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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Finance Docket No 35057

TOWN OF BABYLON AND PINELAWN CEMETERY
PETITION FOR DECLARATORY ORDER

RESPONSE OF THE TOWN OF BABYLON AND PINELAWN
CEMETERY TO THE MOTION OF THE NEW YORK AND
ATLANTIC RAILWAY COMPANY AND COASTAL
DISTRIBUTION LLC FOR A PROTECTIVE ORDER



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August 20, 2007

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Preliminary Statement

The issue that the Town of Babylon (the "Town") and Pinelawn Cemetery ("Pinelawn")¹ raise in their petition – whether a non-rail carrier which operates an independent transfer station/transloading business on railroad property can avoid state and local regulation by making a deal with a rail carrier – requires a close examination of the facts. Respondents New York and Atlantic Railway Company ("NYAR") and Coastal Distribution LLC² ("Coastal") do not want the facts to emerge. To this end, they moved for a protective order blocking all of the discovery that Petitioners seek. Their application should be denied because, as this Board found in Hi Tech Trans, LLC, STB Finance Doc. No. 34192, at 5, 2003 STB LEXIS 475 at *11 (Aug 14, 2003), "[w]hether a particular activity constitutes transportation by rail carrier under Section

¹ The Town and Pinelawn are together referred herein to as "Petitioners."

² In the motion for a protective order, Coastal is identified as Coastal Recycling, LLC. The Town and Pinelawn have no information about Coastal Recycling, LLC, and NYAR and Coastal do not state who Coastal Recycling, LLC is or explain its relationship to either Coastal or NYAR.

10501(b) is a case-by-case and fact specific determination" which depends on a "careful analysis" of the relevant parties' "actual operations "

NYAR and Coastal do not deny that the discovery Petitioners seek concerns the actual operations of Coastal's facility in Farmingdale, New York (the "Farmingdale Facility"), nor do they purport to have provided such information to the Town and Pinelawn. Since the information Petitioners seek in discovery is relevant to the issue raised in the petition and is not otherwise available, the Board should deny the motion of NYAR and Coastal for a protective order

Background

A The Relationship Between NYAR and Coastal

In 2003, NYAR agreed to lease the railyard in Farmingdale, New York – which is actually owned by Pinelawn – to Coastal.³ The lease granted Coastal, a non-rail carrier, the right to the "exclusive use" of the railyard for a period of five years (Pet Ex C ¶ C(3)) In exchange, Coastal agreed to pay NYAR \$2,000 per month in rent (Pet. Ex C ¶ C(1)) Under the terms of the lease, Coastal had the right to make improvements to the premises at its own expense and to remove such improvements at the end of the term (Pet. Ex. C ¶¶ C(2), (8)) The lease further required Coastal to indemnify NYAR against any claims or liability arising out of or resulting from Coastal's use of the Farmingdale Facility. (Pet Ex C ¶ C(5)) Coastal retained liability for the railcars and their contents while the railcars were at the Farmingdale Facility for loading and unloading (Pet Ex C ¶ C(11).)

³ A copy of the lease is annexed as Exhibit C to the Petition and referred to herein as "Pet Ex C " A superseded lease between NYAR and Coastal is annexed as Exhibit B to the Petition

Two years after the lease was signed – and a year after the Board issued its decision in Hi Tech Trans, LLC, supra – NYAR and Coastal substituted in place of the lease a document they called the Transload Facility Operations Agreement (the “Operations Agreement”) ⁴ The change from the lease to the Operations Agreement was made “on advice of counsel,” rather than for business reasons (See Exhibit A hereto, pp. 616, 775-776) Five months before the Operations Agreement was signed, the Town had issued a stop work order with respect to Coastal’s construction of a three-sided structure at the Facility Despite the issuance of the stop work order, Coastal completed construction of its three-sided structure which it now uses in its transfer station/transloading business. (See Exhibit E to Petition.)

The only differences between the lease and the Operations Agreement were cosmetic. Neither the economics of the arrangement between NYAR and Coastal nor the actual operation of the Farmingdale Facility changed when the lease was replaced with the Operations Agreement Like the lease, the Operations Agreement provided for Coastal to pay NYAR a fee of \$2,000 per month (Pet Ex D ¶ 3.02), like the lease, the Operations Agreement allowed Coastal to remove any improvements made at its expense at the end of the term (Pet Ex D ¶ 4 02(a)), like the lease, the Operations Agreement required Coastal to indemnify NYAR against any claims or liability arising out of or resulting from Coastal’s use of the Farmingdale Facility (Pet. Ex D. ¶ 6.01), and like the lease, the Operations Agreement relieves NYAR of any liability for the railcars or their contents once the railcars are uncoupled from NYAR’s locomotive at the Farmingdale Facility (Pet Ex D. ¶ 1 05)

⁴ A copy of the Operations Agreement is annexed as Exhibit D to the Petition and referred to herein as “Pet. Ex D.”

In an obvious attempt to make Coastal's arrangement with NYAR appear different from Hi Tech's arrangement with the rail carrier in Hi Tech Trans , LLC, supra, the Operations Agreement recites that NYAR "shall control all aspects of the Facility's transloading operations " (Pet. Ex. D. ¶ 1 02.) The Operations Agreement also contains a recital that NYAR "desires to engage COASTAL as RAILROAD'S contractor, to operate the Facility on RAILROAD'S behalf." (Pet. Ex. D p. 1) In their response to the petition, NYAR and Coastal characterize Coastal as NYAR's "agent." (Response of New York & Atlantic Railway Co and Coastal Distribution LLC, "Resp ," p 16.) For purposes of this application, NYAR and Coastal describe Coastal as NYAR's "contract operator " (Motion for Protective Order, p 2) But NYAR and Coastal have never produced any evidence establishing that they made an application to the Board for authority to designate Coastal as a "contract operator" or agent at the Farmingdale Facility, nor have they provided any documentation showing that NYAR actually exerts any control over Coastal's operation or that Coastal is acting in a representative capacity on behalf of NYAR

Based on the limited information available to Petitioners, Coastal appears to be operating the Farmingdale Facility independent of NYAR – and not as NYAR's agent. Thus, Coastal and NYAR have testified that NYAR does not set or quote rates to customers for Coastal's transloading service; NYAR is not even aware of the rates Coastal charges for its transloading services; the loading fee that Coastal charges its customers is not tied to the usage fee that Coastal pays NYAR, NYAR is not paid any part of the loading fee that Coastal collects from its shipping customers, NYAR does not pay Coastal anything for the services it provides at the Farmingdale Facility, NYAR has no involvement in contracting with Coastal's shipping

customers, and Coastal built the Farmingdale Facility at its own expense. (See Exhibit A hereto at pp 283, 285, 297-299)

While NYAR and Coastal may have been forced to make some damaging admissions in the course of the district court proceedings, Petitioners have not been provided with the documents they need to develop the facts fully, and they seek those documents in discovery

B. The Town and Pinelawn Have Never Been Provided With Any Discovery

NYAR and Coastal commenced two different types of proceedings involving the Farmingdale Facility – one before the Town’s Zoning Board of Appeals and the other in the United States District Court for the Eastern District of New York. Petitioners did not have the benefit of any discovery in either of those proceedings. Indeed, discovery is not even available in proceedings before the Zoning Board of Appeals and, in the district court proceedings, NYAR and Coastal filed a motion for a preliminary injunction on the same day they filed their complaint. Before the preliminary injunction hearing was held, the Town and Pinelawn were not given an opportunity to conduct discovery and the only issue that was considered thereafter was whether NYAR and Coastal were entitled to preliminary injunctive relief based on the limited evidence they presented. Discovery was not needed or proper for a determination of that issue.

Had the case gone forward in district court, the Town and Pinelawn made clear that they would have pursued discovery there.⁵ But, as the Second Circuit held, it was appropriate for “the parties to petition the STB for a declaratory judgment on the scope of its jurisdiction.” Since the Board is being asked to decide whether Coastal’s operation is within the Board’s exclusive jurisdiction, this forum is the proper one in which to conduct discovery.

⁵ A copy of the letter that the Town sent the district court explaining the need for discovery is annexed hereto as Exhibit B.

To the extent that NYAR and Coastal contend that the record in the district court proceedings establishes that "additional" discovery is unnecessary (Motion for Protective Order, p 2), their position is disingenuous at best. There was no discovery whatsoever in the district court proceeding, and the district court record contains nothing except the selective and one-sided information that NYAR and Coastal chose to present. Far from voluntarily disclosing "[v]oluminous" amounts of crucial information, as they contend (Motion for Protective Order, p 2), NYAR and Coastal produced virtually nothing except redacted versions of the leases they initially signed and the Operations Agreement with which they replaced the lease in response to the Board's decision in HI Tech Trans., *supra*. (See Exhibits C and D hereto ⁶)

Because there was no discovery in either of the two prior proceedings that NYAR and Coastal commenced, the Town and Pinelawn have never seen any documents concerning, among other things, (a) communications with the Board about Coastal; (b) insurance for the Farmingdale Facility, (c) the handling of claims for personal injury or property damage at the Farmingdale Facility, (d) the party responsible for the cost of maintaining and operating the Farmingdale Facility, (e) Coastal's contracts with customers for the shipment of commodities to or from the Farmingdale Facility, (f) payments to Coastal on account of the shipment of commodities to or from the Farmingdale Facility, (g) payments to NYAR on account of the shipment of commodities to or from the Farmingdale Facility, (h) the setting of the amount of the loading fee Coastal charges customers of the Farmingdale Facility and the collection of the

⁶ Exhibits C and D are the versions of the lease and Operations Agreement that NYAR and Coastal produced, from which they redacted the key financial terms which made clear that the Operations Agreement was simply the lease in the guise of an operating agreement. NYAR and Coastal also redacted the Transfer Agreement under which NYAR acquired its rights to use the Farmingdale Facility from the Long Island Railroad. (A copy of the Transfer Agreement, as redacted by NYAR and Coastal, is annexed as Exhibit A to the petition. All of the pages containing compensation terms are missing, see Exhibit A to Petition at page 38.)

loading fee, (i) the marketing of the Farmingdale Facility; (j) environmental testing at the Farmingdale Facility; (k) payments made or due on account of the recovery or recycling of scrap at the Farmingdale Facility, (l) the oversight NYAR exercises with respect to the Farmingdale Facility, (m) the type of commodities shipped to or from the Farmingdale Facility, and (n) complaints about the Farmingdale Facility

While NYAR and Coastal assert that the documents Petitioners seek are “beside the point” (Motion for Protective Order, p 3), they cite no authority which supports their position and, as we explain below, none exists. Based on Board precedent, the documents Petitioners seek are all either directly relevant to the issue raised in the petition or, at the very least, calculated to lead to the discovery of admissible evidence.

C The Facts Are Not Undisputed

NYAR and Coastal are demonstrably wrong in asserting that discovery is unnecessary because “[t]here are no disputed factual issues in this case ” (Motion for Protective Order, p 5). In actuality, the facts are sharply disputed.

The Town’s Zoning Board of Appeals found that “Coastal is fundamentally operating independently of the railroad ”⁷ (Pet Ex F, p. 16.) In reaching this conclusion, the Zoning Board of Appeals pointed to the facts that “Coastal is marketing the site, erecting structures that it requires on the site and repairing tracks at the site, not New York and Atlantic, who is the party actually certified as a railroad ” (Ibid.)

By contrast, the district court found that the Operations Agreement “does not essentially eliminate NYA’s involvement and responsibility for the Farmingdale facility ” Coastal

⁷ A copy of the decision issued by the Town’s Zoning Board of Appeals is annexed as Exhibit F to the petition and referred to herein as “Pet Ex F ”

Distribution, LLC v Town of Babylon, 2006 U.S. Dist. LEXIS 8400, at *20 (E.D.N.Y. Jan. 31, 2006)

Given the irreconcilable factual findings made by the Zoning Board of Appeals and the district court based on their review of essentially the same evidence, it is difficult to see how NYAR and Coastal can seriously contend that the facts are undisputed

D. The Discovery Petitioners Seek Would Not Subject NYAR and Coastal to Undue Burden

NYAR and Coastal make a perfunctory and half-hearted claim that Petitioners' discovery requests are abusive. They do not, however, contend that the information Petitioners seek is commercially sensitive, nor do they identify a single request with which they claim it would be difficult to comply. Instead, they assert – without elaboration – that responding to the requests “would entail hours of examining paper and computer files at both NYAR and Coastal . . .” (Motion for Protective Order, p. 4.) That vague statement hardly establishes undue burden. On the contrary, it appears that the information Petitioners seek consists largely of computer records which can readily be retrieved.

Moreover, in discussing discovery in their response to the petition, NYAR and Coastal never so much as hinted that Petitioners' discovery requests were burdensome. They simply argued that the economic terms of their relationship were irrelevant and that Petitioners had somehow forfeited their right to conduct discovery. (See Resp., p. 20.) They are wrong in both respects. The actual nature of their operation bears directly on the issue before the Board, and Petitioners made clear that, if the district court case had proceeded, they would have sought discovery there. (See Exhibit B hereto.)

While NYAR and Coastal would prefer not to disclose the facts to Petitioners, that is not grounds for granting a protective order.

ARGUMENT

SINCE THE DISCOVERY PETITIONERS SEEK IS RELEVANT TO THE ISSUES BEFORE THE STB, IT SHOULD BE PROVIDED

Under 49 CFR § 1114.21(a)(1), a party to a proceeding before the STB may obtain discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding” or which “appears reasonably calculated to lead to the discovery of admissible evidence.” As long as the information sought “may be relevant to matters in dispute,” the information should be provided. Illinois Railnet, Inc., STB Finance Doc. 34549, at 2, 2005 STB LEXIS 171, at ** 3-4 (April 14, 2005). Moreover, 49 CFR § 1114.21(a)(2) provides that “[i]t is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”

The information Petitioners seek is plainly relevant. As the Board ruled in H1 Tech Trans, LLC, supra, “[w]hether a particular activity constitutes transportation by rail carrier under section 10501(b) is a case-by-case and fact specific determination” and requires “[a] careful analysis of [the non-carrier’s] actual operations.” STB Finance Doc. No. 34192 at 5, 2003 STB LEXIS 475, at *11. The Board differentiated the situation in H1 Tech Trans, LLC “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.” Id., STB Finance Doc. 34192 at 7 n 13, 2003 STB LEXIS 475, at *15. In order to decide whether Coastal’s operation is subject to preemption under the Interstate Commerce Commission Termination Act (“ICCTA”), the Board must have before it facts sufficient to enable it to determine whether a rail carrier built and owns a transloading facility, how the facility has been marketed to the public, and what the relationship is between the rail carrier and the party actually

operating the facility. Petitioners' discovery requests are designed to elicit those facts and are therefore proper.

NYAR and Coastal are, moreover, mistaken in claiming that the self-serving terminology they chose to use in the Operations Agreement is dispositive and that, since the Operations Agreement names Coastal as NYAR's "contract operator," Coastal's operation at the Farmingdale Facility is exempt from state and local regulation. In Kansas City Transportation Co. LLC, STB Finance Doc. No. 34830, 2007 STB LEXIS 254 (May 21, 2007) – a case in which NYAR's counsel represented the petitioner, KCTL – the Board looked beyond the terms of the parties' self-styled operating agreement and rejected petitioner's claim that "KRR is merely acting in KCTL's name as a contract agent fulfilling KCTL's common carrier obligations." The Board explained (STB Finance Doc. No. 34830, at 5, 2007 STB LEXIS 254, at **5-7)

A basic premise of agency law is that the principal accepts liability for the actions of its agent acting within the scope of its authority. The liability provisions of the Contract are sufficient to establish that KRR is not merely an agent of KCTL

Under the Contract, KRR is responsible for all losses or damages related to the switching services and maintenance work it performs, and it must indemnify and hold KCTL, KCT, and KCT's owners harmless from any claims resulting from any contract breach or failure on KRR's part . .

* * *

Based on the evidence of record, it is clear that KRR is more than an agent of KCTL. The liability assumed by KRR alone demonstrates that it is an entity operating in its own right. As such, KRR requires a license from this agency pursuant to 49 U.S.C. 10901.

(Emphasis added and citation omitted)

Like the contract in Kansas City Transportation Co. LLC which purported to make a non-rail carrier the contract operator for a rail carrier, the Operations Agreement purports to make

Coastal NYAR's contract operator. But, like the contract in Kansas City Transportation Co LLC, the Operations Agreement relieves the rail carrier of liability for the acts or omissions of its supposed agent acting within the scope of its authority. Since such a provision is inconsistent with a basic premise of agency law, the Operations Agreement should by itself be sufficient to establish that Coastal – like the non-rail carrier in Kansas City Transportation Co LLC – is an entity operating in its own right and is not subject to federal preemption by virtue of its arrangement with NYAR.

Before making its decision in Kansas City Transportation Co LLC, *supra*, the Board asked KCTL to submit a copy of "its operating agreement with KRR and of all other documents that govern their relationship as it concerns the proposed operation of the Lines, and a detailed statement of the rights and responsibilities of each entity involved in operating the Lines." *Id.*, 2007 STB LEXIS 254, at *4. Petitioners seek equivalent information in the discovery that NYAR and Coastal are attempting to block. Since the Board requested such information in Kansas City Transportation Co LLC, there can be no question that it is relevant.

The Board's decision in Tri-State Brick and Stone of New York, Inc., STB Finance Doc 34824, at 4, 2006 STB LEXIS 463, at **11-12 (Aug. 9, 2006) – a case in which NYAR was also involved – confirms that information about who actually operates the Farmingdale Facility and is responsible for its operation is relevant. In Tri-State Brick, the Board found that the operator of a transload facility was not entitled to federal preemption for the following reasons:

Tri-State Transportation is the only party that operates the transloading facility and is responsible for it. Further, there is no evidence that CP or NY&A has ever quoted rates or charged compensation for Tri-State Transportation's transloading service, or held out that service as part of the line haul rail transportation offered by either railroad. CP's and now NY&A's level of involvement with Tri-State Transportation's transloading operation is insufficient to make Tri-State Transportation's activities an

integral part of NY&A's rail service (or CP's before it).
Petitioners are merely using property owned by the City and
occupied by Tri-State Transportation, under an expired agreement
with CP, to transload cargo

(Emphasis added)

Like Coastal, Tri-State Brick paid the railroad a fee for the right to use the railyard for its transloading operation and, like Coastal, Tri-State Brick had an obligation to meet certain minimum shipping volumes. The Board, however, found that Tri-State Brick was “merely using the City’s property to transload cargo. They are simply rail customers” and there is nothing that “would justify treating them differently from any other non-rail carrier lessor or occupant of rail property, or anyone that desires rail service, for that matter.” Id., STB Finance Doc 3484, at 6, 2006 STB LEXIS 563, at **15-16

In short, Kansas City Transportation Co. LLC, Tri-State Brick and Stone, Inc. and Hi Tech Trans, LLC establish that a non-rail carrier operating a transload facility is not subject to the Board’s exclusive jurisdiction where it is operating the facility for its own benefit. Thus, in the event that the Board finds that it is not clear from the face of the Operations Agreement that Coastal is not NYAR’s agent and not subject to preemption under ICCTA, Petitioners are entitled to conduct discovery to determine the true nature of the relationship between NYAR and Coastal

Under the standard set forth in 49 CFR § 1114.21(a), Petitioners' discovery requests are proper. Accordingly, the motion of NYAR and Coastal for a protective order should be denied.

Dated New York, NY
August 20, 2007

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response of the Town of Babylon and Pinelawn Cemetery to the Motion of the New York and Atlantic Railway Company and Coastal Distribution LLC for a Protective Order was served on August 20, 2007 by FedEx, on the following parties and their counsel

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Fran M. Jacobs

EXHIBIT A

Krebs - Cross/Clark

- 1 Q How is that calculated, by weight?
- 2 A No.
- 3 Q By content?
- 4 A That's a portion of it.
- 5 Q Okay. What else is involved in that?
- 6 A The distance it travels.
- 7 Q Anything else?
- 8 A That's pretty much it. Since we have a weight
- 9 restriction, it doesn't really affect us much.
- 10 Q And do you know what Coastal's loading fees are?
- 11 A No.
- 12 Q Did you ever ask?
- 13 A No.
- 14 Q Do you know if they ever filed anything with the STB?
- 15 A No.
- 16 Q Do you know if the STB regulates the loading rates in
- 17 any way?
- 18 A They don't regulate anybody's loading fees.
- 19 Q That would include Coastal's?
- 20 A And us. They don't have the authority to regulate
- 21 freight rates.
- 22 Q And do you know if New York and Atlantic Railroad has
- 23 ever quoted Coastal's loading fees to customers?
- 24 A No, I don't.
- 25 Q And you haven't because you don't know what the

Krebs - Cross/Clark

1 arrangements need to be made with the landfills at the end
2 of the line?

3 A I would assume so, yes.

4 Q And in doing so, they don't do that on behalf of New
5 York and Atlantic Railroad, correct?

6 A No.

7 Q That's not correct?

8 A No, they don't do it.

9 Q So as far as that step in the process and the initial
10 contracting with the customer and arranging for the
11 loading fees, the disposal fees, New York and Atlantic
12 Railroad has no involvement in that, correct?

13 A No.

14 Q No, they have no involvement?

15 A Correct.

16 Q Now, the next step, then, would be that the trucks
17 come and deliver the C&D debris to the site, correct?

18 A The next step from what?

19 Q After the contract. You entered into the contract,
20 you say we want you to bring in, and we want you to load
21 and ship this.

22 A Yes.

23 Q Now, the trucks that come in and deliver the debris,
24 are they owned by New York and Atlantic Railroad?

25 A No.

Krebs - Cross/Clark

1 Q And, in fact, New York and Atlantic Railroad doesn't
2 get any money for any of the services performed by Coastal
3 at the facility, correct?

4 A We get the per-fee charge per car.

5 Q You get a usage fee, right?

6 A Yes, that's what that is about. They pay us for each
7 car.

8 Q Well --

9 A But I -- I don't get a division of what they are
10 getting.

11 Q Right. Their arrangement, they charge a loading fee,
12 whatever it is, you don't know, but they charge it?

13 A Right.

14 Q And they are obligated to pay a usage fee to New York
15 and Atlantic Railroad of \$20 a car?

16 A Correct.

17 Q And that is separate and apart from their loading
18 fee?

19 A Well, that's where they get the money.

20 Q They could get it anywhere. But they are obligated
21 to pay you \$20 a car; is that correct?

22 A Yes, that would be correct.

23 Q If you look at 3.02 of the agreement, it describes
24 the use charge and it says, "Coastal shall pay the
25 railroad for the use of the facility and in recognition of

Krebs - Cross/Clark

1 the previous contributions to the construction of the
2 facility by the parties a use fee of \$20 per loaded rail
3 car. The usage fee for each loaded car in excess of 1,200
4 in any contract year as determined by the anniversary of
5 the effective date shall be reduced to \$5." Do you see
6 that?

7 A Yes.

8 Q Okay. The \$20 -- withdrawn.

9 So the usage fee, according to the agreement, is
10 for use of the facility and in recognition of the previous
11 contributions made by New York and Atlantic Railroad?

12 A Yes.

13 Q And it's not tied to the loading fee?

14 A No, I guess it's not.

15 Q In fact, regardless of what the loading fee is,
16 they've got to pay you \$20 for every car they ship out of,
17 correct?

18 A Correct.

19 Q And it's based on at least using the first year, in
20 terms of the minimum requirements, the first year with a
21 1,200-car minimum requirement, correct, that Coastal was
22 obligated to ship out?

23 A I guess it was. Let me look. (Perusing.)

24 THE COURT: We're spending a lot of time on
25 this. I think I get the point. I don't know if there is

Krebs - Cross/Clark

1 any more relevance to this area.

2 Q The point is, at \$20 per car, if they haven't paid
3 for the first 1,200 cars that came through, that is
4 \$24,000 they have to pay you on an annual basis?

5 A I guess.

6 Q That's the same as the rent was on the previous
7 agreement, right?

8 A Yes?

9 Q And you, being New York and Atlantic Railroad, paid
10 Coastal nothing for anything that they do in this entire
11 process, right?

12 A No.

13 Q No, that's not right?

14 A No, we do not.

15 Q Now, with respect to the supervision by New York and
16 Atlantic Railroad over the Coastal operations, you said
17 there is nobody there on a full-time basis from New York
18 and Atlantic Railroad, right?

19 A Correct.

20 Q When you say you yourself visit approximately two
21 times a week, sometimes you go in, sometimes you just
22 drive by?

23 A Correct.

24 Q There is no on-site supervisor from New York and
25 Atlantic Railroad, right?

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 Gauen (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.

1 agreement, which is a relatively new
2 agreement, was Coastal at the site?

3 MR. RUTIGLIANO: Coastal was at the
4 site, we were upgrading the site, upgrading
5 fence, track, putting in new structure.

6 THE CHAIRMAN: Now, you don't own
7 the property that your operation sits on, is
8 that correct?

9 MR. RUTIGLIANO: No.

10 THE CHAIRMAN: Were you a tenant at
11 the site?

12 MR. RUTIGLIANO: At that point I
13 believe we were operating under a lease
14 agreement, that's how we gained access to the
15 site.

16 THE CHAIRMAN: Okay, a lease
17 agreement. Why -- is the lease agreement
18 still valid and existing now?

19 MR. RUTIGLIANO: No, I believe the
20 lease agreement in that document has been
21 replaced by the license, by the agency
22 agreement.

23 THE CHAIRMAN: And what prompted you
24 to go from the lease agreement to replace it
25 with the agency agreement?

1 MR. RUTIGLIANO: Advice of counsel.

2 THE CHAIRMAN: So what, what
3 convinced you?

4 MR. RUTIGLIANO: Well, back in
5 March, I think, around Easter of last year,
6 we were served with some documents from
7 Pinelawn.

8 MR. GAUGHRAN: I think Mr. McHugh
9 has testified to that.

10 MR. McHUGH: The thing that actually
11 started the process was the railroad had
12 leased land and there was a challenge to the
13 railroad's legal right to do that. So there
14 was a flaw in the title which caused
15 everybody to be quite concerned. So that was
16 why the process started and then the Hi Tech
17 case came down in the process of negotiating
18 how to get out of a mess.

19 MR. RUTIGLIANO: The question arised
20 (sic), came up in March of last year, with
21 the ownership of the land, which is way after
22 Coastal had expended dollars in improvements --

23 MR. GAUGHRAN: I think this board
24 has heard enough of that.

25 THE CHAIRMAN: When you made this

EXHIBIT B



COURTESY COPY - Original was electronically filed
and assigned document number 72



BOND, SCHOENECK & KING, PLLC
ATTORNEYS AT LAW ■ NEW YORK FLORIDA KANSAS

HOWARD M. MILLER
Direct: 516-267-6318
hmler@bsk.com

July 3, 2007

VIA ELECTRONIC FILING
ECF DOCUMENT NO. 72

Hon. Joanna Seybert
United States District Court
Eastern District of New York
P O Box 9014
100 Federal Plaza
Central Islip, New York 11722

Re *Coastal Distribution, et al v The Town of Babylon, et al* 05-Civ-2032 (JS)(ETB)

Dear Judge Seybert

This letter is filed jointly on behalf of the defendant Town of Babylon (the "Town") and Intervenor-Defendant Pinelawn Cemetery Corporation ("Pinelawn") (The Town and Pinelawn are together referred to as "Defendants"). We received a copy of the June 26, 2007 letter to the Court from counsel for plaintiffs Coastal Distribution, LLC ("Coastal") and the New York and Atlantic Railway Company ("NYAR") (together "Plaintiffs") requesting a pre-motion conference concerning their proposed motion for summary judgment. Although Your Honor's individual rules state that a party who wishes to move for summary judgment should submit a letter briefly stating the basis for the anticipated motion, Plaintiffs did not do so, their June 26 letter simply states – without elaboration or explanation – that Plaintiffs believe this matter is "ripe for disposition." As we explain below, Plaintiffs are mistaken. Not only would their proposed motion be premature here, because no discovery has taken place, but the issues in this case have been presented to the Surface Transportation Board which is uniquely suited to resolve them.

The procedural history of this matter is as follows. Plaintiffs filed their complaint and simultaneously moved for a preliminary injunction. Before any discovery could be conducted, a hearing was held on Plaintiffs' preliminary injunction motion. On January 31, 2006, Your Honor rendered a decision granting Plaintiffs a preliminary injunction against the Town's enforcement of a stop work order. See Coastal Distribution, LLC v Town of Babylon, 2006 WL 270252 (E D N Y 2006). Although that decision was affirmed on appeal in February, the Second Circuit modified it as follows:

1399 Franklin Avenue, Suite 200, Garden City, NY 11530-1679 ■ Phone 516-267-6300 ■ Fax 516-267-6301 ■ www.bsk.com

In any event, we modify the preliminary injunction to allow the parties to petition the [Surface Transportation Board ("STB")] for a declaratory judgment on the scope of its jurisdiction. "As the agency authorized by Congress to administer the Termination Act, the [STB] is uniquely qualified to determine whether state law should be preempted by the Termination Act." Green Mountain [R.R. Corp. v. Vermont], 404 F.3d 637, 642 (2d Cir. 2005) (citation and internal quotation marks omitted). Given the existing guidance from this Court and the STB, the district court did not abuse its discretion by issuing a preliminary injunction, but it is wholly appropriate that the parties should seek further guidance from the STB notwithstanding the pendency of litigation in federal court.

See Coastal Distribution, LLC v. Town of Babylon, 216 Fed. Appx. 97, 103 (2d Cir. 2007) (emphasis added).

In light of the Second Circuit's decision, the Town and Pinelawn are filing a joint petition (the "Petition") (copy attached) with the Surface Transportation Board, which seeks a declaratory order determining that the facility Coastal operates on Pinelawn's property in Farmingdale is not within the exclusive jurisdiction of the STB. Defendants respectfully request that this Court stay all proceedings in this action while the Petition is pending before the STB. Plaintiffs would obviously not be prejudiced if such a stay were granted. This Court's preliminary injunction is in place, and Plaintiffs will therefore be able to continue to operate while this matter is considered by the STB. Nor can Plaintiffs legitimately contend that they would be harmed if the STB, rather than this Court, decided the preemption issue. After all, the basis for their claim that they are exempt from state and local regulation is that the STB has exclusive jurisdiction over them.

If the Court declines to stay this proceeding so that the STB – the agency that plaintiffs themselves claim has exclusive jurisdiction over them – can decide the jurisdictional issue, Defendants oppose Plaintiffs' request to file a motion for summary judgment on the ground that such a motion is premature. As set forth in Defendants' Joint Statement of Material Disputed Facts Pursuant to Local Rule 56.1, a copy of which is enclosed for the Court's convenience, genuine issues of material fact exist in this case and Defendants have not yet had the benefit of any discovery.

Pursuant to Federal Rule of Civil Procedure 56(f), this Court has the power to deny a summary judgment motion as premature where there exist material issues of fact and the non-moving party – Defendants in this case – has not had an opportunity to discover information necessary to oppose the motion. National Life Ins. Co. v. Solomon, 529 F.2d 59, 61 (2d Cir. 1975) (denying summary judgment where no pre-trial discovery had taken place, stating, summary judgment "should not be granted when there are major factual contentions in dispute. This is particularly

Hon Joanna Seybert
July 3, 2007
Page 3

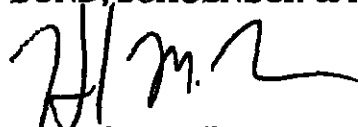
so when, as here, one party has yet to exercise its opportunities for pretrial discovery"), see Celotex Corp v Catrett, 477 U S 317, 326 (1986) (Rule 56(f) prevents nonmoving parties from being "railroaded" by premature summary judgment motions), Trebor Sportswear Co v The LTD Stores, Inc., 865 F 2d 506 (2d Cir 1989) (Under Rule 56(f), "[t]he nonmoving party must have 'had the opportunity to discover information that is essential to his opposition' to the motion for summary judgment" before it can be decided) Indeed, "summary judgment is strongly disfavored" in such circumstances Czerw v Ronald Billiter Electric, Inc., 2005 U S Dist LEXIS 22427, *24-25 (W D N Y 2005) (denying summary judgment because no discovery had yet taken place), accord National Life Ins Co, 529 F 2d at 61, Sacco v Iselin, 1986 U S. Dist LEXIS 16362, *14-15 (S D N Y 1986) (motion for partial summary judgment denied where nonmoving party "had little or no opportunity for discovery")

Because Defendants have not yet had the opportunity to conduct discovery on critical issues of fact including, among other things, the true nature of the relationship between Coastal and NYAR, their financial arrangements, whether Coastal has taken steps to ensure that its operation creates no health and safety problems, and the extent of oversight, if any, actually exercised by NYAR, Defendants have been unable to obtain the information necessary to oppose Plaintiffs' proposed summary judgment motion. Accordingly, in the event that the Court does not stay this action so that the STB can decide the preemption issue, Plaintiffs' motion should be denied because it is premature and would otherwise be wasteful of judicial resources

Thank you for your attention to this matter

Respectfully submitted,

BOND, SCHOENECK & KING, PLLC



Howard M Miller
Enclosure

cc Mark A Cuthbertson, Esq
Fran M Jacobs, Esq ✓
John F McHugh, Esq
Ronald A Lane, Esq
Ronald E Joseph, Esq
James F Gaughran, Esq

EXHIBIT C

05/16/2005 MON 11:08 FAX 718 497 3364 New York & Atlantic Rlwy

003/007

LEASE AGREEMENT: FARMINGDALE - 1

THIS LEASE AGREEMENT ("Agreement") made and entered into this 22nd day of March, 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.

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

1. Rent. 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.
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 March 3rd, 2002 then the initial term shall end on March 2nd, 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, 1,600 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 URR, 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 limits 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 \$8,000,000 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.

05/16/2005 MON 11:07 FAX 718 497 3364 New York & Atlantic Rlwy

0005/007

- 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 insureds 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 13.1 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.3.1 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 ~~xxx~~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-524

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007/007

AGREED AND ACCEPTED:

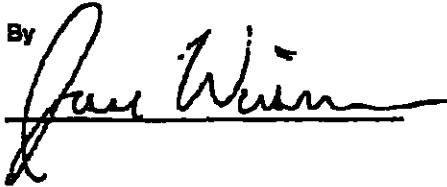
Lessee
Coastal Distribution, LLC
30 A Glen Street
Glen Cove, New York 11542
Tel 516-678-3700

Lessor
New York & Atlantic Railway Co.
68-01 Otto Road
Glendale, New York 11388
Tel 718-497-3023

By:



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 March 22, 2002

DATED: March 22, 2002

/16/2005 MON 11:06 FAX 718 497 3364 New York & Atlantic Rlwy

002/007

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:

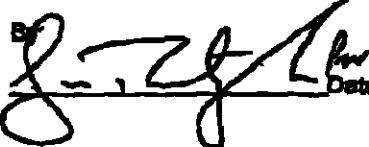
- 1) Lessee agrees that it shall not hold NYA responsible in any way should LIRR not vacate the Premises in a way that allows Lessee to begin to operate, including the possibility of legal action against NYA. Further, Lessee shall not make any commitments to their clientele that, should the Premises 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.

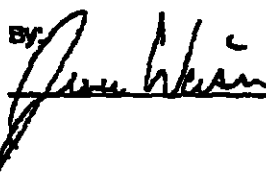
All back rent shall be reimbursed to Lessee by NYA should LIRR not vacate Premises in a timely manner and therefore cause Agreement to terminate as more specifically stated in section 2) herein.

AGREED AND ACCEPTED:

Lessee
 Coastal Distribution, LLC.
 30 A Glen Street
 Glen Cove, New York 11542
 Tel. 516-678-3700

Lessor
 New York & Atlantic Railway Co
 68-01 Otto Road
 Glendale, New York 11365
 Tel. 718-497-3023

By:  Date 3/23/02

By:  Date 3/23/02

EXHIBIT

NYA 6

EXHIBIT D

(C. 5) 741

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 ~~XXXXXX~~ 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 ~~XXXXXX~~ in funds available to NYA

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

- b. NYA will add ~~XXXXXX~~ to figure in "1-a" above, and submit funds to the LIRR in the amount of ~~XXXXXX~~.
 - c. NYA will rebate Lessee in the amount of ~~XXXXXX~~ 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 ~~XXXXXX~~ 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 ~~XXXXXX~~ 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

NYA 7

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.

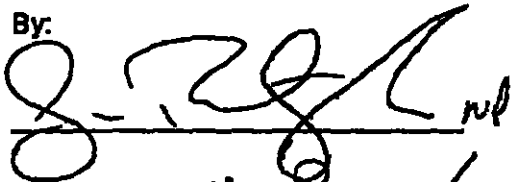
9. **Emergency Interruptions.** When requested by NYA, Lessee agrees to stop any activity in which it is engaged whenever NYA deems an emergency, as necessary to insure the timely and safe operations of the railroad and in no event will train operations or safety be jeopardized.
10. **Compliance with 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 13.1 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 3.1 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

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

By:


Joseph L. Ruzigano

By:


Fred A. Webb

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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