

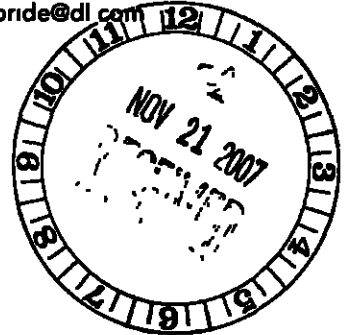
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November 21, 2007



VIA HAND DELIVERY

Mr Vernon A Williams, Secretary
Surface Transportation Board
395 E Street, S W
Washington, DC 20423-0001

Rc *STB Finance Docket No 33388 (Sub-No 101).*
In re CSX Transportation, Inc

Dear Mr Williams

Pursuant to the Board's Decision, served October 23, 2007, in the above-referenced proceeding, enclosed for filing are the original and 10 copies of the "Reply of Frank Vitale and Francis Vitale to CSX Transportation, Inc's Petition for Declaratory Order"

Respectfully submitted,

Michael F. McBride

Michael F McBride
Attorney for Frank Vitale and Francis Vitale

Enclosures

cc (w/encls) Kim Bongiovanni, Esq
Louis E Gitomer, Esq

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SURFACE TRANSPORTATION BOARD

STB Finance Docket No 33388 (Sub-No 101)



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In re **CSX TRANSPORTATION, INC**
Petitioner

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Public Record**

**REPLY OF FRANK VITALE AND FRANCIS VITALE TO
CSX TRANSPORTATION, INC.'S PETITION FOR DECLARATORY ORDER**

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SURFACE TRANSPORTATION BOARD

STB Finance Docket No 33388 (Sub-No. 101)

*In re CSX TRANSPORTATION, INC.
Petitioner*

**REPLY OF FRANK VITALE AND FRANCIS VITALE TO
CSX TRANSPORTATION, INC.'S PETITION FOR DECLARATORY ORDER**

Respondents Frank Vitale and Francis Vitale (the "Vitales") respectfully submit this Reply to the Petition for Declaratory Order (the "Petition") filed by CSX Transportation, Inc ("CSXT")¹ We also respectfully refer this Board to the accompanying affidavits of Gene A Davis, P E and Francis Vitale.

INTRODUCTION AND SUMMARY

In the Petition, CSXT alleges that it "has terminated" an agreement (the "Agreement") with the Vitales under which CSXT's predecessor-in-interest, Consolidated Rail Corporation ("Conrail"), contracted to sell the Vitales seven acres of land in Queens, New York (the "Property") subject to a railroad easement (the "Railroad Easement") CSXT asks this Board to approve its alleged right to terminate the Agreement, arguing that the Agreement would

¹ The Vitales have not been formally made parties of record, but the Board granted their request for an extension of time to file this Reply until November 26, 2007 Also, CSX served counsel for the Vitales with the Petition, obviously acknowledging that the Vitales are the real parties in interest herein. Accordingly, we hereby request that the Board make the Vitales parties of record

supposedly interfere with railroad operations, and thus interfere with the implementation of the *Conrail Consolidation*²

The Vitales respectfully request that this Board dismiss the Petition, or in the alternative deny it, on the following grounds (among others)

First, contrary to the position that it has taken before this Board, CSXT has certified to the New York State Department of Transportation ("NYSDOT") that there will be no interference with railroad operations ***CSXT represented to NYSDOT that***

The Railroad Easement ensures that the Railroad will be able to continue to use the Property for rail transportation purposes, as the Railroad intends to do. The Agreement also provides, among other things, that:

Construction by Purchaser will proceed in a manner that will not unreasonably interfere with the operation of trains

(Request for Determination That Preferential Right of Acquisition Does Not Apply, or alternatively, Request for Release of the Preferential Right of Acquisition, under Section 18 of the Transportation Law of the State of New York, Dec 24, 2004, p. 2) ("CSXT's Section 18 Application")(Ex A) (emphasis supplied).

CSXT made this certification to NYSDOT that there would be no interference with rail operations in December 2004 That was more than six years after the August 22, 1998 "Control Date" (when CSXC and NSR acquired control of Conrail), more than five years after the June 1, 1999 "Split Date" (when the Conrail assets were divided between CSXT and NSR), and more

² *CSX Corp et al —Control—Conrail, Inc et al*, 3 S.T.B 196 (1988)("Conrail I") and *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 [Petition for Supplemental Order]* Decision No 2, STB Finance Docket No 233388 (Sub No 94)(STB served Nov 7, 2003)("Conrail II") *Conrail I* and *Conrail II* are collectively referred to in the Petition, and herein, as the "Conrail Consolidation " CSX Corporation is referred to herein as "CSXC" Norfolk Southern Corporation and Norfolk Southern Railway Company are referred to herein collectively as "NSR" CSXT and its predecessors in interest are also referred to as the "Railroad."

than a year after the August 27, 2003 "Acquisition Date" (when CSXT acquired ownership of the Line) ***CSXT thus made its own determination that there would be no interference with railroad operations***; it did not merely inherit a determination made by Conrail

Second, in fact, the Agreement will not interfere with railroad operations. The Agreement provides for a Railroad Easement seventy-five (75) feet wide and twenty-two (22) feet high so that the Railroad can "use, operate, maintain, repair, replace and inspect the Reserved Tracks and Equipment as and when the same may be necessary or desirable" (Agreement ¶ 2) (Petition Ex. 1). That Railroad Easement gives CSXT far greater clearance than is provided by the numerous existing overpasses that go over this railroad line (the "Line"), as detailed in the accompanying affidavits of Mr. Davis and Mr. Vitale.

Indeed, construction has just been completed on two such overpasses, with lower clearances than the Railroad Easement, within the very Property that is the subject of the Agreement, as part of NYSDOT's reconstruction of the Brooklyn Queens Expressway ("BQE"). CSXT consented to the construction of those overpasses, and worked closely with NYSDOT. CSXT states in its Petition before this Board that the NYSDOT project "***will not interfere with its current or future operations over the Line***" (Petition at p. 12) (emphasis supplied). CSXT thus tells this Board that NYSDOT's recent construction of overpasses, within the Property that is the subject of its Agreement with the Vitales, will not interfere with current or future railroad operations. Those overpasses have lower clearances than are provided by the Railroad Easement. How can CSXT then ask this Board to speculate that the Vitales' project, which will give the Railroad greater clearances, would in some unspecified way interfere with railroad operations?

Third, the Agreement similarly ensures that the Vitales' use of the Property will not interfere with Railroad operations. The Vitales intend to build a structure that spans the Line (allowing room for the Railroad Easement), and to construct buildings (including both residential and commercial) on that structure. The Agreement fully protects CSXT by providing, among other things, that "Construction by Purchaser will proceed in a manner that will not unreasonably interfere with the continued operation of trains" (Agreement ¶ 4(B)). Additionally, the Agreement provides that the "Final Plans and specifications will be subject to the final review and written approval of Conrail's Chief Engineer" (Agreement ¶ 8(b)).

There is nothing unusual about constructing buildings on a structure over a rail line. CSXT and other railroads recognize that the construction of buildings over rail lines does not interfere with railroad operations—as long as there is sufficient clearance, as the Agreement specifically provides. In fact, a "Target" superstore was just built over this Line south of the Property. The New York Metropolitan Transportation Authority ("MTA") has just solicited proposals for the construction of 12 million square feet of residential and commercial space, a cultural building, shops, and parks on "platforms over the Long Island Rail Road tracks on both sides of 11th Avenue" in Manhattan. "In Railyards, Seeing a Blank Canvas on the Hudson," *The New York Times*, p. B5 (Nov. 19, 2007). The lines that use the Manhattan railyards are highly-used rail lines, with hundreds of trains daily, unlike the little-used Line over which the Vitales intend to build.

Fourth, CSXT's claim of interference with railroad operations is also negated by the conduct of CSXT and its predecessor-in-interest, Conrail, over the past twenty years. As detailed below, this Agreement was signed in 1986. It was approved at the highest levels of Conrail—by L. Stanley Crane, Chairman and Chief Executive Officer, under a delegation of

authority by Conrail's Board of Directors. Between that date and 1999, the parties executed more than fifty separate agreements to extend the date for closing under the Agreement. With each extension, the Railroad re-affirmed the validity of the Agreement, and made no claim whatsoever that the Agreement would interfere with railroad operations.

Fifth, CSXT's claim that its predecessor, New York Central Lines LLC ("NYCentral") "terminated" the Agreement in 2002 (Petition, p. 6) is also false. To the contrary, in 2002 NYCentral took the position that the "parties had failed to agree on the material terms of [the Agreement]" and that the Agreement therefore was "non-binding" (Petition, Ex. 3). NYCentral never took the position that it had terminated the Agreement—let alone that it had done so based on a view that the Agreement would interfere with railroad operations. Indeed, CSXT's further statement that CSXT "notified the Vitales that CSXT terminated the Agreement" is similarly without basis (Petition, pp. 8-9). CSXT never notified the Vitales of any supposed termination, or the reason therefor. The first that the Vitales learned of the supposed termination was when they were served with the October 4, 2007 Petition.

Sixth, between 2002 and 2007, the Vitales have been engaged in arbitration and litigation with NYCentral and CSXT, in which the Vitales sought to enforce the Agreement. NYCentral and CSXT lost the arbitration and litigation. The Arbitration Award directed that the Railroad specifically perform under the Agreement and convey the Property to the Vitales, subject to the Railroad Easement. The Arbitration Award was confirmed by the Supreme Court of the State of New York, County of Queens, and a Judgment was entered against the Railroad. The Railroad did not appeal that portion of the Judgment that directed the Railroad to convey the Property to the Vitales, subject to the Railroad Easement. Instead, the Railroad merely appealed from a portion of the Judgment directing further proceedings before the Arbitrator relating to financial

issues (the Railroad lost the appeal, and the Judgment was affirmed in all respects) The Vitales' recent motion seeking to compel the Railroad to participate in further arbitration on these issues, as required by the Judgment, precipitated the filing of this Petition

At no time during the five-year period in which the Parties have been in litigation did either NYCentral or CSXT take the position that the Agreement would interfere with railroad operations. Indeed, shortly after the Arbitration Award directing specific performance was issued, CSXT accepted it and, in accordance with its directive, it filed CSXT's Section 18 Application, quoted above, in which it explicitly represented to NYSDOT that the "Railroad Easement ensures that the Railroad will be able to continue to use the Property for rail transportation purposes" and that the Agreement ensures that "Construction by Purchaser will proceed in a manner that will not unreasonably interfere with the operation of trains" (Ex. A).

Seventh, CSXT's claim that "a greater public benefit would arise from acquisition of a part of the right-of-way by the state of New York" than from the Agreement (Petition, p 12) is based on a misapprehension of the facts NYSDOT has *already* acquired a part of the right-of-way for expansion of the BQE—which reduces the Property to be conveyed under the Agreement from about seven acres to about six acres The Judgment specifically took note of that fact, and thus directed further proceedings before the Arbitrator relating to an adjustment of the purchase price or the award to the Vitales of an equitable share of the condemnation award. The Supreme Court explicitly found that NYSDOT's acquisition of one acre of the Property did not relieve the Railroad of its obligation to convey the remaining six acres of the Property to the Vitales, subject to the Railroad Easement, under the Agreement. (Ex. B) Thus, there is no inconsistency between NYSDOT's acquisition of part of the Property and the Vitales' right to specific performance of the Agreement with respect to the remainder of the Property.

Eighth, in the arbitration proceedings, the Railroad disclosed that the real reason why it wanted to be relieved of its obligations under the Agreement CSXT sought to introduce an appraisal of the Property, showing that the Property was worth far more money than it would receive if it went forward with the Agreement with the Vitales CSXT's counsel candidly admitted that CSXT sought to be relieved of its obligations under the Agreement because the value of the Property had increased since the Agreement was signed (*NY Central v Vitale*, Arbitration, Transcript, June 15, 2004, p. 8, l 9-15, p 16, l 21 – p 17, l 11) (Ex C) CSXT has no right to terminate an Agreement to sell real property on the pretext that it would interfere with railroad operations when the real reason it wants to terminate the Agreement is that it thinks the price is too low

Ninth, this is a single, one-time contract for the sale of a piece of real estate It is not a dispute over wages, or rates, or fees that would have an ongoing financial impact on the complex finances of operating a railroad Even if CSXT is correct that the sales price of the Property is below its current fair market value, (a) that is not grounds to terminate the Agreement, (b) there will be no ongoing impact on the finances of railroad operations, and (c) the one-time dollar impact is insignificant to CSXT and its parent corporation, CSXC, as discussed in greater detail below

In sum, all of the evidence—including CSXT's own representations to NYSDOT—shows that there will be no interference with railroad operations or the implementation of the *Conrail Consolidation* There is one reason, and one reason alone, for CSXT's Petition. CSXT believes that the price under which it is obliged to sell the Property to the Vitales is below the current fair market value, and it is seeking an end-run to avoid compliance with the Arbitration

Award and Judgment directing it to convey the Property to the Vitales That is not grounds to terminate an Agreement, and not grounds to invoke this Board's jurisdiction

CSX's Petition is an abuse of this Board's vital role in the transportation system of the United States This Board lacks jurisdiction to grant CSXT permission to terminate the Agreement (or to approve such termination), because the Agreement will not interfere with railroad operations or the implementation of the *Conrail Consolidation*, and because all issues relating to the enforceability of the Agreement have already been determined, both in the Arbitration, and in the courts of the State of New York ³

The Vitales respectfully request that the Petition be dismissed, or alternatively, that all relief sought in the Petition be denied

1. THE FACTS

A. The Agreement to Convey Property Subject to a Railroad Easement

The Agreement by which Conrail agreed to convey the Property explicitly reserves, for the Railroad, a Railroad Easement designed to allow for continued railroad operations, and it incorporates myriad protections to make sure that the Vitales' construction project on the Property in no way interferes with those operations

³ CSXT's Petition appears to take the position that, if it had the right to terminate the Agreement, it would have no further financial obligations to the Vitales While that is not an issue for this Board (but is, instead, a matter for the Arbitrator and the New York courts), CSXT is incorrect, as a matter of law A Judgment has already been entered against CSXT holding that the Agreement is valid and binding CSXT is in breach of the Agreement, and in violation of the Judgment (because CSXT has refused to convey the Property, as required by the Judgment) Even if CSXT had the right—which it does not have—to terminate the Agreement in 2007, that would not roll back the clock, and relieve CSXT of the obligations that it has already incurred under the Agreement

1. The Clearances Maintained by the Railroad Easement

The Railroad Easement reserved for Conrail in the Agreement preserves clearances far in excess of what is required for continued—or any conceivable expansion of—railroad operations on the Line crossing the Property. Specifically, it provides

RESERVING UNTO CONRAIL a *seventy-five (75) foot wide easement* identified on the attached plans, which easement shall extend upward only to a horizontal plane, but running parallel to the underlying rail line and *measured twenty-two (22) feet, vertically* above top of rail of said Reserved Tracks (hereafter called 'excepted space") the foregoing easement being reserved by Conrail to use, operate, maintain, repair, replace and inspect the Reserved Tracks and Equipment as and when the same may be necessary or desirable

Agreement, ¶ 2 (emphasis supplied) The Agreement also further specifies a

minimum horizontal clearance of 16'00 from the center line of track on the east side and 10'00 from the center line of track on the west side and a vertical clearance of 22'00" from top of rail shall, at all times be maintained by Purchaser.

(Agreement ¶ 10)

2. The Railroad's Rights with Respect to Any Construction, Which Ensure That There Will Be No Interference with Railroad Operations

Furthermore, the Agreement provides that the Railroad be given at least three months notice prior to commencement of construction on the property, it requires the Vitales to pay for the estimated costs of rehabilitation and relocation of tracks underlying and adjacent to the structure to be constructed, it reserves for the Railroad the right to inspect the construction from time to time; and it specifies that "Construction by Purchaser will proceed in a manner that will not unreasonably interfere with the continued operation of trains beneath the area of Purchaser's ownership " (Agreement ¶ 4(B))

The Agreement also incorporates a Construction Contract (Agreement Exhibit C), and explicitly states that the

Final Plans and specifications will be subject to the final review and written approval of Conrail's Chief Engineer. Conrail hereby agrees [sic] to use its best efforts to approve such Building plans, specifications and design computations within sixty (60) days of their receipt at the office of Conrail's Chief Engineer Design and Construction. , or if such approval is not given, Conrail agrees to specify its objections thereto within such time.

Agreement, ¶ 8(B). The Agreement also provides that the

placement of the support columns and structures plans shall be subject to the final review and written approval of Conrail's Chief Engineer with respect to ascertaining whether said columns and structures are within the limits set out in the various schedules and plans appended hereto.

(Agreement ¶ 8(D)) Furthermore, it reserves the right for Conrail, after receipt of notice of completion of all construction work, to examine the location of column placements and to satisfy itself that there are no objectionable encroachments (Agreement ¶ 8(D))

Additionally, the Agreement obligates the Vitales to provide, at their own expense, all necessary protective and safety measures, such as crash walls, warning signs, lighting, inspectors, watchmen, flagmen and other precautions reasonably necessary for purposes of protection and/or safety, and incorporates by reference current AREA Specifications for crash walls protecting supporting columns located within 25 feet of the centerline of track (Agreement ¶ 11(A)) In the Agreement, the Vitales also "agree[d] to grant such easement of access to rights of way as Conrail may require to allow their personnel access to any of its facilities, and agree[d] that any access will remain for as long as required by Conrail personnel, its successors and assigns" (Agreement ¶ 12)

The Agreement also provides that the Parties are to confer with respect to construction scheduling and safety procedures and makes the Vitales responsible for all costs incurred by Conrail in connection therewith (Agreement ¶ 13) Additionally, it imposes comprehensive indemnity and insurance obligations on the Vitales with respect to the Vitales' construction

project at the Property (Agreement ¶ 14), negating the Railroad's expressed concerns in this proceeding about possible liability claims ⁴

Careful review of the Agreement shows that the parties took great care to make sure that the Vitales' plans for the Property *will not interfere* with railroad operations, leaving both ample vertical and horizontal clearances to accommodate current and possible future operations on the Line, and reserving for the Railroad rights of approval of construction plans and input into safety procedures and scheduling

CSXT's eleventh-hour unsubstantiated concerns about interference with railroad operations on the Line, in light of these contractual provisions, just do not ring true

B. The Line

The Line is lightly used, with approximately one loaded train and one empty train traversing the Line each day

As reviewed in the accompanying affidavits of Gene A. Davis, P.E. and Francis Vitale, there are *at least 46 existing overpasses* (structures built over the Line), on the section of this Line that goes through Brooklyn and Queens (two of the five boroughs of the City of New York), which includes the Property. Some of these existing overpasses are as narrow as thirty (30) feet wide, and as low as seventeen feet-six inches (17'6") high. That is far less clearance than that provided in the Agreement—which mandates a Railroad Easement seventy-five (75) feet wide and twenty-two (22) feet high. Some of these lower, and narrower, overpasses have just been built—with CSXT's consent.

⁴ Additionally, the Agreement specifies particular requirements for ventilation, lighting and access (Agreement ¶ 17), and also obligates the Vitales to relocate existing drainage ditches, at their own expense, so as not to interfere with existing access roadways and railroad operations, and only upon approval by Conrail's Chief Engineer (Agreement ¶ 18)

CSXT's allegation in the Petition that the Agreement will create a "choke point" (Petition, p. 11) or an "unnecessary bottleneck" (Petition, p. 12] is simply false. Building a 47th overpass over the Line, particularly one which is much wider and taller than existing overpasses, does not create a bottleneck.

The existing overpasses include the following:

- NYSDOT recently re-built an overpass at Broadway, on the northern boundary of the Property that is the subject of the Agreement. This was built *after* the Acquisition Date (when CSXT took ownership of the Line), and thus was apparently done with CSXT's consent. This overpass leaves a clearance for the Railroad that is only thirty (30) feet wide and twenty (20) feet high, and extends approximately 100 feet long, along the Line. As noted above, CSXT has represented to this Board that this construction by NYSDOT will not interfere with railroad operations.
- NYSDOT also recently rebuilt the Roosevelt Avenue Bridge, which is located within the boundaries of the Property that the Vitales are purchasing. The Roosevelt Avenue Bridge has a horizontal clearance of only thirty (30) feet, and vertical clearance of only eighteen (18) feet, substantially less than the clearances dictated by the Vitale's Agreement with the Railroad. Here, again, CSXT has represented to this Board that this construction by NYSDOT will not interfere with railroad operations.
- There is an existing overpass at Metropolitan Avenue, along the Line south of the Property. That overpass includes a cemetery and retail stores built over the Line. The railroad tunnel underneath the cemetery and retail stores has thirty (30) feet of horizontal clearance on a sixty (60) foot right of way, and only a seventeen feet-six

inch (17'6") vertical clearance. These clearances are significantly smaller than those reserved for the Railroad by the Agreement

- Also south of the Property, on the very same Line, a "Target" superstore and parking facility is being constructed on top of a new overhead bridge with span openings thirty (30) feet wide (at the existing track) and having twenty-two feet six inch (22'6") of vertical clearance.
- This Line also passes under a lengthy tunnel in the Bushwick section of Brooklyn, on top of which are major roadways, streets and private residences

Given these existing overpasses, there is absolutely no basis for CSXT's contention that the Railroad Easement specifically preserved in its Agreement with the Vitales would not be adequate to ensure no interference with railroad operations

C. The Railroad's Repeated Re-Affirmation of the Agreement Between 1986 and 2001

The Agreement was approved at the highest levels of Conrail in 1986, and the validity of the Agreement was repeatedly re-affirmed by the Railroad over the ensuing fifteen years.

The Parties entered into the Agreement on February 20, 1986 (Agreement p 1), and the Agreement was specifically approved by Conrail's then-Chairman and Chief Executive Officer, L. Stanley Crane in a memorandum dated December 5, 1986 (Ex D). Mr. Crane also executed a Delegation of Authority on that date (Ex E), whereby he delegated to the Vice President—Information Systems and Administrative Services, and the Vice President—Real Estate, "authority to execute and deliver on behalf of [Conrail] any and all documents necessary or desirable to transfer any and all right, title and interest in and to [the Property] to Frank Vitale and Francis Vitale, or the nominee thereof"

Although the Agreement contemplated that closing would take place within eighteen months of the date of the Agreement, the parties agreed to adjourn the closing. Between July 7, 1987 and May 26, 1999 (a period spanning nearly twelve years), the Vitales and the Railroad executed more than *fifty written modification agreements extending the closing date* under the Agreement (Ex. F). *Each time it executed one of those modification agreements the Railroad re-affirmed the continued validity of the Agreement.* The Railroad *never* took the position, during all that time, that the Agreement was terminated—or that it was subject to termination—because it would interfere with railroad operations.

Furthermore, although the Railroad now represents to this Board that it sent the Vitales notice of its termination of the Agreement on May 22, 2002 (Petition, p. 6), the actual letter that was sent to the Vitales (Petition, Ex. 3) did not, by any stretch of the imagination, purport to terminate the Agreement (whether on grounds of interference with railroad operations or on any other basis). To the contrary, that May 22, 2002 Letter took the position that conditions precedent to closing had not been met and that the Agreement was non-binding. The words “terminate” or “interference with railroad operations,” or similar language, appear nowhere in that letter. CSXT’s suggestion that the Vitales failed to accept the “termination” of the Agreement and, instead, sought arbitration (Petition, p. 6) is a distortion of the facts. The Vitales commenced arbitration after CSXT’s predecessor NY Central took the position that the Agreement was unenforceable. The first time CSXT or any of its predecessors ever took the position that the Agreement was terminated—or should be terminated because it would interfere with railroad operations—was on October 4, 2007, when it filed this Petition.

**D. Proceedings in Arbitration, in Court, and Before the
New York State Department of Transportation, from
2002 to 2007, Relating to the Agreement**

1. The Arbitration and Court Proceedings

The Vitales commenced arbitration against the Railroad seeking specific performance of the Agreement, which included a broad arbitration clause, more than five years ago (Exhibit G) The Railroad resisted arbitration and commenced a proceeding in New York State Supreme Court, Queens County ("Supreme Court"), seeking to stay the arbitration (Exhibit H) In resisting the arbitration, the Railroad argued that the arbitration should be stayed because the Agreement was not enforceable, but it never asserted that the Agreement was terminated or should be terminated because it would interfere with railroad operations The Vitales opposed NY Central's application to stay the arbitration and filed a cross-petition to compel arbitration (Exhibit I) In April 2003 the Supreme Court denied the Railroad's petition to stay the arbitration, granted the Vitales' cross-petition to compel arbitration, and directed the Parties to proceed to arbitration (Exhibit J)

In 2004, the Vitales and the Railroad jointly appointed Professor Robert M Zinman of St John's University School of Law (the "Arbitrator" or "Professor Zinman") as the sole Arbitrator to hear and determine all issues in the arbitration (Exhibit K) Arbitration hearings took place during the summer of 2004 Thus, the hearings took place a full year after the "Acquisition Date" when CSXT acquired ownership of the Line At the hearings, the Railroad's counsel advised the Arbitrator of CSXT's acquisition of the Line, making clear that CSXT was now the party to the Arbitration, and indeed stating that, during the hearings, when the Railroad's counsel made reference to "Conrail" he intended to refer also to CSXT (*NY Central v Vitale*, Arbitration, Transcript, June 15, 2004, p 7, l 915) (Ex C)

Prior to and during the arbitration, both parties recognized that the Railroad might not be able to convey all of the Property, and that further arbitration might be required with respect to a possible condemnation of a portion of the Property. During the Arbitration, the Railroad argued that the Agreement was unenforceable, but it never took the position that the Agreement had been, or should be, terminated because it would interfere with railroad operations. The Arbitrator issued his award in late September 2004 (the "Award") (Exhibit L), specifically determining that the "Agreement represents a binding contract for the sale of the real estate described therein" and awarding the Vitales specific performance of the Agreement, among other things.

2. CSXT's Certification to NYSDOT That the Agreement Will Not Interfere with Railroad Operations

After entry of the Award, and in accordance with its direction, the Railroad submitted three applications to the NYSDOT under Section 18 of the Transportation Law of the State of New York in late December 2004, requesting a determination that the preferential right of acquisition reserved to the NYSDOT does not apply to the sale of the Property to the Vitales, or in the alternative, for release by the NYSDOT of such right (Exhibit A). In those applications, required under New York State law whenever a railroad embarks on a sale of real property, the Railroad explicitly represented to the NYSDOT that *"the Railroad Easement [in the Agreement] ensures that the Railroad will be able to continue to use the Property for rail transportation purposes, as the Railroad intends to do"* (Exhibit A) (emphasis supplied).

In early 2005, the NYSDOT granted the releases requested in CSXT's Section 18 Applications for the entirety of the Property (Exhibit M), thus permitting the closing on the sale of the Property to go forward. Nevertheless, CSXT refused to close

3. Confirmation of the Arbitration Award, and Entry of Judgment Against the Railroad

Because the railroad refused to close on the sale, it therefore became necessary for the Vitales to make application to the Supreme Court for confirmation of the Arbitration Award so that a judgment could be recorded against the Property (Exhibit N)

NY Central opposed confirmation of the Arbitration Award on the grounds that it could no longer perform the Agreement because a portion of the Property—about one acre out of a total of seven acres—had been taken in eminent domain (after entry of the Arbitration Award and issuance of the Section 18 Releases) by the NYSDOT in connection with the reconstruction of the BQE (Exhibit O) That possibility had been contemplated from the outset, and was explicitly addressed during the course of the Arbitration, as set forth above CSX made no claim that performance of the Agreement would interfere with railroad operations, and *did not* oppose confirmation of the Arbitration Award on those grounds

The Supreme Court rejected the Railroad's arguments in opposition to confirmation of the Arbitration Award and, in September 2005, it confirmed the Arbitration Award (Exhibit B), directing the parties to "expeditiously proceed with the closing at the agreed price of \$900,000." Thereafter, the Supreme Court entered an Order/Judgment confirming the Arbitration Award (Exhibit P) The Order/Judgment specifically recited that the conveyance to the Vitales would be limited to those portions of the Property that were not taken in fee by the State of New York, would be subject to the easements taken by the State of New York, and that it is without prejudice to the right of the Vitales to seek an abatement of a portion of the purchase price, or an equitable share of the condemnation awards relating thereto, in further proceedings before the Arbitrator

4. The Railroad's Decision Not to Challenge the Judgment's Mandate That the Railroad Convey the Property to the Vitales, Subject to the Railroad Easement

The Railroad thereafter appealed from the Order/Judgment to the Appellate Division—Second Department of the Supreme Court of the State of New York ("Appellate Division"), challenging the Order/Judgment insofar as it recognized the Vitales' right to seek an equitable share of the condemnation awards. However, the Railroad did not contest the Judgment's mandate that the Railroad convey the Property to the Vitales, subject to the Railroad Easement. The Railroad never asserted that performance of the Agreement would interfere with railroad operations.

The Appellate Division unanimously affirmed the Supreme Court's Opinion and the Order/Judgment in early 2007 (Exhibit Q).

5. The Continued Arbitration Proceedings

During the summer of 2007, counsel for the Vitales sought to resume the arbitration to address the Vitales' claim for an equitable share of the condemnation award or, alternatively, an abatement of the purchase price on account of the condemnation of approximately one-seventh of the Property, in accordance with the Order/Judgment, but counsel for CSXT advised that CSXT would not agree to conduct the supplemental arbitration before the Arbitrator (Professor Zinman). Accordingly, the Vitales recently filed a motion with the Supreme Court seeking to compel resumption of the arbitration before Professor Zinman, as Arbitrator, in accordance with the Order/Judgment directing that such further arbitration be conducted before the Arbitrator (Exhibit R). Only after CSXT's counsel was served with that motion, on or about October 4, 2007, did CSXT file the instant Petition with this Board, taking the position—for the first time in over twenty years of dealings with the Vitales and five years of arbitration and court

proceedings—that “implementation” of the Agreement would interfere with its implementation of its acquisition and operation of certain assets of Conrail pursuant to the *Conrail Consolidation* (Petition, p 5)

2. THE PETITION SHOULD BE DISMISSED OR DENIED BECAUSE THE AGREEMENT WILL NOT INTERFERE WITH RAILROAD OPERATIONS OR THE *CONRAIL CONSOLIDATION*

A. CSXT Has Certified to NYSDOT That the Agreement Will Not Interfere with Railroad Operations

Following issuance of the Arbitration Award directing the Railroad to convey the Property to the Vitales (Ex L), in December 2004 the Railroad certified, in CSXT’s Section 18 Applications (Ex A), that the sale of the Property to the Vitales *would not interfere with railroad operations*, explicitly stating that “the Railroad Easement ensures that the Railroad will be able to continue to use the Property for rail transportation purposes ... ” It made that certification more than six years after the August 22, 1998 “Control Date” (when CSXC and NSR acquired control of Conrail), more than five years after the June 1, 1999 “Split Date” (when the Conrail assets were divided between CSXT and NSR), and more than a year after the August 27, 2003 “Acquisition Date” (when CSXT acquired ownership of the Line)

CSXT thus made its own determination that there would be no interference with railroad operations, it did not merely inherit a determination made by Conrail

B. The Clearances Provided in the Railroad Easement, as Part of the Agreement, Are Wider and Taller Than Existing Clearances of Other Structures on the Line — Ensuring That the Agreement Will Not Create a “Bottleneck” or “Choke Point” on the Line

Under the Agreement with the Vitales, the Railroad retains a Railroad Easement seventy-five (75) feet wide, and twenty-two (22) feet high for railroad operations, to permit trains to pass

unimpeded and to permit necessary maintenance. As is detailed in the affidavits of Mr. Vitale and Mr. Davis, these are industry-accepted width and height standards, sufficient to permit double-tracking and double-stack trains in the unlikely event that such would be needed. Those restrictions, with which the Vitales' development would comply, are sufficient to accommodate operations far in excess of current railroad operations along the Line.

The Line runs through a densely populated area of Brooklyn and Queens (two of the five boroughs of the City of New York). The Line is, in some parts, in a cut below street level and in others it is elevated. There is an overpass or underpass crossing the Line for every street that traverses the Line. Many of these existing overpasses, including newly-constructed overpasses, have clearances that are narrower in width and shorter in height than the clearances provided in the Railroad Easement for the Property.

For example, as part of the reconstruction of the BQE, which is still in progress, NYSDOT has just re-built the Roosevelt Avenue Bridge and the Broadway overpass, both located within the Property that is the subject of the Agreement. The Railroad consented to the construction of these two overpasses with lesser clearances than are required for the Railroad Easement mandated by the Agreement. The Roosevelt Avenue Bridge has a horizontal clearance width of thirty (30) feet and a vertical clearance of about eighteen (18) feet, and the Broadway overpass has horizontal clearance of thirty (30) feet and vertical clearance of twenty (20) feet.

Indeed, the Railroad admits that these projects do not interfere with railroad operations, having alleged in the Petition that the sale of a "portion of the right-of-way to NYDOT *will not interfere with its current or future operations over the Line*" (Petition at p. 12) (emphasis supplied). If those projects—which were just built with CSXT's consent—with lesser clearances do not interfere with current or future railroad operations, certainly the seventy-five (75) foot

wide and twenty-two (22) foot high envelope required in the Agreement is more than sufficient for all existing or any potential new rail operations on the Line

In addition, the Railroad agreed to reduce the width of its right-of-way at Broadway to about sixty (60) feet, fifteen (15) feet less than the seventy-five (75) foot wide Railroad Easement under the Agreement. Since the Railroad agreed, in its dealings with NYSDOT regarding the BQE reconstruction, that a sixty (60) foot right-of-way would not interfere with railroad operations, the seventy-five (75) foot wide Railroad Easement under the Agreement is surely ample to ensure that the transfer of the Property to the Vitales, and the Vitales' construction on the Property, would not interfere with railroad operations.

On the Line, furthermore, south of the Property, the retailer Target has just constructed a retail superstore and parking area above the tracks on top of a new overhead bridge with span openings thirty (30) feet wide (at the existing track) and having twenty-two feet-six inch (22'6") of vertical clearance (this section of the Line is used by CSXT, but apparently is owned by another railroad).

Moreover, the existing constraints on the Line are perhaps best illustrated by the Metropolitan Avenue overpass, located on the Line approximately two miles south of the Property and, in fact, just one quarter of a mile north of the Railroad's yards. The Metropolitan Avenue overpass is approximately 500 feet long. Located above the Metropolitan Avenue overpass is a portion of the Lutheran Cemetery and some single level, retail stores, and its tunnel has seventeen feet-six inches (17'6") of vertical clearance and thirty (30) feet of horizontal clearance on a sixty (60) foot right-of-way. This poses a much more significant risk of a "bottleneck" than would the Vitale's project, which reserves larger clearances for the Railroad Easement.

Aside from conclusory allegations, the Petition is devoid of any detail concerning how, either now or in the foreseeable future, railroad operations on the Line (including possible, though highly unlikely, expansion to two tracks, or to accommodate double-stack containers) would require more than the Railroad Easement that is provided in the Agreement. Certainly, in the Petition, CSXT did not identify any traffic that the Line could not carry within the parameters of the Railroad Easement to which the Vitales' property would be subject.

C. The Agreement Ensures That the Design of the Vitales' Buildings (Including the Location of Structural Support) and the Actual Construction Will Not Interfere with Railroad Operations

As reviewed in detail above, the Agreement ensures that the Vitales' use of the Property will not interfere with Railroad operations. The Vitales intend to build a structure that spans the Line (allowing room for the Railroad Easement), and to construct buildings (including both residential and commercial) on that structure. The Agreement fully protects CSXT by providing, among other things, that "Construction by Purchaser will proceed in a manner that will not unreasonably interfere with the continued operation of trains." (Agreement ¶ 4(B)). Additionally, the Agreement provides that the "Final Plans and specifications will be subject to the final review and written approval of Conrail's Chief Engineer" (Agreement ¶ 8(b)), and it includes multiple protections for railroad operations with respect to safety, lighting requirements, clearances, indemnification and insurance coverage, just to name a few.

The Agreement was carefully crafted so as to ensure the Railroad's continued ability to operate the Line without interference, and the Vitales intend to abide by those provisions.

D. The Real Reason for CSXT's Desire to Terminate the Agreement—That It Believes the Sales Price Is Too Low—Is Not Grounds to Terminate, and Is an Abuse of This Board's Jurisdiction

It has been clear all along that the real reason for the Railroad's refusal of CSXT to close on the sale of the Property to the Vitales in accordance with the Agreement is that it thinks the contract price is too low. In fact, in the arbitration proceedings CSXT displayed surprising candor about the real reason why it wanted to be relieved of its obligations under the Agreement. CSXT sought to introduce an appraisal of the Property, showing that the Property was worth far more money than it would receive if it went forward with the Agreement with the Vitales.

CSXT's counsel (who stated that he would refer to both CSXT and Conrail as "Conrail"), stated

[CSXT'S COUNSEL] In addition to that position which Conrail is taking [relating to the enforceability of the Agreement], we feel it is beneficial for you to understand what the value, fair market value, of the property in 2004 is, because we submit [that] will help you understand why Conrail's taking the position apart from the legal merits of this case. So again, it's not to say—

ARBITRATOR ZINMAN You are saying if the value has gone up, then Conrail's taking the position that because of that, they don't want to go through with the contract, assuming there is a contract to start with?

[CSXT'S COUNSEL]. Correct. And you hit it right on the head.

(*NY Central v Vitale*, Arbitration, Transcript, June 15, 2004, p. 8, l. 9-15, p. 16, l. 21 – p. 17, l.

11) (Ex. C). But, as set forth in detail above, the Railroad, over a period of twelve years, agreed to extend the closing date under the Agreement, and dissatisfaction with the sale price embodied in the Agreement is not grounds for contract termination or avoidance.

CSXT certainly has no right to invoke this Board's jurisdiction to terminate an Agreement to sell real property on the pretext that it would interfere with railroad operations when the real reason it wants to terminate the Agreement is that it thinks the price is too low

In any event, this is a single, one-time contract for the sale of a piece of real estate. It is not a dispute over wages, or rates, or fees that would have an ongoing financial impact on the complex finances of operating a railroad. Even if CSXT is correct that the sales price of the Property is below its current fair market value, (a) that is not grounds to terminate the Agreement, (b) there will be no ongoing impact on the finances of railroad operations and (c) the one-time dollar impact is insignificant to CSXT and its parent corporation, CSX. The sales price is \$900,000. Suppose the Property were worth a multiple of that—\$5 million, or even \$25 million. That would not even merit a footnote on CSX's financials. In 2006, CSX, had gross revenues of \$9.6 billion, EBITDA⁵ of \$2.8 billion, and net income of \$1.3 billion. CSX's market capitalization is \$17.4 billion.⁶ It is not surprising that, during the five years that CSX has been in litigation with the Vitales, CSX has never listed this litigation in its financial statements. *See, e.g.*, CSX Form 10-K (f/y/e December 29, 2006).

CONCLUSION

For all the foregoing reasons, the Vitales respectfully request that the Petition be dismissed, or alternatively, that all relief sought in the Petition be denied.

⁵ EBITDA is "Earnings Before Interest, Taxes, Depreciation and Amortization."

⁶ <http://marketwatch.nytimes.com/custom/nyt-com/html-companyprofile.asp?MW=http%3A%2F%2Fmarketwatch.nytimes.com%2Fcustom%2Fnyt-com%2Fhtml-companyprofile.asp&symb=csx&x=12&y=9> (visited November 20, 2007).

Dated November 21, 2007

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SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388 (Sub-No. 101)

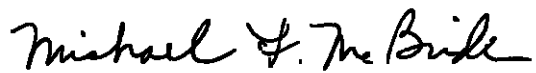
In re CSX TRANSPORTATION, INC
Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that I have served this 21st day of November 2007, one copy of the foregoing "Reply of Frank Vitale and Francis Vitale to CSX Transportation, Inc 's Petition for Declaratory Order" via first-class mail and electronic means upon the following counsel

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VITALE AFFIDAVIT

**SURFACE TRANSPORTATION BOARD
STB Finance Docket No. 33388 (Sub-No. 101)**

***In re CSX TRANSPORTATION, INC.,
Petitioner***

AFFIDAVIT OF FRANCIS VITALE

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

FRANCIS VITALE., being duly sworn, states:

1. My name is Francis Vitale. I was educated as a civil engineer, and am now engaged in real estate development with my father, Frank Vitale. My business address is 50 Harbor Hill Drive, Huntington, NY 11743. I have personal knowledge of the facts set forth in this affidavit, which I submit on our behalf in conjunction with our Reply to the Petition in this matter

2. In the Petition, CSX Transportation ("CSXT," and with its predecessors-in-interest, the "Railroad") seeks a declaratory order that it has the right to terminate an agreement (the "Agreement"), under which CSXT's predecessor-in-interest, Consolidated Rail Corporation ("Conrail") agreed to sell seven acres of land, in Woodside, Queens, New York (the "Property") to my father and me. A rail line (the "Line") runs through the Property, and the Agreement provides that the Property would be sold subject to a railroad easement (the "Railroad Easement") to ensure continued, unimpeded operation of the Line. The Agreement also contains requirements that our construction plans for the Property be approved by the railroad, to ensure that our plans, and the construction work, does not interfere with railroad operations on the Line.

3. I respectfully submit that there is no basis for CSXT's claim that the Agreement would interfere with current or future railroad operations, and respectfully request that this Board deny the Petition.

4. In this affidavit, I will set forth information relevant to our Reply. I have reviewed our Reply, which is truthful and accurate in all respects.

5. We are also submitting herewith an affidavit of Gene E. Davis, P.E. In his affidavit, Mr. Davis makes reference to information and documents that I provided to him. All of the information and documents that I provided to Mr. Davis are entirely accurate.

My Background

6. I received a bachelors degree in civil engineering from Manhattan College in 1967. I practiced as a civil engineer for many years—in private practice, for an engineering consulting firm, as well as for the New York State Department of Transportation—Traffic Department and for the New York City Highway Department.

7. Since approximately 1985, I have been involved in real estate development and construction with my father, including residential and commercial construction (including both new construction and renovation), primarily in and around the New York City metropolitan area.

The Agreement To Purchase the Property, Subject to the Railroad Easement, and Subject to Railroad Approval of Construction Plans

8. In 1986, my father and I (hereinafter, when I refer to "we," I mean my father and I) entered into an Agreement with Conrail, under which we agreed to purchase, and Conrail agreed to sell, approximately seven acres of land, in Woodside, Queens, New York, alongside

the Brooklyn-Queens Expressway ("BQE"). A copy of the Agreement is attached to CSXT's Petition in this proceeding.

9. The Line runs through the Property. The section of the Line that runs through the Property is approximately 0.28 miles long (between milepost QVK 4.58 and milepost QVK 4.86).

10. The Agreement provides that the Property is subject to a Railroad Easement seventy-five (75) feet in width and twenty-two (22) feet high, to permit railroad operations and maintenance to continue unimpeded.

11. The Agreement also contains extensive provisions, which are reviewed in detail in our Reply to the Petition, to ensure that our building plans, and that our actual construction, do not interfere with railroad operations.

12. Let me assure the Board that my father and I recognize that the Railroad Easement, the provisions of the Agreement relating to railroad approval of our building plans, and the provisions of the Agreement ensuring that our actual construction does not interfere with railroad operations, are central to our Agreement. We take our obligations under the Agreement seriously, and will fully abide by those obligations to ensure that there is no interference with railroad operations.

13. From when the Agreement was signed over 20 years ago, until CSXT filed the Petition before this Board, the Railroad never claimed that the Agreement would, in the slightest way, interfere with railroad operations. To the contrary, the Railroad consistently took the position that the provisions for the Railroad Easement, and the other provisions of the Agreement, were more than adequate to ensure that there would be no interference.

The Extension of the Closing Date, and Proceedings in Arbitration, in Court, and before the New York State Department of Transportation

14. Pursuant to the Agreement, we made a deposit with Conrail of \$90,000, which would be applied toward the payment of the total sales price of \$900,000.

15. The Agreement contemplated that closing would take place within eighteen months of the date of the Agreement. However, the parties decided to adjourn the closing. Between July 7, 1987 and May 26, 1999 (a period spanning nearly twelve years), we executed more than fifty written modification agreements with the Railroad extending the closing date under the Agreement (Reply Ex. F). During all that time, the Railroad never asserted that the Agreement was terminated, or that it was subject to termination, or that the Agreement would interfere with railroad operations. To the contrary, when it executed each of the more than fifty modification agreements, the Railroad re-affirmed the validity of the Agreement and its intent to proceed with the closing, and thus implicitly re-affirmed that the Agreement would not interfere with railroad operations.

16. In 2002, we sought to close on the sale of the Property so that we would take title and could proceed with our building plans. The Railroad refused. We then commenced arbitration against the Railroad pursuant to the Agreement. The Railroad refused to participate in arbitration under the Agreement and commenced a court proceeding seeking to stay the arbitration on the grounds that the Agreement was not binding. We prevailed in the court proceeding, and a court Order was entered compelling the Railroad to arbitrate our claim to enforce the Agreement. The parties jointly selected Professor Robert M Zinman of St. John's University Law School as Arbitrator.

17. Later, we prevailed in the arbitration and the Arbitrator entered an Arbitration Award ruling that the Agreement was valid and binding and that the Railroad was required to go to closing and sell the Property to us. CSXT acknowledges this in the Petition (at p. 6).

18. After entry of the Arbitration Award, and in accordance with the provisions thereof, in December 2004, the Railroad submitted three applications to the New York State Department of Transportation ("NYSDOT") under Section 18 of the Transportation Law of the State of New York, requesting a determination that the preferential right of acquisition reserved to the NYSDOT does not apply to the sale of the Property to us under the Agreement, or in the alternative, for release by the NYSDOT of such right (Reply Ex. A) ("CSXT's Section 18 Application").

19. In those applications, required in New York State whenever a railroad embarks on a sale of real property, the Railroad explicitly represented to the NYSDOT that *"the Railroad Easement [in the Agreement] ensures that the Railroad will be able to continue to use the Property for rail transportation purposes, as the Railroad intends to do."* (Reply Ex. A) (emphasis supplied).

20. In early 2005, NYSDOT granted the releases requested in CSXT's Section 18 Application for the entirety of the Property (Reply Ex. M), thus permitting the closing on the sale of the Property to go forward.

21. Even after entry of the Arbitration Award and the grant of the necessary Section 18 Releases, however, the Railroad resisted complying with the Arbitration Award and continued to refuse to close on the sale of the Property. Accordingly, our attorneys had to pursue additional

procedures in court to have the Arbitration Award confirmed, and a Judgment entered and recorded against the Property.

22. Both before and during the arbitration, we and the Railroad knew that it was likely that some portion of the Property might be taken in eminent domain by the New York State Department of Transportation ("NYSDOT") in connection with its reconstruction of the BQE. During the arbitration, we specifically asserted our right to close on the Property, even if there were a partial condemnation, subject to our right to an adjustment of the purchase price or other appropriate relief if the Railroad could not convey all of the Property. In fact, after the Arbitration Award was entered, but before it was confirmed and reduced to Judgment, approximately one acre out of a total of seven acres comprising the Property was taken in eminent domain by the NYSDOT.

23. The Judgment that was entered directed that the Railroad convey the Property to us, subject to the Railroad Easement, in accordance with the Agreement. The Judgment thus provided, in part, that it is

ORDERED and ADJUDGED that

(a) New York Central Lines LLC ("NY Central"), as successor to Consolidated Rail Corporation ("Conrail"), and their successors, be and hereby ordered to specifically perform the Agreement dated February 20, 1986 between Conrail, as Seller, and Frank Vitale and Francis Vitale, as Purchaser, as Amended (as amended, the "Agreement") with respect to certain real property in Woodside, Queens, New York (the "Property") for the agreed purchase price of \$900,00, of which \$90,000 has been paid on signing of the Agreement. * * *

(b) NY Central, Conrail, and their successors are ordered to proceed expeditiously with the closing of title, conveying title to the Vitales or their assignees.

(Order/Judgment Confirming Arbitration Award, pp. 3- 4) (Reply Ex. P).

24. Because the Railroad would only be able to convey six acres of the Property (the seventh acre having been taken by NYSDOT by eminent domain), the Judgment also specifically preserved our right to seek an abatement of the purchase price, or an equitable share of the condemnation award, in further proceedings before the Arbitrator, Professor Zinman.

25. After the Judgment confirming the Award was entered, the Railroad appealed, objecting to the part of the Judgment that preserved our right to seek an equitable share of the condemnation award in further arbitration proceedings. The Railroad did not appeal that portion of the Judgment directing specific performance of the Agreement, and did not appeal that portion of the Judgment which stated "NY Central, Conrail, and their successors are ordered to proceed expeditiously with the closing of title, conveying title to the Vitales or their assignees."

26. The appellate court affirmed the Judgment.

27. While CSXT's Petition makes reference to the arbitration, CSXT failed to advise this Board that:

- The Arbitration Award has been confirmed, and a Judgment has been entered directing CSXT to convey the Property to us (subject to the Railroad Easement) in accordance with the Agreement;
- CSXT did not appeal that portion of the Judgment, and thus acknowledged that, as a matter of law, it is obliged to convey the Property to us (subject to the Railroad Easement), and
- On the portion of the Judgment that CSXT did appeal (relating to further arbitration proceedings), CSXT lost the appeal; and the Judgment was affirmed in all respects.

28. The Railroad nevertheless refused to participate in supplemental arbitration proceedings on the issue of an abatement of the purchase price or an equitable share of the condemnation award, now taking the position that a new arbitrator should determine this issue,

instead of the already-appointed arbitrator who is familiar with the case. We therefore made an application in court to compel the Railroad to proceed with the arbitration.

29. It was after we made that application in court to compel the Railroad to proceed with the arbitration that the Railroad filed this Petition, taking the position—for the first time—that the Agreement will interfere with railroad operations. In the court proceedings, the Railroad also cited its filing of its October 4, 2007 Petition with this Board as grounds for refusal to comply with the Judgment directing further arbitration.

30. Our application to compel resumed arbitration is now pending before the same court that issued the Judgment, which has been informed of the filing of the Petition with the STB. I note that the Railroad did not disclose this pending application in Court in its Petition.

31. In the Petition, the Railroad gives the impression that the condemnation has not yet taken place, and that NYSDOT is “seeking” to acquire a portion of the Property (Petition at p. 12), but, in fact, the condemnation has already taken place. The conveyance of a portion of the Property is not some other option that the Railroad should be allowed to pursue as preferable to performance of the Agreement and compliance with the Award and Judgment, as the Railroad would apparently have this Board believe. To the contrary, the issue to be arbitrated, as the New York courts have ruled, is whether there should be an abatement of the purchase price, or the award of an equitable share of the condemnation award, in light of the fact that the Railroad will only be able to convey six, not seven, acres of land.

CSX's Claim that the Agreement Will Interfere with Railroad Operations

32. Over the past twenty years, we have had extensive communications with the Railroad about the Property. From 1986 until 2002, these communications were entirely

amicable, with both sides working towards a closing of the sale. From 2002 until 2007, we were on opposite sides of an arbitration and a litigation with the Railroad. But during both periods of time—the period when we were working together towards a closing, and the period of arbitration and litigation—one thing remained constant: At no time did CSXT maintain that the Agreement would interfere with railroad operations. CSXT first made that claim in its Petition filed with this Board. I respectfully submit that there is no basis for CSXT's claim.

33. CSX's Petition refers to our building plans as a possible "choke point" (Petition at 10) and a "constraint" (Petition at 12) on rail operations that "will increase the congestion and lessen the opportunity for increased rail competition and infrastructure that the Board sought to ensure" (Petition at p. 11). CSX refers to its "doubts" about our plans (Petition at 12), and suggests various problems that "may" occur, which are only predictions about things that have not yet occurred (such as the alleged inability to expand the Line at some undefined time in the future, the possible prohibition of transportation of certain commodities, potential "unending litigation" concerning such matters as noise and damages to the building we intend to build, the attraction of certain people to rail lines, injuries or deaths to people who may be attracted to our building if it is built over the Line, possible maintenance difficulties of the Line, and a "chill" to any change to the Line by CSX) (Petition at 9-10).

34. None of the hypothetical things that CSX raised in the Petition (which is unsupported by any evidence) as potential problems has, in fact, occurred, and I know of no basis for believing that there is any likelihood that they will occur.

35. Nowhere in the Petition did CSX specify how sale of the Property to us, subject to a Railroad Easement allowing for continued railroad operations, would cause any of hypothetical problems posited by the Railroad.

36. In fact, there are extensive provisions in the Agreement—including not only the Railroad Easement, but provisions relating to railroad approval of our building plans and railroad monitoring of actual construction—to ensure that there will be no interference. There is no evidence to the contrary.

37. The Petition deceptively suggests that “Under the Agreement, the Vitales could begin constructing the apartment complex, whether or not CSXT had made any changes to the Line or right-of-way”(Petition at 10). But, as discussed above, in accordance with the Agreement, we could not begin construction until we had obtained the Railroad’s approval. In any event, despite the allegation quoted above from the Petition, “changes to the Line or right-of-way” made by CSX T (if any) should have no impact on our building plans, because the seventy-five (75) foot wide, twenty-two (22) foot high easement that Conrail retained and CSXT now is entitled to use will accommodate “changes to the Line or right-of-way” for any conceivable railroad operations on the Line.

The Facts Relating to the Railroad Line

38. On November 12, 2007, one of our counsel, Richard M. Zuckerman, Esq., and I met with Gene M. Davis, P.E., an expert in railroad operations, construction, engineering, and maintenance from the R.L. Banks and Associates, Inc. firm (which I understand is well-known to the STB). During our visit, we actually walked the Line, and I briefed Mr. Davis on our building

plans for the property. Mr. Davis and I spent about five hours at the Line. (Mr. Zuckerman was there for part, but not all, of this time.)

39. I have observed the Line for more than twenty years—since before we signed the Agreement. During that time, I visited the Property on a regular basis. In fact, our family owns an apartment building about three blocks from the Property, and both the Property and Line are visible from the apartment building.

40. The Line is lightly used, and has been lightly used for years. Based on my own personal observation, approximately one loaded train and one empty train traverse the Line per day. That has been the case for years. In its Petition, CSX offered no information on the railroad operations over the Line to contradict these observations.

41. The Railroad Easement for railroad operations to which our Property is subject under the Agreement would permit trains to pass unimpeded, and also would permit necessary maintenance. I am informed that the dimensions of the easement (seventy-five (75) feet wide and twenty-two (22) feet high) are industry-standards for width and height sufficient to permit double-tracking (if that should ever be needed) and passage of double-stack trains. In the Petition, CSX did not identify any traffic that the Line could not carry because of the Railroad Easement to which our Property would be subject.

42. The project that we plan to build on the Property in accordance with the Agreement will be built on a platform spanning the Line, and will incorporate residential apartment buildings with some commercial space, consistent with prevailing usage in the area.

43. We will construct our buildings in strict compliance with the Agreement. Our development will not encroach on the Railroad Easement, which the Railroad will retain.

Moreover, pursuant to the Agreement, we will submit our plans to the Railroad for its approval prior to construction, and we will comply with all other contract provisions regarding construction, safety, lighting, clearances, and insurance and indemnification, among others. All of the contractual provisions dictating submission of plans for approval by the Railroad (which shall not be unreasonably withheld, of course) will ensure that there will be no interference with railroad operations on the Line. These provisions are described in greater detail in our Reply to the Petition.

44. It is apparent that the buildings we intend to construct will not interfere with railroad operations or maintenance. Not only will there be ample clearance, side-to-side, because of the seventy-five (75) foot easement, but also there will also be twenty-two (22) feet of vertical clearance. Mr. Davis advises me (and states in his affidavit) that the New York State vertical clearance standard is only twenty (20) feet.

45. Obviously, the Railroad Easement applicable to our Property was reserved by Conrail so that trains could continue to operate on the Line, and that remains true today.

46. There are other structures along the Line, such as street overpasses, to the north and south of the Property, and on the Property itself, with lesser clearances than the Railroad Easement in our Agreement provides. The presence of these other structures does not interfere with railroad operations on the Line. Neither will our construction.

47. Mr. Davis's affidavit describes four such structures that provide the same or less clearance than will be provided by the Railroad Easement on our Property: (a) the newly-rebuilt Roosevelt Avenue Bridge, (b) the Target superstore overpass, (c) the Metropolitan Avenue overpass, and (d) the narrowing of the right-of-way at Broadway as a result of NYSDOT's BQE

construction. Based upon my personal knowledge of the Line, Mr. Davis's descriptions are entirely accurate.

48. Allow me to describe a fifth example of the many structures, along the Line, that provide the same or less clearance than will be provided by the Railroad Easement on our Property.

49. In the Bushwick section of Brooklyn, south of the Property, the Line runs through a tunnel approximately 4000 feet long, running beneath two major roadways, several local streets, and many private residences. That tunnel is divided into four separate, arched bays, two of which are approximately twenty-four (24) feet wide, and two of which are approximately fourteen (14) feet wide, all with vertical clearances of roughly eighteen (18) feet. The Railroad currently runs trains through only one of the fourteen (14) foot wide bays of this tunnel.

50. The Line runs through a densely populated area of Brooklyn and Queens (two of the five boroughs of the City of New York). The Line is, in some parts, in a cut, below street level and in others is elevated. There is either an overpass or an underpass for every street that crosses the Line. There are approximately 146 crossings of the Line in Brooklyn and Queens, including approximately 46 overpasses (where traffic on city streets passes above the Line). Many of these existing overpasses, including newly-constructed overpasses, have clearances that are narrower in width and shorter in height than the clearances provided in the Railroad Easement for the Property. Two such overpasses with lower clearances than the Railroad Easement were recently constructed as part of NYSDOT's reconstruction of the BQE, and the Railroad has stated in its Petition that those projects "will not interfere with its current or future operations over the Line .."(Petition at 12).

51. Accordingly, our project in accordance with the Agreement will not interfere with any present or future use of the Line for any conceivable railroad transportation needs, now or in the foreseeable future, because the reserved Railroad Easement will be more than sufficient to accommodate present and any conceivable future railroad operations on the Line.

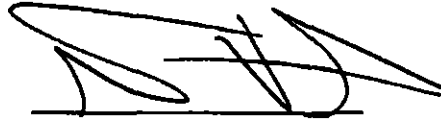
52. For these reasons, I respectfully submit that CSX's Petition is an effort to abuse this Board's authority to override contracts if necessary so as to facilitate railroad operations. Our buildings will not interfere in any way with such operations, as this Affidavit, the Affidavit of Mr. Davis and the Reply demonstrate

53. I therefore believe that CSX is pursuing its Petition to deprive us of the benefits of the deal that we struck with Conrail simply because the Property is obviously now worth more than it was in 1986 when we entered into the Agreement. Of course, CSX will still benefit by going to closing, because it will obtain the remainder of the agreed-upon sales price beyond the \$90,000 we have already paid. In any event, CSXT knew of our Agreement when it did its due diligence at the time it acquired a portion of Conrail's properties, so the fact that CSXT would not obtain payment at today's value of the Property is something that CSXT should have taken into account in the price it paid for its portion of Conrail.

54. Certainly, because there will be no interference with railroad operations on the Line, the fact that CSXT thinks that the contract price is too low is no basis for CSXT to ask this Board to relieve it of its contractual obligations.

55. My father and I respectfully request that this Board deny CSXT's Petition.

FURTHER AFFIANT SAITH NOT.



Francis Vitale


Notary Public

My commission expires on the 1st day of July, 2010.

JACOB INWALD
NOTARY PUBLIC, STATE OF NEW YORK
NO. 02IN6062844
QUALIFIED IN NASSAU COUNTY
COMMISSION EXPIRES JULY 1, 2010

DAVIS AFFIDAVIT

SURFACE TRANSPORTATION BOARD

STB Finance Docket No. 33388 (Sub-No. 101)

*In re CSX TRANSPORTATION, INC.,
Petitioner*

AFFIDAVIT OF GENE A. DAVIS, P.E.

STATE OF NEW YORK)
) SS.:
COUNTY OF ALBANY)

GENE A. DAVIS, P. E., being duly sworn, states:

1. My name is Gene A. Davis, P.E. I am the Director of Transportation Engineering at R. L. Banks & Associates, Inc. ("RLBA"), primarily working out of an office at 9841-A Vine Street, Soddy Daisy, TN 37379. My telephone number there is (423) 332-0243. The main office of RLBA is located at 2107 Wilson Boulevard, Suite 750, Arlington, VA 22201. The telephone number of the main office is (703) 276-7522. A copy of my Resume is attached as Exhibit A.

2. I have been retained in this matter by Frank and Francis Vitale (the "Vitalles") to render an opinion on whether an Agreement, under which CSX Transportation, Inc. ("CSXT") is obliged to transfer six acres of land in Woodside, Queens, New York (the "Property") to the Vitalles, subject to a railroad easement (the "Railroad Easement"), and subject to railroad approval of construction plans, would interfere with railroad operations. RLBA is being compensated at its regular hourly rates for my services. The compensation is not contingent in any respect.

I. My Experience and Expertise in Railroad Engineering and Operations

3. As my Resume indicates, before joining RLBA, I received a Bachelor of Science degree in Civil Engineering from Tennessee Technological University and an MBA from Georgia Southern University.

4. I was employed by Norfolk Southern Corporation ("NS") for eighteen years. During those years, I held various positions with increasing responsibility within the Engineering Department, including management and engineering of track structure, bridge and building inspection, condition assessment, maintenance, rehabilitation, design and construction as well as railroad operations. My last position was Assistant Division Engineer -- Bridges and Buildings in Bluefield, West Virginia.

5. I am a registered Professional Engineer in the State of Virginia. I am a member of the American Railway Engineering and Maintenance-of-Way Association, where I serve as a member of the Technical Committees 18 (Light Density & Short Line Railways) and 12 (Rail Transit). Additional duties on Committee 18 include being a Subcommittee Chairman.

6. Since leaving NS, and as a result of my affiliation with RLBA, I have gained project experience including but not limited to the following: a) for CSX Transportation ("CSX"), analyzing CSX maintenance-of-way costs incurred along two separate corridors in Florida; b) for the City of Indianapolis, concerning the engineering feasibility and costs of diverting CSX mainline railroad freight traffic and Amtrak trains now moving through downtown to the Indianapolis Belt Line; c) for Holcim, U.S.A., with respect to a possible "build-out" of a new rail line to obtain service from a second railroad in South Carolina; d) for a solid waste company, concerning track inspection and maintenance cost estimates associated with planning the construction of long, loading tracks to facilitate serving a planned, transfer station adjacent to Union Pacific Railroad associated with the transporting of waste by rail to a remote landfill; e) for the Port of Morehead City, North Carolina, performing a physical inspection and evaluation of track conditions along eleven miles of seaport terminal rail infrastructure; f) for the City of Santa Fe, inspecting and assessing the condition of about twenty miles of Santa Fe Southern Railway track structure between Santa Fe and Lamy, New Mexico; g) for the Saratoga Economic Development Corporation, assessing the ability of the Canadian Pacific Railway's Adirondack Branch to support potential future passenger or freight train operations between Saratoga Springs and Corinth, NY in connection with the prospective purchase of the line; h) for Riverside County Transportation Commission in California, estimating track and bridge structure capital costs associated with eight, extended Metrolink service passenger rail scenarios; i) in support of Pyco Industries' "feeder line" application to the STB to acquire certain rail lines, conducting an on-site, physical inspection of select South Plains Switching, Ltd. Co. tracks in Lubbock, Texas; j) estimating the initial capital costs necessary to reopen a rail line between St. Johnsbury and Gilman, VT; k) providing track maintenance and upgrade cost estimates in planning a possible purchase of the Union Pacific Railroad's 32-mile Santa Cruz Branch line to support recreational and public transportation objectives; l) for the Mississippi Development Authority, developing projected future twenty-year maintenance-of-way cost estimated budgets, with and without track upgrades, in connection with an economic analysis of the Magnolia State purchasing 96 miles of track between Gulfport and Hattiesburg, MS; and m) estimating the capital costs necessary to upgrade tracks and to construct a long bridge over Union Pacific's main line in connection with the feasibility of instituting a regional rail passenger service along an existing short-line railroad corridor between Visalia and Lemoore, CA.

7. As a result of my education and experience, I am an expert in railroad track structure planning, rehabilitation, engineering and maintenance, design, construction and operations.

II. The Issue: Whether the Agreement to Convey the Property to the Vitales, Subject to a Railroad Easement and Subject to Railroad Approval of Construction Plans, Would Interfere with Railroad Operations

8. Under the Agreement (Petition, Exhibit 1), Consolidated Rail Corporation ("Conrail") agreed to sell the Property to the Vitales, subject to the Railroad Easement, which

would allow continued operation of the rail line (the "Line") that goes through the Property. CSXT is the successor-in-interest to Conrail's interests as seller under the Agreement.

9. The Property was originally seven acres. I am advised that one acre was taken in eminent domain by the New York State Department of Transportation ("NYSDOT"), for reconstruction of the Brooklyn-Queens Expressway ("BQE"), which is adjacent to the Property, so that the Property to be conveyed to the Vitales is now six acres.

10. In its Petition in this proceeding, CSXT takes the position that the Agreement would interfere with railroad operations, arguing that the Property would be a possible "choke point" (Petition at 10) and a "constraint" (Petition at 12) on rail operations that "will increase the congestion and lessen the opportunity for increased rail competition and infrastructure that the Board sought to ensure." (Petition at 11.)

11. CSX also suggests various problems that "may" occur, such as the alleged inability to expand the Line at some undefined time in the future, the possible prohibition of transportation of certain commodities, potential "unending litigation" concerning such matters as noise and damages to the Vitales' buildings, the attraction of certain people to rail lines, and injuries or deaths to people who may be attracted to the Vitales' structure if it is built over the Line. (Petition at 9-10).

12. I have undertaken an analysis of the Line to determine whether, in my judgment, the conveyance of the Property to the Vitales, subject to the Railroad Easement, and the Vitales' development of the Property in accordance with the Agreement (which provides for approval of construction plans by the railroad) would interfere with either existing or potential rail operations along the Line.

III. Facts Relating to The Rail Line

13. To evaluate CSXT's claims that the Vitales' building plans would be a "choke point" or a "constraint" on rail operations, on Monday, November 12, 2007, I went to New York City to inspect the Line including both the portion of the Line on the Property, and adjacent sections of the Line. The portion of the Line on the Property is 0.28 mile long, paralleling the Brooklyn-Queens Expressway between Milepost QVK 4.58 and Milepost QVK 4.86). (Petition at 3, 6, and 9-12).

14. I met at the Property with Francis Vitale and his son, Chris Vitale, as well as with Richard Zuckerman, Esq., counsel for the Vitales. During my visit, we actually walked nearby and over the Line on public property and overhead bridge (street) crossings. I was briefed on the Vitales' plans for that property, which Francis Vitale describes in a separate Affidavit. Francis and Chris Vitale also escorted me to other locations along that same Line, which I also observed from public property adjacent to and over the Line. I also inspected maps and satellite photographs of the Line.

15. I reviewed (a) the extent of use of the Line and (b) existing conditions on the Line, including existing clearances and overpasses, which affect both existing use and any possible expansion of use of the Line.

16. In its Petition, CSX offered no information on the railroad operations over the Line. It was readily apparent during the approximately five hours (11 AM to 4 PM) that I spent at the Line on Monday, November 12, 2007, that the Line is lightly used. During that entire time, only one train used the Line. A train located just south of Metropolitan Avenue appeared to be in the process of running around its consist to proceed north. I observed the train from a nearby school property, and it appeared that the train consisted mostly of boxcars on that particular trip. My personal observation of light use of the Line was confirmed by the Vitales. The Vitales own an apartment building approximately three blocks from the Property, and are thus in a position to observe the use of the Line on a daily basis. The Vitales advised me that approximately one loaded train and one empty train traverse the Line each day.

17. Under the Agreement with the Vitales, the railroad would retain a Railroad Easement seventy-five (75) feet wide, and twenty-two (22) feet high for railroad operations, to permit trains to pass unimpeded and to permit necessary maintenance. These are industry-accepted width and height standards, sufficient to permit double-tracking (though I doubt that would ever be needed, given the very low level of use of the Line) and double-stack trains. Those restrictions, with which the Vitales' development would comply, are sufficient to accommodate operations far in excess of current railroad operations along the Line.

18. The Line runs through a densely populated area of Brooklyn and Queens (two of the five boroughs of the City of New York). The Line is, in some parts, in a cut, below street level and in others is elevated. There is either an overpass or an underpass for every street that crosses the Line. Based upon my review of a map of the Line, there are approximately 146 crossings of the Line in Brooklyn, and Queens, including approximately 46 overpasses crossing over the Line. Many of these existing overpasses, including newly-constructed overpasses, have clearances that are narrower in width and shorter in height than the clearances provided in the Railroad Easement for the Property.

19. For example, as part of the reconstruction of the BQE, which is still in progress, NYSDOT has just re-built the Roosevelt Avenue Bridge, which goes over the Line, within the Property that is the subject of the Agreement. The newly-rebuilt Roosevelt Avenue Bridge has a horizontal clearance width of thirty (30) feet and a vertical clearance of about eighteen (18) feet, as shown in Photo Log, Picture Photo Log, Picture # 1 and associated Drawing # 1 of Exhibit C, which were furnished to me by Mr. Francis Vitale who received it from NYSDOT. Allowing a new overpass to be constructed on the Line, within the Property, with only thirty (30) feet of horizontal clearance (in each bay) and eighteen (18) feet of vertical clearance reinforces my opinion that the seventy-five (75) foot wide and twenty-two (22) foot high envelope required in the Agreement with the Vitales is more than sufficient for all existing or any potential new rail operations. An additional view of the Roosevelt Avenue Bridge from the rooftop of the Vitale's apartment building can be seen in Photo Log, Picture # 2.

20. Similarly, as part of the re-construction of the BQE adjacent to the Property, CSX agreed to reduce the width of its CSX's right-of-way to about sixty (60) feet as shown in Photo Log, Picture # 3. That is fifteen (15) feet less than the seventy-five (75) foot wide Railroad Easement under the Agreement. Since CSXT agreed, in its dealings with NYSDOT regarding the BQE reconstruction, that a sixty (60) foot ROW would not interfere with railroad operations, it is evident that the seventy-five (75) foot wide Railroad Easement under the Agreement is

ample to ensure that the transfer of the Property to the Vitales, and the Vitales' construction on the Property, similarly will not interfere with railroad operations.

21. On the Line, south of the Property, the retailer Target has just constructed a retail superstore and parking area above the tracks on top of a new overhead bridge with span openings thirty (30) feet wide (at the existing track) and having twenty-two feet-six inch (22'6") of vertical clearance, as seen in Exhibit C Drawing # 2 that I personally received from the Target Construction Manager's office at the construction site. (This section of the Line is used by CSXT, but apparently is owned by another railroad.)

22. The existing constraints on the Line are perhaps best illustrated by the Metropolitan Avenue overpass, located on the Line approximately two miles south of the Property. The Metropolitan Avenue overpass is approximately 500 feet long. Located above the Metropolitan Avenue overpass is a portion of the Lutheran Cemetery and some single level, retail stores, as seen in Photo Log, Picture # 4. I understand from Mr. Francis Vitale that at the Metropolitan Avenue overpass, the bridge has seventeen feet-six inches (17'6") of vertical clearance and thirty (30) feet of horizontal clearance on a sixty (60) foot ROW. Given the fact that the Line runs under both commercial development and a cemetery, it would be a massive project to provide greater clearance at this location. To my knowledge, CSXT has never stated that it is even considering doing so.

23. It is inconceivable to me that, now or in the foreseeable future, railroad operations on the Line (including possible, though highly unlikely, expansion to two tracks, or to accommodate double-stack containers from non-existent, potential shippers) would require more than the Railroad Easement that is provided in the Agreement. Certainly, in the Petition, CSXT did not identify any traffic that the Line could not carry within the parameters of the Railroad Easement to which the Vitales' property would be subject.

24. Although CSXT suggests that there "may" be prohibitions on the movement of certain commodities because of the Vitales' building plans (Petition at 10), CSX fails to identify any such prohibitions. As importantly, CSXT fails to explain why the Vitales' project would present any issues, with respect to the transportation of certain commodities, different from those already presented by existing, occupied structures on the Line (including the newly-built Target superstore). If there were such restrictions, they would be a far greater barrier to CSXT transportation operations than just along the Line in question, because of the innumerable structures adjoining or over railroad lines in the United States, especially in the Northeast.

25. CSXT cannot argue that the seventy-five (75) foot wide and twenty-two (22) foot high easement is too small, because other existing clearances on the Line are narrower and shorter. CSXT could not expand its operations beyond that seventy-five (75) foot wide and twenty-two (22) foot high envelope without rebuilding approximately 46 existing overhead constraints on the Line. Indeed, if there was any foreseeable expansion of the Line for which this Railroad Easement would be inadequate, why would CSXT have consented to the recent construction of the Roosevelt Avenue Bridge, and why would CSXT not have tried to stop the recent construction of the Target store both of which provide constraints on the Line greater than the Vitales' project?

26. Mr. Francis Vitale explained to me that the construction contemplated by the Vitales, a mixed use commercial and residential development, would be built on a platform constructed over the Line, in full compliance with the Agreement, allowing for the Railroad Easement. The Agreement specifically provides that the plans for the construction will be subject to approval of the railroad (and that railroad engineers will have to approve, for example, the location of structural supports) to ensure that there is no interference with railroad operations. In light of this obligation to submit the building plans to CSXT for approval, there appears to be no basis whatsoever for the Petition's claim that "Under the Agreement, the Vitales could begin constructing the apartment complex, whether or not CSXT had made any changes to the Line or right-of-way." (Petition at 10.)

27. The type of construction contemplated by the Vitales construction of residential and commercial buildings over active rail lines, allowing for a sufficient railroad easement is common, and would not be materially different from the many other such structures over or alongside railroad lines throughout the United States, especially in the New York metropolitan area.

28. For example, on Monday, November 19, 2007, The New York Times published proposals submitted by five developers to the Metropolitan Transportation Authority ("MTA") for the construction of 12 million square feet of residential and commercial space, a cultural building, shops, and parks on "platforms over the Long Island Rail Road tracks on both sides of 11th Avenue" in Manhattan. "In Railyards, Seeing a Blank Canvas on the Hudson," *The New York Times*, p. B5 (Nov. 19, 2007). These are highly-used rail lines—with hundreds of trains daily, unlike the little-used Line over which the Vitales intend to build.

29. CSXT's also suggests that railroad operations would produce too much noise for the Vitales' planned development. Anyone who spent even a few minutes at the Property would know that that is not true. The neighborhood through which the Line traverses, including the Property, is a densely-built residential area. The Vitales' development will not significantly affect the density of the area. It is also a noisy area not because of the two trains that CSXT sends along this Line each day, but because there are both subways and elevated passenger rail lines (all part of the New York City Subway system) adjacent to the Property. The subway trains pass every few minutes.

30. CSXT's claims about possible trespassing on the Line are not affected by the Agreement, or by the Vitales' construction plans. Just as there is, unfortunately, some trespassing on many rail lines, there is some trespassing on this Line as evidenced by extensive graffiti, on newly built walls, at the level of the tracks. There is no reason to believe that that trespassing would be increased by the Vitales' project. The possibility of such trespassing has not deterred other projects built over rail lines—such as the Target store, and the planned construction over the MTA's Manhattan railyards.

IV. Conclusion: There Will Be No Interference with Railroad Operations

31. Based on the Railroad Easement to which the Vitales' property would be subject, their plans for a mixed use residential and commercial development built on a platform over the Line, and the extensive protections in the Agreement ensuring that the railroad engineers must

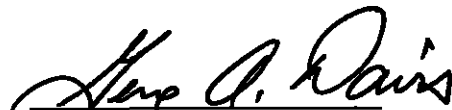
approve construction plans, it is apparent that the building the Vitales intend to construct will not interfere with railroad operations or maintenance whatsoever. Not only will there be ample clearance, side-to-side, because of the seventy-five (75) foot easement, but there will also be twenty-two (22) feet of vertical clearance (ample even for double-stack trains). The New York State vertical clearance standard is only 20 feet. Obviously, the Railroad Easement was reserved by Conrail so that trains could continue to operate on the Line.

32. Railroads reserve easements for their needs, as Conrail did in this situation, which are designed to be adequate for present and potential, future railroad operations. In my opinion, the Railroad Easement applicable to the property that the Vitales intend to purchase would be more than adequate for railroad transportation needs over the Line. Indeed, the Railroad Easement provided under this Agreement provides for a wider and higher clearance than is provided by many existing overpasses along the Line.

33. In addition, as noted above, in accordance with the Agreement to sell the Property to the Vitales, the Vitales' plans must be submitted to CSXT for its approval (which approval, of course, is not to be unreasonably withheld).

34. I conclude that the Agreement, and the Vitales' proceeding with construction under the Agreement, will not interfere with any present or future use of the Line for any conceivable railroad transportation needs, now or in the foreseeable future, because the reserved Railroad Easement will be more than sufficient to accommodate present or future railroad operations on the Line.

FURTHER AFFIANT SAITH NOT.


Gene A. Davis


Notary Public

My commission expires on the 20 day of January, 2011.

MICHAEL H VAN GUYSLING
NOTARY PUBLIC, STATE OF NEW YORK
Schenectady -SARATOGA COUNTY 01VA6086560
COMMISSION EXPIRES JANUARY 2011

**Exhibit A
Resume**

Gene A. Davis, P.E.

Director, Transportation Engineering

Education

MBA, Georgia Southern University, 1997

BS, Civil Engineering, Tennessee Technological University, 1983

Professional Registrations and Affiliations

Registered Professional Civil Engineer

American Railway Engineering and Maintenance-of-Way Association, member since 1996

AREMA Member of Technical Committee 12 (Rail Transit) and 18 (Light Density & Short Line Railways)

Years of Transportation Experience

23

Qualifications

Mr. Davis joined RLBA after 18 years of experience with Norfolk Southern Corporation during which he held positions with increasing responsibility within the Engineering Department spanning management and engineering of railroad track structure, bridge and building inspection, condition assessment, maintenance, rehabilitation, design and construction as well as railroad operations.

Areas of Expertise

- **Track and Structure Planning, Rehabilitation, Engineering and Maintenance** Planned, scheduled and supervised numerous, large track projects such as tie renewals, rail installation, track resurfacing, shoulder cleaning and undercutting operations, structure upgrading and grade/sub-grade stabilization. Supervised numerous bridge and culvert rehabilitation projects and extensive tunnel repairs and tunnel portal reconfigurations.
- **Design** Participated in the redesign of the track layout in Sandusky, Ohio yard to streamline operations and the redesign of existing physical plant trackage owned by railroad customers.
- **Construction** Constructed tracks at Shaffer's Crossing mechanical facilities in Roanoke, Virginia.
- **Operations** Experience with switching and yard operations, train performance, customer service, FRA rules, regulations and labor agreements.

Relevant Project Experience

- **CSX Transportation** Analyzed CSX Maintenance-of-Way (MOW) costs incurred along two, separate corridors in Florida, specifically, both proposed commuter rail service on the Central Florida Commuter Rail Transit (CFCRT) corridor between Deland and Kissimmee surrounding Orlando and existing Tri-Rail commuter rail service between West Palm Beach and Miami, over the South Florida Rail Corridor. Those costs were used in part to analyze allocated costs per-mile among CSX, Amtrak and the State of Florida. CSX is in negotiations with the State of Florida's Department of Transportation (FDOT) to determine an equitable, allocated cost per mile to maintain the subject corridors in a steady state of repair (level of utility) as necessary to support a specified level of service, in this case, FRA Class 4 track. FDOT had engaged a consultant to perform an analysis of data and projections furnished by the state. Reviewed actual, historical cost information provided by CSX and critiqued a copy of that consultant's report based on CSX furnished data and industry experience.

- ***Downtown Indianapolis Railroad Relocation Working Group*** Provided engineering feasibility analysis to support consideration of diverting CSXT mainline railroad freight traffic and Amtrak trains now moving through downtown Indianapolis to an enhanced Indianapolis Belt Line operation including an examination of the need and cost to construct a second main track and upgrade existing Belt Line tracks, necessary crossovers and sidings to achieve desired capacity requirements.
- ***Holdin U.S.A.*** Conducted a field inspection focused on existing conditions in the subject area and how railroad operations might be potentially impacted, coordinated with local railroad officials familiar with current operations, communicated project findings and drafted a Verified Statement submitted to the Surface Transportation Board, in connection with RLBA's engagement by the second largest cement manufacturer in the United States to examine and evaluate the operations and safety implications of constructing a "build-out" to obtain better rates and service by gaining access to the trackage of a second rail carrier (Norfolk Southern) in South Carolina.
- ***Confidential Private Sector Client*** Performed a track inspection and provided maintenance cost estimates to a solid waste company seeking to locate on Union Pacific Railroad and transport waste by rail to a remote landfill. Provided turnout and at-grade highway crossing installation costs.
- ***Morehead City Terminal/Carolina Rail Services*** Performed a physical inspection and evaluated track conditions along 11-miles of seaport terminal rail infrastructure in Morehead City, NC and determined costs to upgrade and maintain track structure to handle 286,000 pound rail cars.
- ***Santa Fe Trails*** Physically Inspected and assessed the condition of about 20 miles of Santa Fe Southern Railway track structure between Santa Fe and Lamy, New Mexico. Particular attention was given to drainage structures (bridges and culverts), switches and public, at-grade highway-rail crossings along with general track conditions, after which, cost estimate were provided for up to five years to maintain track in a steady state of repair. Comprehensive component condition assessment and cost estimates were associated with due diligence in connection with a possible sale to the public agency preserving rail access to Santa Fe. Provided potential maintenance costs were track to be abandoned.
- ***Saratoga Economic Development Corporation*** Assessed the ability of the Canadian Pacific Railway's Adirondack Branch to support potential future passenger and/or freight train operations between Saratoga Springs and Corinth, New York in connection with the prospective purchase of the line by RLBA's client. After physical inspection of the many critical assets, in particular bridges, switches and public, at-grade highway-rail crossings, provided an opinion letter as to the track and bridge structure condition. A review of proposed force account work charges necessary to bring the line up to FRA Class 2 track standards also was conducted. Prioritized additional capital spending in the event additional funding was available.
- ***Riverside County Transportation Commission*** After a physical inspection of many portions of four different rail corridors with Riverside County. Estimated the track and bridge structure capital costs associated with eight, extended Metrolink service passenger rail scenarios. The range of potential corridor conditions varied from adding additional tracks within existing rights-of-way owned and/or operated by Union Pacific or BNSF to upgrading existing tracks to completely new track construction along a brand new route. Based upon various levels of train service, infrastructure requirements were estimated along with order-of-magnitude capital costs.
- ***PYCO Industries*** Conducted an on-site, physical inspection of select South Plains Switching, Ltd. Co. (SAW) tracks in support of PYCO's feeder line application to acquire certain SAW rail lines under three alternative, rail asset scenarios. Determined rehabilitation needs of track structure along with the costs to cure same and provided annualized maintenance costs to keep SAW track structure in a steady state of repair, post-rehabilitation. Provided written testimony in three Verified Statements concerning rehabilitation costs necessary to return track to FRA Class 1 status and/or to upgrade it to handle

Gene A. Davis, P.E.

286,000 pound rail cars and provided rebuttal testimony to opinions on behalf of SAW and a competing feeder line applicant.

- **Northeastern Vermont Development Association** Estimated the initial capital costs to reopen a rail line between St. Johnsbury and Gilman, Vermont. After **physical inspection** of many critical assets, in particular bridges, switches and public at-grade highway-rail crossings, provided cost estimates to achieve FRA Class 1 track conditions.
- **Santa Cruz Regional Transportation Commission** Provided track maintenance and upgrade cost estimates, assuming current and higher traffic axle weights, in planning the possible purchase of the Union Pacific Railroad's 32-mile Santa Cruz Branch line to support recreational and public transportation objectives. Cost estimates included typical production activities, **inspection** and minor repair of track structure in its current state and upgrade costs to handle 286,000 pound rail cars.
- **Mississippi Development Authority** Developed projected future twenty year annual maintenance-of-way cost estimate budgets, subdivided into capital and expense categories, both with and without track upgrades in connection with an economic analysis of the Magnolia State purchasing 96-miles of track between Gulfport and Hattiesburg, MS.
- **Cross Valley Rail Corridor Joint Powers Authority** Estimated the capital costs necessary to upgrade track speeds, improve grade crossings, build additional tracks to facilitate train meets and construct a long bridge over the Union Pacific main line in connection with examining the feasibility of instituting a regional rail passenger service along an existing short-line railroad corridor between Visalia and Lemoore, CA, providing approximately ninety minute headways, sixteen hours a day, using three diesel multiple unit trainsets assumed to be powered by fuel cell technology.

Norfolk Southern Corporation Work Experience

- **Assistant Division Engineer-Bridges (Pocahontas Division)** Territorial responsibility covered trackage in the Virginias and southern Ohio. Coordinated and facilitated new construction, inspection, and maintenance of drainage structures including bridges and culverts. Coordinated remedial repairs to tunnel structures. The 1,300 miles of his territory included over 24 miles of various bridge types, 8,000 culverts of varying construction types, 20 miles of tunnels and 16 miles of slide fences.
- **Bridge and Building Supervisor (Georgia Division)** Territory spanned 500 miles including Savannah, Augusta and Macon, Georgia. Performed inspections, supervised maintenance repairs and new construction by company forces of drainage structures including bridges and culverts.
- **Track Supervisor (Lake and Pocahontas Divisions)** Territories encompassed trackage in Ohio (Lake) as well as the Virginias (Pocahontas). Performed FRA inspections and accomplished remedial repairs to track structure via maintenance and rail gang, tie/surfacing and surfacing work. Coordinated contract service work including rail grinding and undercutting. Was responsible for over 190 miles of track including four yards.
- **Assistant Track Supervisor (Pocahontas and Virginia Divisions)** Territories encompassed trackage in the Virginias. Performed FRA inspections and remedial repairs to track structures. Assisted in coordinating program maintenance work and contract service work on the track structure. Was responsible for over 41 miles of track including three yards.

Exhibit B
Photo Log



Photo # 1
 Roosevelt Avenue Overpass from 41st Street Overpass
 Note Temporary Track (Shoofly) to the East of Main Track (looking north)



Photo # 2
 Rooftop Photo of Roosevelt Avenue Overpass from Vitale-Owned Apartment Building
 Note Bridge Opening in Center of Photo (looking east)



Photo # 3
 Brooklyn-Queens Expressway Construction
 Note Temporary Track (Shoofly) to the East of Main Track (look south)



Photo # 4
 Metropolitan Avenue Overpass (approximately 500 Feet Long)
 (looking north)

Exhibit C
Technical Drawings

FED. ROAD REG. NO.		STATE	CONTRACT NO.		SHEET NO.		TOTAL SHEETS	
1		AL.	D259600		847		1155	
NAME								
BROOKLYN QUEENS EXPRESSWAY								
61 ST STREET TO BROADWAY								
QUEENS COUNTY, NEW YORK								
P.L.N. K73053					B.L.N. 2-23056-7 & 2-24138-0			

Approx.
18' high

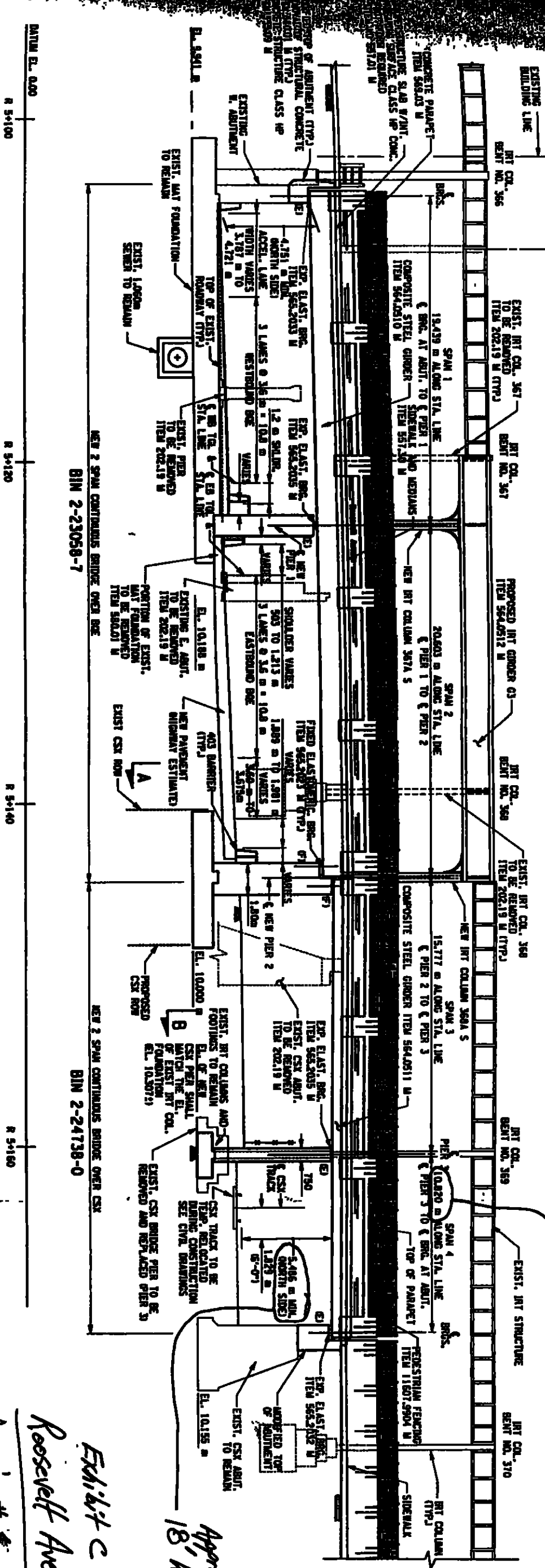


Exhibit C
Roosevelt Avenue
Drawing # 1

SOUTH ELEVATION
SCALE 1/250

ALL DIMENSIONS ARE IN MM UNLESS OTHERWISE NOTED

AS BUILT REVISIONS

1. PROJECTION OF PIERS, ABUTMENTS AND PRT COLUMNS DUE TO SKED ANGLE ARE NOT SHOWN FOR CLARITY.
2. LANE AND SHOULDER WIDTHS MEASURED NORMAL TO BGE TGL

1. GENERAL PLAN
2. SECTION A-A AND B-B

510-03
510-02

LOAD RATING TABLE SPANS 1 AND 2 (LFD)	
INVENTORY	MS-37.7
OPERATING	MS-62.8

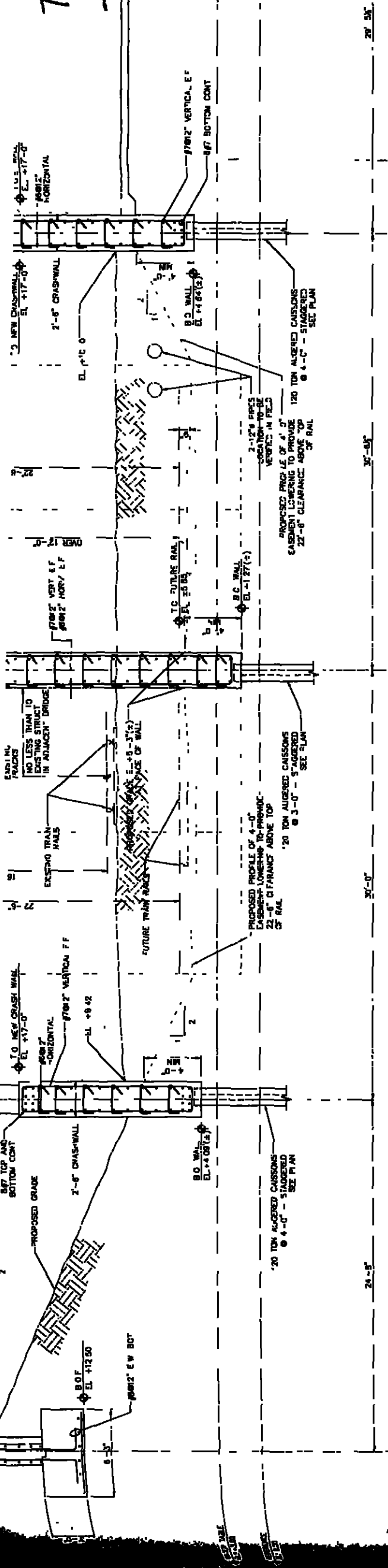
LOAD RATING TABLE SPANS 3 AND 4 (LFD)	
INVENTORY	MS-36.6
OPERATING	MS-61.0

(F) - FIXED BEARING

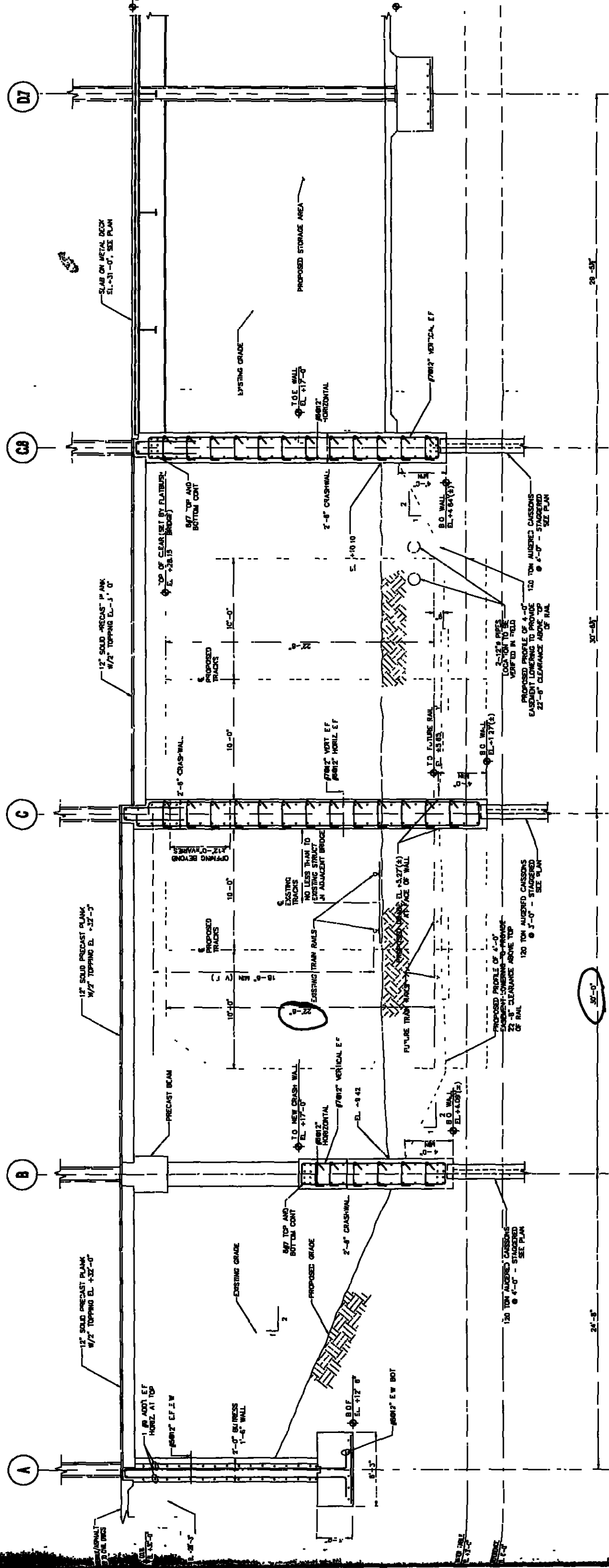
STATE OF NEW YORK
DEPARTMENT OF TRANSPORTATION

Page 14

Exhibit C
Target Store
Location
Drawing # 2



SECTION AT LOADING DOCK



SECTION AT RETAIL

Exhibit A

Request for Determination That Preferential Right of Acquisition Does Not Apply, or alternatively, Request for Release of the Preferential Right of Acquisition, Under Section 18 of the Transportation Law of the State of New York

December 24, 2004

Certified Mail – Return Receipt Requested

Mr. Frank N. Mengel
Director, Real Estate Division
State of New York – Department of Transportation
50 Wolf Road
Albany, New York 12232

**This Request Relates to:
Block 1312, Lot 1, Borough of Queens, City of New York**

Dear Mr. Mengel:

CSX Transportation, Inc., as successor-in-interest to New York Central Lines LLC, which was in turn successor in interest to Consolidated Rail Corporation (collectively, the "Railroad"), is the seller under an agreement (the "Agreement") to sell three contiguous parcels of land in Woodside, Queens, New York (collectively, the "Property") to Frank Vitale and Francis Vitale (the "Vitales"). The Property is to be sold subject to a railroad easement. The "Bay Ridge Branch" rail line runs through the Property. *The Railroad has not abandoned, and does not intend to abandon, the Property for railroad transportation purposes.* The Railroad and the Vitales are filing a request under Section 18 of the Transportation Law ("Section 18"), for:

(a) a determination that the preferential right of acquisition does not apply, because each parcel is being sold subject to a railroad easement, and therefore the Property is not being "abandoned for railroad transportation purposes" as defined in Section 18, *or, alternatively,*

(b) a release of the preferential right of acquisition under Section 18.

The Railroad and the Vitales are filing a separate (but identical) request as to each of the three parcels in the Property. In the event that the Commissioner determines that the preferential right of acquisition does not apply, or determines to release the preferential right of acquisition, as to any of the three parcels (or any portion of any parcel), the Railroad intends to proceed with the sale of such parcel (or portion of such parcel), even if the Commissioner exercises the preferential right of acquisition of another parcel (or portion of that or another parcel).

The Property includes the following three parcels:

Tax Block 1282, Lot 110, Borough of Queens, City of New York
Tax Block 1303, Lot 1, Borough of Queens, City of New York
Tax Block 1312, Lot 1, Borough of Queens, City of New York.

A map of the Property is enclosed, marked with the tax lot numbers. A draft description of the Property is also enclosed.

The Railroad has not abandoned, and does not intend to abandon, the Property for railroad transportation purposes. The Agreement (§ 2) explicitly provides for the following easement (the "Railroad Easement"):

RESERVING UNTO CONRAIL a seventy-five (75) foot wide easement identified on the attached plans, which easement shall extend upward only to a horizontal plane, but running parallel to the underlying rail line and measured twenty-two (22) feet, vertically above top of rail of said Reserved Tracks (hereinafter called "excepted space") the foregoing easement being reserved by Conrail to use, operate, maintain, repair, replace and inspect the Reserved Tracks and Equipment as and when the same may be necessary or desirable.

The Railroad Easement ensures that the Railroad will be able to continue to use the Property for railroad transportation purposes, as the Railroad intends to do.¹ The Agreement (§ 4(B)) also provides, among other things, that:

Construction by Purchaser will proceed in a manner that will not unreasonably interfere with the continued operation of trains

Subdivision one of Section 18 grants to the Commissioner a preferential right of acquisition of "property ... which has been abandoned for railroad transportation purposes as defined in subdivision two of this section." Subdivision two of Section 18 provides, in pertinent part:

For purposes of this section, property shall be deemed to be abandoned for railroad transportation purposes (a) when, where required by law, a certificate of abandonment of the railroad line situate thereon has been issued by the interstate commerce commission and/or any other federal or state agency having jurisdiction thereof; or (b) when such a certificate of abandonment is not so required and the use of the property for railroad transportation purposes has been discontinued with the intent not to resume.

Here, no certificate of abandonment has been issued, and none is sought, because the Railroad does not intend to abandon the Property for railroad transportation purposes. The use of the property for railroad transportation purposes has not been discontinued; to the contrary, that use

¹ The Railroad and the Vitales may determine to modify the dimension of the Railroad Easement, but any such modification will still allow the Railroad to "use, operate, maintain, repair, replace and inspect the Reserved Tracks and Equipment as and when the same may be necessary or desirable."

Mr. Frank N. Mengol
Director, Real Estate Division

December 24, 2004
Page 3

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Alternatively, the Railroad and the Vitales respectfully request that the Commissioner grant a Release of the Preferential Right of Acquisition.

The Railroad and the Vitales would be glad to provide additional information if you so request. Thank you for your consideration.

Respectfully yours,

CSX TRANSPORTATION, INC., AN SUCCESSOR-
IN-INTEREST TO NEW YORK CENTRAL LINES
LLC, AS SUCCESSOR-IN-INTEREST TO
CONSOLIDATED RAIL CORPORATION
Seller

FRANK VITALE AND FRANCIS VITALE
Purchasers

By: 
Name: *William Wallach*
Title: *Attorney*

By: 

William Wallach, Esq.
wwallach@mccartor.com
MCCARTOR & ENGLISH, LLP
245 Park Avenue - 27th Floor
New York, NY 10167
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fax: 212-609-6921

*Attorneys for CSX Transportation, Inc., as
Successor-in-Interest to New York Central
Lines LLC, as Successor-In-Interest to
Consolidated Rail Corporation*

Richard M. Zuckerman, Esq.
rzuckerman@sonnenschein.com
Jacob Inwald, Esq.
jinwald@sonnenschein.com
SONNENSCHNITZ & ROSENTHAL LLP
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New York, New York 10020
telephone: (212) 398-5213 (Mr. Zuckerman)
telephone: (212) 398-5215 (Mr. Inwald)
fax: (212) 768-6800.

Attorneys for Frank Vitale and Francis Vitale

Enclosures

cc (w/Enclosures) (Federal Express):

Mr. Jack Earl
Economic Development Section - POD 504
State of New York - Department of
Transportation
50 Wolf Road

Mr. Michael Younel
Economic Development Section - POD 504
State of New York - Department of
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50 Wolf Road

Mr. Frank N. Mengel
Director, Real Estate Division

December 24, 2004
Page 4

Albany, New York 12232

Albany, New York 12232

Request for Determination That Preferential Right of Acquisition Does Not Apply, or alternatively, Request for Release of the Preferential Right of Acquisition, Under Section 18 of the Transportation Law of the State of New York

December 24, 2004

Certified Mail – Return Receipt Requested

Mr. Frank N. Mengel
Director, Real Estate Division
State of New York – Department of Transportation
50 Wolf Road
Albany, New York 12232

**This Request Relates to:
Block 1303, Lot 1, Borough of Queens, City of New York**

Dear Mr. Mengel:

CSX Transportation, Inc., as successor-in-interest to New York Central Lines LLC, which was in turn successor in interest to Consolidated Rail Corporation (collectively, the "Railroad"), is the seller under an agreement (the "Agreement") to sell three contiguous parcels of land in Woodside, Queens, New York (collectively, the "Property") to Frank Vitale and Francis Vitale (the "Vitales"). The Property is to be sold subject to a railroad easement. The "Bay Ridge Branch" rail line runs through the Property. *The Railroad has not abandoned, and does not intend to abandon, the Property for railroad transportation purposes.* The Railroad and the Vitales are filing a request under Section 18 of the Transportation Law ("Section 18"), for:

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The Railroad and the Vitales are filing a separate (but identical) request as to each of the three parcels in the Property. In the event that the Commissioner determines that the preferential right of acquisition does not apply, or determines to release the preferential right of acquisition, as to any of the three parcels (or any portion of any parcel), the Railroad intends to proceed with the sale of such parcel (or portion of such parcel), even if the Commissioner exercises the preferential right of acquisition of another parcel (or portion of that or another parcel).

The Property includes the following three parcels:

Tax Block 1282, Lot 1, Borough of Queens, City of New York
Tax Block 1303, Lot 1, Borough of Queens, City of New York
Tax Block 1312, Lot 1, Borough of Queens, City of New York.

A map of the Property is enclosed, marked with the tax lot numbers. A draft description of the Property is also enclosed.

The Railroad has not abandoned, and does not intend to abandon, the Property for railroad transportation purposes. The Agreement (§ 2) explicitly provides for the following easement (the "Railroad Easement"):

RESERVING UNTO CONRAIL a seventy-five (75) foot wide easement identified on the attached plans, which easement shall extend upward only to a horizontal plane, but running parallel to the underlying rail line and measured twenty-two (22) feet, vertically above top of rail of said Reserved Tracks (hereinafter called "excepted space") the foregoing easement being reserved by Conrail to use, operate, maintain, repair, replace and inspect the Reserved Tracks and Equipment as and when the same may be necessary or desirable.

The Railroad Easement ensures that the Railroad will be able to continue to use the Property for railroad transportation purposes, as the Railroad intends to do.¹ The Agreement (§ 4(B)) also provides, among other things, that:

Construction by Purchaser will proceed in a manner that will not unreasonably interfere with the continued operation of trains ...

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Mr. Frank N. Mengel
Director, Real Estate Division

December 24, 2004
Page 3

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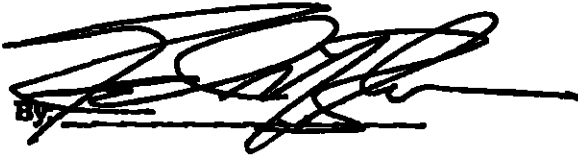
The Railroad and the Vitales would be glad to provide additional information if you so request. Thank you for your consideration.

Respectfully yours,

CSX TRANSPORTATION, INC., AS SUCCESSOR-
IN-INTEREST TO NEW YORK CENTRAL LINES
LLC, AS SUCCESSOR-IN-INTEREST TO
CONSOLIDATED RAIL CORPORATION
Seller

FRANK VITALI AND FRANCIS VITALI
Purchasers

By: 
Name: William Wallach
Title: Attorney

By: 

William Wallach, Esq.
wwallach@mccarter.com
MCCARTER & ENGLISH, LLP
245 Park Avenue - 27th Floor
New York, NY 10167
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*Attorneys for CSX Transportation, Inc., as
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Attorneys for Frank Vitale and Francis Vitale

Enclosures

cc (w/Enclosures) (Federal Express):

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Economic Development Section - POD 504
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50 Wolf Road

Mr. Michael Younsi
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50 Wolf Road

Mr. Frank N. Mengel
Director, Real Estate Division

December 24, 2004
Page 4

Albany, New York 12232

Albany, New York 12232

Request for Determination That Preferential Right of Acquisition Does Not Apply, or alternatively, Request for Release of the Preferential Right of Acquisition, Under Section 18 of the Transportation Law of the State of New York

December 24, 2004

Certified Mail – Return Receipt Requested

Mr. Frank N. Mengel
Director, Real Estate Division
State of New York – Department of Transportation
50 Wolf Road
Albany, New York 12232

**This Request Relates to:
Block 1282, Lot 110, Borough of Queens, City of New York**

Dear Mr. Mengel:

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Mr. Frank N. Mengel
Director, Real Estate Division

December 24, 2004
Page 3

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Alternatively, the Railroad and the Vitales respectfully request that the Commissioner grant a Release of the Preferential Right of Acquisition.

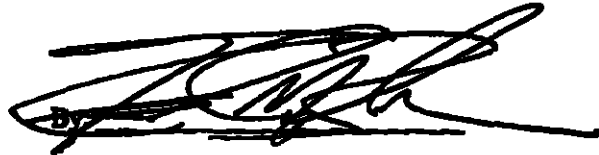
The Railroad and the Vitales would be glad to provide additional information if you so request. Thank you for your consideration.

Respectfully yours,

CSX TRANSPORTATION, INC., AS SUCCESSOR-
IN-INTEREST TO NEW YORK CENTRAL LINES
LLC, AS SUCCESSOR-IN-INTEREST TO
CONSOLIDATED RAIL CORPORATION
Seller

FRANK VITALE AND FRANCIS VITALE
Purchasers

By: 
Name: *William Wallach*
Title: *Attorney*

By: 

William Wallach, Esq.
wwallach@mccarter.com
McCARTER & ENGELMAN, LLP
245 Park Avenue - 27th Floor
New York, NY 10167
telephone: 212-609-6800
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*Attorneys for CSX Transportation, Inc., as
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Richard M. Zuckerman, Esq.
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Attorneys for Frank Vitale and Francis Vitale

Enclosures

cc (w/Enclosures) (Federal Express):

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50 Wolf Road

Mr. Michael Younal
Economic Development Section - POD 504
State of New York - Department of
Transportation
50 Wolf Road

Mr. Frank N. Mengel
Director, Real Estate Division

December 24, 2004
Page 4

Albany, New York 12232

Albany, New York 12232

Exhibit B

..

**MEMORANDUM BY THE
HONORABLE DUANE A. HART
DATED SEPTEMBER 12, 2005**

MEMORANDUM

**SUPREME COURT : QUEENS COUNTY
1A PART 18**

NEW YORK CENTRAL LINES, LLC, etc.

- against -

FRANK VITALE, et al.

x

INDEX NO. 20662/02

BY: HART, J.

DATED: SEPTEMBER 12, 2005

x

This is an application pursuant to CPLR 7510 to confirm an arbitration award.

This controversy arises out of a 1986 contract for the sale of real property owned at the time by Consolidated Rail Corporation (Conrail), a predecessor in interest to New York Central Lines, LLC (NY Central), to Frank and Francis Vitale. After extended negotiations and years of delay, the Vitales demanded arbitration, which was compelled by this court in a judgment dated March 25, 2003. Thereafter, this matter was submitted to arbitration pursuant to a stipulation of the parties dated March 25, 2004 that selected an arbitrator and defined the issues to be presented. An award was issued on or about September 28, 2004 granting the Vitales specific performance of the contract at the original agreed purchase price of \$900,000. The closing of title was contingent upon obtaining a Section 18 release from the New York State Department of Transportation (NYSDOT). Inasmuch as the parties were aware of the possibility of

condemnation of all or part of the subject property by NYSDOT for the expansion of the Brooklyn-Queens Expressway, this issue was presented during arbitration. The arbitrator specifically provided that upon receipt of the release "for one or more of the parcels in whole or in part," the parties were to proceed expeditiously with the closing of title.

NY Central opposes the confirmation asserting the award has been rendered largely moot due to the subsequent condemnation actions of the NYSDOT which affect portions of the parcels intended to be conveyed under the 1986 agreement. Citing General Obligations Law § 5-1311(1)(a), NY Central implies that all or a material part of the real property has been taken by eminent domain thereby rendering the contract unenforceable.

Upon a review of a NYSDOT document entitled "Explanation of Acquisition" and the annexed maps, it is apparent that out of the approximate seven acres originally contemplated under the contract, NY Central retains title to substantial acreage though portions are subject to a permanent as well as temporary easements. Under these circumstances, a purchaser may proceed to enforce the contract and receive an abatement of the purchase price for the property taken by eminent domain. (General Obligations Law § 5-1311(1)(a)(2); see, Lucenti v Cavuca Apts., 48 NY2d 530 [1979].)

A court's function in reviewing an arbitration award is limited to whether it is irrational, violates a strong public policy or exceeds a specific limitation of the arbitrator's power. (See, Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y., 1 NY3d 72 [2003]; Matter of Pangini Stone Setting v Crow and Sutton Assoc., ___ AD3d ___, 799 NYS2d 110 [2005].) Here, NY Central's claim that the contract has been rendered moot due to the eminent domain takings is without basis. The Vitales have obtained a Section 18 release as required by the award. The failure of NY Central to even raise the existence of any grounds specified under CPLR 7511(b) for vacatur necessitates the confirmation of the arbitration award. (See, Matter of Domotoc v State Farm Mut. Ins. Co., 9 AD3d 367 [2004].)

The parties are directed to expeditiously proceed with the closing at the agreed price of \$900,000. This determination is without prejudice to the Vitales, if they be so advised, to seek an appropriate abatement of the purchase price in additional arbitration proceedings.

Accordingly, the application to confirm the award is granted.

Settle Judgment.

Duane A. Hunt
J.S.C.

Exhibit C

ARBITRATION

FRANK VITALE and FRANCES VITALE,

Claimants,

Professor Robert M. Zinman

-against-

NEW YORK CENTRAL LINES, LLC, as Successor
to Consolidated Rail Corporation,

Respondent.

June 15, 2004
10:18 a.m.

ARBITRATION

held at Sonnenschein Nath & Rosenthal, LLP,
1221 Avenue of the Americas, New York, New
York, before BARBARA R. ZELTMAN, a Professional
Shorthand Reporter and Notary Public within and
for the State of New York.



David Feldman
Worldwide

2 1 2 3 APPEARANCES 4 5 ST JOHN'S UNIVERSITY 6 School of Law 7 Arbitrator 8 8000 Utopia Parkway 9 Jamaica, NY 11439 10 11 BY ROBERT M. ZINMAN, Professor of Law 12 13 SONNENSCHN NATH & ROSENTHAL, LLP 14 Attorneys for the Claimants 15 1221 Avenue of the Americas 16 New York, New York 10020 17 BY RICHARD ZUCKERMAN, ESQ., and 18 JACOB INWALD, ESQ. 19 20 McCARTER ENGLISH 21 Attorneys for the Respondents 22 245 Park Avenue 23 New York, New York 10167 24 BY: WILLIAM D. WALLACH, ESQ. 25 26 ALSO PRESENT: 27 FRANK VITALE and FRANCES VITALE, Claimants	4 1 ARBITRATION 2 MR. ZUCKERMAN: Good morning, my name 3 is Richard Zuckerman. Accompanying me is my 4 colleague, Jacob Inwald. 5 We are from the firm Sonnenschein 6 Nath & Rosenthal, LLP, attorneys for the 7 claimants, Frank and Frances Vitale. 8 Present also are Frank Vitale and 9 Frances Vitale, both as parties and as 10 witnesses. 11 I will also note on record that 12 William Wallach, attorney for Central Lines, 13 LLC, Consolidated Rail Corporation, 14 respondent, in this matter is here 15 representing the respondent. 16 And we are honored to have Professor 17 Robert M. Zinman as the arbitrator. 18 Mr. Wallach did note that he expects 19 to have a representative of his client later 20 here today, but has kindly said we can 21 proceed and not await the arrival of his 22 representative. 23 (Whereupon, the representative enters 24 the room.) 25 MR. ZUCKERMAN: With impeccable
3 1 2 3 INDEX 4 5 PAGE 6 WITNESS: 7 FRANK VITALE: 8 Direct Examination 51 9 By Mr. Zuckerman 10 11 Cross Examination 64 12 By Mr. Wallach 13 Redirect Examination 85 14 Recross Examination 91 15 Redirect Examination 95 16 Recross Examination 97 17 18 FRANCES VITALE: 19 Direct Examination 99 20 By Mr. Zuckerman 21 22 Cross Examination 178 23 By Mr. Wallach 24 25 EXHIBITS 26 Exhibit 1 through 88 5 27 Exhibit 6-A 89	5 1 ARBITRATION 2 tuning, after I finished stating that 3 Mr. Wallach stated we not need await the 4 arrival of his client, Robert Ado, and his 5 client, Mr. Ado, entered the room. 6 And welcome Mr. Ado. 7 Before we went on record Mr. Wallach 8 and I had a discussion about evidence in this 9 matter, and we are in agreement on most of 10 the issues with respect to the evidence on 11 behalf of the claimants. 12 We prepared a binder of exhibits to be 13 used in this matter. The binder contains 89 14 numbered exhibits that are separated by tabs. 15 Mr. Wallach on behalf of the 16 respondent has kindly stated that they have 17 no objection to the introduction of 18 Exhibits 1 through 88 into evidence, and I 19 therefore request that those so be admitted 20 into evidence. 21 ARBITRATOR ZINMAN: They are admitted 22 (Exhibit 1 through 88 were admitted 23 into Evidence.) 24 MR. ZUCKERMAN: Mr. Wallach also 25 indicated that since most of the exhibits on

6

1 **ARBITRATION**
2 his list are duplicates of our exhibits, that
3 he will identify three exhibits from a list
4 that he had given us earlier that he intends
5 to introduce in evidence, and when he does
6 those, we will respond, although I expect we
7 will not have any objection because it
8 appears those come from the plaintiff.
9 The only other evidentiary matter
10 is --
11 MR. WALLACH: Can I interrupt for a
12 second?
13 MR. ZUCKERMAN: Sure.
14 MR. WALLACH: Having agreed to
15 Claimants' Exhibits -- what I will call 1
16 through 88, do we need to discuss your
17 proposed Exhibit 89, or is it just not going
18 to be in evidence?
19 MR. ZUCKERMAN: Why don't we discuss
20 it now. We might as well do that, and then
21 we can discuss the other evidentiary issue.
22 Exhibit 89, which is the last tab in
23 the binder that you have before you,
24 Professor Zinman, is a chart of expenses
25 incurred by the Vitales in connection with

7

1 **ARBITRATION**
2 this project.
3 This was prepared for the purposes of
4 this arbitration. It's a compilation
5 exhibit. It is drawn from checks and
6 financial records, all of which were produced
7 to New York Central. This chart was not a
8 part of Vitale records; it was prepared from
9 those records as a compilation exhibit for
10 presentation at the arbitration.
11 We also offered this in a limited
12 purpose in this arbitration, and the Vitales
13 are seeking specific performance. They are
14 not seeking to recover the amount of money
15 they spent on the project, they recognize
16 these are expenses that they incurred in
17 moving towards a closing on the project.
18 We offered this simply for the purpose
19 of showing that during the 16 years that
20 elapsed from when the contract was signed in
21 1986 until May 2002 when CSX stated for the
22 first time they would not go forward with the
23 contract, the Vitales incurred substantial
24 expenses in reliance of the fact that there
25 was a binding contract. And they were moving

8

1 **ARBITRATION**
2 towards the closing, and that while not aware
3 of the specific amounts of those expenses,
4 Conrail and later CSX were certainly aware
5 that certain expenses were being incurred in
6 light of the prior contract.
7 It was offered for that limited
8 purpose.
9 MR. WALLACH: Throughout these
10 proceedings it would be helpful if we just
11 referred to "Conrail" rather than going back
12 and forth, depending on the year, as to
13 Conrail or CSX. There's no disagreement that
14 CSX succeeded to Conrail's rights. I'm just
15 going to use Conrail throughout.
16 ARBITRATOR ZINMAN: That's fine.
17 MR. WALLACH: My objection to proposed
18 Exhibit 89 is, first of all, under the 1986
19 agreement, neither party's entitled, if
20 successful, to recover costs or attorney's
21 fees. It wasn't contracted for, it's not in
22 the document.
23 There is no dispute from Conrail's
24 point of view that at certain points in time
25 from 1986 forward the Vitales expended

9

1 **ARBITRATION**
2 efforts to move the project along, but that's
3 not what we are here for. We are here to
4 talk about whether or not there is still a
5 binding contract, not if whether the Vitales
6 spend \$100,000 or \$300,000 that contract
7 becomes binder.
8 So to the extent there are numbers on
9 this document -- and I realize you haven't
10 looked at it -- I submit that's a good thing
11 for now, it's just not relevant towards the
12 determination you are being asked to make as
13 to whether or not there is a binding
14 agreement.
15 I am not going to challenge -- you'll
16 hear from the testimony of the Vitales, I
17 presume, what they did along the way and when
18 they may have stopped. But this document is
19 in summary form, it's not broken down by
20 years indicating when the different efforts
21 were made. And the timing here is very
22 important.
23 So for that reason, I would request
24 that if you are not prepared to rule right
25 now, perhaps listen and see how the evidence

10 1 ARBITRATION 2 goes in and whether this document is really 3 needed for the limited purpose counsel has 4 indicated he was going to propose it, or not 5 at all. 6 But it is Conrail's position that this 7 just showing numbers, perhaps to make you 8 think they spent money, therefore there's a 9 contract. And that should not carry the day, 10 given the issues today. 11 MR. ZUCKERMAN: Let me just say, I 12 think Mr. Wallach's suggestion there is no 13 need for a ruling until we reached the time 14 of testimony is a good suggestion. 15 Therefore, I won't offer that at this time 16 and we'll withhold that and see if it 17 becomes necessary. It may indeed be when we 18 reach that point, I may simply decide not to 19 offer it in. Make it easier. 20 There is one evidentiary issue that 21 has been raised by the proposed evidence of 22 Conrail, and I made brief reference to that 23 while we were off the record. And now we are 24 on the record, I'll go into greater detail. 25 This past Friday Mr. Wallach provided	12 1 ARBITRATION 2 said "market value as of the date of 3 closing," then we would need appraisals as of 4 today. But we don't, that's not what the 5 contract says. 6 So I cannot -- and I think what is 7 interesting is there's somewhat of an 8 inconsistency between the position 9 Mr. Wallach took with respect to our proposed 10 Exhibit 89, that numbers are irrelevant, with 11 the proposed proffer of this appraisal by New 12 York Central. 13 We would oppose the introduction of 14 the appraisal into evidence. If Mr. Wallach 15 wants to state what the relevance is, which I 16 would ask he do so without going into what 17 the numbers are, he would -- obviously, he 18 can avail himself of that opportunity. 19 There is also the related issue that 20 if appraisal evidence is to come in, it would 21 be our position that it should come in 22 through live testimony of the appraiser. 23 Whenever there is -- certainly when 24 there is a condemnation proceeding or when 25 there is a legal or tertiary proceeding or
11 1 ARBITRATION 2 to us an appraisal of one of the three 3 parcels that are at issue in this arbitration 4 that was prepared. It's dated as of 5 April 26, 2004. Mr. Wallach advised me that 6 his client had only received it earlier last 7 week. And it purports to appraise the value 8 of one of the three properties as of 9 April 2004. And Mr. Wallach had stated when 10 he transmitted this to me that he intended to 11 offer this into evidence. 12 Up until we received this appraisal on 13 Friday, New York Central/Conrail had not in 14 any way suggested that they regarded the 15 value of the property as of 2004 as bearing 16 at all on the issue of whether or not there 17 is a binding contract for sale of the 18 property. 19 There is no question that a contract 20 was signed in 1986 and that is some time ago. 21 And there is no question that the contract 22 fixes a price of \$900,000. The contract does 23 not state market value as of the date of 24 closing. 25 Obviously, if we had a contract that	13 1 ARBITRATION 2 legal proceeding where the value of the 3 property is at issue, the ordinary way of 4 doing that is to -- unless their decision is 5 committed to appraisers, which sometimes 6 does, but when there is a fact finder such as 7 judge or arbitrator, to determine it, then 8 one puts the appraiser on the witness stand 9 so one can cross examine the appraiser as to 10 the substance and methodology and et cetera, 11 and not simply have a thick report, but not 12 subject to cross examination. 13 Here that would entail two witnesses 14 because this appraiser's methodology is in 15 two parts: One is that the real estate 16 appraiser was called upon to appraise the 17 property after the construction of a platform 18 over the railroad so that one could then 19 build upon it. The real estate appraiser, to 20 do that, called upon an engineer to calculate 21 the cost of that structure, and then with 22 some refinement -- I'm just giving a broad 23 brush -- the appraiser said, "Well, after you 24 spend this money to build the platform, what 25 you will have will be the following." And

14 1 ARBITRATION 2 the appraiser simply relies completely on the 3 exact dollar numbers that the engineer 4 produces. That's actually two components. 5 So if this appraiser were to come into 6 evidence, we would request there be live 7 testimony of both the appraiser and the 8 engineer on whose report he relied for the 9 cost of building the structure. 10 I would also ask that we would reserve 11 the issue on whether we would want to call a 12 real estate appraiser for rebuttal. We did 13 not in fact, until this past Friday, 14 think that the issue of value was part of the 15 case at all. Therefore, we didn't intend to 16 introduce any evidence on the issue of value. 17 So I would suggest Mr. Wallach have an 18 opportunity to proffer what the relevance is 19 and why this is being offered without going 20 into the substance of the appraisal. 21 MR. WALLACH: Well, if nothing else, I 22 am consistent, actually. So let me tell you 23 why the position we are claiming with respect 24 to the appraisal is not contradictory of what 25 I said in connection with the Vitales'	16 1 ARBITRATION 2 nor to complicate these proceedings to that 3 level. It is to allow you to understand 4 better, in addition to the legal arguments 5 that Conrail is relying upon, why an 6 agreement from 1986 at a price of \$900,000 is 7 not binding on Conrail in 2004 and the 8 thought process that affected Conrail's view, 9 given certain inactions taken by the Vitales 10 over the last 16, 17 years. 11 ARBITRATOR ZINMAN: I am not sure I 12 understand. 13 You mean that if the value has changed 14 the contract is not valid? 15 MR. WALLACH: No. What I am saying is 16 it's Conrail's position that for several 17 reasons that were set forth in our prehearing 18 submission -- and which you will hear during 19 testimony of these proceedings -- the 1986 20 agreement cannot be enforced by the Vitales. 21 In addition to that position which 22 Conrail is taking, we feel it is beneficial 23 for you to understand what the value, fair 24 market value of the property in 2004 is, 25 because we submit will help you understand
15 1 ARBITRATION 2 proposed Exhibit 89. 3 And to do that, let's talk about what 4 an arbitration is not about. This 5 arbitration is not about fixing the value for 6 property or properties at issue. I am not 7 asserting that or claiming that in any way. 8 But as you know, we're addressing an 9 agreement that was signed in February of 10 1986. We are in June of 2004 now. The 11 project hasn't been built. The February 1986 12 agreement had a price, as counsel indicated, 13 of \$900,000. We can ask that you take the 14 equivalent of judicial notice that real 15 estate values are not the same in 2004 as 16 they were when the Mets won the World Series 17 in 1986. 18 I ask and could intend on asking the 19 Vitales whether or not they agree that the 20 value of the parcels of land and of the 21 project as contemplated has changed either up 22 or down since 1986. 23 But the function of the appraisal 24 report is not to bring in an appraiser, nor 25 the engineer, nor the real estate appraiser,	17 1 ARBITRATION 2 why Conrail's taking the position apart from 3 the legal merits of this case. So again, 4 it's not to say -- 5 ARBITRATOR ZINMAN: You are saying if 6 the value has gone up, then Conrail's taking 7 the position that because of that, they don't 8 want to go through with the contract, 9 assuming there is a contract to start with? 10 MR. WALLACH: Correct. And you hit it 11 right on the head. It's Conrail's position 12 there is not an enforceable contract anymore. 13 And in addition to the position there 14 is no longer an enforceable contract, it is 15 beneficial for you to see how the property 16 value and project value has increased since 17 1986 because that informs Conrail's decision 18 not to continue negotiations that were 19 never-ending and which the Vitales are 20 believing are open-ended. So that's the 21 purpose for it. Legally we have reference to 22 the contract factually why Conrail says 23 enough with the ongoing negotiations. 24 ARBITRATOR ZINMAN: But if there was 25 no contract, Conrail can say enough with

ARBITRATION

these negotiations, without any consideration of the value?

MR. WALLACH: That's correct.

And if I was to place in order, as I will, Conrail's position, first and foremost, Conrail's position is there is no longer binding agreement that is enforceable either by the Vitales or by Conrail.

Second and separately, we feel it's important that you know what the value of the property is or a range of the property in 2004. Because that will help you understand why Conrail is saying enough with these ongoing negotiations that are leading nowhere.

It was my intent to raise this issue with the Vitales when I cross examined them. It can be addressed by if I ask them questions about their perception of what the value of the property is now. If their answer is sufficient, then I don't even have to go to the appraisal report. But that's the reason for the appraisal report, to frame better the current value of the property.

ARBITRATION

ARBITRATOR ZINMAN: Why don't we hold the appraisal report for the evidence that comes in to see if it would be relevant.

MR. WALLACH: And it might not be needed.

ARBITRATOR ZINMAN: If there is no contract, then certainly it doesn't matter what the value is. If there is a contract, there's a question whether it matters what the value is.

MR. WALLACH: Correct.

ARBITRATOR ZINMAN: So we'll see what comes up, what is introduced and see whether the appraisal should be introduced.

Is that okay?

MR. ZUCKERMAN: That's a very sensible approach.

Let me just note in response to Mr. Wallach's comment that it seems logical that if Conrail thought that, notwithstanding the passage of time, \$900,000 was more than the property was worth, the property was only worth a half million if they tried to sell it to someone else, that unless there was some

ARBITRATION

other reason driving Conrail they'd say, "Gee, even it's not a binding contract, let's go forward because it's a good deal."

So it seems logical and I don't think we would contest there is some economic motivation of Conrail in deciding whatever the legal posture of the parties is, they'd rather not go forward with this.

And if Mr. Wallach is suggesting that all he wants to suggest is that Conrail believes the property is worth more than the \$900,000, I would gladly stipulate that, that Conrail believes it's worth more than \$900,000.

MR. WALLACH: But I certainly would like to have the Vitales testify, not just counsel.

ARBITRATOR ZINMAN: Cuts both ways. Conrail doesn't want to go through with the transaction because the value has gone up so much, and the Vitales will want to go through with the transaction because the price has gone up so much. So I am not sure that --

MR. ZUCKERMAN: Well, either that or

ARBITRATION

the Vitales are just stubborn. And I'll say that in front of Mr. Vitale, but we can address that when we reach the time.

When we talked procedures, we talked about opening arguments, and unless there is anything else that's preliminary --

MR. WALLACH: Off the record we talked about post-hearing submissions, and we'll do that another time. For sake of completeness, which is not a bad thing, particularly when -- as often is the case, there were some documents which are many duplicates.

It's my understanding that the maps that are hidden behind the shelf there, the maps are not coming into evidence, so I don't have to address a potential objection to the maps?

MR. ZUCKERMAN: We are not intending -- Mr. Wallach indicated there were additional documents that we provided to Mr. Wallach. Among the documents were some plans. We are not intending to introduce the plans as part of the direct case.

I will note that among the plans that

Exhibit D

MEMORANDUM

CONRAIL



to Michael D. Sims

1434, Six Penn Center

Philadelphia, PA

DATE Dec 4 1986

FROM John F. Jaeger

001, 1528 Walnut St.

Philadelphia, PA

SUBJECT

Woodside/Queens, New York -- Proposed sale to
 Frank and Francis Vitale -- Case No. 68174

PHONE

Attached is a Delegation of Authority to complete a sale of property in Woodside, Queens Borough and County, New York for \$900,000 to Frank Vitale and Francis Vitale (father and son).

The property proposed to be sold contains 7.03 acres of land on Conrail's New York Connecting Branch (Day Ridge Line) between 37th Avenue and Woodside Avenue. The sale area is bounded by the Brooklyn-Queens Expressway and a residential area. Conrail will reserve the track, a 75 foot wide by 22 foot high (above top of rail) easement and fiber optic rights. The purchaser proposes to build a residential complex adjacent to and above the sale area.

The necessary departments have approved this sale and the consideration being obtained represents a fair value. I recommend approval. If you concur, please forward this transaction to Mr. Crane.

FCF/nls
 attachment(s)

Date: December 5, 1986
 To: L. Stanley Crane
 From: Michael D. Sims

M.D. Sims 12/5/86

I approve.

Date: December 5, 1986
 To: John F. Jaeger
 From: L. Stanley Crane

I approve.

[Signature] cc: Allan Schimmel

cc: G. R. Scioli
 J. T. Sullivan -- A copy of the agreement for development of the area rights is attached.

D. C. Kozior

Exhibit E

R.E. Case No. 68174

DELEGATION OF AUTHORITY--CONVEYANCES

On the basis of the authority conferred upon me by the Board of Directors of Consolidated Rail Corporation (the "Corporation") at their meeting on August 10, 1976 to conduct the business and affairs of the Corporation, I hereby delegate to the Vice President-Information Systems and Administrative Services, and to the Assistant Vice President-Real Estate, or either of them, the authority to execute and deliver on behalf of the Corporation any and all documents necessary or desirable to transfer any and all right, title and interest in and to approximately 7.03 acres of the Corporation's property, between 37th Avenue and Woodside Avenue in the vicinity of 73rd Street, in Woodside, Queens Borough and County, New York, for a consideration of \$900,000 to Frank Vitale and Francis Vitale, or the nominee thereof.

Dated: 12-5-86


L. Stanley Crane, Chairman
and Chief Executive Officer

CLAIMANTS' EXHIBIT
1-C

Exhibit F

May 26, 1999

Consolidated Rail Corporation -
310 Thornall Street, Suite 390
Edison, N.J. 08837

Attention: Robert J. Tracy

SUBJECT: Agreement dated as of February 20, 1986 between CONSOLIDATED
RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE,
Purchaser, for Case No. 68174.

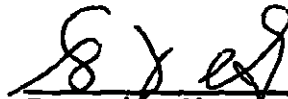
This will confirm discussions regarding the purchase of the property
referred to in the above contract to the effect that approval has been
given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of
the Purchaser to cancel the contract and obtain the return of the
deposit as provided therein is extended to August 31, 1999.
2. Paragraph 26 is now modified so that the Closing of the Title shall
occur on or before AUGUST 31, 1999 and is further modified that
the Purchaser shall give Conrail not less than thirty (30) days
notice of a date for Closing, instead of the date as now provided
in Paragraph 26 of said contract.
3. In all other respects, the provisions of said contract shall
remain in full force and effect.

Please indicate your agreement and approval of the above modifications
by signing on behalf of Conrail in the lower portion here indicated.

Very truly yours,


Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 
R.W. Ryan
Director-Real Estate

Dated 5/28/99

V 0001

August 20, 1998

Consolidated Rail Corporation
510 Thornall Street, Suite 390
Edison, NJ 08837

Attention: Robert J. Tracy

SUBJECT: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for Case No.68174.

This will confirm discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

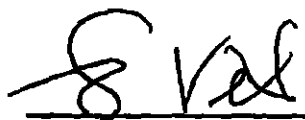
1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to November 30, 1998.
2. Paragraph 26 is now modified so that the Closing of Title shall occur on or before December 31, 1998 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for Closing, instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects, the provisions of said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,



Frank Vitale



Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 

R.W. Ryan
Director-Real Estate

Dated 8/21/98

V 0002

April 25, 1998

Consolidated Rail Corporation
510 Thornall Street, Suite 390
Edison, NJ 08837

Attention: Robert J. Tracy

SUBJECT: Agreement dated February 20, 1996 between CONSOLIDATED
RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE,
Purchaser, for Case No.69174.

This will confirm our discussion regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to July 31, 1998.
2. Paragraph 26 is now modified so that the Closing of Title shall occur on or before August 31, 1998 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of the date for Closing, instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects, the provisions of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 
R.W. Ryan
Regional Director - Real Estate

Dated 5/15/98

V 0003

July 28, 1997

Consolidated Rail Corporation
510 Thornall Street, Suite 390
Edison, NJ 08837

Attention: Robert J. Tracy

SUBJECT: Agreement dated as of February 20, 1996 between CONSOLIDATED
RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE,
Purchaser, for Case No. 69174.

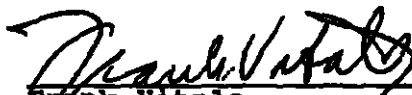
Dear Mr. Tracy:

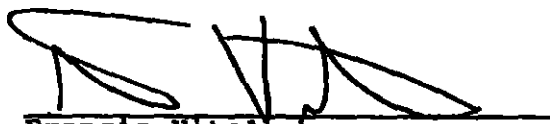
This will confirm our discussion regarding the purchase of the property
referred to in the above contract to the effect that approval has been
given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of
the Purchaser to cancel the contract and obtain the return of the
deposit as provided therein is extended to October 31, 1997.
2. Paragraph 26 is now modified so that the Closing of Title shall
occur on or before November 30, 1997 and is further modified that
the Purchaser shall give Conrail not less than thirty (30) days
notice of a date for Closing, instead of the date as now provided
in Paragraph 26 of said contract.
3. In all other respects, the provisions of the said contract shall
remain in full force and effect.

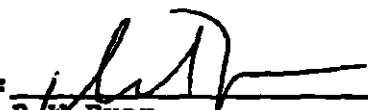
Please indicate your agreement and approval of the above modifications
by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 
R.W. Ryan
Regional Director - Real Estate

Dated 8/22/97

V 0004

April 18, 1997

Consolidated Rail Corporation
510 Thornall Street, Suite 390
Edison, NJ 08837

Attention: Robert J. Tracy

SUBJECT: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for Case No. 69174.

Dear Mr. Tracy:

This will confirm our discussion regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to July 31, 1997.
2. Paragraph 26 is now modified so that the Closing of Title shall occur on or before August 31, 1997 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for Closing, instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects, the provisions of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,



Frank Vitale



Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 

R.W. Ryan

Regional Director - Real Estate

Dated 5/14/97

V 0005

October 28, 1996

Consolidated Rail Corporation
510 Thornall Street, Suite 390
Edison, NJ 08837

Attention: Robert J. Tracy

SUBJECT: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for Case No.69174.

Dear Mr. Tracy:

This will confirm our discussion regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

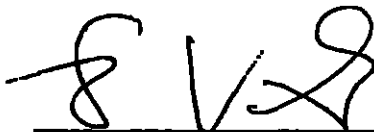
1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to January 31, 1997.
2. Paragraph 26 is now modified so that the Closing of Title shall occur on or before February 28, 1997 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing, instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects, the provisions of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,



Frank Vitale



Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 

R.W. Ryan
Regional Director-Real Estate

Dated 11/4/96

V 0006

January 28, 1997

Consolidated Rail Corporation
510 Thornall Street, Suite 390
Edison, NJ 08837

Attention: Robert J. Tracy

SUBJECT: Agreement dated as of February 20, 1986 between CONSOLIDATED
RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE,
Purchaser, for Case No.69174.

Dear Mr. Tracy:

This will confirm our discussion regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to April 30, 1997.
JULY 21, 1997
2. Paragraph 26 is now modified so that the Closing of Title shall occur on or before May 31, 1997 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing, instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects, the provisions of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,



Frank Vitale



Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 

R.W. Ryan
Regional Director - Real Estate

Dated 2/7/97

V 0007

July 28, 1996

Consolidated Rail Corporation
510 Thornall Street, Suite 390
Edison, NJ 08837

Attention: Robert J. Tracy

SUBJECT: Agreement dated as of February 20, 1986 between CONSOLIDATED
RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE,
Purchaser, for Case No. 69174.

Dear Mr. Tracy:

This will confirm our discussion regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to October 31, 1996.
2. Paragraph 26 is now modified so that the Closing of Title shall occur on or before November 30, 1996 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing, instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects, the provisions of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 
R.W. Ryan
Regional Manager-Real Estate

Dated 8/8/96

V 0008

April 26, 1996

Consolidated Rail Corporation
510 Thornall Street, Suite 390
Edison, NJ 08837

Attention: Robert J. Tracy

SUBJECT: Agreement dated as of February 20, 1986 between CONSOLIDATED
RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE,
Purchaser, for Case No.69174.

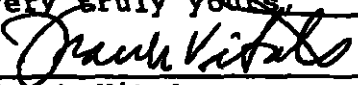
Dear Mr. Tracy:

This will confirm our discussion regarding the purchase of the property
referred to in the above contract to the effect that approval has been
given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of
the Purchaser to cancel the contract and obtain the return of the
deposit as provided therein is extended to July 31, 1996.
2. Paragraph 26 is now modified so that the Closing of Title shall
occur on or before August 31, 1996 and is further modified that
the Purchaser shall give Conrail not less than thirty (30) days
notice of a date for closing, instead of the date as now provided
in Paragraph of said contract.
3. In all other respects, the provisions of the said contract shall
remain in full force and effect.

Please indicate your agreement and approval of the above modifications
by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,



Frank Vitale



Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 

R.W. Ryan
Regional Manager-Real Estate

Dated 4/30/96

V 0009

January 23, 1996

Consolidated Rail Corporation
510 Thornall Street, Suite 240
Edison, NJ 08837

Attention: Robert J. Tracy

SUBJECT: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for Case No. 69174.

Dear Mr. Tracy:

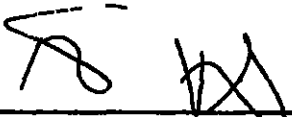
This will confirm our discussion regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to April 30, 1996.
2. Paragraph 26 is now modified so that the Closing of Title shall occur on or before May 31, 1996 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing, instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects, the provisions of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 
R.W. Ryan
Regional Manager-Real Estate

Dated 2/21/96

V 0010

October 25, 1995

Consolidated Rail Corporation
510 Thornall Street, Suite 240
Edison, NJ 08837

Attention: Robert J. Tracy

SUBJECT: Agreement dated as of February 20, 1986 between CONSOLIDATED
RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE,
Purchaser, for Case No. 69174.

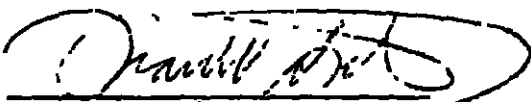
Dear Mr. Tracy:

This will confirm our discussion regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to January 31, 1996.
2. Paragraph 26 is now modified so that the Closing of Title shall occur on or before February 28, 1996 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing, instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provisions of the said contract shall remain in full force and effect.

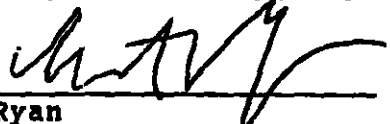
Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 
R.W. Ryan
Regional Manager-Real Estate

Dated 11/27/95

V 0011

July 25, 1995

Consolidated Rail Corporation
510 Thornall Street, Suite 240
Edison, NJ 08837

Attention: Robert J. Tracy

SUBJECT: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for Case No. 69174.

Dear Mr. Tracy:

This will confirm our discussion regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to October 31, 1995.
2. Paragraph 26 is now modified so that the Closing of Title shall occur on or before November 30, 1995 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing, instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provisions of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 
R.W. Ryan
Regional Manager-Real Estate

Dated 8/11/95

V 0012

April 27, 1995

Consolidated Rail Corporation
510 Thornall Street, Suite 240
Edison, NJ 08837

Attention: Robert J. Tracy

SUBJECT: Agreement dated as of February 20, 1986 between CONSOLIDATED
RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE,
Purchaser, for Case No. 69174

Dear Mr. Tracy:

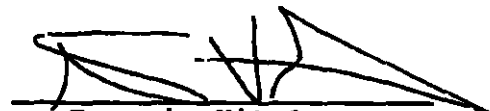
This will confirm our discussion regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to July 31, 1995.
2. Paragraph 26 is now modified so that the Closing of Title shall occur on or before August 31, 1995 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing, instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provisions of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 
R.W. Ryan
Regional Manager-Real Estate

Dated 5/5/95

V 0013

January 30, 1995

Consolidated Rail Corporation
510 Thornall Street, Suite 240
Edison, NJ 08837

Attention: Robert J. Tracy

SUBJECT: Agreement dated as of February 20, 1986 between CONSOLIDATED
RAIL CORPORATION, Seller, and FRANK AND FRANCIS VITALE, Purchaser,
for Case No.69174

Dear Mr. Tracy:

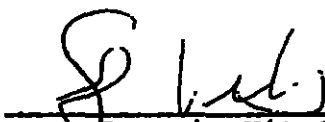
This will confirm our discussion regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to April 30,1995.
2. Paragraph 26 is now modified so that the Closing of Title shall occur on or before May 31,1995 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing, instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provisions of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 
R.W. Ryan
Regional Manager-Real Estate

Dated: 4/8/95

V 0014

October 20, 1994

Consolidated Rail Corporation
510 Thornall Street, Suite 240
Edison, NJ 08837

Attention: Robert J. Tracy

SUBJECT: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for Case No. 69174

Dear Mr. Tracy:

This will confirm our discussion regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to January 31, 1995.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before February 28, 1995 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provisions of the said contract shall remain in full force and effect.

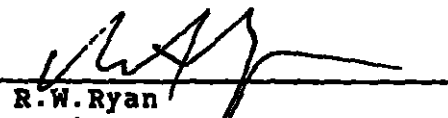
Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 
R.W. Ryan
Regional Manager-Real Estate

Dated: 11/4/94

V 0015

July 6, 1994

Consolidated Rail Corporation
510 Thornall Street, Suite 240
Edison, NJ 08837

Attention: Robert J. Tracy

SUBJECT Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCES VITALE, Purchaser, for property situate in Queens, New York
Case No. 69174

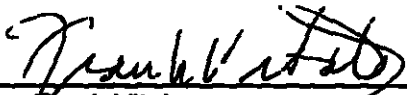
Dear Mr. Tracy:

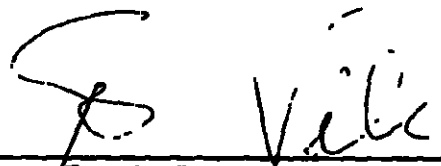
This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect

1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to September 30, 1994.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before October 31, 1994 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provisions of the said contract shall remain in full force and effect.

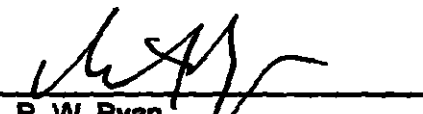
Please indicated your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 
R. W. Ryan
Regional Manager- Real Estate

Dated: 7/27/94

V 3118

March 3, 1994

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attn: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for property situate in Queens, New York Case No. 68174.

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to June 30, 1994.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before July 31, 1994 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,



Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION
By:



Regional Mgr. - Real Estate

Dated: 3/14/94

A:VITA.301/10
RJT.das

V 0016

November 23, 1993

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attn: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for property situate in Queens, New York Case No. 68174.

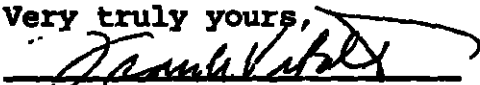
Dear Mr. Tracy:

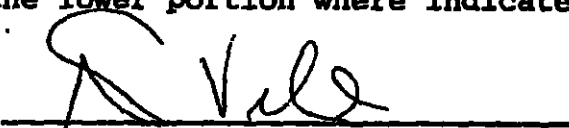
This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to February 28, 1994.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before March 31, 1994 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION
By:


Regional Mgr. - Real Estate

Dated: 12/2/93

A:VITA.301
RJT.das

V 0017

RECEIVED

AUG 30 1993

CONSOLIDATED RAIL CORP.
REAL ESTATE DEPART.
EDISON, N. J. 08837

August 25, 1993

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attn: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for property situate in Queens, New York Case No. 68174.

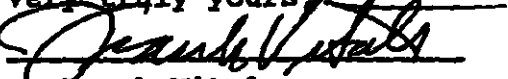
Dear Mr. Tracy:

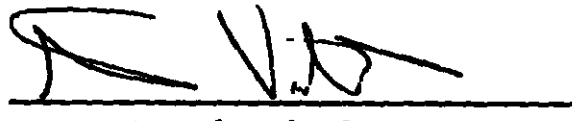
This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to November 30, 1993.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before December 31, 1993 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION

By:


Regional Mgr. - Real Estate

Dated: Aug 28, 1993

A:VITA.301
RJT.das

V 0018

June 1, 1993

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attn: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for property situate in Queens, New York Case No. 68174.

Dear Mr. Tracy:

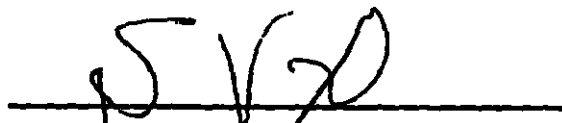
This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to August 31, 1993.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before September 30, 1993 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION
By:


Regional Mgr. - Real Estate

Dated: 6/14/93

A:VITA.301
RJT.das

V 3124

RECEIVED

MAR 4 1993

February 26, 1993

CONSOLIDATED RAIL CORP.
REAL ESTATE DEPT.
EDISON, N.J. 08837

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attn: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for property situate in Queens, New York Case No. 68174.

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to May 31, 1993.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before June 30, 1993 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION
By:


Regional Mgr. - Real Estate

Dated: 3-5-93

A:VITA.301
RJT.das

V 0019

December 4, 1992

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attn: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for property situate in Queens, New York Case No. 68174.

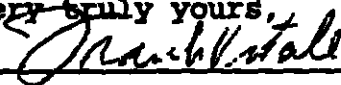
Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

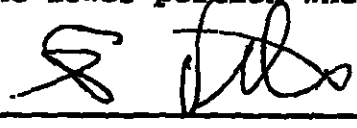
1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to February 28, 1993.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before March 31, 1993 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,

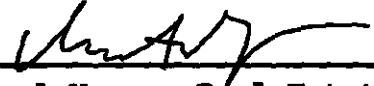


Frank Vitale



Francis Vitale

CONSOLIDATED RAIL CORPORATION
By:



Regional Mgr. - Real Estate

Dated: 12-14-92

A:VITA.301
RJT.das

V 0020

August 27, 1992

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attn: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for property situate in Queens, New York Case No. 68174.

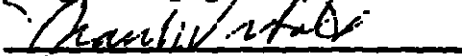
Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to November 30, 1992.
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3. In all other respects the provision of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,



Frank Vitale



Francis Vitale

CONSOLIDATED RAIL CORPORATION
By:



Regional Mgr. - Real Estate

Dated: 7/16/92

A:VITA.301
RJT.das

V 4209

CONRAIL

RECEIVED

JUN 3 1992

CONSOLIDATED RAIL CORP.
REAL ESTATE DEPART.
EDISON, N J. 08837

May 28, 1992

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, new Jersey 08837

Attn: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for property situate in Queens, New York Case No. 68174.

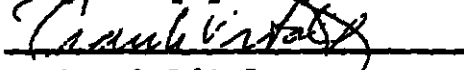
Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

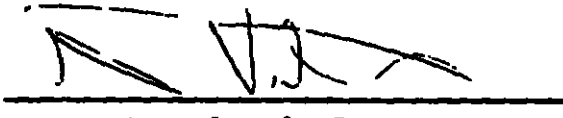
1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to August 31, 1992.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before September 30, 1992 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,



Frank Vitale



Francis Vitale

CONSOLIDATED RAIL CORPORATION

By:



Regional Mgr. - Real Estate

Dated: 6/4/92

A:VITA.301

RJT.das

V 4208

February 28, 1992

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attn: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for property situate in Queens, New York Case No. 68174.

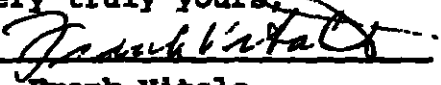
Dear Mr. Tracy:

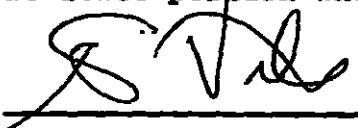
This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to May 31, 1992.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before June 30, 1992 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION
By:


Regional Mgr. - Real Estate

Dated: 2/4/92

A:VITA.301
RJT.das

V 4207

December 23, 1991

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attn: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for property situate in Queens, New York Case No. 68174.

Dear Mr. Tracy:

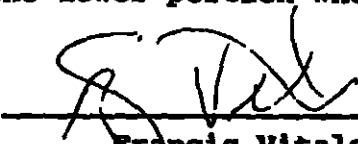
This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to February 29, 1992.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before March 31, 1992 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

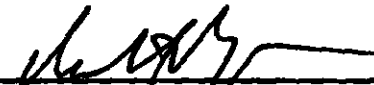
Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale

 (12/26/91)
Francis Vitale

CONSOLIDATED RAIL CORPORATION
By:


Regional Mgr. Real Estate

Dated: 1/2/92

A:VITA.301
RJT.das

V 4206

Returned
1/6/92
RJS

December 23, 1991

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attn: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for property situate in Queens, New York Case No. 68174.

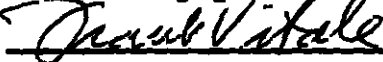
Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to February 29, 1992.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before March 31, 1992 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale

 (12/26/91)
Francis Vitale

CONSOLIDATED RAIL CORPORATION
By:


Regional Mgr. - Real Estate

Dated: 1/2/92

A:VITA.301
RJT.das

V 4205

October 29, 1991

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, new Jersey 08837

Attn: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for property situate in Queens, New York Case No. 68174.

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

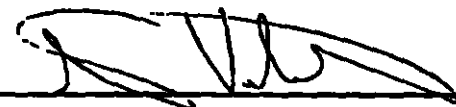
1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to December 31, 1991.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before January 31, 1992 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,



Frank Vitale



Francis Vitale

CONSOLIDATED RAIL CORPORATION
BY:



Regional Mgr. / Real Estate

Dated: 11/13/91

A:VITA.301
RJT.das

V 4203

August 20, 1991

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attn: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for property situate in Queens, New York
Case No. 68174

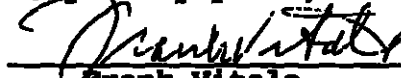
Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to October 31, 1991.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before November 30, 1991 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,



Frank Vitale



Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 

Regional Mgr. - Real Estate

Dated: 8/26/91

A:VITA.301
RJT.das

V 4202

July 1, 1991

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attn: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for property situate in Queens, New York
Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to August 31, 1991.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before September 30, 1991 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,

Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION
By: 
Regional Mgr. + Real Estate

Dated: 7-12-91

A:VITA.301
RJT.das

V 4201

May 2, 1991

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attn: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for property situate in Queens, New York
Case No. 68174

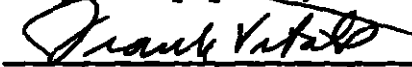
Dear Mr. Tracy:

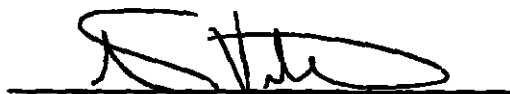
This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to June 30, 1991.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before July 31, 1991 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 

Regional Mgr. - Real Estate

Dated: 5/9/91

A:VITA.301
RJT.das

V 4200

March 4, 1991

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attn: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between CONSOLIDATED RAIL CORPORATION, Seller, and FRANK and FRANCIS VITALE, Purchaser, for property situate in Queens, New York
Case No. 68174

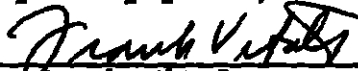
Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

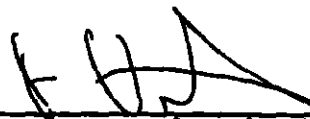
1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to April 30, 1991.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before May 31, 1991 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,



Frank Vitale



Francis Vitale

CONSOLIDATED RAIL CORPORATION
By: 

Regional Mgr. - Real Estate

Dated: 3/14/91

A:VITA.301
RJT.das

V 4199

RECEIVED

DEC 29 1990

CONSOLIDATED RAIL CORP.
REAL ESTATE DEPT.
EDISON, N. J. 08837

December 20, 1990

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between
Consolidated Rail Corporation, Seller, and
Frank and Francis Vitale, Purchaser, for property
situate in Queens, New York
Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to February 28, 1991.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before March 31, 1991 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

V 4197

Agreement
December 20, 1990
Page -2-
=====

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,



Frank Vitale



Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 

Manager - Real Estate

Dated: 12/28/90

A:VITA.RJT
RJT.ds

V 4198

September 11, 1990

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between
Consolidated Rail Corporation, Seller, and
Frank and Francis Vitale, Purchaser, for property
situate in Queens, New York
Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to October 31, 1990.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before November 30, 1990 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

V 4195

Agreement
September 11, 1990
Page -2-
=====

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,

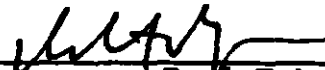


Frank Vitale



Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 

Manager - Real Estate

Dated: 9-16-90

A:VITA.RJT
RJT.ds

V 4196

November 2. 1990

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between
Consolidated Rail Corporation, Seller, and
Frank and Francis Vitale, Purchaser, for property
situate in Queens, New York
Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to December 31, 1990.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before January 31, 1991 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

V 4193

Agreement
November 2, 1990
Page -2-
=====

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 
Manager - Real Estate

Dated: 11/12/90

A:VITA.RJT
RJT.ds

V 4194

June 1, 1990

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between
Consolidated Rail Corporation, Seller, and
Frank and Francis Vitale, Purchaser, for property
situate in Queens, New York
Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to June 30, 1990.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before July 31, 1990 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

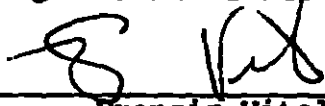
V 4191

Agreement
June 1, 1990
Page -2-
=====

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,



Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 

Manager - Real Estate

Dated: 6/5/90

A:VITA.RJT
RJT.ds

V 4192

July 3, 1990

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between
Consolidated Rail Corporation, Seller, and
Frank and Francis Vitale, Purchaser, for property
situate in Queens, New York
Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to August 31, 1990.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before September 30, 1990 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

V 4189

Agreement
July 3, 1990
Page -2-
=====

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,



Frank Vitale



Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 

Manager - Real Estate

Dated: 7/13/90

A:VITA.RJT
RJT.ds

V 4190

RECEIVED

MAY 17 1990

**CONSOLIDATED RAIL CORP.
REAL ESTATE DEPART.
EDISON, N. J. 08837**

May 8, 1990

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between
Consolidated Rail Corporation, Seller, and
Frank and Francis Vitale, Purchaser, for property
situate in Queens, New York
Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to May 31, 1990.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before June 30, 1990 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

V 4187

Agreement

May 8, 1990

Page -2-

=====

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,



Frank Vitale



Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 

Manager - Real Estate

Dated: 5/18/90

A:VITA.RJT
RJT.ds

V 4188

April 5, 1990

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between
Consolidated Rail Corporation, Seller, and
Frank and Francis Vitale, Purchaser, for property
situate in Queens, New York
Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to April 30, 1990.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before May 31, 1990 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

V 4185

Agreement
April 5, 1990
Page -2-

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,



Frank Vitale


Francis Vitale

CONSOLIDATED RAIL CORPORATION

By: 

Manager - Real Estate

Dated: April 16, 1990

March 9, 1990

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between
Consolidated Rail Corporation, Seller, and
Frank and Francis Vitale, Purchaser, for property
situate in Queens, New York
Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

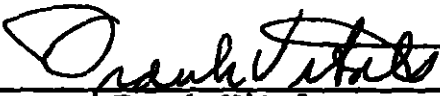
1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to March 31, 1990. *~ March 31*
2. Paragraph 26 is now modified so that the closing of title shall occur on or before April 30, 1990 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

V 4183

Agreement
March 9, 1990
Page 2

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,

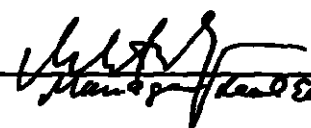


Frank Vitale



Francis Vitale

Consolidated Rail Corporation

By: 

Mark S. Kent

Dated: 3/14/90

A:VITA.RJT
RJT:ds

V 4184

January 30, 1990

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between
Consolidated Rail Corporation, Seller, and
Frank and Francis Vitale, Purchaser, for property
situate in Queens, New York
Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to February 28, 1990.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before March 31, 1990 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

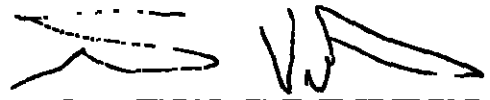
V 4181

Agreement
January 30, 1990
Page 2

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

Consolidated Rail Corporation

By: 
MANAGER-REAL ESTATE

Dated: 2/8/90

A:VITA3.RJT
RJT:bg

V 4182

January 2, 1990

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between
Consolidated Rail Corporation, Seller, and
Frank and Francis Vitale, Purchaser, for property
situate in Queens, New York
Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to January 31, 1990.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before February 28, 1990 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

Agreement
January 2, 1990
Page 2

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,



Frank Vitale



Francis Vitale

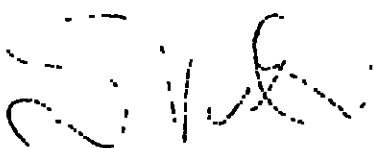
Consolidated Rail Corporation

By: 

MANAGER-REAL ESTATE

Dated: 1-11-90

A:VITA3.RJT
RJT:sd



V 4180

November 30, 1989

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between
Consolidated Rail Corporation, Seller, and
Frank and Francis Vitale, Purchaser, for property
situate in Queens, New York
Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to December 31, 1989.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before January 31, 1990 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

Agreement
November 30, 1989
Page 2

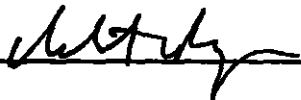
Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

Consolidated Rail Corporation

By: 

Dated: 12/6/89

A:VITA3.RJT
RJT:sd

V 4178

October 31, 1989

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between
Consolidated Rail Corporation, Seller, and
Frank and Francis Vitale, Purchaser, for property
situate in Queens, New York
Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to November 30, 1989.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before December 31, 1989 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

V 4175

Agreement
October 31, 1989
Page 2

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

Consolidated Rail Corporation

By: 

Dated: 11-8-89

A:VITA3.RJT
RJT:sd

V 4176

October 2, 1989

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between
Consolidated Rail Corporation, Seller, and
Frank and Francis Vitale, Purchaser, for property
situate in Queens, New York
Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to October 31, 1989.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before November 30, 1989 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

Agreement
October 2, 1989
Page 2

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,



Frank Vitale



Francis Vitale

Consolidated Rail Corporation

By: 

Manager / Rand E. Tate

Dated: 10/11/89

A:VITA3.RJT
RJT:sd

V 4174

September 1, 1989

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between
Consolidated Rail Corporation, Seller, and
Frank and Francis Vitale, Purchaser, for property
situate in Queens, New York
Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to September 30, 1989.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before October 31, 1989 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

V 4171

Agreement
September 1, 1989
Page 2

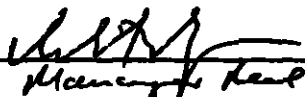
Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,

Frank Vitale

Francis Vitale

Consolidated Rail Corporation

By: 
Francis Vitale

Dated: 9/2/89

A:VITA3.RJT
RJT:sd

V 4172

August 3, 1989

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between
Consolidated Rail Corporation, Seller, and
Frank and Francis Vitale, Purchaser, for property
situate in Queens, New York
Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to August 31, 1989.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before September 30, 1989 and is further modified that the Purchaser shall give Conrail not less than thirty (3) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

Agreement
August 3, 1989
Page 2

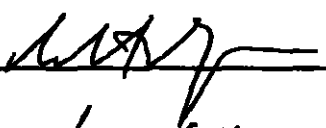
Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,

Frank Vitale

Francis Vitale

Consolidated Rail Corporation

By: 

Dated: August 4, 1989

A:VITA3.RJT
RJT:sd

V 4170

June 16, 1989

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between
Consolidated Rail Corporation, Seller, and
Frank and Francis Vitale, Purchaser, for property
situate in Queens, New York
Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to July 31, 1989.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before August 30, 1989 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

Agreement
June 16, 1989
Page 2

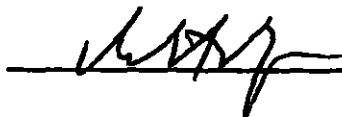
Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,

Frank Vitale

Francis Vitale

Consolidated Rail Corporation

By: 

Dated: 6-21-89

A:VITA3.RJT
RJT:sd

V 4168

May 5, 1989

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Subject: Agreement dated as of February 20, 1986 between
Consolidated Rail Corporation, Seller, and
Frank and Francis Vitale, Purchaser, for property
situate in Queens, New York
Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the Purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to May 31, 1989.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before June 30, 1989 and is further modified that the Purchaser shall give Conrail not less than thirty (30) days notice of a date for closing instead of the date as now provided in Paragraph 26 of said contract.
3. In all other respects the provision of the said contract shall remain in full force and effect.

V 4165

Agreement
May 5, 1989
Page 2

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail in the lower portion where indicated.

Very truly yours,

Frank Vitale

Francis Vitale

Consolidated Rail Corporation

By: *Legal Counsel*

Dated: 5/12/89

A:VITA3.RJT
RJT:sd

V 4166

February 27, 1989

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Re: Agreement dated as of February 20, 1986
between Consolidated Rail Corporation,
Seller, and Frank & Francis Vitale, Purchaser,
for property situate in Queens, New York. Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to March 31, 1989.

2. Paragraph 26 is now modified so that the closing of title shall occur on or before April 30, 1989 and is further modified that the purchaser shall give Conrail not less than 30 days notice of a date for closing instead of the date as now provided in paragraph 26 of said contract.

3. In all other respects the provisions of the said contract shall remain in full force and effect.

V 4163

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail the lower portion where indicated.

Very truly yours,

Frank Vitale

Francis Vitale

Consolidated Rail Corporation

By: *Stephen L. ...*

Dated: 3/1/05

A:VITA#2.RJT
RJT:tv

V 4164

January 17, 1989

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Re: Agreement dated as of February 20, 1986
between Consolidated Rail Corporation,
Seller, and Frank & Francis Vitale, Purchaser,
for property situate in Queens, New York. Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to February 28, 1989.

2. Paragraph 26 is now modified so that the closing of title shall occur on or before March 31, 1989 and is further modified that the purchaser shall give Conrail not less than 30 days notice of a date for closing instead of the date as now provided in paragraph 26 of said contract.

3. In all other respects the provisions of the said contract shall remain in full force and effect.

V 4161

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail the lower portion where indicated.

Very truly yours,

Frank Vitale

Francis Vitale

Consolidated Rail Corporation

By: *Frank Vitale*

Dated: 1/20/89

A:VITA#2.RJT
RJT:tv

V 4162

*

December 7, 1988

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Re: Agreement dated as of February 20, 1986
between Consolidated Rail Corporation,
Seller, and Frank & Francis Vitale, Purchaser,
for property situate in Queens, New York. Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to December 31, 1988.

2. Paragraph 26 is now modified so that the closing of title shall occur on or before January 31, 1989 and is further modified that the purchaser shall give Conrail not less than 30 days notice of a date for closing instead of the date as now provided in paragraph 26 of said contract.

3. In all other respects the provisions of the said contract shall remain in full force and effect.

V 4159

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail the lower portion where indicated.

Very truly yours,

Frank Vitale

Francis Vitale

Consolidated Rail Corporation

By:

Dated: 12/8/84

A:VITA#2.RJT
RJT:tv

V 4160

November 9, 1988

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Re: Agreement dated as of February 20, 1986
between Consolidated Rail Corporation,
Seller, and Frank & Francis Vitale, Purchaser,
for property situate in Queens, New York. Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respect:

1. Paragraph 3-E is now modified so that the right on the part of the purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to November 30, 1988.

2. Paragraph 26 is now modified so that the closing of title shall occur on or before December 31, 1988 and is further modified that the purchaser shall give Conrail not less than 30 days notice of a date for closing instead of the date as now provided in paragraph 26 of said contract.

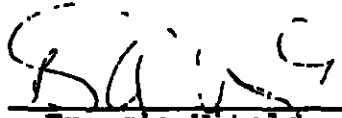
3. In all other respects the provisions of the said contract shall remain in full force and effect.

V 4157

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail the lower portion where indicated.

Very truly yours,

Frank Vitale



Francis Vitale

Consolidated Rail Corporation

By: 

Dated: 11/16/88

A:VITA#2.RJT
RJT:tv

V 4158

*

October 14, 1988

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Re: Agreement dated as of February 20, 1986
between Consolidated Rail Corporation,
Seller, and Frank & Francis Vitale, Purchaser,
for property situate in Queens, New York. Case No. 68174

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respects:

1. Paragraph 3-E is now modified so that the right on the part of the purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to October 31, 1988.

2. Paragraph 26 is now modified so that the closing of title shall occur on or before November 30, 1988 and is further modified that the purchaser shall give Conrail not less than 30 days notice of a date for closing instead of the date as now provided in paragraph 26 of said contract.

3. In all other respects the provisions of the said contract shall remain in full force and effect.

V 4155

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail the lower portion where indicated.

Very truly yours,


Frank Vitale

Francis Vitale

Consolidated Rail Corporation

By: 

Dated: 10/14/08

A:VITA#2.RJT
RJT:tv

V 4156

BROWN & WOOD

555 CALIFORNIA STREET
SAN FRANCISCO, CA 94104
415-398-3908

ONE WORLD TRADE CENTER
NEW YORK, N. Y 10048

212-838-5300

10900 WILSHIRE BOULEVARD
LOS ANGELES, CA 90024
213-208-4343

ONE FARRAGUT SQUARE SOUTH
WASHINGTON, D C 20006
202-383-7400

April 26, 1988

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Re: Agreement dated as of February 20, 1986
between Consolidated Rail Corporation,
Seller, and Frank & Francis Vitale, Purchaser,
for property situate in Queens, New York

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respects:

1. Paragraph 3-E is now modified so that the right on the part of the purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to May 31, 1988.

2. Paragraph 26 is now modified so that the closing of title shall occur on or before October 31, 1988 and is further modified that the purchaser shall give Conrail not less than 30 days notice of a date for closing instead of the dates as now provided in paragraph 26 of said contract.

3. In all other respects the provisions of the said contract shall remain in full force and effect.

V 4153

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail the lower portion where indicated.

Very truly yours,

Frank Vitale

Francis Vitale

Consolidated Rail Corporation

By _____

Dated:

V 4154

BROWN & WOOD

555 CALIFORNIA STREET
SAN FRANCISCO, CA 94104
415-398-3909

ONE WORLD TRADE CENTER
NEW YORK, N. Y. 10048

212-838-8300

10800 WILSHIRE BOULEVARD
LOS ANGELES, CA. 90084
213-208-4343

ONE FARRAGUT SQUARE SOUTH
WASHINGTON, D. C. 20006
202-393-7400

February 12, 1988

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention: Robert J. Tracy

Re: Agreement dated as of February 20, 1986
between Consolidated Rail Corporation,
Seller, and Frank & Francis Vitale, Purchaser,
for property situate in Queens, New York

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the above contract to the effect that approval has been given to modify the contract in the following respects:

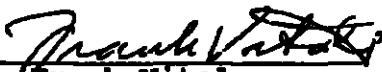
1. Paragraph 3-E is now modified so that the right on the part of the purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to March 31, 1988.
2. Paragraph 26 is now modified so that the closing of title shall occur on or before October 31, 1988 and is further modified that the purchaser shall give Conrail not less than 30 days notice of a date for closing instead of the dates as now provided in paragraph 26 of said contract.
3. In all other respects the provisions of the said contract shall remain in full force and effect.

RECEIVED

FEB 17 1988

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

Consolidated Rail Corporation

By 

Dated:

cc: Robert Cook, Esq.

V 4152

FIELDS. ZIMMERMAN & SEGALL
COUNSELLORS AT LAW

LEO J. ZIMMERMAN
HAROLD C. FIELDS
STANLEY G. FIELDS
BERNARD SEGALL, RET.

MICHAEL H. BRODNICK
COUNSEL (DECD)

90-04 161ST STREET
JAMAICA, N. Y. 11432

TELEPHONE
OLYMPIA 8-0600

July 7, 1987

Consolidated Rail Corporation
510 Thornall Street - Suite 240
Edison, New Jersey 08837

Attention of Robert J. Tracy

Re Frank & Francis Vitale w. Conrail

Dear Mr. Tracy:

This will confirm our discussions regarding the purchase of the property referred to in the contract above to the effect that approval has been given to modify the contract dated February 20, 1986 in the following respects:

1. Paragraph 3-e is now modified so that the right on the part of the purchaser to cancel the contract and obtain the return of the deposit as provided therein is extended to February 29, 1988.

2. Paragraph 26 of the said contract is now modified so that the closing of title shall occur on or before March 31, 1988 and is further modified that the purchaser shall give Conrail not less than 30 days of a date for closing instead of the dates as now provided in paragraph 26 of said contract.

3. In all other respects the provisions of the said

V 3136

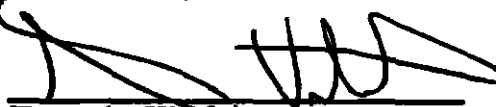
FIELDS, ZIMMERMAN & SEGALL

contract shall remain in full force and effect.

Please indicate your agreement and approval of the above modifications by signing on behalf of Conrail the lower portion where indicated.

Very truly yours,


Frank Vitale


Francis Vitale

Consolidated Rail Corporation

By 

Attest

V 3137

Exhibit G

New York Central Lines, LLC
July 18, 2002
Page 2

in violation of our rights under the Contract; (4) an Order directing specific performance of the Contract; (5) damages which we sustained as a result of your breach of the Contract; (6) such other and further relief as the Arbitrator(s) shall deem appropriate; and (7) your share of the costs of the Arbitration, pursuant to the Contract.

PLEASE TAKE FURTHER NOTICE that, pursuant to Article 20 of the Contract, we hereby appoint, to act as Arbitrator:

Ivan W. Moskowitz, Esq.
Mandel Resnik Kaiser Moskowitz & Greenstein, P.C.
220 East 42nd Street
New York, New York 10017
(212) 573-0000
Fax: (212) 573-0067

Mr. Moskowitz meets the qualifications to act as Arbitrator under the Contract, being a "competent person[]" having no substantial interest in the matter in controversy."¹

PLEASE TAKE FURTHER NOTICE that, pursuant to Section 7503(c) of the Civil Practice Law and Rules of the State of New York, unless you apply to stay the arbitration within twenty(20) days after service of this Demand for Arbitration, you shall thereafter be precluded from objecting that a valid agreement was made or has not been complied with or from asserting in court the bar of a limitation of time. An application to stay arbitration must be made within twenty (20) days after the service of the demand for arbitration or shall be precluded.

The background of the dispute with respect to the Contract is as follows:

The Contract (Exhibit A hereto) was executed on or about February 20, 1986. Under the Contract, Conrail, your predecessor in interest, agreed to sell to us certain real property in Woodside, County of Queens, City and State of New York (the "Property"), for the purchase price of \$900,000. Purchaser made a \$90,000 deposit towards the purchase price.

Article 29 of the Contract provided, in part, that the Contract did not constitute a binding agreement upon Conrail unless and until Conrail (through its duly authorized representative) gave written notification (the "Article 29 Notice") to purchaser that the transaction had received the necessary approval and authorization of Conrail's senior management or board of directors, and that Conrail was legally bound. On or about December 4, 1986, a memorandum was prepared within Conrail, to seek the approval of Conrail's senior management, and thus make the Contract legally binding upon Conrail. On or about December 5, 1986, Michael D. Sims, a

¹ In accordance with said Article 20 of the Contract, Seller may, if it so elects, serve a notice setting forth the name and address of the person it designates as its Arbitrator, and any additional points in dispute to be determined by arbitration, within 10 (ten) days from the date of the mailing of this notice, in accordance with Section 21(B) of the Contract. Within 10 (ten) days thereafter, the two arbitrators thus named shall select a third arbitrator and notify both parties of such selection. Pursuant to Article 20 of the Contract, if Seller fails to select an arbitrator within ten (10) days from the date of mailing of this notice, then the above-named arbitrator selected by Purchaser shall act as the sole arbitrator in this proceeding.

member of the senior management of Conrail, and L. Stanley Crane, Chairman and Chief Executive Officer of Conrail (and thus a member of the senior management of Conrail), approved the memorandum. Within a few days thereafter, Robert J. Tracy ("Mr. Tracy"), Conrail's duly authorized representative, gave written notification to purchaser that the transaction had received the necessary approval and authorization of Conrail's senior management, by handing a copy of the memorandum, with his business card attached, to Frank Vitale. Mr. Tracy had written, upon his business card attached to the memorandum, "Frank - Mr. Crane is the Chairman." The memorandum, with Mr. Tracy's attached business card, as handed by Mr. Tracy to Frank Vitale, constituted the Article 29 Notice (Exhibit B). Conrail, as your predecessor in interest, thus became legally bound to the Contract. A copy of the Delegation of Authority - Conveyances, to which reference is made in the Article 29 Notice, is annexed as Exhibit C.

Between 1986 and 1999, the Parties repeatedly adjourned the date of the closing pursuant to the Contract. On or about May 28, 1999 (the "May 1999 Modification"), Conrail and Purchaser executed a written agreement (Exhibit D) further adjourning the closing to August 31, 1999. Neither the Contract, nor the May 1999 Modification, made the closing "time of the essence."

After the execution of the May 1999 Modification, you succeeded to Conrail's interests under the Contract, and you designated Mr. Tracy, who had been Conrail's duly authorized representative with respect to the Contract, as your duly authorized representative with respect to the Contract.

Mr. Tracy, as Seller's duly authorized representative, met with us on July 1, 1999 and again on August 30, 1999, the day before the scheduled closing date. At the August 30, 1999 meeting, Mr. Tracy, on behalf of Seller, stated that Seller wanted to further adjourn the closing date five years, until June 2004, because, if the closing were to occur before that date, Seller would be obliged to share the proceeds of the sale with Norfolk-Southern. Purchaser had no objection to that long an adjournment of the closing date. The Parties therefore agreed, based upon Seller's request, to adjourn both the date of closing, and the date upon which Purchaser could cancel the Contract and obtain the return of its \$90,000 deposit. Therefore, based upon your request, the closing did not occur on August 31, 1999, and no new date for closing was set.

Through the remainder of 1999, 2000, and 2001, the Parties had several meetings in further preparation for the closing of sale under the Contract. There were two additional meetings in 1999. There were ten meetings in 2000, a meeting every month except for February and July. In 2001, Purchaser and Seller scheduled meetings for every month (except April) through October. However, Mr. Tracy postponed most of the meetings. Four meetings were held in 2001 — on March 23, May 4, May 30, and October 17. Purchaser continued to have telephone conversations with Mr. Tracy through November 2001 and, on several occasions in December 2001, Mr. Tracy returned the telephone calls of Purchaser's counsel, but they never spoke.

During these meetings, the Parties discussed possible modifications to the Contract, while always recognizing that the Contract remained a valid and binding Contract and that, if the

Parties did not agree upon the possible modifications, the Parties would be obliged to proceed to the closing of sale under the terms and conditions of the Contract. No further agreements modifying the Contract were executed by both Parties. At no time did either Party declare the Contract to be "time of the essence." At no time did either Party seek to declare the other Party to be in default. At no time did either Party take the position that the other Party had abandoned the Contract, or that the Contract was not a valid, binding, and enforceable contract.

Because of the breakdown in communications during December 2001, on December 27, 2001, Purchaser sent notice (Exhibit E) to Seller setting a closing date of April 15, 2002. The notice did not make the closing "time of the essence." The notice also specifically noted that the closing may be subject to the Parties' obtaining the Section 18 Release, and requested Seller's cooperation in obtaining the Section 18 Release. In response, Seller advised Purchaser that Mr. Tracy was no longer employed by Seller, and that Seller could not locate Mr. Tracy's files relating to the Contract.

On April 10, 2002, Purchaser's counsel wrote a letter (Exhibit F) to Seller with respect to the matter, asking whether Seller intended to proceed with the April 15, 2002 closing. On April 11, 2002, Seller wrote a letter to Purchaser's counsel (Exhibit G), stating that Seller would not proceed with the closing and taking the position, for the first time, that the Contract "expired in August, 1999."

On May 24, 2002, Seller sent a letter to us ("Seller's May 2002 Letter") (Exhibit H). Seller's May 2002 Letter claimed: (1) Seller never gave the Article 29 Notice; (2) Purchaser failed to close title on August 20, 1987 (the original closing date set in the Contract) and on August 31, 1999 (the closing date set in the May 1999 Modification); (3) Purchaser failed to send notice to reclaim its \$90,000 deposit under the Contract and therefore had forfeited its deposit; (4) the Parties failed to agree upon material terms of the Contract; and (5) the Contract was not binding, and Seller was abandoning any further negotiations relating thereto.

The following points are thus in dispute:

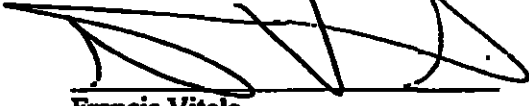
1. Seller's claim that it never gave the Article 29 Notice is without basis. The Article 29 Notice was duly and properly given in December 1986, and the Contract thus became binding upon Conrail, your predecessor-in-interest, and is binding upon you.
2. Seller's claim that Purchaser "failed" to close title to the Property on August 20, 1987 and again on August 31, 1999 is without basis. Closing of title did not occur on August 20, 1987 because the Parties mutually agreed to adjourn the closing. Closing of title did not occur on August 31, 1999, because you requested that the closing be adjourned. Moreover, even if Purchaser had "failed" to close title on either or both dates, that would not affect the fact that the Contract remains a valid and binding Contract because no Party has, at any time, scheduled a "time of the essence" closing. In addition, the Parties, by their conduct, have evidenced their understanding that the Contract remains in force and effect.

3. Seller's claim that Purchaser forfeited its \$90,000 deposit is without basis. When, at Seller's request, the Parties agreed to adjourn the closing date of August 31, 1999, the Parties also agreed to adjourn the date by which Purchaser could cancel the Contract and obtain the return of its deposit. Purchaser continues to have that right, but Purchaser has no present intent to exercise that right and instead intends to proceed to closing.
4. Seller's claim that the Parties have failed to agree upon material terms of the Contract is without basis. The Contract contains all of the material terms. The fact that the Purchaser has, in good faith, discussed possible modifications to the Contract with Seller does not negate that fact.
5. Seller's claim that the Contract is "non-binding" is without basis. The Contract remains valid and binding.
6. Purchaser seeks, and is entitled to: (1) a declaration that the Contract remains in full force and effect and otherwise declaring the rights and responsibilities of the Parties thereunder; (2) an Order directing you to fully cooperate with us to proceed towards a closing under the Contract including, without limitation, an Order directing you to cooperate in obtaining all necessary permits and approvals including, without limitation, the Section 18 Release; (3) an Order preliminarily and permanently enjoining you from selling the property to any third parties in violation of our rights under the Contract; (4) an Order directing specific performance of the Contract; (5) damages which we sustained as a result of your breach of the Contract; (6) such other and further relief as the Arbitrator(s) shall deem appropriate; and (7) your share of the costs of the Arbitration, pursuant to the Contract.

PLEASE TAKE FURTHER NOTICE that Purchaser shall be represented in the Arbitration by Richard M. Zuckerman, Esq. and Jacob Inwald, Esq., Sonnenschein Nath & Rosenthal, 30 Rockefeller Plaza, New York, New York 10112, Phone: (212) 398-5213; Fax: (212) 398-5245, to whom all further communications with respect to the Contract and the arbitration should be addressed.

Very truly yours,


Frank Vitale


Francis Vitale

New York Central Lines, LLC
July 18, 2002
Page 6

cc:

Ivan W. Moskowitz, Esq.
Mandel Resnik Kaiser Moskowitz & Greenstein, P.C.
220 East 42nd Street
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Attorneys for Frank Vitale and Francis Vitale, Claimants

Exhibit H

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

NEW YORK CENTRAL LINES, LLC, as
Successor to Consolidated Rail Corporation,

Petitioner,

v.

FRANK VITALE and FRANCIS VITALE,

Respondents.

INDEX NO.

VERIFIED PETITION

TO THE SUPREME COURT OF THE STATE OF NEW YORK,
County of Queens:

Petitioner New York Central Lines, LLC, successor to Consolidated Rail Corporation (hereinafter "Conrail"), by and through its attorneys, McCarter & English, LLP, by way of Verified Petition against respondents Frank Vitale and Francis Vitale to stay arbitration in accordance with CPLR 7503(b) because there is no agreement under which to arbitrate and no rights to enforce, states as follows:

PARTIES

1. New York Central Lines, LLC is a Delaware single-member limited liability company whose tax and mailing address is 500 Water Street (J-910), Jacksonville, Florida, of which the single member is Consolidated Rail Corporation ("CRC"), a Pennsylvania corporation whose mailing address is 2001 Market Street, (19-B), P.O. Box 41419,

Philadelphia, Pennsylvania, which is a wholly-owned subsidiary of Conrail, Inc., a Pennsylvania corporation whose principal place of business is at the CRC address.

2. Upon information and belief, defendant Frank Vitale is a New York resident and real estate developer with offices at 27-17 216th Street, Bayside, Queens, New York.

3. Upon information and belief, defendant Francis Vitale is a New York resident and real estate developer with offices at 27-17 216th Street, Bayside, Queens, New York.

BACKGROUND FACTS

4. On or about February 20, 1986, Conrail, Frank Vitale, and Francis Vitale executed a non-binding option agreement for the sale of certain property in Woodside, County of Queens, City and State of New York (the "Property"). The parties intended to thereafter explore the possibility and feasibility of the Vitales erecting a structure above Conrail's railroad tracks for commercial development. A copy of this agreement is attached as Exhibit A and incorporated by reference. Under this agreement, the Vitales' good faith deposit was completely refundable for a period of 17 months, prior to a closing that was to occur in the 18th month, August 20, 1987 (the "Closing"). Among other things on which the parties were to agree were (a) the size and dimensions of the parcel to be purchased; (b) the construction contract for the project with adequate protections, during construction, for the continued operation of the freight tracks beneath; (c) the location of the support columns for the structure, in a manner to minimize interference with freight operations; (d) the extent of necessary infrastructure relocation and cost-sharing; and (e) insurance coverage during and after construction.

5. The agreement also specified numerous material conditions precedent to the Closing. The Vitales, as Purchasers, did not comply with all of their obligations and in the intervening sixteen years, there was no closing.

6. Of particular significance was Article 29 of the agreement, which stated in relevant part, and in all capital letters because of its importance:

ANYTHING HEREIN TO THE CONTRARY NOTWITHSTANDING, IT IS DISTINCTLY UNDERSTOOD AND AGREED THAT THIS INSTRUMENT DOES NOT CONSTITUTE A BINDING AGREEMENT OR IMPOSE ANY OBLIGATION ON CONRAIL OR ITS SUCCESSORS OR ASSIGNS OR ITS AGENTS, UNLESS AND UNTIL CONRAIL'S ASSISTANT VICE PRESIDENT REAL ESTATE OR HIS DULY AUTHORIZED REPRESENTATIVE, AS AUTHORIZED BY CONRAIL'S SYSTEM REAL ESTATE OFFICE, GIVES WRITTEN NOTIFICATION TO PURCHASER TO THE EFFECT THAT THIS TRANSACTION HAS RECEIVED THE NECESSARY APPROVAL AND AUTORIZATION [sic] OF CONRAIL'S SENIOR MANAGEMENT/OR BOARD OF DIRECTORS AND THAT CONRAIL IS LEGALLY BOUND.

7. Conrail never supplied the Vitales with the notice expressly required by Article 29 of the agreement.

8. As expressed previously, in addition to this express approval requirement, several terms in the agreement were indefinite and required further negotiation and resolution by the parties before a final contract could exist and the Closing could take place. For example, the parties could not agree on the scope of insurance coverage and increased limits under Article 15, the cost of track improvements to be borne under Article 4(B), the purchaser-requested deletion of the Article 18 purchaser obligation to fund the relocation of existing drainage ditches, the purchaser-requested deletion of Schedule A (the description of the property to be conveyed, the building construction plans, and the location of the support columns),

and modification of Section C, with regard to language in Articles 10(A) and (C) respecting reimbursement to be made or costs to be borne by purchasers.

9. Similarly, the agreement contained a host of conditions that called for satisfaction before the Closing. Among these prerequisites were requirements that the respondents obtain necessary government permits and authorizations. The Vitales have not procured the required governmental authorizations and upon information and belief, this is one reason for their continued requests for contract extensions, as discussed in detail below.

10. In or about 1988, the Vitales proposed several modifications to the agreement that were ultimately rejected by Conrail. A copy of this proposed Modification Agreement is attached as Exhibit B and incorporated by reference.

11. Specifically, in paragraph 6 of the proposed 1988 Modification Agreement, the respondents sought to eliminate the stringent approval requirements set forth in Article 29 of the original agreement. Proposed paragraph 6 stated:

The execution of this letter by Conrail constitutes the written notification to Purchaser required under Paragraph 29 of the Agreement.

As noted above, Conrail did not accept this proposed modification or the conclusion it sought to establish. Thus, it was clear in 1988 that the approval requirements set forth in the 1986 agreement remained to be satisfied. In the years that have elapsed, that condition was never satisfied.

12. Notwithstanding Conrail's refusal to accept the Vitales' proposed modifications, the parties continued to discuss and negotiate the indefinite terms of the 1986 agreement. In the course of those discussions, the parties failed to agree on a new closing date because the Vitales continued to work on their plans and make permit applications and thus, were not in a position to close. Without consensus on all points and all Contract exhibits, Conrail was unwilling to agree to a new closing date.

13. More than a decade later, in approximately May of 1999, the parties entered into an Extension Agreement by which they agreed in pertinent part that "the Closing of the Title shall occur on or before August 31, 1999." A copy of this Extension Agreement is attached as Exhibit C and incorporated by reference. The Extension Agreement also provided that "[i]n all other respects, the provisions of said contract shall remain in full force and effect," thereby preserving the Article 29 approval requirements. Notably, the Extension Agreement did not indicate that the Article 29 approval had been given previously, and did not incorporate any language resembling the proposed Paragraph 6 of the unsigned Modification Agreement prepared by the Vitales in 1988, regarding the grant of the Article 29 approval through execution and delivery of this Extension Agreement.

14. In contravention of the terms of the Extension Agreement, the Closing did not occur on or before August 31, 1999. The closing of title has never occurred. Moreover, upon information and belief, it appears that the respondents took few steps to satisfy the obligations prescribed by the 1986 agreement to facilitate closing.

15. In or about July of 2000, the Vitales presented Conrail with yet another proposed Modification Agreement. A copy of this proposed Modification Agreement is attached as Exhibit D and incorporated by reference. This proposed Modification Agreement

stemmed from the Vitales' desire to again extend the date for the Closing. In response to the Vitales' proposal, Conrail indicated that it would not sign a time extension until all items being discussed for contract modification had been agreed upon.

16. In or about August of 2000, the parties again met to discuss the contractual points that remained open and potential modifications to be made to the agreement. Among the proposed modifications was a proposal by the respondents to delete Article 29 from the agreement. A copy of the notes from this meeting (prepared by the Vitales) is attached as Exhibit E and incorporated by reference.

17. More than a year later, on or about October 27, 2001, the parties met, once again, to discuss the status of the proposed property disposition. A copy of the minutes of this meeting (again prepared by the Vitales) and the accompanying Modification Agreement Status document are attached as Exhibit F and incorporated by reference. The minutes of this meeting and status report again confirm and highlight the several materials issues that remained unresolved.

18. Specifically, the minutes reveal that the government had contacted Conrail in connection with a possible New York State acquisition of a portion of the Property for an expansion of the Brooklyn-Queens Expressway. This turn of events affected directly the parties' ability to close on the Property, as the designated land would be altered by the government's acquisition. Most importantly, the Modification Agreement Status document indicates that the Vitales continued to seek the deletion of the Article 29 approval requirement.

19. The parties did not execute any document reflecting the terms set forth in the Modification Status Report of October, 2001, and no agreement was reached as to the open disputed issues. Likewise, upon information and belief, the respondents did not fulfill the

WHEREFORE, Conrail seeks the entry of an Order from the Court granting the petitioner the following relief pursuant to CPLR §3001:

A. Declaring that Frank and Francis Vitale failed to satisfy the requirements set forth in Article 29 of the agreement dated February 20, 1986.

B. Declaring that as a result of Frank and Francis Vitale's failure to satisfy Article 29 of the agreement dated February 20, 1986, the agreement does not constitute a binding agreement or impose any obligation on Conrail or its successors or assign or its agents.

C. Declaring that the February 20, 1986 agreement is of no force and effect.

D. Temporarily, preliminarily, and permanently enjoining the Vitales from proceeding with the arbitration demand contained in their letter of July 18, 2002, and declaring that Conrail has no obligations to take any action pursuant to or relating to the demand for arbitration pending further Order of this Court.

Dated: New York, New York
August __, 2002

McCARTER & ENGLISH, LLP
Attorneys for Petitioner
300 Park Avenue
New York, New York 10022-7402
(212) 609-6800

By: _____
DAVID A. RICHARDS
A Member of the Firm

VERIFICATION

STATE OF MARYLAND)
City) SS.:
COUNTY OF Baltimore)

Daniel Kevin Hulley being duly sworn, deposes and says:

That he is an authorized representative of the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes them to be true.

Daniel Kevin Hulley

Sworn to and subscribed to
before me this 1st day of
August __, 2002.

L. Paul F. Henderson
Notary

Exhibit I

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

**NEW YORK CENTRAL LINES, LLC, as Successor to
Consolidated Rail Corporation,**

Petitioner,

- against -

FRANK VITALE and FRANCIS VITALE,

Respondents.

Index No. 20662 / 2002

**VERIFIED ANSWER and
CROSS-PETITION TO
COMPEL ARBITRATION**

Respondents Frank Vitale and Francis Vitale ("Respondents" or the "Vitales"), by their attorneys, Sonnenschein Nath & Rosenthal, for their Verified Answer to the Verified Petition of New York Central Lines, LLC ("NY Central" or "Petitioner"), as Successor to Consolidated Rail Corporation ("Conrail"), and for their Verified Cross-Petition to Compel Arbitration, state:

1. Upon information and belief, admit the allegations of Paragraph 1, except deny knowledge or information sufficient to form a belief as to the identity of the member or members of NY Central and aver that, in connection with the transaction at issue, Petitioner has used the addresses New York Central Lines, LLC c/o CSX Real Property, Inc., 510 Thornall Street, Suite 42, Edison, New Jersey 08837 and New York Central Lines, LLC c/o CSX Real Property, Inc., 2 North Charles Street, 11th Floor, Baltimore, Maryland 21201-3814.

2. Admit the allegations of paragraphs 2 and 3.

3. Deny the allegations of Paragraph 4, except refer to the Contract (as described and defined below) for its terms, and aver:

- (a) On or about February 20, 1986, Conrail, as Seller, entered into an agreement with the Vitales, as Purchaser (as amended, the "Contract"). A copy of the Vitale's Demand for Arbitration is annexed to the Petition as **Petition Exhibit J**. The copy of the Contract is annexed to the Demand

for Arbitration as Exhibit A (and will thus be referred to as **Petition Exhibit J-A**).

- (b) Under the Contract, Conrail agreed to sell to the Vitales a seven-acre parcel of land (the "Property"), located in Woodside, Queens, New York, reserving unto Conrail an easement for a below-grade rail line which runs through the Property.
- (c) The Property is not only unimproved (except for the below-grade rail line), but had been left by Conrail (and is now left by NY Central, as its successor) in a deteriorated condition. The Property is strewn with garbage, and is both an eyesore and a hazard to the community of Woodside.
- (d) The Vitales intended, and continue to intend, to develop the Property principally with a residential building or buildings whose structure would span the rail line, so that the rail line could continue to operate (in accordance with the easement) underneath the building's structure. The Property was and is unique and valuable; nowhere in the vicinity of the Property is there a comparable site available for development
- (e) The Contract set the purchase price at \$900,000. The Vitales made a \$90,000 deposit towards the purchase price.
- (f) The Contract contemplated that the closing would take place within 18 months, but did not make time of the essence.
- (g) The Contract contained all of the material terms, including without limitation:

- (i) Contrary to Petitioner's allegation that the parties had not agreed upon the size and dimensions of the Property, Schedule A to the Contract identified the Property, which includes three parcels, by the Tax Map numbers of the three parcels: Parcel 1 - Block 1282, Lot 1; Parcel 2 - Block 1303, Lot 1; and Parcel 3 - Block 1312, Lot 1, as well as by reference to specific plans prepared by A. F. Salkowitz, Architect, dated May 15, 1979, and also stated the size of the three parcels.
- (ii) Contrary to Petitioner's allegation that the parties had not agreed upon the terms of a construction contract that would allow continued rail operations during construction, a copy of the construction contract is annexed to the Contract as Schedule C.
- (iii) Contrary to Petitioner's allegation that the parties had not yet agreed on issues such as the location of support columns, infrastructure relocation, and insurance coverage, the Contract addresses each of those issues, and sets forth the basis upon which each of those issues will be determined. In any event, the absence of a final determination on those issues does not affect the validity or enforceability of the Contract.

4. Deny the allegations of paragraph 5, except refer to the Contract for its terms, aver that the Vitales complied with all of their obligations under the Contract, and aver that, for the reasons described below, a closing has not yet taken place.

5. Deny the allegations of paragraphs 6 and 7, except admit that Article 29 of the Contract is accurately quoted in paragraph 6, and aver that:

- (a) Article 29 of the Contract provided, in part, that the Contract did not constitute a binding agreement upon Conrail unless and until "the transaction ... received the necessary approval and authorization [sic] of Conrail's senior management /or Board of Directors" and written notification of such approval was given by Conrail to the Vitales. ("the Article 29 Approval").
- (b) On or about December 4, 1986, a memorandum proposing the Article 29 Approval (the "Approval Memorandum") was prepared within Conrail, to seek the approval of Conrail's senior management, and thus make the Contract legally binding upon Conrail. A copy of the Approval Memorandum is annexed to the Demand for Arbitration as part of Exhibit B (Petition Exhibit J-B). The Approval Memorandum provided, in part:

The property proposed to be sold contains 7.03 acres of land on Conrail's New York Connecting Branch (Bay Ridge Line) between 37th Avenue and Woodside Avenue. The sale area is bounded by the Brooklyn-Queens Expressway and a residential area. Conrail will reserve the track, a 75 foot wide by 22 foot high (above the rail) easement and fiber optic rights. The purchaser proposed to build a residential complex adjacent to and above the sale area.

The necessary departments have approved this sale and the consideration being obtained represents a fair value. I recommend approval. If you concur, please forward this transaction to Mr. Crane [i.e., L. Stanley Crane, Chairman and Chief Executive Officer of Conrail].

(emphasis added).

- (c) On or about December 5, 1986, Michael D. Sims, a member of the senior management of Conrail, on behalf of Conrail, approved the Contract, by signing the Approval Memorandum:

I approve. /s/ *M D Sims* 12/5/86

- (d) On or about December 5, 1986, L. Stanley Crane, Chairman and Chief Executive Officer of Conrail (and thus a member of the senior management of Conrail), on behalf of Conrail, approved the Contract, by signing the Approval Memorandum:

I approve. /s/ *LSC*

- (e) Because the Contract was thus approved by the senior management of Conrail (indeed, by Conrail's Chairman and Chief Executive Officer), the Contract became binding upon Conrail in accordance with the terms of Article 29. All that remained to be done under Article 29 was for Conrail to advise the Vitales, in writing, that the Contract had been approved. Within a few days after Conrail's senior management approved the Contract, Robert J. Tracy ("Mr. Tracy"), Conrail's duly authorized representative, gave written notification to the Vitales that the Contract had received the necessary approval and authorization of Conrail's senior management, by handing a copy of the Approval Memorandum, with his business card attached, to Frank Vitale. Mr. Tracy had written, upon his business card attached to the memorandum, "Frank - Mr. Crane is the Chairman." By providing the actual Approval Memorandum to the Vitales, Conrail gave the notice required by Article 29 (Petition Exhibit J-B).

(f) Conrail thus became legally bound to the Contract.

6. Deny the allegations of paragraph 8, refer to the Contract for its terms, and aver that the Contract contained all of the material terms.

7. Deny the allegations of paragraph 9, refer to the Contract for its terms, and aver the Contract contemplates that both Conrail, as Seller, and the Vitales, as Purchaser, will satisfy certain conditions prior to closing.

8. Deny the allegations of paragraphs 10 and 11, except aver:

(a) Between 1986 and 2001, while always recognizing that the Contract remained valid and binding, both Conrail and the Vitales proposed various modifications to the Contract, some of which were agreed upon, and others of which were not agreed upon.

(b) The proposed 1988 Modification Agreement annexed to the Petition as **Petition Exhibit B** was one of these proposed modifications. It was signed by the Vitales, but not signed by Conrail, leaving the Contract in place as a valid and binding agreement.

(c) Paragraph 6 of the proposed 1988 Modification Agreement recited that the execution of that agreement would constitute the notice required by Article 29. In fact, as noted above, the Article 29 Approval, and notice thereof, had already been given in December 1986. The inclusion of paragraph 6 in the proposed 1988 Modification Agreement was merely intended to confirm that no further approvals either of the original Contract, or of the proposed 1988 Modification Agreement, were necessary.

9. Deny the allegations of paragraphs 12 and 13, except aver that:

- (a) Between 1986 and 1999, Conrail and the Vitales repeatedly adjourned the date of the closing pursuant to the Contract.
- (b) On or about May 28, 1999, Conrail and the Vitales executed a written agreement (the "May 1999 Modification") (Petition Exhibit J-D) further adjourning the closing to August 31, 1999. The closing had earlier been adjourned repeatedly by similar written agreements.
- (c) The May 1999 Modification recited that, except for the change in the date of closing (and a corresponding date for the return of the Vitales' down payment), *"the provisions of said contract shall remain in full force and effect."* (emphasis added). Petitioner's argument that that provision "preserv[ed] the Article 29 approval requirements" is frivolous. Conrail had approved the Contract, pursuant to Article 29, in December 1986, and had given the Vitales written notice thereof. Article 29 remained in full effect, but had been fulfilled. Indeed, if the Contract was not binding (as NY Central now belatedly contends), the May 1999 Modification would not have stated that the contract *"remains"* in full force and effect.
- (d) Neither the Contract, nor the May 1999 Modification, made the closing "time of the essence."

10. Deny the allegations of paragraph 14, except aver:

- (a) After the execution of the May 1999 Modification, NY Central succeeded to Conrail's interests under the Contract, and NY Central designated Mr. Tracy, who had been Conrail's duly authorized representative with respect to the Contract, as its duly authorized representative with respect to the Contract.

- (b) Mr. Tracy, as NY Central's duly authorized representative, met with the Vitales on July 1, 1999 and again on August 30, 1999, the day before the scheduled closing date.
 - (c) At the August 30, 1999 meeting, Mr. Tracy, on behalf of NY Central, stated that NY Central wanted to further adjourn the closing date five years, until June 2004, because, if the closing were to occur before that date, NY Central would be obliged to share the proceeds of the sale with Norfolk Southern Railway Co. The Vitales had no objection to that long an adjournment of the closing date. NY Central and the Vitales therefore agreed, based upon NY Central's request, to adjourn both the date of closing, and the date upon which Purchaser could cancel the Contract and obtain the return of its \$90,000 deposit.
 - (d) Therefore, based upon NY Central's request, the closing did not occur on August 31, 1999, and no new date for closing was set.
- 11. Deny the allegations of paragraph 15, except aver:
 - (a) Through the remainder of 1999, 2000, and 2001, NY Central and the Vitales had several meetings in further preparation for the closing of sale under the Contract.
 - (b) During these meetings, NY Central and the Vitales discussed possible modifications to the Contract, while always recognizing that the Contract remained a valid and binding Contract and that, if they did not agree upon the possible modifications, they would be obliged to proceed to the closing of sale under the terms and conditions of the Contract. During these

discussions, the proposed Modification Agreement annexed to the Petition as **Petition Exhibit D** was sent to Mr. Tracy by the Vitales.

- (c) No further agreements modifying the Contract were executed by both NY Central and the Vitales.
- (d) At no time did either NY Central or the Vitales declare the Contract to be "time of the essence."
- (e) At no time did either NY Central or the Vitales seek to declare the other Party to be in default.
- (f) At no time did either NY Central or the Vitales take the position that the other had abandoned the Contract, or that the Contract was not a valid, binding, and enforceable contract.

12. Deny the allegations of paragraph 16, except aver that:

- (a) In or about August 2000, the Vitales proposed that if a modification of the Contract were to be executed, Article 29 should be deleted because the requirements of Article 29 had already been met, and NY Central agreed.
- (b) On or about August 8, 2000, Mr. Tracy, on behalf of NY Central, sent a facsimile transmission to the Vitales (annexed hereto as **Answer Exhibit 1**), enclosing a chart prepared by Mr. Tracy captioned, "Agreement Modifications," one page of which is **Petition Exhibit E**. The chart memorialized the agreement between NY Central and the Vitales that, because the Article 29 Approval, and notice thereof, had been given over 13 years earlier, Article 29 would be deleted from the Contract.

13. Deny the allegations of paragraph 17, except aver that Mr. Tracy and the Vitales met on October 17, 2001, and that **Petition Exhibit F** is a copy of the minutes of that meeting.

14. Deny the allegations of paragraph 18, except refer to the minutes for the content, aver that New York State's proposed acquisition of a portion of the Property would not affect the ability of NY Central and the Vitales to perform under the Contract with respect to the remainder of the Property, and aver that the Vitales again proposed the deletion of Article 29 because the requirements of Article 29 had already been met, as NY Central agreed.

15. Deny the allegations of paragraph 19, except aver that NY Central and the Vitales did not execute any modification agreement, and aver that agreement was reached on all material terms relating to the transaction.

16. Deny the allegations of paragraph 20, except aver that:

- (a) On several occasions in December 2001, Mr. Tracy returned the telephone calls of the Vitales' counsel, but they never spoke.
- (b) Because of the breakdown in communications, on December 27, 2001, the Vitales sent notice (Petition Exhibit J-E) to CSX Corp., the operator for NY Central, setting a closing date. The notice did not make the closing "time of the essence." The notice also specifically noted that the closing may be subject to obtaining a release (the "Section 18 Release") under Section 18 of the Transportation Law of the State of New York ("Section 18"), and requested NY Central's cooperation in obtaining the Section 18 Release. In response, CSX Corp., as operator for NY Central, advised the Vitales that Mr. Tracy was no longer employed by CSX Corp., and that CSX Corp. could not locate Mr. Tracy's files relating to the Contract.
- (c) Respondents refer to Section 18 for its terms.
- (d) As noted above, the approval and notice under Article 29 had been given in December 1986. A request to NY Central to cooperate in obtaining the

Section 18 Release was thus entirely appropriate, and cannot be characterized as premature.

17. Deny knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 21, except upon information and belief, deny that senior corporate officers of CSX Real Property, Inc. were unfamiliar with the circumstances surrounding the Contract.

18. Deny the allegations of paragraph 22, except admit that the Vitales' counsel received the April 11, 2002 letter annexed to the Petition as Petition Exhibit H.

19. Deny the allegations of paragraph 23, except admit that the Vitales' counsel received the May 24, 2002 letter annexed to the Petition as Petition Exhibit I, and aver that Petitioner, in the May 24, 2002 letter, purported to claim Respondent's \$90,000 down payment as a forfeiture by operation of Articles 3(D) and 3(E) of the Contract and paragraphs 1 and 3 of the May 1999 Modification, and Petitioner thus admitted that the Contract had become, and was, binding.

20. Admit the allegations of paragraph 24.

21. Deny the allegations of paragraph 25, except refer to the Demand for Arbitration for its contents.

22. Deny the allegations of paragraph 26.

23. Deny the allegations of paragraph 27, except aver that:

(a) There exists a real controversy over the rights, duties and obligations of the parties to one another.

(b) That controversy, pursuant to the terms of the Contract, is subject to arbitration.

(c) NY Central, as successor to Conrail, is bound by the Contract, including the agreement to arbitrate.

(d) Petitioner will sustain no injury if the arbitration is not stayed, because Petitioner is bound by the agreement to arbitrate.

CROSS-PETITION TO COMPEL ARBITRATION

24. Respondents repeat the allegations and averments of paragraphs 1 through 23 hereof.

25. Article 20 of the Contract provides:

If any dispute shall arise under the terms of this Agreement with the exception of the attached Schedules A, B, C, it shall be determined by Arbitration. Either party may demand such arbitration by notice to the other party setting forth the point or points in dispute and the name and address of the person appointed by it to act as arbitrator. Within ten (10) days after such notice is given, the party to whom it is given shall give the party demanding arbitration a notice setting forth the name and address of the arbitrator selected by it and any additional point or points in dispute to be determined by arbitration. Within ten (10) days thereafter the two arbitrators thus named shall select a third and notify both parties of such selection. In case the party upon whom demand for arbitration is made fails within the said ten (10) days to select an arbitrator, then the single arbitrator selected by the party demanding arbitration shall act. In case the two arbitrators selected aforesaid fail within the time limit to select a third, then either party may, after ten (10) days' notice to the other, apply to any Judge of the United States court of general original jurisdiction for the District of New York or to any New York Court of appropriate jurisdiction for the selection of the third arbitrator. All the arbitrators selected shall be competent persons having no substantial interest in the matter in controversy. The arbitrator or arbitrators so selected shall, within ten (10) days after selection, designate a time not less than ten (10) days nor more than thirty (30) days thereafter, and a convenient place in the City of New York for a hearing, immediately notifying both parties thereof. The arbitrators shall meet at the time and place thus designated and the parties may then and there appear and offer evidence bearing upon the matters in controversy, and within thirty (30) days after the conclusion of such hearing the arbitrators shall render their decision in writing. The decision of the arbitrators or of a majority

of them or of the sole arbitrator if there shall be but one, shall be final and conclusive upon the parties and each party shall abide by the same. Each party shall pay the fee of the arbitrator named by it and one-half of all other expenses of such arbitration, including, but not limited to, the fee of the third arbitrator, but counsel and witness fees of the parties shall not be included.

26. There is a dispute between NY Central and the Vitales under the Contract.

27. The dispute is subject to arbitration pursuant to Article 20 of the Contract.

28. On July 24, 2002, the Vitales duly served upon NY Central, by Certified Mail, Return Receipt Requested, a Demand for Arbitration and Appointment of Arbitrator, a copy of which is annexed to the Petition as **Petition Exhibit J**, and is incorporated herein by reference. Such Demand for Arbitration and Appointment of Arbitrator was mailed, by Certified Mail, Return Receipt Requested, on July 24, 2002. Copies of the Certified Mail receipts and the returned postcards acknowledging receipt are annexed hereto as **Answer Exhibit 2**. A courtesy copy of the Demand for Arbitration and Appointment of Arbitrator was hand delivered to counsel for NY Central on July 24, 2002.

29. In the Demand for Arbitration and Appointment of Arbitrator, the Vitales duly appointed, to act as Arbitrator:

Ivan W. Moskowitz, Esq. ("Mr. Moskowitz")
Mandel Resnik Kaiser Moskowitz & Greenstein, P.C.
220 East 42nd Street
New York, New York 10017
(212) 573-0000
Fax: (212) 573-0067

30. In the Demand for Arbitration and Appointment of Arbitrator, the Vitales gave notice to NY Central that:

In accordance with said Article 20 of the Contract, Seller [i.e., NY Central] may, if it so elects, serve a notice setting forth the name and address of the person it designates as its Arbitrator, and any additional points in dispute to be determined by arbitration, within 10 (ten) days from the date of the mailing of this notice, in

accordance with Section 21(B) of the Contract. Within 10 (ten) days thereafter, the two arbitrators thus named shall select a third arbitrator and notify both parties of such selection. Pursuant to Article 20 of the Contract, if Seller fails to select an arbitrator within ten (10) days from the date of mailing of this notice, then the above-named arbitrator selected by Purchaser shall act as the sole arbitrator in this proceeding.

31. In the Demand for Arbitration and Appointment of Arbitrator, the Vitales further gave notice to NY Central, pursuant to CPLR § 7503(c):

PLEASE TAKE FURTHER NOTICE that, pursuant to Section 7503(c) of the Civil Practice Law and Rules of the State of New York, unless you apply to stay the arbitration within twenty (20) days after service of this Demand for Arbitration, you shall thereafter be precluded from objecting that a valid agreement was made or has not been complied with or from asserting in court the bar of a limitation of time. An application to stay arbitration must be made within twenty (20) days after the service of the demand for arbitration or shall be precluded.

32. Because the Demand for Arbitration and Designation of Arbitrator was mailed on July 24, 2002, the 10 day period provided in Article 20 expired on Monday, August 5, 2002 (because the tenth day, August 3, 2002, was a Saturday).

33. NY Central did not designate a second arbitrator by August 5, 2002, the end of the time period set by the Contract. Instead, on August 5, 2002, NY Central filed an unsigned proposed Order to Show Cause and Petition in this Court in this proceeding, and requested that the arbitration be stayed. However, no Order to Show Cause was entered on that date, and no stay extending NY Central's time to designate a second arbitrator was entered on that date.

34. In accordance with Article 20 of the Contract, Mr. Moskowitz was thus duly designated as the sole arbitrator to resolve the disputes between the parties.

35. Pursuant to his designation as arbitrator, on August 16, 2002, Mr. Moskowitz duly executed his Oath as arbitrator, and duly noticed the arbitration hearing to be held on September 12, 2002.

36. Later in the day on August 16, 2002, counsel for NY Central advised counsel for the Vitales that it had received, that afternoon, an Order to Show Cause which had been entered on August 14, 2002, setting a hearing in this Proceeding, and staying the arbitration pending the hearing.

37. NY Central has taken the position that the disputes set forth in the Demand for Arbitration and Appointment of Arbitrator are not subject to arbitration, and has refused to participate in the arbitration, on the grounds that the Contract is not binding even though the Article 29 Approval, and notice thereof, was duly given in December 1986, and even though, by claiming the forfeiture of the Vitale's \$90,000 down payment, Petitioner admits that the Contract is binding.

38. NY Central is obliged, under the Contract, to participate in the arbitration and, whether or not it does so, will be bound (as will the Vitales) by any arbitration award awarded by Mr. Moskowitz, subject only to the provisions of Article 75 relating to confirmation of arbitration awards.

39. The Vitales are entitled to an Order vacating the temporary restraining order, denying the stay, directing that the arbitration of the disputes set forth in the Demand for Arbitration and Appointment of Arbitrator be resumed before Mr. Moskowitz as the sole arbitrator, and compelling NY Central to arbitrate such disputes in such manner.

WHEREFORE, Respondents Frank Vitale and Francis Vitale respectfully request that an Order be entered:

- (a) Denying the stay and all other relief sought in the Petition in all respects, and vacating the temporary restraining order; and
- (b) Directing the resumption of the arbitration of the disputes set forth in the Demand for Arbitration and Appointment of Arbitrator before Ivan W.

**Moskowitz, Esq., as the sole arbitrator, pursuant to the Contract; and
compelling Petitioner NY Central to arbitrate such disputes in such
manner; and**

- (c) Awarding Respondents such other and further relief as the Court deems
just and proper.**

**Dated: New York, New York
September 13, 2002**

SONNENSCHN NATH & ROSENTHAL

By:

Richard M. Zuckerman

Jacob Inwald

30 Rockefeller Plaza - 29th Floor

New York, New York 10112

(212) 398-5213 (Mr. Zuckerman)

(212) 398-5215 (Mr. Inwald)

Fax: (212) 398-5245 (Not for Service)

Attorneys for Respondents

Frank Vitale and Francis Vitale

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RUBINBAUM LLP → 17184234882

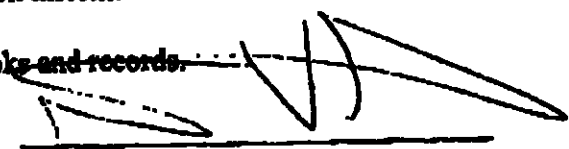
NO.627 D01

VERIFICATION

STATE OF NEW YORK)
)
COUNTY OF QUEENS) SS.:

FRANCIS VITALE, being duly sworn, states:

I am one of the Respondents in this matter. I have read the foregoing VERIFIED ANSWER and CROSS-PETITION TO COMPEL ARBITRATION, which are true to my own knowledge, except as to matters alleged upon information and belief. As to those matters, I believe them to be true, based upon my books and records.


Francis Vitale

Sworn to before me this
13 day of September 2002

NANCY C. GENTILE
Notary Public, State of New York
No. 01GE4832488
Qualified in Queens County
Commission Expires January 31, 2006

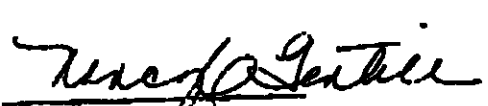

Notary Public

Exhibit J

Short Form Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART IA Part 18
Justice

NEW YORK CENTRAL LINES, LLC, etc.

- against -

FRANK VITALE, et al.

Index
Number 20662 2002

Motion
Date January 8 2003

Motion
Cal. Number 39

The following papers numbered 1 to 6 read on this application by petitioner to stay arbitration between the parties and for a declaration that a certain agreement between petitioner's predecessor and respondents is of no force and effect, and a cross motion by respondents to compel arbitration.

QUEENS COUNTY CLERK
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Papers
Numbered

Order to Show Cause - Petition - Exhibits	1-4
Answer - Cross Motion - Exhibits	5-6

Upon the foregoing papers it is ordered and adjudged that the application and the cross motion are determined as follows:

This is a special proceeding to stay arbitration commenced pursuant to CPLR 7502(a) and 7503(b). Insofar as petitioner also seeks a declaratory judgment, such relief is not available in this special proceeding, but must be the subject of a plenary action. (CPLR 3001; see, Matter of Liberty Mut. Ins. Co. v Tetteh, 277 AD2d 239; Matter of General Re Corp. v Foxe, 177 Misc 2d 867, 880-881.)

The court's function in this proceeding is to determine whether a valid agreement to arbitrate was made and complied with and whether the dispute comes within the scope of the arbitration agreement. (CPLR 7503[a], [b]; see, Sisters of St. John the Baptist, Providence Rest Convent v Phillips R. Geraghty Constr., Inc., 67 NY2d 997; Matter of County of Rockland [Primiano Constr. Co.], 51 NY2d 1.) If these questions are answered in the affirmative, judicial inquiry ends and issues concerning the substantive validity of the contract, including whether there has been a meeting of the minds, are left for the arbitrator. (See, Matter of Cassone, 63 NY2d 756; Matter of Weinrott v Carr,

32 NY2d 190; Matter of Intelligent Bank Mgt. [East Coast Financial Corp.], 207 AD2d 760.)

The current dispute between the parties is clearly within the scope of the broad arbitration provision in the agreement at issue between petitioner's predecessor, Consolidated Rail Corporation ("Conrail"), and respondents. The agreement provides for the arbitration of "any dispute [which] shall arise under the terms of this Agreement" with certain exceptions not pertinent here. Furthermore, petitioner's contention that a valid agreement to arbitrate was not made is without merit. Although paragraph 29 of the contract did provide that the instrument would not constitute a binding agreement unless Conrail gave written notification to respondents that the transaction had been approved by its senior management or board of directors, this requirement was substantially satisfied when Conrail, through its representative, provided respondents with a copy of an initialed Conrail memorandum in which Conrail's chairman, as well as another member of Conrail's senior management, approved the transaction. Since the court finds that the parties made a valid agreement to arbitrate, whether the contract as a whole is enforceable is a matter for the arbitrator. (See, Wagner Acquisition Corp. v Giove, 250 AD2d 857.)

Accordingly, the petition is denied, the cross motion is granted, and the proceeding is dismissed. The parties are directed to proceed to arbitration.

Dated: March 25, 2003

Duane E. Hart
J.S.C.

Glenn D. Amico
Clerk

QUEENS COUNTY CLERK
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Exhibit K

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

**NEW YORK CENTRAL LINES, LLC, as Successor to
Consolidated Rail Corporation,**

Petitioner,

- against -

FRANK VITALE and FRANCIS VITALE,

Respondents.

Index No. 20662 / 2002

**STIPULATION REGARDING
ARBITRATION**

WHEREAS on or about July 18, 2002, Frank Vitale and Francis Vitale (the "Vitales"), duly served a Demand for Arbitration upon New York Central Lines, LLC ("NY Central"), as Successor to Consolidated Rail Corporation ("Conrail"), with respect to certain disputes arising under an Agreement dated February 20, 1986 between Conrail, as Seller, and Frank Vitale and Francis Vitale, as Purchaser, as Amended (as amended, the "Contract"), with respect to certain real property in Woodside, Queens, New York (the "Property"); and

WHEREAS on or about August 5, 2002, NY Central filed its petition in this proceeding to stay arbitration, and the Vitales thereafter filed a cross-petition to compel arbitration; and

WHEREAS on or about April 11, 2003, the Court entered its Order denying the petition to stay arbitration and granting the cross-petition to compel arbitration; and

WHEREAS the Vitales and NY Central (collectively, the "Parties") wish to enter into this Stipulation to appoint an Arbitrator and otherwise to facilitate the Arbitration;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned counsel for the Parties:

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DIARIED And K Ford
BY And K Ford

The Parties hereby jointly appoint Professor Robert M. Zinman, St. John's University
School of Law, 8000 Utopia Parkway, Jamaica, New York 11439, as the sole Arbitrator to hear
and determine all issues in the arbitration.

Dated: New York, New York
March 25, 2004

MCCARTER & ENGLISH, LLP

By: 

David Alan Richards
William D. Wallach
245 Park Avenue, 27th Floor
New York, NY 10167
(212) 609-6800
Fax: (212) 609-6921

Attorneys for New York Central Lines, LLC

SCHWENSCHEIN NATH & ROSENTHAL LLP

By: 

Richard M. Zuckerman
Jacob Erwald
1221 Avenue of the Americas
New York, New York 10020
(212) 768-6700
Fax: (212) 768-6800

*Attorneys for
Frank Vitale and Francis Vitale*

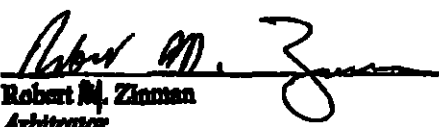
**ACCEPTANCE OF APPOINTMENT AND
OATH OF ARBITRATOR**

STATE OF NEW YORK }
COUNTY OF QUEENS }

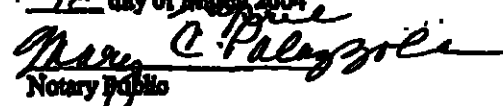
SS.:

ROBERT W. ZINMAN, being duly sworn, states:

I hereby accept the appointment as Arbitrator. I swear that I will hear and decide this
controversy faithfully and fairly.


Robert M. Zinman
Arbitrator

Sworn to before me this
1st day of March, 2004


Mary C. Palazzola
Notary Public

MARY C. PALAZZOLA
NOTARY PUBLIC, State of New York
No. 01PAS032674
Qualified in Queens County
Commission Expires Dec. 27, 2006

NOTICE OF ENTRY

Sir: Please note under this the within is a (certified) true copy of A JUDGMENT duly entered in the office of the clerk of the within named court on April 11, 2003.

Dated: April 24, 2003

Yours, etc.

SONENSCHEIN NATH & ROSENTHAL LLP

By:

Name:

Attorneys for

Office and Post Office Address

1221 AVENUE OF THE AMERICAS

New York, NY 10020

212.768.6700

The David A. Richards, Esq., McGowan & English, LLP

Attorney(s) for Petitioner

NOTICE OF SETTLEMENT

Sir: Please note under this the within is a (certified) true copy of a JUDGMENT duly entered in the office of the clerk of the within named court on April 11, 2003.

Yours, etc.

SONENSCHEIN NATH & ROSENTHAL LLP

By:

Name:

Attorney(s) for

Office and Post Office Address

1221 AVENUE OF THE AMERICAS

New York, NY 10020

212.768.6700

To:

Attorney(s) for

SONENSCHEIN NATH & ROSENTHAL LLP

ATTORNEYS FOR THE STATE OF NEW YORK

Office and Post Office Address

1221 AVENUE OF THE AMERICAS

New York, NY 10020

212.768.6700

SONENSCHEIN NATH & ROSENTHAL LLP

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1221 AVENUE OF THE AMERICAS

New York, NY 10020

212.768.6700

SONENSCHEIN NATH & ROSENTHAL LLP

ATTORNEYS FOR THE STATE OF NEW YORK

Office and Post Office Address

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Exhibit L

PRIVATE ARBITRATION AWARD

Frank Vitale and Francis Vitale

Claimants

Vs

**Prof. Robert M. Zinman
Arbitrator**

**New York Central Lines, LLC, as Successor
To Consolidated Rail Corporation,**

Respondent

This dispute involves an agreement (the "Agreement") dated February 20, 1986 between Consolidated Rail Corporation ("Conrail"), seller, and Frank Vitale and Francis Vitale ("Vitale"), purchaser, for the sale and purchase of seven acres of real property in the Borough of Queens, New York City. Although "New York Central Lines," now CSX, succeeded to the interest of Conrail on June 1, 1999, the seller under the Agreement will be referred to herein as "Conrail" except where specific reference is being made to CSX.).

This dispute involves, primarily, two questions: (1) was a binding contract for the sale of real estate entered into between Conrail and Vitale? (2) If the Agreement is or became a binding contract, is that contract still effective? It is my conclusion that the answer is yes to both questions.

1. *Was the Agreement a binding contract for the sale of the real estate?*

When executed, the Agreement did not constitute a binding contract. While the Agreement had all the essential elements of a contract – parties, agreement to sell and to buy, description of the property, terms of the sale and signatures of the parties,¹ Article 29 constituted a condition precedent to the effectiveness and enforceability of the Agreement. It provided that:

this instrument does not constitute a binding agreement or impose any obligation on Conrail . . . unless and until. Conrail's Assistant Vice President Real Estate or his duly authorized representative, as authorized by Conrail's System Real Estate Office, gives written notification to Purchaser to the effect that this transaction has received the necessary approval and authorization of Conrail's Senior Management/or Board of Directors and that Conrail is legally bound.

On or about December, 1996, Robert J. Tracy, Assistant Manager Real Estate, in Conrail's Real Estate Department, who had been charged with the duty to, and did conduct the contract negotiations with Vitale for most of the period prior to that date (but without authority to approve the Agreement under Article 29), delivered to Vitale a memorandum from John V. Jaeger, then Assistant Vice President Real Estate,² dated December 4, 1986, to Michael D. Sims, Vice President of Information Systems, describing the Agreement, stating that the "necessary departments have approved this sale," and that the sale price represented a "fair value." The memorandum recommended approval. Below the memorandum are the words "I approve" signed by Mr. Sims on December 5, 1986, and below that, "I approve" initialed by Mr. L. Stanley Crane, Conrail's Chairman of the Board on December 5, 1986. Attached to the memorandum was a delegation of authority dated December 5, 1986, from Mr. Crane to the Vice President-Information Systems and Administrative Services and to the Assistant Vice

¹ See MILTON R. FRIEDMAN, CONTRACTS AND CONVEYANCES OF REAL PROPERTY, § 1.2(b) (5th ed.1991).

² The titles are obtained from the testimony of Robert Ryan, June 16, 2004, Transcript at 290.

President – Real estate, or either of them, to execute all documents necessary or desirable to effectuate the transfer. Stapled to the memorandum was Mr. Tracy's card on which he wrote: "Frank [apparently Frank Vitale]—Mr. Crane is the Chairman."

Conrail's argument that Article 29 was not complied with is based primarily on the fact that Mr. Tracy was not authorized to "give written notification to Purchaser" of the approval. Indeed, Conrail claims that it was the internal policy of that organization not to communicate its approval until the closing was about to take place,³ which would leave Conrail free to back out of any agreement at any time prior or almost prior to the closing. Assuming this was the policy of Conrail, the argument appears, at best, to be an untenable one for Conrail to make, given the fact that Mr. Tracy was the person authorized to deal with Vitale and the memorandum he delivered clearly showed that approval was given by the appropriate officers of Conrail, and no evidence was offered to indicate that any such policy of Conrail was communicated to Vitale, who incurred substantial expenses after the approval was received. At worst, the argument, if successful, would allow Conrail to commit virtual fraud (which I am sure it would not intentionally do) on prospective purchasers by submitting evidence of approval and then claiming that the messenger did not have authority to make the delivery.

In the instant case, we have an unusual situation, since after Mr. Tracy's departure, Conrail maintains that all of Tracy's files, and all of Conrail's files in connection with this transaction – at its home office, engineer's office and at the offices of anyone else who dealt with the proposed sale – had disappeared. Mr. Robert Ryan, Director of Real Estate and Conrail's only witness, attributed this to New York Central Lines succeeding Conrail, downsizing, and the cleaning out of Tracy's office. He agreed

³ Testimony of Robert Ryan, June 16, 2004, Transcript at 293.

that "there probably are" e-mail messages at least in more recent times, but he stated that "I don't have any of those."⁴ No witness was called who had been involved in the details of the transaction.⁵ As a result, even if we were to accept Conrail's argument, we do not have any evidence that the policy described by Mr. Ryan was applied in this case, or if it were, that Vitale had been informed of the policy, or even that Mr. Tracy had not been authorized in this case to deliver the approvals.⁶ It would seem reasonable for the Vitale's to have assumed that Tracy had at least the authority to deliver the approvals given by the appropriate officers of Conrail.⁷

Conrail contends, however, that the Agreement contains other conditions precedent to the binding nature of the Agreement. First, Conrail claims that Vitale failed to obtain approval of the transaction by the Department of Transportation as required by Article 34 of the Agreement. That article states, in part:

Purchaser with the cooperation of Conrail, shall act to obtain the approval if required of this entire Agreement and the conveyance proposed thereunder by the New York Public Utility Commissioner and/or the New York Department of Transportation and any other approvals of other agencies that may be required. Purchaser shall be granted a period of one-hundred twenty (120) days to obtain said approval or such longer time as

⁴ *Id.* at 317-18.

⁵ Mr. Ryan testified that his involvement with the transaction was "not much other than signing the extension letters periodically to brief me on the situation periodically and especially at the time of signing these extensions." He also stated that he was only "very vaguely" familiar with the rail line that is at issue in the project. Testimony of Robert Ryan, June 16, 2004 at 288-89.

⁶ In prior litigation in this case on the issue of whether this arbitration should be held, the court stated that Mr. Tracy's delivery of these documents constituted substantial compliance with Article 29. There is disagreement between the parties as to whether this determination became the law of this case. I need not consider whether that statement precluded a different determination in this arbitration, since my conclusion is consistent with the determination of the court.

⁷ I do not agree with Conrail's argument (Transcript August 4, 2004 at 49) that even if the approval of the transaction required by Article 29 were given and delivered, the requirements of Article 29 would still not have been met because the approvals and delegation of authority to execute documents did not specifically state that "Conrail is legally bound." I believe that Conrail became legally bound upon delivery of the approval. While the use of the conjunctive creates an ambiguity, I would construe that ambiguity in favor of Vitale, not only because the contract was drafted by Conrail (Transcript June 15, 2004, Testimony of Frank Vitale, at 56) but also because the conjunctive would not alert a reasonable person to the fact that the delivered approvals would not be sufficient to meet the Article 29 requirements unless it contained the above quoted words.

it reasonably deems necessary to effectuate said transaction. In the event Purchaser cannot obtain said approval, it shall have the option to terminate this Agreement in accordance with the express terms hereof, and be entitled to the return of all sums paid on account of the purchase price.

Conrail is, of course, correct that without a Department of Transportation release, to the extent required by Section 18 of the Transportation Law, the closing cannot be held. Thus the release may be a precondition to closing. However it is not a precondition to the contract being considered binding on the parties. Nothing in Article 34 is similar to the requirements of Article 29 in making the obtaining of the governmental approvals a condition to the effectiveness of the Agreement.

While Conrail points out that Article 34 gave Vitale 120 days to obtain the approval, Article 34 also provided that Vitale shall have such extended time as Vitale "reasonably deems necessary to effectuate the transaction." Although the obtaining of approval within the required periods may simply be a precondition to the ability of Vitale to exercise the option to terminate the Agreement and become entitled to a return of the deposit as provided by that section, Conrail may be contending that the failure to obtain the approval within the 120 day period constituted a default on the part of Vitale under the Agreement. Such a possibility will be discussed in connection with the discussion in part 2 of this Opinion dealing with whether the Agreement is still effective between the parties. For the purposes of this part, I find that the Agreement is effective notwithstanding the failure to obtain Department of Transportation approval.

No other of the provisions cited by Conrail in my opinion could constitute a precondition to the Agreement's effectiveness. I am somewhat bewildered by the gratuitous statement in the letter of December 11, 1987 from Vitale's previous counsel, Brown & Wood, to the effect that the Article 29 approval had not been obtained from

Conrail.⁸ A later letter from Brown & Wood dated April 16, 1990, clearly stated that the consent had been given⁹ and that statement does not appear to have been controverted by Conrail at the time. It is unclear why the first statement was made, and it may be, as suggested by present counsel to Vitale,¹⁰ that it was simply a mistake. Whether a mistake or not, the statement was incorrect and I so find. I conclude that the Agreement became a binding contract as of the date of the delivery of the Conrail approvals by Mr. Tracy.

2. Is the Agreement Still Effective?

It is, at best, unusual for a contract of sale of real estate to be extended as long as this one. However parties to the contract have the power to extend a contract for sale by agreement and either party has a right to obtain an adjournment before time is made the essence of the contract.¹¹ In the instant case, the contract was extended numerous times by written agreement, the last written extension running out at the end of August 1999. Thereafter there were no written extensions of the agreement. On December 27, 2001, Vitale sent notice to Conrail on December 27, 2001 setting April 1, 2002 as the closing date. On April 11, 2002, Conrail stated that it did not know of any agreement requiring a conveyance of the property and that it was not in a position to "progress a sale." The issue then is whether the Agreement was still effective as a contract of sale when Vitale sent the notice and Conrail replied, and whether it remains in effect as of this date.

⁸ Respondent's Exhibit 72.

⁹ Claimant's Exhibit 36.

¹⁰ Transcript August 4, 2004 at 29.

¹¹ "Although time is not generally of the essence, where the date scheduled for closing has passed, a seller may make time of the essence by giving the purchaser notice to this effect." MILTON FRIEDMAN, *CONTRACTS AND CONVEYANCES OF REAL PROPERTY*, § 12.1(c) (5th ed. 1991). No time is of the essence notice was ever sent from Conrail to Vitale.

Time is not of the essence in a contract for the sale of real estate unless the contract so provides or the contract is effectively made so by notice¹² In this case no party has made time of the essence and there is no written extension of the contract beyond August 31, 1999. Thus it is necessary to consider whether there is some evidence (i) that the parties had expressly or impliedly abandoned or otherwise terminated the contract, or (ii) that there was a default by Claimant that went to the essence of the contract, and relieved Respondent of its obligations thereunder.

At the expiration of the last written extension on August 31, 1999, Vitale contends that Conrail requested that the closing be extended for another five years, that Vitale agreed to such an extension, that, at the suggestion of Conrail's representative, Robert Tracy, the parties proceeded to negotiate an omnibus extension agreement dealing with other proposed modifications of the Agreement, and that these negotiations continued until Mr. Tracy was no longer employed by Conrail, and communications ceased. This contention is backed by Vitale's internal memoranda and drafts of proposed extension and modification agreements. Conrail does not dispute these contentions, and since, as previously discussed, all its files have disappeared, it offers no evidence to the contrary. Although Vitale did not act with alacrity, I find no evidence that Vitale intentionally surrendered or relinquished its rights under the contract. In light of this, I accept Vitale's contentions in this respect.

Given the foregoing facts, I conclude that there was no abandonment of the contract and that, by virtue of the course of dealings between the parties, both parties considered the contract effective until Conrail, in response to Vitale's letter of December 27, 2001 setting April 1, 2002 as a closing date subject to obtaining the necessary

¹² *Id.*

approval/release from the Department of Transportation, disclaimed the existence of a binding contract in its letter of April 11, 2002. Finally on May 24, 2002, D. Kevin Hurley, Assistant Vice President of Conrail (CSX), in a letter to Vitale, for the first time maintained that Conrail had not given the Article 29 notice; that Vitale failed to close the title within the Agreement's time limits; that Vitale failed to send a timely notice to reclaim its deposit, which it contended was consequently forfeited; that the parties had failed to agree on "material terms" of the Agreement; and that Conrail thereby "abandoned negotiations under the non-binding Contract." I conclude that notwithstanding the contentions of Mr. Hurley, the contract remained in effect.

I also disagree with the contentions of Conrail that Vitale defaulted under the terms of the agreement by not complying with its provisions. I do not believe that the contentions made by Conrail with respect to Vitale's failure to obtain financing or a title report are germane. A purchaser may acquire real property without financing or title insurance. Actually Vitale maintains that it plans to close with its own funds, and evidence has been presented to show that the description has already been reviewed by a title company.

The only precondition to closing may be the notification or release under Section 18 of the New York Transportation Law. One of the reasons for the adjournments of closing apparently stems from the indication that the Department of Transportation may not give approval with respect to all three parcels because it may take part of the property for reconstruction of the Brooklyn-Queens Expressway. Article 34 of the Agreement clearly encompasses such notification or the obtaining of such a release to the extent it is required under the law. Article 34 also requires that Vitale "act to obtain" governmental

approvals "with the cooperation of Conrail." The statute requires Conrail to give the notification and request any required release, and the Department of Transportation in its letter (with copy to Conrail) in response to Vitale's former counsel's inquiry of September 12, 1989,¹³ so stated. Furthermore, Robert Ryan, testifying on behalf of Conrail, stated that in his experience, such applications were made by Conrail.¹⁴ On the other hand it is also clear that Vitale did not pursue with vigor the cooperation of Conrail in taking the steps necessary to obtain such release. While the release may be a prerequisite to a closing, the fact that the release has not been given at this time does not appear to constitute a default on the part of either of the parties that goes to the essence of, and would terminate the Agreement. As pointed out above, the time limit in Article 34 of the Agreement appears to be for the benefit of Vitale, enabling Vitale to terminate the agreement and receive a return of its deposit if the necessary consents become unavailable. As a result, Article 34 gives Vitale the right to extend the time for a reasonable period. While Vitale has been less than aggressive in effectuating the approvals, I fail to see evidence of any demand on the part of Conrail for specific action on Vitale's part or evidence that the conduct of Vitale has been unreasonable, given the open issue of the potential Brooklyn-Queens Expressway taking.

Conrail also contends that Vitale is not prepared to close on the closing date it set, citing these open items as evidence of that. I doubt that a closing can be held on the date specified without prior release from the Department of Transportation.¹⁵ Had Conrail given notice making time of the essence, the Agreement would have terminated as of the closing date set if in fact Vitale would not have been in a position to close. In the

¹³ Clement's Exhibit 26.

¹⁴ Transcript, Testimony of Robert Ryan, June 16, 2004, at 306.

¹⁵ This is not intended as a conclusion that it is not possible to have a closing conditioned on the release.

absence of such a notice, however, I am not in a position to determine that the Agreement has been terminated.

I thus conclude that the Agreement represents a binding contract for the sale of the real estate described therein.

AWARD

1. I order specific performance of the Agreement for the agreed purchase price of \$900,000., of which \$90,000 has been paid on the signing of the Agreement.
2. I order Conrail to cooperate in obtaining any required Section 18 Release from the Department of Transportation by filing separate applications for each of the three parcels in the property. I order Vitale to cooperate with Conrail in pursuing the release. Upon receipt thereof (for one or more of the parcels in whole or in part), I order Vitale and Conrail to proceed expeditiously with the closing of title.
3. I enjoin Conrail from selling the property covered by the Agreement to any third parties in violation of the rights of Vitale under the Agreement.
4. I order the parties to pay the costs of this arbitration as provided in Article 20 of the Agreement.

AFFIRMATION

I am a member of the Bar of the State of New York, and ma the Arbitrator in this matter. I hereby affirm under penalty of perjury that the foregoing is my Award.

A handwritten signature in black ink, appearing to read "Robert M. Zinman", written over a horizontal line.

Robert M. Zinman
Professor of Law
September 28, 2004

Exhibit M



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

January 12, 2005

Mr. William Wallach, Esq.
SX Transportation, Inc.
245 Park Avenue – 27th Floor
New York, N.Y. 10167

Mr. Richard M. Zucherman, Esq.
Sonnenschein Nath & Rosenthal LLP
1221 Avenue of the Americas
New York, New York 10020

Re: Request for Release of Preferential Rights
Block 1282, Lot 110, Block 1303, Lot 1 and
Block 1312, Lot 1
Borough of Queens, City of New York
N.Y.S.D.O.T. CSX – File #17

Dear Messrs. William Wallach and Richard Zucherman

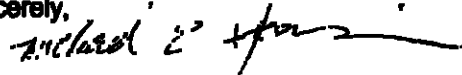
I am writing in response to your December 24, 2004 letter requesting a determination if Section 18 of the Transportation Law and the State's preferential right of acquisition applies to the subject three lots.

Upon review, the referenced three lots are not determined to be abandoned for railroad transportation purposes. In accordance with the provisions of Section 18 of New York State Department of Transportation Law, the subject lots are exempt from preferential rights of acquisition, and no release is required at this time. However, such determination shall not preclude the undertaking of a subsequent investigation concerning the same properties should a subsequent sale or abandonment for non-transportation related purposes occur. Any future intent in this regard would require a Department review at that time.

Mr. William Wallach, Esq
Mr. Richard M. Zucherman, Esq
January 10, 2005
Page 2 Of 2

Please feel free to contact me if you have any questions. I can be reached at 457-4763, or e-mail me at myounsi@dot.state.ny.us

Sincerely,

A handwritten signature in black ink, appearing to read "Mike Younsi", with a long horizontal flourish extending to the right.

Mike Younsi
Economic Development Section

cc: D. Currey, Regional Director, Region 11
R. Seymour, Real Estate Division, POD - 41, MC 0320

Exhibit N

..

**NOTICE OF MOTION TO CONFIRM
ARBITRATION AWARD AND TO ENTER
JUDGMENT THEREON DATED MAY 10,**

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

**NEW YORK CENTRAL LINES, LLC, as Successor to
Consolidated Rail Corporation,**

Petitioner,

- against -

FRANK VITALE and FRANCIS VITALE,

Respondents.

**Index No. 20662 / 2002
(Assigned to Hon. Duane A. Hart,
J.S.C.)**

**NOTICE OF MOTION TO CONFIRM
ARBITRATION AWARD AND TO
ENTER JUDGMENT THEREON**

PLEASE TAKE NOTICE, that upon the annexed affirmation of Jacob Inwald dated May 10, 2005, the exhibits annexed hereto, and upon all the prior pleadings and proceedings heretofore had herein, the undersigned will move this Court at L.A.S. Part 18, Court Room 41, at the Courthouse located at 88-11 Sutphin Boulevard, Jamaica, New York, 11435 on June 1, 2005 at 9:30 AM, or as soon thereafter as counsel may be heard, for an Order:

- (a) Pursuant to CPLR §§ 7502(a) (iii), 7510, and 7514 confirming the Arbitration Award dated September 28, 2004 (the "Award") and entering Judgment thereon; and
- (b) Granting such other and further relief as this Court deems just, proper and equitable under the circumstances.

PLEASE TAKE FURTHER NOTICE that the real property affected by the Award and the judgment to be entered upon its confirmation in this special proceeding is situated in the Borough of Queens in the City and State of New York, and is more particularly described as follows:

ALL that certain plot, piece or parcel of land, situated, lying and being in the Borough of Queens, City and State of New York, bounded and described as follows:

All of those three (3) certain parcels of land along Conrail's right of way in the Town of Woodside, Borough and County of Queens, City and State of New York, known as and by the tax descriptions on the Tax Map of the Borough and County of Queens as Parcel 1 Block 1282 Lot 1, Parcel 2 Block 1303 Lot 1 and Parcel 3 Block 1312 Lot 1, as shown on plan prepared by A.H. Salkowitz, Architect, dated May 15, 1979 and designated thereon as "Parcel 1", which consists of approximately 87,400 square feet situated north of Roosevelt Avenue and known as Tax Block 1282 Lot 1, and as "Parcel 2", which consists of approximately 77,000 square feet located between 41st Avenue and Roosevelt Avenue and known as Tax Block 1303 Lot 1, and as "Parcel 3", which consists of approximately 140,125 square feet lying south of 41st Avenue and known as Tax Block 1312 Lot 1.

Said real property is known as the following Blocks and Lots on the Tax Map of the City of New York:

<u>Block</u>	<u>Lot</u>
1282	110
1303	1
1312	1

PLEASE TAKE FURTHER NOTICE that answering papers, if any, are required to be served at least seven days before the return date of this motion, in accordance with the provisions of CPLR 2214(b).

Dated: New York, New York
May 10, 2005

SONNENSCHEN NATH & ROSENTHAL LLP

By: 
Richard M. Zuckerman
Jacob Inwald
1221 Avenue of the Americas
New York, New York 10020
(212) 768-6700
Fax: (212) 768-6800

*Attorneys for Respondents
Frank Vitale and Francis Vitale*

TO: David Alan Richards, Esq.
William Wallach, Esq.
McCARTER & ENGLISH, LLP
245 Park Avenue, 27th Floor
New York, NY 10167
(212) 609-6800
Fax: (212) 609-6921

*Attorneys for Petitioner New York Central Lines, LLC,
as Successor to Consolidated Rail Corporation*

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

**NEW YORK CENTRAL LINES, LLC, as Successor to
Consolidated Rail Corporation,**

Petitioner,

- against -

FRANK VITALE and FRANCIS VITALE,

Respondents.

**Index No. 20662 / 2002
(Assigned to Hon. Duane A.
Hart, J.S.C.)**

**AFFIRMATION OF JACOB
INWALD IN SUPPORT OF
MOTION TO CONFIRM
ARBITRATION AWARD AND FOR
JUDGMENT THEREON**

Jacob Inwald, an attorney admitted to practice law in the State of New York, hereby affirms, under penalty of perjury, as follows:

1. I am an attorney admitted to practice law in the State of New York and am of counsel to Sonnenschein Nath & Rosenthal LLP, attorneys for Respondents Frank Vitale and Francis Vitale ("Respondents" or the "Vitales"). I submit this affirmation, which is based on my own personal knowledge, in support of the Vitales' motion to confirm an arbitration award and for entry of judgment thereon.

2. On or about July 18, 2002, the Vitales duly served a Demand for Arbitration (Exhibit A) upon New York Central Lines, LLC ("NY Central"), as Successor to Consolidated Rail Corporation ("Conrail"), seeking specific performance, declaratory and injunctive relief with respect to certain disputes arising under an Agreement dated February 20, 1986 between Conrail, as Seller, and the Vitales, as Purchaser, as Amended (the "Agreement") (Exhibit B), for the sale of certain real property in Woodside, Queens, New York (the "Property"). The Agreement included a broad arbitration clause (Agreement, ¶ 20, Exhibit B).

3. The Property which is the subject of the Agreement and which is affected by this special proceeding is situated in the Borough of Queens in the City and State of New York, and is more particularly described as follows:

ALL that certain plot, piece or parcel of land, situated, lying and being in the Borough of Queens, City and State of New York, bounded and described as follows:

All of those three (3) certain parcels of land along Conrail's right of way in the Town of Woodside, Borough and County of Queens, City and State of New York, known as and by the tax descriptions on the Tax Map of the Borough and County of Queens as Parcel 1 Block 1282 Lot 1, Parcel 2 Block 1303 Lot 1 and Parcel 3 Block 1312 Lot 1, as shown on plan prepared by A.H. Salkowitz, Architect, dated May 15, 1979 and designated thereon as "Parcel 1", which consists of approximately 87,400 square feet situated north of Roosevelt Avenue and known as Tax Block 1282 Lot 1, and as "Parcel 2", which consists of approximately 77,000 square feet located between 41st Avenue and Roosevelt Avenue and known as Tax Block 1303 Lot 1, and as "Parcel 3:", which consists of approximately 140,125 square feet lying south of 41st Avenue and known as Tax Block 1312 Lot 1.

Said real property is known as the following Blocks and Lots on the Tax Map of the City of New York:

<u>Block</u>	<u>Lot</u>
1282	110
1303	1
1312	1

4. On or about August 5, 2002, NY Central commenced this special proceeding with the filing of its petition to stay the foregoing arbitration. The Vitales opposed NY Central's application to stay the arbitration, and filed a cross-petition to compel arbitration in accordance with Paragraph 20 of the Agreement.

5. On or about November 6, 2002, the Vitales filed a Notice of Pendency with respect to the Property with the Queens County Clerk, a copy of which was served upon counsel for NY Central on or about November 1, 2002 (Exhibit C).

5. On or about April 11, 2003, this Court entered its Order and Judgment denying NY Central's petition to stay arbitration, granting the Vitales' cross-petition to compel arbitration, and directing the Parties to proceed to arbitration. Notice of entry of this Court's Order and Judgment was duly served upon counsel for NY Central on or about April 24, 2003 (Judgment with Notice of Entry, Exhibit D).

6. On or about March 25, 2004, the Vitales and NY Central (collectively, the "Parties") entered into a Stipulation Regarding Arbitration (Exhibit E) pursuant to which the Parties jointly appointed Professor Robert M. Zinman of St. John's University School of Law (the "Arbitrator") as the sole Arbitrator to hear and determine all issues in the arbitration.

7. The Arbitrator duly swore an Acceptance of Appointment and Oath of Arbitrator on or about April 1, 2004 (Exhibit E).

8. The Parties entered into a Stipulation Regarding Issues to be Arbitrated and Schedule and Procedures for Arbitration on or about March 25, 2004 (Exhibit F).

9. The Arbitrator duly held arbitration hearings on June 15-16, 2004, during which the Parties duly appeared, submitted their proofs and made their arguments.

10. The Arbitrator heard closing arguments, following submission of closing briefs, on August 4, 2004. The hearings were closed upon the Arbitrator's receipt of the transcript of closing arguments on or about September 1, 2004.

11. The Arbitrator, having fully considered all the evidence and arguments of counsel, duly issued an award in writing, signed and acknowledged by the Arbitrator, and delivered said award to the Parties, on or about September 28, 2004 (the "Award") (Exhibit G).

12. The Arbitrator's Award determined that the "Agreement represents a binding contract for the sale of the real estate described therein" and issued an award as follows:

1. I order specific performance of the Agreement for the agreed purchase price of \$900,000., of which \$90,000 has been paid on the signing of the Agreement.

2. I order Conrail [NY Central] to cooperate in obtaining any required Section 18 Release from the Department of Transportation by filing separate applications for each of the three parcels in the property. I order Vitale to cooperate with Conrail in pursuing the release. Upon receipt thereof (for one or more of the parcels in whole or in part), I order Vitale and Conrail to proceed expeditiously with the closing of title.

3. I enjoin Conrail [NY Central] from selling the property covered by the Agreement to any third parties in violation of the rights of the Vitales under the Agreement.

4. I order the parties to pay the costs of this arbitration as provided in Article 20 of the Agreement.

13. The Award has not been vacated or modified and the time for NY Central to make an application to vacate or modify the Award pursuant to CPLR § 7511 has expired.

14. This motion to confirm the Award is brought within one year after the delivery of the Award to the Parties and is therefore timely pursuant to CPLR § 7510.

15. In an effort to avoid unnecessary motion practice in connection with this matter, I contacted counsel for Petitioner by email (Exhibit H) to seek consent to confirmation of the Award by means of a stipulated Order and Judgment, but was advised by email on May 9, 2005 (Exhibit I) that Petitioner would not so consent, necessitating this application pursuant to CPLR §§ 7502(a), 7510 and 7514 for confirmation and entry of judgment on the Award.

WHEREFORE, I respectfully request that the Court, in accordance with CPLR §§ 7510 and 7514, confirm the Award and enter judgment herein on the Award, in favor of Respondents, as follows:

(a) New York Central Lines, LLC ("NY Central"), as Successor to Consolidated Rail Corporation ("Conrail"), and their successors, be and hereby are ordered to specifically perform the Agreement dated February 20, 1986 between Conrail, as Seller, and Frank Vitale and Francis Vitale, as Purchaser, as Amended (as amended, the "Agreement"), with respect to certain real property in Woodside, Queens, New York (the "Property") for the agreed purchase price of \$900,000, of which \$90,000 has been paid on the signing of the Agreement.

(b) NY Central, Conrail, and their successors are ordered to cooperate in obtaining any required Section 18 Release from the New York State Department of Transportation by filing separate applications for each of the three parcels in the Property. The Vitales are ordered to cooperate with NY Central, Conrail, and their successors in pursuing the Release. Upon receipt thereof (for one or more of the parcels, in whole or in part), NY Central, Conrail, and their successors are ordered to proceed expeditiously with the closing of title.

(c) NY Central, Conrail, and their successors are enjoined from selling the Property covered by the Agreement to any third parties in violation of the rights of the Vitales under the Agreement.

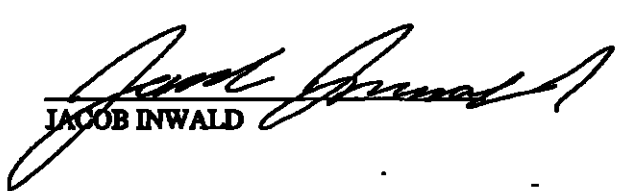
(d) The Parties are ordered to pay the costs of the Arbitration as provided in Article 20 of the Agreement.

I further respectfully request that such Order and Judgment direct the Clerk to record the Order and Judgment against the following Property in the County of Queens in the City of New York:

Block 1282, Lot 110

Block 1303, Lot 1

Block 1312, Lot 1.


JACOB INWALD

Dated: New York, New York
May 10, 2005

Exhibit O

**AFFIRMATION OF WILLIAM D.
WALLACH IN OPPOSITION TO MOTION
TO CONFIRM ARBITRATION AWARD
AND JUDGMENT THEREON DATED MAY**

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

NEW YORK CENTRAL LINES, LLC, as Successor to Consolidated Rail Corporation, Petitioner, -against- FRANK VITALE and FRANCIS VITALE, Respondents.	: : : : : : : :	INDEX NO. 20662/02 AFFIRMATION OF WILLIAM D. WALLACH IN OPPOSITION TO MOTION TO CONFIRM ARBITRATION AWARD AND JUDGMENT THEREON
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WILLIAM D. WALLACH, an attorney admitted to practice before this Court in connection with this matter, hereby affirms, under penalty of perjury, as follows.

1. I am a member of McCarter & English, LLP, counsel for Petitioner New York Central Lines, LLC ("NY Central"). I submit this Affirmation, which is based on my own personal knowledge and review of official documents, in Opposition to the Vitales' Motion to Confirm Arbitration Award and for Entry of Judgment thereon. For the reasons discussed below, it is respectfully submitted that the Motion should be denied because subsequent condemnation actions by the New York State Department of Transportation ("NYSDOT") have rendered it largely moot.

2. Specifically, the proposed Order and Judgment should not be entered because paragraphs 2(a) and (c) have been rendered moot by the NYSDOT's action. Moreover, paragraphs 2(b) and (d) have been performed previously and therefore no relief is required.

3. With respect to the Affirmation submitted on behalf of the Respondents, NY Central does not take issue with the background facts and related documents referenced in paragraphs 2 through 15. It should be noted, however, that with respect to Block 1282, the

parties, and the underlying 1986 Agreement, referred to the operative Lot as Lot 1, not Lot 110 as appears in the Affirmation. It is our understanding that there is no Lot 1 and therefore Lot 110 is in fact the proper designation. This is significant for the reasons that follow.

4. The real property at issue here is as follows:

<u>Block</u>	<u>Lot</u>
1282	110
1303	1
1312	1

However, Blocks 1282 and 1303 are no longer owned by NY Central as a result of governmental action by NYSDOT.

5. Throughout the long history of the 1986 Agreement and these proceedings, the parties have been aware of NYSDOT's intent to further widen the Brooklyn-Queens Expressway ("BQE") and that such expansion might impact the subject parcels. That possibility is now a reality.

6. Pursuant to a Notice of Appropriation, dated January 25, 2005, NYSDOT took title to the property, easement or right, to Lot 1282, Lot 110 and Block 1303, Lot 1. These takings are reflected in the documents and maps attached hereto at Tab 1. These takings directly affect two of the three parcels intended to be conveyed under the 1986 Agreement and most likely prevent the contemplated construction over the railroad line.

7. The actions by NYSDOT, specifically the vesting of title prior to a closing on the parcels at issue, secures the seller's rights to the proceeds of that condemnation. This result is confirmed in New York General Obligations Law, Section 5-1311. In pertinent part, this statute

provides as follows when the parties' contract has no specific language on the disposition of an award in the event of condemnation occurring between contract and closing:

1. Any contract for the purchase and sale or exchange of realty shall be interpreted, unless the contract expressly provides otherwise, as including an agreement that the parties shall have the following rights and duties:
 - a. When neither the legal title nor the possession of the subject matter of the contract has been transferred to the purchaser: (1) if all or a material part thereof is destroyed without fault of the purchaser or is taken by eminent domain, the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that he has paid; but nothing herein contained shall be deemed to deprive the vendor of any right to recover damages against the purchaser for any breach of contract by the purchaser prior to the destruction or taking....

8. Construing the predecessor statute to Section 5-1311, the Second Department in The County of Westchester v. P. & M. Materials Corporation, 248 N.Y.S. 2d 539 (2nd Dept. 1964) held that "in the case of a total or material taking in eminent domain, because the vendor [seller] cannot be assumed to have taken on the full risk of loss and to have granted the purchaser the prospect of all the gain, and because unlike the case of physical destruction, the vendor cannot insure himself against a contract loss occasioned by the taking, we may impute to the contracting parties the intention that, in such a case, the vendor is relegated to the condemnation award which will give him the fair market value of his property." Thus, the vendee out of possession was entitled to recover no more than the amount of its deposit and was not entitled to recover for alleged expenses incurred for architectural plans and related items for buildings which could not be constructed as a result of the taking.

9. As noted above and in the attached documents, the actions by NYSDOT taking two of the three parcels here and the vesting of title in NYSDOT cannot be undone. To enforce the Arbitration Award under these circumstances would therefore be an act in violation of law

and thus against public policy. See Meyers v. Kinney Motors, Inc., 301 N.Y.S. 2d 171, 172-73 (1st Dept. 1969); Mantel v. Unipak Aviation Corp., 284 N.Y.S. 2d 640, 641 (2nd Dept. 1967).

10. For all these reasons, NY Central respectfully submits that the Motion to Confirm Arbitration Award should be denied.



WILLIAM D. WALLACH

DATED: May 25, 2005

MEI5051009.1

Exhibit P

**ORDER/JUDGMENT CONFIRMING
ARBITRATION AWARD ENTERED
OCTOBER 19, 2005 BY HONORABLE
DUANE A. HART**

At IAS Part 18 of the Supreme Court of the
State of New York held in and for the County
of Queens at the Courthouse located at 88-11
Sutphin Blvd., Jamaica, Queens, New York,
on the 18 day of OCT, 2005.

PRESENT:

HONORABLE DUANE A. HART, J.S.C.

**NEW YORK CENTRAL LINES, LLC, as Successor to
Consolidated Rail Corporation,**

Petitioner,

- against -

FRANK VITALE and FRANCIS VITALE,

Respondents.

Index No. 20662 / 2002

**ORDER/
JUDGMENT CONFIRMING
ARBITRATION AWARD**

**QUEENS COUNTY
BLOCK 1282, LOT 110
BLOCK 1303, LOT 1
BLOCK 1312, LOT 1**

2005 OCT 19 AM 11:37

**QUEENS COUNTY CLERK
FILED RECORDED**

Respondents, having applied for confirmation of the award in arbitration herein, signed and acknowledged on the 28th day of September 2004, a copy of which is annexed hereto, whereby Respondents were granted specific performance of a contract to purchase the above-referenced real property.

Now, on reading and filing (i) the Notice of Motion to Confirm Arbitration Award and to Enter Judgment Thereon dated May 10, 2005 and the Affirmation of Jacob Inwald dated May 10, 2005 and the exhibits thereto, all submitted in support of said Motion, (ii) the Affirmation of William D. Wallach dated May 25, 2005 and the exhibits thereto, all submitted in opposition to said Motion, and (iii) the Reply Affirmation of Richard M. Zuckerman dated June 16, 2005 and the exhibits thereto, all submitted in further support of said Motion, and upon all the pleadings and proceedings herein; and it appearing: (a) that Frank Vitale and Francis Vitale (the "Vitales"), duly served a Demand for Arbitration upon New York Central Lines, LLC ("NY Central"), as Successor

to Consolidated Rail Corporation ("Conrail"), seeking specific performance, declaratory and injunctive relief with respect to certain disputes arising under an Agreement dated February 20, 1986 between Conrail, as Seller, and Frank Vitale and Francis Vitale, as Purchaser, as Amended (as amended, the "Agreement") for the sale of certain real property in Woodside, Queens, New York (the "Property"); (b) that on or about August 5, 2002, NY Central filed its petition in this proceeding to stay arbitration, and the Vitales thereafter filed a cross-petition to compel arbitration; (c) that a Notice of Pendency was duly served by the Vitales with respect to the Property and filed with the Queens County Clerk on or about November 6, 2002; (d) that on or about April 11, 2003, this Court entered its Order and Judgment denying NY Central's petition to stay arbitration and granting the Vitales' cross-petition to compel arbitration, notice of entry of which was duly served upon counsel for NY Central on or about April 24, 2003; (e) that the Vitales and NY Central (collectively, the "Parties") entered into a Stipulation Regarding Arbitration on or about March 25, 2004 pursuant to which the Parties jointly appointed professor Robert M. Zinman as the sole Arbitrator to hear and determine all issues in the arbitration (the "Arbitrator"); (f) that the Arbitrator duly swore an Acceptance of Appointment and Oath of Arbitrator on or about April 1, 2004; (g) that the Parties entered into a Stipulation Regarding Issues to be Arbitrated and Schedule and Procedures for Arbitration on or about March 25, 2004; (h) that the Arbitrator duly held arbitration hearings on June 15-16, 2004, during which the Parties duly appeared, submitted their proofs and made their arguments; (i) that the Arbitrator heard closing arguments, following submission of closing briefs, on August 4, 2004, and that the arbitration hearings were closed on or about September 1, 2004 upon the receipt of the transcript of closing arguments; (j) that the Arbitrator, having fully considered all the evidence and arguments of counsel, duly issued an award in writing, signed and acknowledged by the Arbitrator, and delivered said award to the Parties, on or about September 28, 2004; (k) that the Award has not been vacated or modified and the time for NY Central to make an application to vacate or modify the Award pursuant to CPLR § 7511 has expired; (l) that the motion to confirm the

Award was timely made within one year of delivery of the award pursuant to CPLR § 7510, and the ~~and due deliberation having been held~~
Court having heard all the arguments of counsel in support of and in opposition to the motion, and
having issued its Memorandum Decision dated September 12, 2005 granting the application to
confirm the Award,

and ADJUDGED, of Robert
NOW, THEREFORE, IT IS HEREBY ORDERED, that the application to confirm the Award, the
M. Zinman, dated September 28, 2004,
terms of which are incorporated herein by this reference, be and the same hereby is granted, and it is
further

and
ORDERED, ADJUDGED ~~AND DECREED~~, that

(a) New York Central Lines, LLC ("NY Central"), as Successor to Consolidated Rail
Corporation ("Conrail"), and their successors, be and hereby are ordered to specifically perform the
Agreement dated February 20, 1986 between Conrail, as Seller, and Frank Vitale and Francis Vitale,
as Purchaser, as Amended (as amended, the "Agreement"), with respect to certain real property in
Woodside, Queens, New York (the "Property") for the agreed purchase price of \$900,000, of which
\$90,000 has been paid on the signing of the Agreement. The Property which is the subject of this
Judgment is situated in the Borough of Queens in the City and State of New York, and is more
particularly described as follows:

ALL that certain plot, piece or parcel of land, situated, lying and
being in the Borough of Queens, City and State of New York,
bounded and described as follows:

All of those three (3) certain parcels of land along Conrail's right of
way in the Town of Woodside, Borough and County of Queens, City
and State of New York, known as and by the tax descriptions on the
Tax Map of the Borough and County of Queens as Parcel 1 Block
1282 Lot 110, Parcel 2 Block 1303 Lot 1 and Parcel 3 Block 1312 Lot
1, as shown on plan prepared by A.H. Salkowitz, Architect, dated
May 15, 1979 and designated thereon as "Parcel 1", which consists of
approximately 87,400 square feet situated north of Roosevelt Avenue
and known as Tax Block 1282 Lot 110, and as "Parcel 2", which
consists of approximately 77,000 square feet located between 41st
Avenue and Roosevelt Avenue and known as Tax Block 1303 Lot 1,
and as "Parcel 3", which consists of approximately 140,125 square
feet lying south of 41st Avenue and known as Tax Block 1312 Lot 1.

Said real property is known as the following Blocks and Lots on the Tax Map of the City of New York:

<u>Block</u>	<u>Lot</u>
1282	110
1303	1
1312	1

(b) NY Central, Conrail, and their successors are ordered to proceed expeditiously with the closing of title, conveying title to the Vitales or their assignees.

(c) NY Central, Conrail, and their successors are enjoined from selling the Property covered by the Agreement to any third parties in violation of the rights of the Vitales under the Agreement.

3. JUDGMENT is hereby entered upon the Award in accordance with CPLR § 7514, in favor of the Respondents Frank Vitale and Francis Vitale, whose address is 27-17 216th Street, Bayside, New York 11360, and against Petitioner New York Central Lines, LLC as Successor to Consolidated Rail Corporation, and its successors and assigns, which maintains addresses at: c/o CSX Real Property, Inc., 2 North Charles Street, 11th Floor, Baltimore, MD 21201-3814; c/o CSX Real Property, Inc., 510 Thornall Street, Suite 42, Edison, NJ 08837; and c/o CSX Transportation, 500 Water Street, Jacksonville, FL 32202.

4. The Clerk be and hereby is directed to record this Judgment Confirming the Arbitration Award against the following Property in the County of Queens in the City of New York:

Block 1282, Lot 110

Block 1303, Lot 1

Block 1312, Lot 1.

5. This conveyance of the Property by NY Central pursuant to the Award and pursuant to this Judgment, shall be limited to those portions of the Property that have not been

- 4 -

Q
5C { taken in fee by the State of New York and shall be subject to the easements taken by the State on or about January 18, 2005, without prejudice to the right of the Vitales to seek an abatement of a portion of the purchase price, or an equitable share of the condemnation awards relating thereto, in further proceedings before the Arbitrator, and without prejudice to the right of NY Central to oppose any such application for abatement or equitable share of the condemnation awards by the Vitales in such further proceedings before the Arbitrator

Dated: Queens, New York
October 19, 2005

ENTER,

Duane A. Hart
Duane A. Hart, J.S.C.

a
Entered *19th* day of *OCTOBER*, 2005.
Judgment signed on this

Gloria E. Amos
Clerk

QUEENS COUNTY CLERK
FILED
RECORDED
2005 OCT 19 AM 11:37

PRIVATE ARBITRATION AWARD

Frank Vitale and Francis Vitale

Claimants

Vs

**Prof. Robert M. Zinman
Arbitrator**

**New York Central Lines, LLC, as Successor
To Consolidated Rail Corporation,**

Respondent

This dispute involves an agreement (the "Agreement") dated February 20, 1986 between Consolidated Rail Corporation ("Conrail"), seller, and Frank Vitale and Francis Vitale ("Vitale"), purchaser, for the sale and purchase of seven acres of real property in the Borough of Queens, New York City. Although "New York Central Lines," now CSX, succeeded to the interest of Conrail on June 1, 1999, the seller under the Agreement will be referred to herein as "Conrail" except where specific reference is being made to CSX).

This dispute involves, primarily, two questions: (1) was a binding contract for the sale of real estate entered into between Conrail and Vitale? (2) If the Agreement is or became a binding contract, is that contract still effective? It is my conclusion that the answer is yes to both questions.

1. *Was the Agreement a binding contract for the sale of the real estate?*

When executed, the Agreement did not constitute a binding contract. While the Agreement had all the essential elements of a contract -- parties, agreement to sell and to buy, description of the property, terms of the sale and signatures of the parties,¹ Article 29 constituted a condition precedent to the effectiveness and enforceability of the Agreement. It provided that:

this instrument does not constitute a binding agreement or impose any obligation on Conrail . . . unless and until Conrail's Assistant Vice President Real Estate or his duly authorized representative, as authorized by Conrail's System Real Estate Office, gives written notification to Purchaser to the effect that this transaction has received the necessary approval and authorization of Conrail's Senior Management/or Board of Directors and that Conrail is legally bound.

On or about December, 1996, Robert J. Tracy, Assistant Manager Real Estate, in Conrail's Real Estate Department, who had been charged with the duty to, and did conduct the contract negotiations with Vitale for most of the period prior to that date (but without authority to approve the Agreement under Article 29), delivered to Vitale a memorandum from John V. Jaeger, then Assistant Vice President Real Estate,² dated December 4, 1986, to Michael D. Sims, Vice President of Information Systems, describing the Agreement, stating that the "necessary departments have approved this sale," and that the sale price represented a "fair value." The memorandum recommended approval. Below the memorandum are the words "I approve" signed by Mr. Sims on December 5, 1986, and below that, "I approve" initialed by Mr. L. Stanley Crane, Conrail's Chairman of the Board on December 5, 1986. Attached to the memorandum was a delegation of authority dated December 5, 1986, from Mr. Crane to the Vice President-Information Systems and Administrative Services and to the Assistant Vice

¹ See MILTON R. FRIEDMAN, CONTRACTS AND CONVEYANCES OF REAL PROPERTY, § 1.2(b) (5th ed. 1991).

² The titles are obtained from the testimony of Robert Ryan, June 16, 2004, Transcript at 290.

President -- Real estate, or either of them, to execute all documents necessary or desirable to effectuate the transfer. Stapled to the memorandum was Mr. Tracy's card on which he wrote "Frank [apparently Frank Vitale]—Mr. Crane is the Chairman."

Conrail's argument that Article 29 was not complied with is based primarily on the fact that Mr. Tracy was not authorized to "give written notification to Purchaser" of the approval. Indeed, Conrail claims that it was the internal policy of that organization not to communicate its approval until the closing was about to take place,³ which would leave Conrail free to back out of any agreement at any time prior or almost prior to the closing. Assuming this was the policy of Conrail, the argument appears, at best, to be an untenable one for Conrail to make, given the fact that Mr. Tracy was the person authorized to deal with Vitale and the memorandum he delivered clearly showed that approval was given by the appropriate officers of Conrail, and no evidence was offered to indicate that any such policy of Conrail was communicated to Vitale, who incurred substantial expenses after the approval was received. At worst, the argument, if successful, would allow Conrail to commit virtual fraud (which I am sure it would not intentionally do) on prospective purchasers by submitting evidence of approval and then claiming that the messenger did not have authority to make the delivery.

In the instant case, we have an unusual situation, since after Mr. Tracy's departure, Conrail maintains that all of Tracy's files, and all of Conrail's files in connection with this transaction -- at its home office, engineer's office and at the offices of anyone else who dealt with the proposed sale -- had disappeared. Mr. Robert Ryan, Director of Real Estate and Conrail's only witness, attributed this to New York Central Lines succeeding Conrail, downsizing, and the cleaning out of Tracy's office. He agreed

³ Testimony of Robert Ryan, June 16, 2004, Transcript at 295.

that "there probably are" e-mail messages at least in more recent times, but he stated that "I don't have any of those."⁴ No witness was called who had been involved in the details of the transaction.⁵ As a result, even if we were to accept Conrail's argument, we do not have any evidence that the policy described by Mr. Ryan was applied in this case, or if it were, that Vitale had been informed of the policy, or even that Mr. Tracy had not been authorized in this case to deliver the approvals.⁶ It would seem reasonable for the Vitale's to have assumed that Tracy had at least the authority to deliver the approvals given by the appropriate officers of Conrail.⁷

Conrail contends, however, that the Agreement contains other conditions precedent to the binding nature of the Agreement. First, Conrail claims that Vitale failed to obtain approval of the transaction by the Department of Transportation as required by Article 34 of the Agreement. That article states, in part:

Purchaser with the cooperation of Conrail, shall act to obtain the approval if required of this entire Agreement and the conveyance proposed thereunder by the New York Public Utility Commissioner and/or the New York Department of Transportation and any other approvals of other agencies that may be required. Purchaser shall be granted a period of one-hundred twenty (120) days to obtain said approval or such longer time as

⁴ *Id.* at 317-18

⁵ Mr. Ryan testified that his involvement with the transaction was "not much other than signing the extension letters periodically to brief me on the situation periodically and especially at the time of signing these extensions." He also stated that he was only "very vaguely" familiar with the rail line that is at issue in the project. Testimony of Robert Ryan, June 16, 2004 at 288-89.

⁶ In prior litigation in this case on the issue of whether this arbitration should be held, the court stated that Mr. Tracy's delivery of these documents constituted substantial compliance with Article 29. There is disagreement between the parties as to whether this determination became the law of this case. I need not consider whether that statement precluded a different determination in this arbitration, since my conclusion is consistent with the determination of the court.

⁷ I do not agree with Conrail's argument (Transcript August 4, 2004 at 49) that even if the approval of the transaction required by Article 29 were given and delivered, the requirements of Article 29 would still not have been met because the approvals and delegation of authority to execute documents did not specifically state that "Conrail is legally bound." I believe that Conrail became legally bound upon delivery of the approval. While the use of the conjunctive creates an ambiguity, I would construe that ambiguity in favor of Vitale, not only because the contract was drafted by Conrail (Transcript June 15, 2004, Testimony of Frank Vitale, at 56) but also because the conjunctive would not alert a reasonable person to the fact that the delivered approvals would not be sufficient to meet the Article 29 requirements unless it contained the above quoted words. .

it reasonably deems necessary to effectuate said transaction. In the event Purchaser cannot obtain said approval, it shall have the option to terminate this Agreement in accordance with the express terms hereof, and be entitled to the return of all sums paid on account of the purchase price

Conrail is, of course, correct that without a Department of Transportation release, to the extent required by Section 18 of the Transportation Law, the closing cannot be held. Thus the release may be a precondition to closing. However it is not a precondition to the contract being considered binding on the parties. Nothing in Article 34 is similar to the requirements of Article 29 in making the obtaining of the governmental approvals a condition to the effectiveness of the Agreement

While Conrail points out that Article 34 gave Vitale 120 days to obtain the approval, Article 34 also provided that Vitale shall have such extended time as Vitale "reasonably deems necessary to effectuate the transaction." Although the obtaining of approval within the required periods may simply be a precondition to the ability of Vitale to exercise the option to terminate the Agreement and become entitled to a return of the deposit as provided by that section, Conrail may be contending that the failure to obtain the approval within the 120 day period constituted a default on the part of Vitale under the Agreement. Such a possibility will be discussed in connection with the discussion in part 2 of this Opinion dealing with whether the Agreement is still effective between the parties. For the purposes of this part, I find that the Agreement is effective notwithstanding the failure to obtain Department of Transportation approval.

No other of the provisions cited by Conrail in my opinion could constitute a precondition to the Agreement's effectiveness. I am somewhat bewildered by the gratuitous statement in the letter of December 11, 1987 from Vitale's previous counsel, Brown & Wood, to the effect that the Article 29 approval had not been obtained from

Conrail.⁸ A later letter from Brown & Wood dated April 16, 1990, clearly stated that the consent had been given⁹ and that statement does not appear to have been controverted by Conrail at the time. It is unclear why the first statement was made, and it may be, as suggested by present counsel to Vitale,¹⁰ that it was simply a mistake. Whether a mistake or not, the statement was incorrect and I so find. I conclude that the Agreement became a binding contract as of the date of the delivery of the Conrail approvals by Mr. Tracy.

2 Is the Agreement Still Effective?

It is, at best, unusual for a contract of sale of real estate to be extended as long as this one. However parties to the contract have the power to extend a contract for sale by agreement and either party has a right to obtain an adjournment before time is made the essence of the contract.¹¹ In the instant case, the contract was extended numerous times by written agreement, the last written extension running out at the end of August 1999. Thereafter there were no written extensions of the agreement. On December 27, 2001, Vitale sent notice to Conrail on December 27, 2001 setting April 1, 2002 as the closing date. On April 11, 2002, Conrail stated that it did not know of any agreement requiring a conveyance of the property and that it was not in a position to "progress a sale." The issue then is whether the Agreement was still effective as a contract of sale when Vitale sent the notice and Conrail replied, and whether it remains in effect as of this date.

⁸ Respondent's Exhibit 72.

⁹ Claimant's Exhibit 36.

¹⁰ Transcript August 4, 2004 at 29.

¹¹ "Although time is not generally of the essence, where the date scheduled for closing has passed, a seller may make time of the essence by giving the purchaser notice to this effect." MILTON FRIEDMAN, *CONTRACTS AND CONVEYANCES OF REAL PROPERTY*, § 12.1(c) (5th ed. 1991). No time is of the essence notice was ever sent from Conrail to Vitale.

Time is not of the essence in a contract for the sale of real estate unless the contract so provides or the contract is effectively made so by notice¹² In this case no party has made time of the essence and there is no written extension of the contract beyond August 31, 1999. Thus it is necessary to consider whether there is some evidence (i) that the parties had expressly or impliedly abandoned or otherwise terminated the contract, or (ii) that there was a default by Claimant that went to the essence of the contract, and relieved Respondent of its obligations thereunder.

At the expiration of the last written extension on August 31, 1999, Vitale contends that Conrail requested that the closing be extended for another five years, that Vitale agreed to such an extension, that, at the suggestion of Conrail's representative, Robert Tracy, the parties proceeded to negotiate an omnibus extension agreement dealing with other proposed modifications of the Agreement, and that these negotiations continued until Mr. Tracy was no longer employed by Conrail, and communications ceased. This contention is backed by Vitale's internal memoranda and drafts of proposed extension and modification agreements. Conrail does not dispute these contentions, and since, as previously discussed, all its files have disappeared, it offers no evidence to the contrary. Although Vitale did not act with alacrity, I find no evidence that Vitale intentionally surrendered or relinquished its rights under the contract. In light of this, I accept Vitale's contentions in this respect.

Given the foregoing facts, I conclude that there was no abandonment of the contract and that, by virtue of the course of dealings between the parties, both parties considered the contract effective until Conrail, in response to Vitale's letter of December 27, 2001 setting April 1, 2002 as a closing date subject to obtaining the necessary

¹² *Id.*

approval/release from the Department of Transportation, disclaimed the existence of a binding contract in its letter of April 11, 2002. Finally on May 24, 2002, D. Kevin Hurley, Assistant Vice President of Conrail (CSX), in a letter to Vitale, for the first time maintained that Conrail had not given the Article 29 notice; that Vitale failed to close the title within the Agreement's time limits; that Vitale failed to send a timely notice to reclaim its deposit, which it contended was consequently forfeited; that the parties had failed to agree on "material terms" of the Agreement; and that Conrail thereby "abandoned negotiations under the non-binding Contract." I conclude that notwithstanding the contentions of Mr. Hurley, the contract remained in effect.

I also disagree with the contentions of Conrail that Vitale defaulted under the terms of the agreement by not complying with its provisions. I do not believe that the contentions made by Conrail with respect to Vitale's failure to obtain financing or a title report are germane. A purchaser may acquire real property without financing or title insurance. Actually Vitale maintains that it plans to close with its own funds, and evidence has been presented to show that the description has already been reviewed by a title company.

The only precondition to closing may be the notification or release under Section 18 of the New York Transportation Law. One of the reasons for the adjournments of closing apparently stems from the indication that the Department of Transportation may not give approval with respect to all three parcels because it may take part of the property for reconstruction of the Brooklyn-Queens Expressway. Article 34 of the Agreement clearly encompasses such notification or the obtaining of such a release to the extent it is required under the law. Article 34 also requires that Vitale "act to obtain" governmental

approvals "with the cooperation of Conrail." The statute requires Conrail to give the notification and request any required release, and the Department of Transportation in its letter (with copy to Conrail) in response to Vitale's former counsel's inquiry of September 12, 1989,¹³ so stated. Furthermore, Robert Ryan, testifying on behalf of Conrail, stated that in his experience, such applications were made by Conrail.¹⁴ On the other hand it is also clear that Vitale did not pursue with vigor the cooperation of Conrail in taking the steps necessary to obtain such release. While the release may be a prerequisite to a closing, the fact that the release has not been given at this time does not appear to constitute a default on the part of either of the parties that goes to the essence of, and would terminate the Agreement. As pointed out above, the time limit in Article 34 of the Agreement appears to be for the benefit of Vitale, enabling Vitale to terminate the agreement and receive a return of its deposit if the necessary consents become unavailable. As a result, Article 34 gives Vitale the right to extend the time for a reasonable period. While Vitale has been less than aggressive in effectuating the approvals, I fail to see evidence of any demand on the part of Conrail for specific action on Vitale's part or evidence that the conduct of Vitale has been unreasonable, given the open issue of the potential Brooklyn-Queens Expressway taking.

Conrail also contends that Vitale is not prepared to close on the closing date it set, citing these open items as evidence of that. I doubt that a closing can be held on the date specified without prior release from the Department of Transportation.¹⁵ Had Conrail given notice making time of the essence, the Agreement would have terminated as of the closing date set if in fact Vitale would not have been in a position to close. In the

¹³ Chaimant's Exhibit 26.

¹⁴ Transcript, Testimony of Robert Ryan, June 16, 2004, at 306.

¹⁵ This is not intended as a conclusion that it is not possible to have a closing conditioned on the release.

absence of such a notice, however, I am not in a position to determine that the Agreement has been terminated

I thus conclude that the Agreement represents a binding contract for the sale of the real estate described therein.

AWARD

1. I order specific performance of the Agreement for the agreed purchase price of \$900,000., of which \$90,000 has been paid on the signing of the Agreement.
2. I order Conrail to cooperate in obtaining any required Section 18 Release from the Department of Transportation by filing separate applications for each of the three parcels in the property. I order Vitale to cooperate with Conrail in pursuing the release. Upon receipt thereof (for one or more of the parcels in whole or in part), I order Vitale and Conrail to proceed expeditiously with the closing of title.
3. I enjoin Conrail from selling the property covered by the Agreement to any third parties in violation of the rights of Vitale under the Agreement.
4. I order the parties to pay the costs of this arbitration as provided in Article 20 of the Agreement.

AFFIRMATION

Index No 2040/2002
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

NEW YORK CENTRAL LINES LLC is Defendant as
Counterclaimant and Complainant,

Plaintiff

against
FRANK VITALE and FRANCIS VITALE.

Respondent.

NOTICE OF ENTRY OF JUDGMENT CONFIRMING
ARBITRATION AWARD

SONENSCHEIN NATE & ROSENTHAL LLP

Attorneys for Respondent
1221 Avenue of the Americas
New York, NY 10020
212 368 6700

Service of a copy of the within
is hereby notified.
Dated

Attorneys for

NOTICE OF ENTRY

The Plaintiff hereby notifies the Defendant that a copy of a JUDGMENT
CONFIRMING ARBITRATION AWARD has been entered in the office of
the Clerk of the County of Queens on October 18, 2002.
Dated October 18, 2002

Yours, etc.

Represented by Sonenchein, Nate & Rosenthal, LLP

By 
David A. Richards, Esq., Attorney at Law

Attorneys for Respondents Frank Vitale and Francis Vitale

Office and Court Office Address

1221 AVENUE OF THE AMERICAS

New York, NY 10020

212 368 6700

The David A. Richards, Esq., Attorney at Law, LLP

Attorneys for Plaintiff

Exhibit Q

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D14101
G/cb

_____AD3d_____

Argued - January 18, 2007

A. GAIL PRUDENTI, P.J.
GABRIEL M. KRAUSMAN
MARK C. DILLON
WILLIAM E. McCARTHY, JJ.

2005-10964

DECISION & ORDER

In the Matter of New York Central Lines, LLC,
etc., appellant, v Frank Vitale, et al., respondents.

(Index No. 20662/02)

McCarter & English, LLP, New York, N.Y. (William D. Wallach, Newark, N.J., pro hac vice, and Matthew H. Sontz of counsel), for appellant.

Sonnenschein Nath & Rosenthal LLP, New York, N.Y. (Richard M. Zuckerman of counsel), for respondents.

In a proceeding pursuant to CPLR article 75 to permanently stay arbitration, the petitioner appeals from a judgment of the Supreme Court, Queens County (Hart, J.), entered October 19, 2005.

ORDERED that the appeal is dismissed, with costs.

The parties' agreement for the purchase and sale of real property contained a clause that "any dispute [that] shall arise . . . shall be determined by Arbitration." The judgment appealed from entered October 19, 2005, provided that specific performance of the parties' contract pursuant to an arbitration award was without prejudice to the respondents seeking in further arbitration proceedings an abatement of a portion of the purchase price, or an equitable share of a condemnation award resulting from the condemnation of a portion of the subject property by the State of New York, and without prejudice to the right of the petitioner in such proceedings to oppose any abatement or equitable sharing of the condemnation award. Since the judgment of the Supreme Court did not resolve the viability of any claims or defenses to an abatement of the purchase price

February 27, 2007

Page 1.

MATTER OF NEW YORK CENTRAL LINES, LLC v VITALE

or equitable sharing of the condemnation award, the only issue involved on this appeal, and instead merely stated that the respondents could raise, and the petitioner could oppose, such issues at a further arbitration proceeding, the petitioner is not aggrieved by the judgment appealed from (*see* CPLR 5511, *Schwartzberg v Kingsbridge Hgts. Care Ctr., Inc.*, 28 AD3d 465, 466; *420 E. Assoc v Estate of Lennon*, 225 AD2d 326).

PRUDENTI, P.J., KRAUSMAN, DILLON and McCARTHY, JJ., concur.

ENTER


James Edward Pelzer
Clerk of the Court

Exhibit R

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

**NEW YORK CENTRAL LINES, LLC, as Successor to
Consolidated Rail Corporation,**

Petitioner,

- against -

FRANK VITALE AND FRANCIS VITALE,

Respondents.

**Index No. 20662 / 2002
(Assigned to
Hon. Duane A. Hart, J.S.C.)**

**NOTICE OF MOTION TO
COMPEL RESUMPTION OF
ARBITRATION PREVIOUSLY
ORDERED BY THIS COURT, IN
ACCORDANCE WITH THE
ORDER OF THE APPELLATE
DIVISION**

PLEASE TAKE NOTICE that, upon the annexed affirmation of Richard M. Zuckerman dated September 28, 2007, the exhibits annexed thereto, and upon all the prior pleadings and proceedings herein, the undersigned will move this Court at I.A.S. Part 18, Court Room 41, at the Courthouse located at 88-11 Sutphin Boulevard, Jamaica, New York, 11435 on October 17, 2007 at 9:30 AM, or as soon thereafter as counsel may be heard, for an Order:

- (a) Pursuant to CPLR § 7503, compelling Petitioner New York Central Lines, LLC ("NY Central") to resume the arbitration proceedings previously ordered by this Court, before the duly-appointed arbitrator herein, Professor Robert M. Zinman, in accordance with this Court's October 19, 2005 Order/Judgment Confirming Arbitration Award, as affirmed by the Appellate Division—Second Department of the Supreme Court of the State of New York; and**
- (b) Granting such other and further relief as this Court deems just, proper and equitable under the circumstances.**

PLEASE TAKE FURTHER NOTICE that the real property affected by the Arbitration Award and the Order/Judgment confirming such award in this special proceeding is situated in the Borough of Queens in the City and State of New York, and is more particularly described as follows:

ALL that certain plot, piece or parcel of land, situated, lying and being in the Borough of Queens, City and State of New York, bounded and described as follows:

All of those three (3) certain parcels of land along Conrail's right of way in the Town of Woodside, Borough and County of Queens, City and State of New York, known as and by the tax descriptions on the Tax Map of the Borough and County of Queens as Parcel 1 Block 1282 Lot 1, Parcel 2 Block 1303 Lot 1 and Parcel 3 Block 1312 Lot 1, as shown on plan prepared by A.H. Salkowitz, Architect, dated May 15, 1979 and designated thereon as "Parcel 1", which consists of approximately 87,400 square feet situated north of Roosevelt Avenue and known as Tax Block 1282 Lot 1, and as "Parcel 2", which consists of approximately 77,000 square feet located between 41st Avenue and Roosevelt Avenue and known as Tax Block 1303 Lot 1, and as "Parcel 3:", which consists of approximately 140,125 square feet lying south of 41st Avenue and known as Tax Block 1312 Lot 1.

Said real property is known as the following Blocks and Lots on the Tax Map of the City of New York:

<u>Block</u>	<u>Lot</u>
1282	110
1303	1
1312	1

PLEASE TAKE FURTHER NOTICE that answering papers, if any, are required to be served at

least seven days before the return date of this motion, in accordance with the provisions of CPLR 2214(b).

Dated: New York, New York
September 28, 2007

SONNENSCHN NATH & ROSENTHAL LLP

By:


Richard M. Zuckerman
Jacob Inwald

1221 Avenue of the Americas
New York, New York 10020
(212) 768-6700
Fax: (212) 768-6800

*Attorneys for Respondents
Frank Vitale and Francis Vitale*

TO: David Alan Richards, Esq.
William Wallach, Esq.
MCCARTER & ENGLISH, LLP
245 Park Avenue, 27th Floor
New York, NY 10167
(212) 609-6800
Fax: (212) 609-6921

*Attorneys for Petitioner New York Central Lines, LLC,
as Successor to Consolidated Rail Corporation*

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

**NEW YORK CENTRAL LINES, LLC, as Successor to
Consolidated Rail Corporation,**

Petitioner,

- against -

FRANK VITALE AND FRANCIS VITALE,

Respondents.

**Index No. 20662 / 2002
(Assigned to
Hon. Duane A. Hart, J.S.C.)**

**AFFIRMATION OF
RICHARD M. ZUCKERMAN
IN SUPPORT OF MOTION TO
COMPEL RESUMPTION OF
ARBITRATION PREVIOUSLY
ORDERED BY THIS COURT, IN
ACCORDANCE WITH THE ORDER
OF THE APPELLATE DIVISION**

**RICHARD M. ZUCKERMAN, an attorney admitted to practice law in the State of New York,
hereby affirms under penalty of perjury:**

**1. I am a member of Sonnenschein Nath & Rosenthal LLP, attorneys for
Respondents Frank Vitale and Francis Vitale ("Respondents" or the "Vitales"). I respectfully
submit this affirmation, which is based on my personal knowledge, in support of the Vitales'
motion to compel resumption of the arbitration previously ordered by this Court before the duly
appointed arbitrator, Professor Robert M. Zinman.**

**2. In defiance of an order of this Court compelling arbitration, in defiance of a
judgment of this Court that confirmed the Arbitration Award and specifically provided that
further arbitration proceedings should go forward before Professor Zinman, and in defiance of an
order of the Appellate Division affirming that judgment, New York Central Lines LLC ("NY
Central") has refused to resume the arbitration proceedings. There is no basis whatsoever for
NY Central's position, which gives the Vitales no choice but to ask this Court, once again, to
compel NY Central to proceed with the arbitration.**

3. NY Central's position is but the latest step in a continuous course of conduct, over the past five years, during which it has taken virtually every conceivable action both to resist its contractual obligation to arbitrate its dispute with the Vitales and to thwart the Arbitration Award (and the Judgment entered thereon).

Summary

4. This dispute arises out of a 1986 contract (the "Agreement") by the predecessor of NY Central to sell to the Vitales seven acres of land (the "Property") in Woodside, Queens, New York, subject to a railroad easement. The Agreement contains a broad arbitration clause.

5. In 2002, after NY Central took the position that the Agreement was not a binding contract, the Vitales demanded arbitration. After proceedings before this Court, this Court entered an Order and Judgment compelling arbitration, and the parties jointly designated Professor Zinman as arbitrator.

6. Professor Zinman conducted arbitration proceedings, and duly entered an Arbitration Award on September 28, 2004, granting the Vitales specific performance of the Agreement. At the time of the arbitration hearings, both the Vitales and NY Central knew that it was possible that a portion of the Property would be taken by eminent domain by the New York State Department of Transportation ("NYSDOT") for expansion of the Brooklyn-Queens Expressway, which is adjacent to the Property. Before the Arbitration Award was confirmed, NYSDOT took title to about one acre of the Property through eminent domain. Therefore, when the Arbitration Award was confirmed by this Court in an Order/Judgment entered October 19, 2005, this Court directed specific performance of the Agreement—which would result in the conveyance, to the Vitales, of six of the seven original acres—but specifically provided that the Vitales could pursue further arbitration proceedings before Professor Zinman, as Arbitrator, for either (a) an adjustment in the purchase price, in light of the fact that they would only be

receiving six of the seven acres, or (b) a portion of the condemnation award. On January 18, 2007, the Appellate Division unanimously affirmed this Court's Order/Judgment.

7. The Vitales have now sought to resume those arbitration proceedings—as directed by this Court and the Appellate Division, and NY Central has refused to do so. The Vitales therefore seek an Order from this Court directing the resumption of the arbitration proceedings.

8. Also in defiance of this Court's Order and Judgment, NY Central has refused to close on the sale of the remaining six acres of the Property. The Vitales are continuing to seek to resolve that issue with NY Central, and therefore are not seeking relief from this Court on that issue at this time. The Vitales reserve the right to seek appropriate relief—including contempt—in the event NY Central continues to refuse to close on the sale.

The Order to Compel Arbitration and the Designation of Professor Zinman as Arbitrator

9. On July 18, 2002, the Vitales duly served a Demand for Arbitration (Exhibit A) upon NY Central, as successor to Consolidated Rail Corporation ("Conrail"), seeking specific performance and related relief with respect to disputes arising under the Agreement dated February 20, 1986 between Conrail, as Seller, and the Vitales, as Purchaser, as Amended (Exhibit B), for the sale of certain real property in Woodside, Queens, New York (the "Property"). The Agreement included a broad arbitration clause (Agreement, ¶ 20, Exhibit B).

10. NY Central took the position that the Agreement was not a binding contract and resisted arbitrating under the Agreement and, on or about August 5, 2002, it commenced this special proceeding seeking a stay of the arbitration. The Vitales opposed NY Central's application to stay the arbitration and filed a cross-petition to compel arbitration in accordance with Paragraph 20 of the Agreement.

11. This Court entered its Order and Judgment dated April 11, 2003 denying NY Central's petition to stay arbitration, granting the Vitales' cross-petition to compel arbitration, and directing the Parties to proceed to arbitration. The Vitales served notice of entry of this Court's Order and Judgment upon counsel for NY Central on or about April 24, 2003 (Judgment with Notice of Entry, **Exhibit C**).

12. On or about March 25, 2004, the Vitales and NY Central entered into a Stipulation Regarding Arbitration and a Stipulation Regarding Issues to be Arbitrated (**Exhibit D**) pursuant to which the Parties jointly appointed Professor Robert M. Zinman of St. John's University School of Law (the "Arbitrator") as the sole Arbitrator to hear and determine all issues in the arbitration.

The Arbitration Proceedings and the Arbitration Award

13. Professor Zinman, as Arbitrator, held arbitration hearings on June 15-16, 2004, during which the Parties duly appeared, submitted their proofs and made their arguments, and he later heard closing arguments, following submission of closing briefs, on August 4, 2004. The hearings were closed upon the Professor Zinman's receipt of the transcript of closing arguments on or about September 1, 2004.

14. Prior to and during the arbitration, both parties recognized that NY Central might not be able to convey all of the Property, and that further arbitration might be required with respect to the very subject now at issue in the resumption of arbitration sought by the Vitales. Indeed, the issue was fully briefed in the Vitales Pre-Hearing Memorandum, which stated:

[I]t is possible that, before the closing, the State may condemn a portion of the Property for the BQE project. The Vitales, however, are entitled to specific performance of the Contract even if some portion of the Property cannot be conveyed, though they will be entitled to an abatement of the purchase price to reflect the portion of the Property which cannot be conveyed.... The Vitales therefore request that the Arbitrator direct specific performance for the agreed upon price of \$900,000, including a direction that NY Central cooperate with the

Vitales in seeking separate Section 18 approvals for each of the three parcels, and providing that, in the event NY Central is unable to convey the entire Property, the Vitales may make further application to the Arbitrator for an abatement.

(Vitales' Pre-Hearing Memorandum, 5/21/04, pp. 17-18, Exhibit E) (emphasis supplied).

15. The Arbitrator, having fully considered all the evidence and arguments of counsel, duly issued an Arbitration Award in writing, signed and acknowledged by the Arbitrator, and delivered said Arbitration Award to the Parties, on or about September 28, 2004 (the "Arbitration Award") (Exhibit F).

16. The Arbitrator determined that the "Agreement represents a binding contract for the sale of the real estate described therein" and issued an Arbitration Award as follows:

1. I order specific performance of the Agreement for the agreed purchase price of \$900,000., of which \$90,000 has been paid on the signing of the Agreement.

2. I order Conrail [NY Central] to cooperate in obtaining any required Section 18 Release from the Department of Transportation by filing separate applications for each of the three parcels in the property. I order Vitale to cooperate with Conrail in pursuing the release. Upon receipt thereof (for one or more of the parcels in whole or in part), I order Vitale and Conrail to proceed expeditiously with the closing of title.

3. I enjoin Conrail [NY Central] from selling the property covered by the Agreement to any third parties in violation of the rights of the Vitales under the Agreement.

4. I order the parties to pay the costs of this arbitration as provided in Article 20 of the Agreement.

(Arbitration Award, p. 10, Exhibit F).

This Court's Order and Judgment Confirming the Arbitration Award and Providing for Further Arbitration Proceedings Before Professor Zinman, as Arbitrator

17. Promptly after the Arbitration Award was entered, the Vitales sought and, on January 12, 2005, obtained, the Section 18 Releases from NYSDOT for the entirety of the Property (Exhibit G), thus permitting the closing to go forward. Nevertheless, in violation of the

Arbitration Award, NY Central refused to close and it therefore became necessary for the Vitales to make application to this Court to confirm the Arbitration Award so that a judgment could be recorded against the Property.

18. NY Central opposed confirmation of the Arbitration Award and entry of judgment thereon on the grounds that it could no longer perform the Agreement because a portion of the Property—about one acre out of a total of seven acres—had been taken in eminent domain (after entry of the Arbitration Award and issuance of the Section 18 Releases) by NYSDOT in connection with the reconstruction of the Brooklyn-Queens Expressway, a possibility contemplated from the outset that was explicitly addressed during the course of the Arbitration, as set forth above.

19. This Court rejected NY Central's arguments in opposition to confirmation of the Arbitration Award, and in an Opinion entered on or about September 12, 2005 (Exhibit H), this Court confirmed the Arbitration Award, directing the parties to "expeditiously proceed with the closing at the agreed price of \$900,000." This Court also held that its confirmation of the Arbitration Award was "without prejudice to the Vitales, if they be so advised, to seek an appropriate abatement of the purchase price in additional arbitration proceedings."

20. NY Central thereafter contested the form of judgment that the Vitales presented for settlement in accordance with this Court's Opinion, but on October 19, 2005 this Court entered an Order/Judgment confirming the Arbitration Award (Exhibit I). The Order/Judgment specifically recited that the conveyance to the Vitales would be limited to those portions of the Property that were not taken in fee by the State of New York, would be subject to the easements taken by the State of New York, and that it is

without prejudice to the right of the Vitales to seek an abatement of a portion of the purchase price, or an equitable share of the condemnation awards relating

thereto, in further *proceedings before the Arbitrator [defined therein as Professor Zinman]*....

(emphasis supplied)

The Appellate Division's Affirmance of this Court's Order and Judgment

21. NY Central thereafter appealed from the Order/Judgment to the Appellate Division—Second Department, but did not perfect its appeal until May 2006. In its appeal, NY Central challenged the Order/Judgment insofar as it recognized the Vitales' right to seek an equitable share of the condemnation awards, but it did not challenge the Order/Judgment's direction that further proceedings on the issue be addressed by the Arbitrator. The Appellate Division unanimously affirmed this Court's Opinion and the Order/Judgment on or about January 18, 2007 (Exhibit J).

The Vitales' Demand for Resumption of Arbitration Proceedings, and NY Central's Refusal To Participate

22. As part of the eminent domain proceedings, the Vitales received a Deposit Notification from the State of New York-Office of Attorney General dated June 12, 2007 (Exhibit K) advising that the State Comptroller has deposited the sum of \$6,043,020.00 in an Eminent Domain Account in connection with the eminent domain taking of a portion of the Property. Under the Eminent Domain Law, that is the minimum amount of the actual condemnation award; the actual amount could be higher.

23. On or about June 29, 2007, I sent a letter to the DOT (Exhibit L), on behalf of the Vitales, advising the DOT that, in accordance with the Order/Judgment, as affirmed by the Appellate Division, the decision of whether the Vitales are entitled to a share of the condemnation award is to be determined by the Arbitrator (Professor Zinman).

24. On or about June 29, 2007, I also sent a letter to Professor Zinman (Exhibit M) requesting the scheduling of a conference as a first step in the resumption of the arbitration of the Vitales' claim for an equitable share of the condemnation award or, alternatively, an abatement of the purchase price on account of the condemnation of approximately one seventh of the Property, in accordance with the Order/Judgment.

25. On or about July 2, 2007 Professor Zinman wrote to counsel for the parties (Exhibit N) offering to schedule a preliminary conference for supplemental arbitration, in response to which counsel for NY Central replied by letter dated July 6, 2007 (Exhibit O) stating that scheduling of a preliminary conference was premature because Professor Zinman's role in the supplemental arbitration is an "open issue."

26. On or about September 24, 2007 counsel for NY Central advised that NY Central would not agree to conduct the supplemental arbitration before Professor Zinman.

The Need for Relief from this Court

27. Although this Court's Order/Judgment specified explicitly that the Vitales' claims for an equitable share of the condemnation proceeds or for an abatement are to be determined by arbitration before the Arbitrator (*defined therein as Professor Zinman*), NY Central now attempts to forum shop by stating that there should be a new arbitrator. NY Central's insistence on appointment of a new arbitrator is contrary to this Court's explicit directive in the Order/Judgment (as affirmed by the Appellate Division—Second Department), and also contrary to the parties' agreement designating Professor Zinman as arbitrator.

28. After all these years of protracted proceedings, during which NY Central has thrown up procedural obstacles at every opportunity, there is absolutely no reason to start from scratch with a new arbitrator when there is an already-appointed Arbitrator, familiar with the facts of this case and, indeed, with the specific issues presented by the condemnation of a portion

of the Property—an issue that was explicitly addressed during the arbitration—who remains ready, willing and able to proceed expeditiously with the continued arbitration of this limited issue in accordance with this Court's directive in the Order/Judgment.

WHEREFORE, I respectfully request that the Court, in accordance with the Order/Judgment and CPLR § 7502, compel NY Central to participate in the resumed arbitration before Professor Zinman, and to grant such other and further relief as the Court may deem just and proper.



Richard M. Lickerman

Dated: New York, New York
September 28, 2007