the general purposes of comprehensive planning and zoning." *Northeast Mines*, 584 F.Supp. at 114. Insofar as the Town's zoning and building laws are critical to public health safety and welfare, the second part of the *Middlesex* test is met in this case.

3. The State Proceeding Provides a Forum Within Which *Federal Claims* May Be Raised

With reference to the third *Middlesex* prong, Plaintiffs have raised their federal preemption arguments in the ZBA Proceeding and the ZBA and the courts of New York may adjudicate the federal question raised by plaintiffs. *See New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491

U.S. 350, 365 (1989). Plaintiffs will have ample opportunity to allege any constitutional violations in an Article 78 proceeding to seek a Temporary Restraining Order. *Christ the King Regional High School v. Culvert*, 815 F.2d 219 (2d Cir. 1987); *Hip-Hop Summit Action Network v. New York Temporary State Com'n on Lobbying*, 2003 WL 22832569 (S.D.N.Y.). Coastal raised its federal preemption argument before the ZBA and they can challenge that decision in an Article 78 proceeding. Moreover, Plaintiffs should be required to exhaust their state court remedies rather than collaterally challenge the state court proceedings via the federal courts. *See O'Neill v. City of Philadelphia*, 32 F.3d 785, 792-93 (3d Cir. 1994). The third prong, therefore has also been met and this action should be dismissed pursuant to *Younger* and its progeny.

CONCLUSION

Accordingly, it is respectfully requested that the Court reject the Report and Recommendation in its entirety and dismiss this case on the grounds of abstention, or, alternatively deny Plaintiffs' motion for a preliminary injunction.

Dated: *Huntington*, New York
August 12, 2005

Respectfully submitted,
LAW OFFICES OF MARK A. CUTHBERTSON

/s/ Mark A. Cuthbertson

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY,

Plaintiffs,

v.

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON and PINELAWN CEMETERY,

Defendants.

NOTICE OF APPEAL

Civ. No.: 05-CV-2032 (JS) (ETB)

Notice is hereby given that Pinelawn Cemetery, defendant in the above named case, hereby appeals to the United States Court of Appeals for the Second Circuit from the District Court's Memorandum and Order entered in this action on the 31st day of January, 2006.

Dated: February 27, 2006
Huntington, New York

LAW OFFICES OF
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Pinelawn Cemetery

A-1250

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY,

Plaintiffs,

v.

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, and PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON and PINELAWN CEMETERY,

Defendants.

----------X

Notice of Appeal

05-CV-2032 (JS) (ETB)

PLEASE TAKE NOTICE that Defendants Town of Babylon, Town of Babylon Board of Zoning Appeals, and Peter Casserly hereby appeal to the United States Court of Appeals for the Second Circuit from the Memorandum and Order granting Plaintiffs' request for a preliminary injunction entered in this action on January 31, 2006.

Dated: Garden City, New York
February 28, 2006

Respectfully submitted,

BOND, SCHOENECK & KING, PLLC

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A-1250

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -X

COASTAL DISTRIBUTION, LLC, AND THE NEW YORK AND ATLANTIC RAILWAY COMPANY,

Plaintiffs,

v.

THE TOWN OF BABYLON, A MUNICIPAL CORPORATION, THE TOWN OF BABYLON BOARD OF ZONING APPEALS, and PETER CASSERLY, AS COMMISSIONER OF PLANNING AND DEVELOPMENT OF THE TOWN OF BABYLON and PINELAWN CEMETERY,

Defendants.

- -X

Notice of Appeal

05-CV-2032 (JS) (ETB)

PLEASE TAKE NOTICE that Defendants Town of Babylon, Town of Babylon Board of Zoning Appeals, and Peter Casserly hereby appeal to the United States Court of Appeals for the Second Circuit from the Memorandum and Order granting Plaintiffs' request for a preliminary injunction entered in this action on January 31, 2006.

Dated: Garden City, New York
February 28, 2006

Respectfully submitted,

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Pinelawn Cemetery

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COASTAL DISTRIBUTION, LLC AND THE NEW YORK AND ATLANTIC AND ATLANTIC RAILWAY COMPANY,	:	05-Civ-2032 (JS) (ETB)
Plaintiffs,	:	
v.	:	DEFENDANTS' JOINT STATEMENT OF MATERIAL DISPUTED FACTS PURSUANT
THE TOWN OF BABYLON, et al.,	:	TO LOCAL RULE 56 1
Defendants,	:	
-and-	:	
PINELAWN CEMETERY CORPORATION,	:	
Intervenor-Defendant.	:	

Pursuant to Local Civil Rule 56.1, defendant the Town of Babylon ("Babylon") and intervenor-defendant Pinelawn Cemetery Corporation ("Pinelawn") (together referred to as "Defendants") submit the following counterstatement pursuant to Rule 56 1 setting forth those issues as to which there exists a genuine issue of material fact[1]:

1. The allegations in paragraph 1 of Plaintiffs' Joint Local Rule 56.1 Statement of Uncontested Facts ("Plaintiffs' Statement") purport to set forth legal conclusions, all of which are disputed.[2] One of the central issues in this case is whether the facility operated in

[1] References to the Joint Appendix are cited parenthetically in the text. Since Plaintiffs seek to move for summary judgment before any discovery has been conducted in this proceeding, the evidence available to Pinelawn is extremely limited. If Plaintiffs are permitted to move for summary judgment without allowing Pinelawn to conduct discovery, Pinelawn will oppose the motion pursuant to Fed.R Civ.P. 56(f).

[2] Local Rule 56.1(a) requires that the moving party submit a "short and concise statement of the material facts to which the moving party contends there is no genuine issue to be

(Continued...)

Farmingdale, New York (the "Farmingdale Facility") by plaintiff Coastal Distribution, LLC ("Coastal"), a private non-rail carrier, is subject to the exclusive jurisdiction of the Surface Transportation Board ("STB"). Defendants have not yet had the benefit of any discovery. In discovery, Defendants will elicit facts concerning, among other things, (a) the relationship between Coastal and The New York and Atlantic Railway Company ("NYAR") and (b) the activities Coastal is conducting at the Farmingdale Facility. However, even without the benefit of discovery, the evidence available to Defendants raises an issue of fact about whether the Farmingdale Facility is being used as a transfer station, rather than as a transload terminal, and whether NYAR and Coastal have something other than a contractor-agent relationship. The limited evidence now available to Defendants indicates that Coastal is using the Farmingdale Facility to conduct an independent business, for its own benefit, using NYAR's status as a rail carrier to avoid compliance with federal, state, and local regulation. (A-551-555; A-557-571; A-1098-1109.)

2. The allegations in paragraph 2 of Plaintiffs' Statement are disputed, except that Defendants do not dispute that NYAR is an interstate carrier by railroad authorized by the STB to provide common carrier service on Long Island, that NYAR acquired the freight operating franchise of the Long Island Railroad (the "LIRR") in 1996, and that the Farmingdale Facility is located on property owned by Pinelawn. In addition to being disputed, the remaining allegations in paragraph 2 of Plaintiffs' Statement are based on

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(Continued...)

tried." Plaintiffs' Statement does not comply with this Rule because it does not consist of short and concise statements, and it therefore is not readily susceptible of response.

hearsay and, as such, do not satisfy Fed.R.Civ.P. 56(e) which requires that a motion for summary judgment be based on facts which would be admissible in evidence.

3. The allegations in paragraph 3 of Plaintiffs' Statement are disputed, except that Defendants do not deny that NYAR's freight operating rights are set forth in a Transfer Agreement dated as of November 18,1996 between LIRR and Southern Empire State Railroad Company which NYAR has identified as a predecessor. To the extent that the allegations in paragraph 3 of Plaintiffs' Statement purport to describe the objective of the State of New York and NYAR's predecessor in entering into the Transfer Agreement, they are hearsay and, as such, do not satisfy Fed.R.Civ.P. 56(e) which requires that a motion for summary judgment be based on facts which would be admissible in evidence. (A-195, 202-203.)

4. The allegations in paragraph 4 of Plaintiffs' Statement are disputed. In addition, the allegations in paragraph 4 of Plaintiffs' Statement are based on hearsay and, as such, do not satisfy Fed.R.Civ P. 56(e) which requires that a motion for summary judgment be based on facts which would be admissible in evidence.

5. The allegations in paragraph 5 of Plaintiffs' Statement are not disputed, but are not material. They are also based on hearsay and, as such, do not satisfy Fed.R Civ.P. 56(e) which requires that a motion for summary judgment be based on facts which would be admissible in evidence.

6. The allegations in paragraph 6 of Plaintiffs' Statement are not disputed, but are not material. They are also based on hearsay and, as such, do not satisfy Fed.R.Civ.P. 56(e) which requires that a motion for summary judgment be based on facts which would be admissible in evidence.

7. The allegations in paragraph 7 of Plaintiffs' Statement are disputed and are not material. They are also based on hearsay and, as such, do not satisfy Fed.R.Civ.P. 56(e) which requires that a motion for summary judgment be based on facts which would be admissible in evidence. Defendants have not had the benefit of discovery in this proceeding and therefore have not had the opportunity to determine the truth of the Plaintiffs' allegations about transportation on Long Island.

8. The allegations in paragraph 8 of Plaintiffs' Statement are disputed. Defendants have not had the benefit of any discovery in this proceeding and therefore have not had an opportunity to determine the truth of NYAR's representations concerning NYAR's efforts with respect to rail traffic. In discovery, Defendants will seek evidence concerning the effect of Coastal's operation on truck traffic. To the extent that paragraph 8 of Plaintiffs' Statement refers to the State's goal, it is based on hearsay and, as such does not satisfy Fed.R.Civ.P. 56(e) which requires that a motion for summary judgment be based on facts which would be admissible in evidence.

9. The allegations in paragraph 9 of Plaintiffs' Statement are disputed, except that the allegation that the Farmingdale Facility is a "wye" track which was used in railroad operations to turn cars and locomotives is not disputed, but is not material. The remaining allegations in paragraph 9 of Plaintiffs' Statement are based on hearsay and, as such, do not satisfy Fed R Civ.P. 56(e) which requires that a motion for summary judgment be based on facts which would be admissible in evidence. Defendants have not had the benefit of any discovery in this proceeding and therefore have not had an opportunity to determine the accuracy of Plaintiffs' assertion that the Farmingdale Facility is the only facility "transferred"

to NYAR which is suitable for transloading bulk materials. In discovery, Defendants will seek evidence concerning the suitability of other facilities for transloading bulk materials.

10. The allegations in paragraph 10 of Plaintiffs' Statement are disputed. Defendants have not had the benefit of any discovery in this proceeding and therefore have not had an opportunity to determine the truth of the representations made in paragraph 10 of Plaintiffs' Statement. Plaintiffs have not produced any evidence in admissible form supporting the allegations in paragraph 10 of their Statement concerning the traffic volumes generated by CSX Transportation and any allegations with respect to traffic volumes therefore constitute hearsay As such, Plaintiffs' allegations do not satisfy Fed.R.Civ.P. 56(e) which requires that a motion for summary judgment be based on facts which would be admissible in evidence. In discovery, Defendants will seek evidence concerning traffic volumes and other aspects of NYAR's dealings with CSX Transportation.

11. The allegations in paragraph 11 of Plaintiffs' Statement are undisputed, except that Defendants (a) dispute Plaintiffs' allegations that (i) NYAR did not enter into the lease with Coastal for the purpose of collecting rent, but to increase the amount of rail traffic through the Farmingdale Facility and (ii) NYAR sought an experienced operator with a proven track record of generating significant bulk material transloading business in area, and (b) assert that Defendants have not had the benefit of any discovery in this proceeding and therefore have not had an opportunity to determine the truth of the representations made in paragraph 11 of Plaintiffs' Statement concerning the reasons for NYAR's actions. In discovery, Defendants will seek evidence concerning how Coastal came to be involved in the Farmingdale Facility, Coastal's previous business experience, and the nature of NYAR's dealings with Coastal.

12. The allegations in paragraph 12 of Plaintiffs' Statement are disputed They are based on hearsay and, as such, do not satisfy Fed.R.Civ.P. 56(e) which requires that a motion for summary judgment be based on facts which would be admissible in evidence.

13. The allegations in paragraph 13 of Plaintiffs' Statement are disputed Defendants have not had the benefit of any discovery in this proceeding and therefore have not had an opportunity to determine the truth of the allegations set forth in paragraph 13. Moreover, the processing of construction and demolition debris implicates issues of health and safety, and requires more than adopting some dust control measures. Code of Town of Babylon §§ 133-1, 133-2, 213-10, 213-278, 213-279, and 213-281. In discovery, Defendants will seek evidence concerning the initial business plan of Coastal and NYAR.

14. The allegations in paragraph 14 of Plaintiffs' Statement are disputed Defendants have not had the benefit of any discovery in this proceeding. However, based on the information available to Defendants at this time, it appears that the LIRR approved Coastal's plans because it was informed – erroneously – that Coastal did not intend to process any material at the Farmingdale Facility (A-123 at ¶ 13.) With respect to the allegations in paragraph 14 of Plaintiffs' Statement concerning Coastal's purported communications with the Town, Plaintiffs have produced no evidence showing what, if anything, the Town was told about ownership of the property on which the Farmingdale Facility was located, the nature of the proposed operation, or the identity of the person who would be conducting the operation. In the written communication from the Town to which Plaintiffs refer, the Town's Commissioner of Planning and Development, Peter Casserly ("Casserly"), sent a letter to an architect who had contacted him concerning the "Long Island Railroad Property." (A-130.) It is impossible to tell from the letter whether the architect informed Casserly that his client

was Coastal – and not the LIRR or NYAR. (Ibid.) From the letter, however, it does not appear that Casserly was actually shown any plans: Casserly wrote that he was confirming a conversation with the architect in which he said that the Town did not review plans or issue building permits for the LIRR. (Ibid.)

15. The allegations in paragraph 15 of Plaintiffs' Statement are disputed to the extent that they relate to when Plaintiffs learned that Pinelawn was the fee owner of the Farmingdale Yard. Defendants have not had the benefit of any discovery in this proceeding and therefore have not had an opportunity to determine the truth of Plaintiffs' representations concerning their knowledge of ownership of the Farmingdale Yard. The allegations in paragraph 15 of Plaintiffs' Statement are undisputed to the extent that they set forth the dates on which the leases expired, but are disputed to the extent that they assert that Pinelawn delivered a document to Coastal purporting to show that Pinelawn had consented to the renewal of the 1904 lease after the deadline for renewing the lease had expired. Pinelawn commenced litigation to establish that the lease was not properly renewed. Pinelawn Cemetery v. Coastal Distribution, LLC, et al., Supreme Court, Suffolk County (Index No. 8599-04). In discovery, Defendants will seek evidence concerning (a) Plaintiffs' knowledge of Pinelawn's ownership of the Farmingdale Yard and (b) communications between Pinelawn and Coastal and NYAR.

16. The allegations in paragraph 16 of Plaintiffs' Statement are disputed, except that the allegation that Coastal built a three-sided structure on the Farmingdale property owned by Pinelawn is undisputed. Defendants have not had the benefit of any discovery in this proceeding and therefore have not had an opportunity to determine the truth of Plaintiffs' representations concerning Coastal's reason for proceeding with construction, the amount

Coastal spent on the structure, and the dust control and other measures that Coastal has in place. In discovery, Defendants will seek evidence concerning Coastal's reason for proceeding with construction, the amount Coastal spent on the structure, and the dust control and other measures that Coastal has in place.

17. The allegations in paragraph 17 of Plaintiffs' Statement are disputed to the extent that they assert that Pinelawn changed its position on January 15, 2004 concerning the 1904 lease. The allegations in paragraph 17 of Plaintiffs' Statement are undisputed to the extent that they assert that a letter was sent to Coastal on behalf of Pinelawn, but are disputed to the extent that they purport to characterize the substance of the letter. (A-1063.)

18. The allegations in paragraph 18 of Plaintiffs' Statement are disputed and, in violation of Local Rule 56.1, are wholly unsupported by a citation to admissible evidence.

19. The allegations in paragraph 19 of Plaintiffs' Statement are disputed, except that the allegation that the Town issued a Stop Work Order to Coastal on March 29, 2004 is undisputed. Defendants have not had the benefit of discovery in this proceeding and therefore have not had an opportunity to determine the truth of Plaintiffs' allegations concerning their purported discussions with the Town's building inspector and the state of construction of the structure. Moreover, to the extent that Plaintiffs do not identify the inspector by name or provide the date(s) of discussions with him, Plaintiffs' allegation does not constitute evidence in admissible form and therefore does not satisfy the requirements of Fed.R.Civ.P. 56(e). In discovery, Defendants will seek evidence concerning communications about the Stop Work Order and the construction of the structure.

20. The allegations in paragraph 20 of Plaintiffs' Statement are disputed. Defendants have not had the benefit of discovery in this proceeding and therefore has not had

an opportunity to determine the truth of Plaintiffs' allegations concerning Coastal's purported discussion with the "Township attorney." Moreover, to the extent that the Plaintiffs do not identify the attorney by name or provide the date of the purported discussion with him, Plaintiffs' allegation does not constitute evidence in admissible form and therefore does not satisfy the requirements of Fed.R.Civ.P. 56(e) In discovery, Defendants will seek evidence concerning Plaintiffs' purported communications with the "Township attorney."

21. The allegations in paragraph 21 of Plaintiffs' Statement are disputed, except that the allegations that Pinelawn filed a lawsuit in Suffolk County Supreme Court, that the Suffolk County Court denied Pinelawn's request for a preliminary injunction, and that the matter is still pending are undisputed. Plaintiffs have not produced any evidence in admissible form supporting the allegations in paragraph 21 of their Statement concerning actions taken in furtherance of an "Agreement." As such, Plaintiffs' allegations do not satisfy Fed.R.Civ.P. 56(c) which requires that a motion for summary judgment be based on facts which would be admissible in evidence.

22. The allegations in paragraph 22 of Plaintiffs' Statement are undisputed to the extent that they assert that Coastal and NYAR replaced their lease with an agreement entitled Transload Facility Operations Agreement (the "Operations Agreement"), and are otherwise disputed. Defendants have not had the benefit of any discovery in this proceeding. However, based on the information available to Defendants at this time, it appears that there was no business reason for replacing the Lease with the Operations Agreement. Rather, the change was a legal maneuver made "on advice of counsel" in the face of the STB's decision in Hi Tech. (A-616, 775-776) NYAR's counsel had, in fact, represented Hi Tech in the proceedings before the STB, and therefore recognized that Coastal would be unsuccessful in

claiming that its operation was within the STB's exclusive jurisdiction based on the Lease. Coastal and NYAR drafted the Operations Agreement with Hi Tech in mind. Thus, the Operations Agreement recites that NYAR "desires to engage COASTAL as RAILROAD's contractor, to operate the Facility on RAILROAD'S behalf" and that "RAILROAD shall control all aspects of the Facility's transloading operations." (A-557-558 ¶ 1.02.) But, NYAR's president, Fred Krebs ("Krebs") admitted that nothing changed in the operation of the Farmingdale Property under the Lease and its operation under the Operations Agreement. (A-236; see also A-273-274.) Even the economics of the deal between Coastal and NYAR also remained the same when the Lease was repackaged as the Operations Agreement. Instead of paying NYAR $24,000 per year in rent, Coastal agreed to pay the same amount under the Operations Agreement in the form of a fee of $20 per rail car for 1,200 cars a year -- which was the number of rail cars Coastal committed to deliver to NYAR per year under both the Lease and the Operations Agreement. (A-551 ¶ C, A-563 ¶ 3 02; A-297-298.) Even though Coastal was ostensibly operating the Farmingdale Property on NYAR's "behalf" under the Operations Agreement, Coastal sets its own loading fee – and NYAR does not know how much that fee is or receive any part of it. (A-283-284, 297; see also A-72 ¶ 10.) NYAR does not quote the fee to its own customers or offer Coastal's loading services as part of the services it offers. (A-283, 545-548.) Article VI of the Operations Agreement contains a broad indemnification clause obligating Coastal to indemnify NYAR from any claims arising out of Coastal's use or occupancy of the premises. Moreover, paragraph 1.12 provides: "Coastal acknowledges that Railroad may use the tracks and other yard facilities from time to time for railroad purposes so long as that use does not unreasonably interfere

with *Coastal's operation.*" (A-535; emphasis added) In discovery, Defendants will seek further evidence concerning the true nature of the relationship between Coastal and NYAR.

23. The allegations in paragraph 23 of Plaintiffs' Statement are disputed to the extent that they allege that the Town Supervisor sent a memorandum to the Chairman of the Zoning Board of Appeals pursuant to and in furtherance of an agreement with Pinelawn, and that the Town Supervisor recognized that Coastal provided a benefit to the public local vendors. These allegations are wholly unsupported by a citation to admissible evidence and therefore violate Local Rule 56.1. The allegations in paragraph 23 of Plaintiffs' Statement are otherwise not material.

24. The allegations in paragraph 24 of Plaintiffs' Statement are disputed, except that the allegation that the New York State Department of Environmental Conservation (the "DEC") is a state agency is undisputed. Section 27-011 of the New York Environmental Conservation Law expressly provides that the governing body of a county, city, town, or village may adopt local laws which are not inconsistent with the State Environmental Conservation Law or any rule promulgated thereunder. Accordingly, contrary to Plaintiffs' allegation, DEC's jurisdiction is not exclusive. Moreover, Defendants have not had the benefit of any discovery in this proceeding and do not know how Coastal came to obtain the letter dated February 15, 2005 that Plaintiffs characterize as a "determination" prior to the date of the letter that Coastal somehow obtained from DEC. (A-1070-1071.) In discovery, Defendants will seek evidence concerning the circumstances surrounding the DEC letter The letter itself constitutes inadmissible hearsay and is not a determination of anything No proceeding was pending before the DEC, and there is no evidence establishing on what, if anything, DEC based its "understanding" of the facts. Since the DEC letter refers to "the

contract between the parties," it appears that the DEC was unaware that a lease had existed and never questioned why it was replaced by the Operations Agreement. There is also no evidence that DEC "inspected" Coastal's operation and deemed it acceptable. On the contrary, the letter indicates that DEC believed it had no jurisdiction over Coastal's operation. (Ibid.) In addition, it appears that DEC based its "determination" solely upon Coastal's representations. (Ibid.)

25 The allegations in paragraph 25 of Plaintiffs' Statement are disputed. Although the Zoning Board of Appeals adopted its decision to uphold the Stop Work Order on April 21, 2005, the decision itself is dated February 10, 2005. (A-30.) Plaintiffs' allegation that the decision was the product of an agreement with Pinelawn is wholly unsupported by a citation to admissible evidence and therefore violates Local Rule 56.1.

26. The allegations in paragraph 26 of Plaintiffs' Statement are disputed. Defendants have not had the benefit of any discovery in this proceeding and therefore have not had an opportunity to determine what activities Coastal conducts or conducted at the Farmingdale Facility. However, based on the information available to Defendants at this time, it appears that Coastal is operating a transfer station – a facility at which waste is processed – and is doing so on its own and not on behalf of NYAR. (A-1098-1109.) Moreover, because the Farmingdale Facility is not enclosed, Coastal has not taken steps to minimize the escape of dust and other environmental, health, and safety hazards. (A-331.) In discovery, Defendants will seek evidence concerning the true nature of Coastal's operation at the Farmingdale Facility.

27. The allegations in paragraph 27 of Plaintiffs' Statement are disputed. There is no evidence that NYAR's president visits the Farmingdale Facility at least twice a week

Rather, when asked whether he had been to the Farmingdale Facility, NYAR's president responded that sometimes he goes in and "sometimes [he] just drive[s] by." (A-232) Moreover, Defendants have not had the benefit of any discovery in this proceeding and therefore have not had an opportunity to determine the truth of Plaintiffs' allegations concerning the dealings between Coastal and NYAR. In discovery, Defendants will seek further evidence concerning the dealings between Coastal and NYAR.

28. The allegations in paragraph 28 of Plaintiffs' Statement pursuant to quote the Operations Agreement and, as such, are undisputed, but are not material. Defendants have not had the benefit of any discovery in this proceeding and therefore have not had an opportunity to determine the true nature of the relationship between Coastal and NYAR. In discovery, Defendants will seek further evidence concerning the dealings between Coastal and NYAR. As discussed in paragraph 1 above, based on the limited information available to Defendants without the benefit of any discovery, it appears that the Operations Agreement is a sham and that Coastal operates the Farmingdale Facility for its own benefit without control by NYAR; Coastal retains all of the profits from the Farmingdale Facility and bears all of the expenses. (A-297-299.)

29. The allegations in paragraph 29 of Plaintiffs' Statement are disputed to the extent that they purport to characterize NYAR's agreements with Coastal and CSX Transportation and to the extent that they suggest that Coastal's use of the Farmingdale Facility is limited. In fact, the Operations Agreement bars NYAR from changing the configuration of the tracks if the change would interfere with Coastal's operation. (A-558 at ¶ 1.03.) Moreover, NYAR is not even allowed to use the Farmingdale Facility if its use would unreasonably interfere with Coastal's operation. (A-561 at ¶ 1.12.)

30. The allegations in paragraph 30 of Plaintiffs' Statement are disputed. Coastal's operation was not among the transload facilities that NYAR held out to the public as a facility for transloading bulk materials. (A-572-573.) In addition, it is clear from the Operations Agreement that Coastal is not operating the Farmingdale Facility as NYAR's agent. Thus, under the Operations Agreement, NYAR has no involvement in or responsibility for Coastal's operation. (A-557). Paragraph 1.05 of the Operations Agreement provides that "New York [and] Atlantic's responsibility and liability for the cars and their contents bound to or from the facility and when the cars are uncoupled from New York [and] Atlantic's locomotive at the facility and the railroad's responsibility and liability is resumed when the cars are coupled to the locomotives " (A-558; A-294-295.) Moreover, Defendants have not had the benefit of any discovery in this proceeding and therefore have not had an opportunity to determine whether the shippers using the Farmingdale Facility are related to Coastal and NYAR. In discovery, Defendants will seek evidence concerning communications between Coastal and NYAR, on the one hand, and potential customers, on the other hand.

31. The allegations in paragraph 31 of Plaintiffs' Statement are disputed. Defendants have not had the benefit of any discovery in this proceeding and therefore have not had an opportunity to determine the identity of Coastal's shippers or the reasons for using a particular mode of transportation. In discovery, Defendants will seek evidence concerning Coastal's shippers and their reasons for using a particular mode of transportation. The allegations in paragraph 31 of Plaintiffs' Statement are also based on hearsay and, as such, do not satisfy Fed.R.Civ.P. 56(e) which requires that a motion for summary judgment be based on admissible evidence.

32. The allegations in Paragraph 32 of Plaintiffs' Statement are disputed. Defendants have not had the benefit of any discovery in this proceeding. In discovery, Defendants will seek evidence concerning complaints about Coastal's operation and conditions created by Coastal's operation.

Dated: June 21, 2007

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

COASTAL DISTRIBUTION, LLC AND THE NEW YORK AND ATLANTIC AND ATLANTIC RAILWAY COMPANY,

Plaintiffs,

v.

THE TOWN OF BABYLON, et al.,

Defendants,

-and-

PINELAWN CEMETERY CORPORATION,

Intervenor-Defendant.

----------x

05-Civ-2032 (JS) (ETB)

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
:
COUNTY OF NEW YORK)

FRAN M. JACOBS, being duly sworn, deposes and says:

1. I am a member of the firm of Duane Morris LLP, attorneys for defendant in this action.

2. I am over 18 years of age and am not a party to this action.

3. On June 21, 2007, I served Defendants' Joint Statement of Material Disputed Facts Pursuant to Local Rule 56.1 on counsel for the other parties herein by depositing in the official depository maintained and exclusively controlled by the United States Government at 340 West 42nd Street, New York, NY 10036-9998, true and correct copies of the same, properly enclosed in a postpaid wrapper addressed to them at the following addresses designated by them for that purpose:

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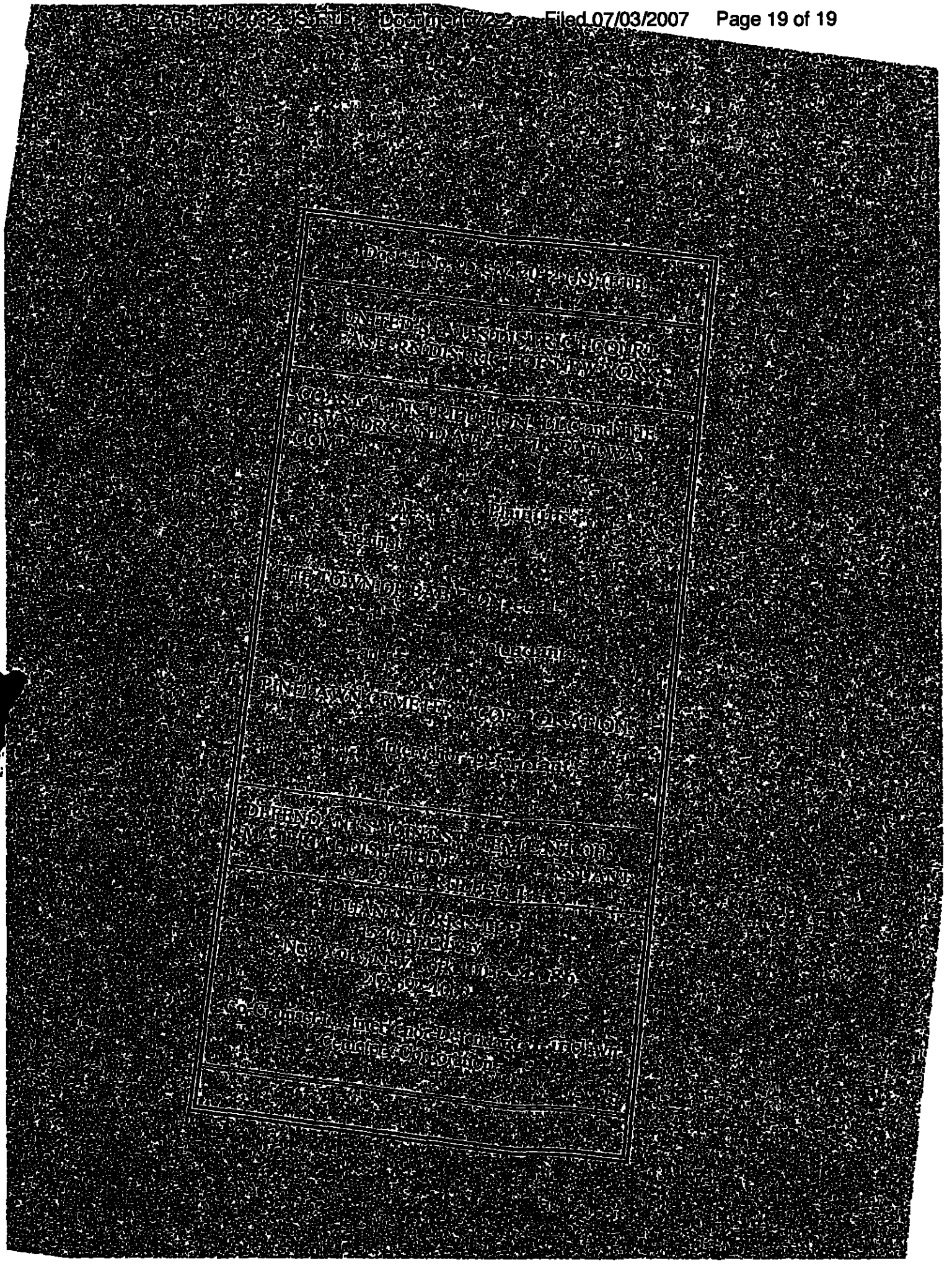
Attorneys for Plaintiff Coastal Distribution, LLC

Fran M. Jacobs
FRAN M. JACOBS

Sworn to before me this
21st day of June 2007

Laurie Deale-Ritterbusch
Notary Public

RITTERBUSCH LAURIE DEALE
Notary Public, State of New York
No. 01DE6144191
Qualified in Westchester County
Commission Expires April 24, 2010



Docket No. [illegible] (JS) (ETB)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

COASTAL DISTRIBUTION, LLC and THE NEW YORK AND ATLANTIC RAILWAY COMPANY

Plaintiffs,

against

THE TOWN OF BABYLON et al.

and

Defendants

PINELAWN CEMETERY CORPORATION

Intervenor-Defendant

DEFENDANT'S JOINTS [illegible] MATERIAL DISPUTED [illegible]

[illegible]

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