

Before The
Surface Transportation Board

Finance Docket No. 35157

PETITION OF THE CITY OF ALEXANDRIA, VIRGINIA
FOR DECLARATORY ORDER

**RESPONSE OF NORFOLK SOUTHERN RAILWAY COMPANY TO
PETITION FOR DECLARATORY ORDER**

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The Petition by the City of Alexandria, Virginia (“Alexandria” or the “City”) for a Declaratory Order is without merit. The simple fact is that, contrary to what is alleged by the City, the Norfolk Southern Railway Company (“Norfolk Southern”) ethanol transloading facility located in Alexandria, Virginia (the “Facility”) is not leased to Norfolk Southern’s contractor, RSI Leasing, LLC (“RSI”), or to any other party. Instead, the Facility is owned and operated by and on behalf of Norfolk Southern. The City’s Petition should be denied.

Moreover, as will be made clear, this matter goes beyond the narrow legal questions presented to the Surface Transportation Board (the “Board”). Indeed, the City has filed its Petition, based as it is on mere speculation with no evidence, in the heat of political passions that threaten to boil over and overwhelm reason as an interstate railroad attempts to be a good corporate citizen while carrying on its business. This proceeding involves an Alexandria City Council member’s reference to a “three mile” impact area and other reckless statements that unnecessarily inflame fear in the Alexandria

community. It involves nothing less than political vows to do “everything [the City of Alexandria] can do to shut down this facility,” ignoring two years of communication and cooperation and ultimate findings by City officials that the Facility meets all of the requirements of the Statewide Fire Prevention Code. All of this is about the transportation of ethanol, the use of which the Federal government effectively mandates.¹

There can be no disagreement as to the facts. The relevant facts set forth herein are undisputed, coming from the City itself or otherwise supported with documentation. There is no disagreement as to the relevant law. While Norfolk Southern disagrees with the City’s interpretation of a Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (“DOT”) regulation and the City’s erroneous belief that the regulation applies to transloading facilities, Norfolk Southern demonstrates that application of that regulation is not relevant to the Board’s review of the City’s Petition. Otherwise, the parties agree as to the application of law.

The Board has all the information it needs to decide the City’s Petition. It should not permit the City to perpetuate this proceeding further by engaging in unnecessary discovery. As will be shown, the City is, and has been, engaged in a political battle, and

¹ Under the Clean Air Act, EPA requires that reformulated gasoline (“RFG”) be used in certain regions, and other regions have voluntarily adopted such requirements. Much of Northern VA is required to use RFG. The law specifies that RFG contain oxygen (2 percent by weight). See Clean Air Act Section 211(k), 42 U.S.C. 7545. Ethanol and MTBE (methyl tertiary butyl ether) are the two most commonly used substances that add oxygen to gasoline. Because of concerns with MTBE in groundwater, many oil companies are opting to use ethanol, and in fact the federal government encourages use of ethanol in general as an energy resource. See, e.g., “Fact Sheet: Harnessing the Power of Technology for a Secure Energy Future,” <http://www.whitehouse.gov/news/releases/2007/02/20070222-2.html> (section titled Ethanol And Other Biofuels Are Part Of A Larger Strategy To Address Energy Security, Cleaner Air, And Climate Change), Feb. 22, 2007; Fact Sheet: Developing Renewable Fuels and Clean Diesel Technologies“, <http://www.whitehouse.gov/news/releases/2005/05/20050516-3.html>, May 16, 2005.

the Board should not allow itself to be brought into the melee, permitting its processes to be used to perpetuate the conflict.

This Response will first set out the history and background of the controversy leading up to the filing of the Petition. It will then detail the facts regarding the Facility and its operations, a picture of reality that is woefully lacking in the Petition. Contrary to the claims set forth in the Petition, the Facility is not leased to anyone – it is owned and operated by and on behalf of Norfolk Southern. This Response will demonstrate why the cited DOT regulation regarding the transport of hazardous materials is both inapplicable to transportation to the Facility and, more importantly, not relevant to the Board's analysis as to whether the Facility is operated by or on behalf of the railroad. Finally, this Response will detail why the Petition must be denied without the need for discovery.

HISTORY AND BACKGROUND

History of the Van Dorn Street Yard Area

Norfolk Southern and its predecessors have operated in the City of Alexandria for over a century. An important part of those operations have taken place at the Van Dorn Street Yard. Over the years, that yard has been very active. It supports traffic moving over the four adjacent main line tracks. (Not only Norfolk Southern, but also Virginia Railway Express and Amtrak operate over those main line tracks.) As recently as 2006, the yard served as an intermodal facility with nearly 100 trucks per day entering and leaving the yard.

Van Dorn Street Yard is located in the western part of the city in an area that, until recently, was characteristically highly industrial. The immediate area is still largely

an industrial area – for example nearby is Virginia Paving Company, an asphalt paving producer, and abutting the yard is the Covanta Alexandria/Arlington Waste-to-Energy Facility, co-owned by the City of Alexandria and Arlington County and constructed in 1988.

Lately, however, the City has allowed construction and location of some residential units in the area, and has itself located educational facilities there, notwithstanding the continued rail and other industrial use. The military, which had a base located at Cameron Station, sold the property to a developer in the mid-1990's, and Alexandria permitted residential townhouse development on this former army base. About the same time, a developer purchased and began constructing a residential area called Summers Grove. In the same area, the City built Samuel W. Tucker Elementary School, which was opened in September 2000.² The City wants to move other non-industrial facilities to the area, and finds the presence of Virginia Paving and Norfolk Southern to be a hindrance.

The History of the Facility and the City's Involvement

Norfolk Southern first met with the mayor of Alexandria over two years ago to open the communication stream concerning what was then a proposed facility. Norfolk Southern thereafter promptly began working with Alexandria city officials concerning the proper configuration and equipment for the Facility to be located in the yard.

This consultation led the Facility to be configured, for example, with four new fire hydrants, several eye wash stations and other safety equipment, a bermed area

capable of holding the entire liquid contents of eighteen rail tank cars (or well over 515,000 gallons), and special grounding rods designed to prevent the discharge of static electricity. Norfolk Southern, as requested by city officials, purchased 1,640 gallons of specialized ethanol fire-fighting foam ("AR-AFFF Foam"),³ and, before the Facility opened, prepositioned that AR-AFFF Foam at the Facility in a special temperature controlled container.⁴

Norfolk Southern wrote letters to the City, explaining when it intended to begin construction, and then again when it discovered that construction would be somewhat delayed.⁵ It consulted with City offices during the design of the Facility. During the construction phase, Norfolk Southern, in coordination with Alexandria's water

² Tucker Elementary is not located adjacent to the Facility. Separating the specially bermed and fenced Facility and Tucker Elementary is an asphalted expanse, four main line tracks, and a wide, free flowing stream which is now a part of a flood control project.

³ The "AR" in "AR-AFFF" stands for "alcohol resistant." Ethanol has an affinity for water, so it is difficult, though not impossible, to fight an ethanol fire with water or non-alcohol resistant foam.

⁴ Much is made in both the Petition and the public forums that the City did not have a means to deliver the AR-AFFF Foam. It was 2006, however, when the City told Norfolk Southern to acquire the foam, so it would be reasonable for Norfolk Southern to assume that the City either had, or intended to acquire, a means to deliver the foam. Not only did the City not tell Norfolk Southern that it did not have the means to apply the foam, apparently, the City believed it did, in fact, have that capability. See, City Memorandum, communicated from Robert Rodriguez (Alexandria Chief Fire Marshall) to John Catlett (Alexandria Director of Code Enforcement), via e-mail dated November 28, 2007 attached as Exhibit A ("Alcohol fuel fires require alcohol resistant foam that is designed to work with alcohols and polar solvents. Norfolk Southern has agreed to provide up to 1600 gallons of AFFF type foam in portable containers to be stored on site for use by the Alexandria Fire Department. *Currently, the fire department already carries this type of foam on most of the unit*") (emphasis added). As is discussed further below, City officials were instructed beginning January 2, 2008 not to communicate with Norfolk Southern. See note 7 and accompanying text. The City should not be heard to complain about Norfolk Southern initiating operations at a time that the City did not have the capacity to utilize the foam when it was under a communications lock down until after operations were initiated. See Petition at 4 (claiming that "the operation started at a point when the railroad knew that the City (as well as all other jurisdictions in the region) lacked even the most basic equipment and material to fight an ethanol-fueled fire").

department agents, connected the Facility and its four fire hydrants to the City's water system. On November 8, 2007, an on-site meeting was held with City officials to discuss the Facility, and Norfolk Southern informed the City that it intended to open the facility in April 2008.⁶

Unbeknownst to Norfolk Southern at the time, in early 2008, the City gave strict instructions to its officials to cut off communication with Norfolk Southern.⁷ As the date approached for the Facility to begin operations, Norfolk Southern and its contractor RSI called the City's fire department several times to arrange delivery of the Facility's keys so that that the fire department would have twenty-four hour access to the Facility. For some time, the City's fire department ignored the calls and declined delivery of the keys.

⁵ These letters are attached as Exhibits B and C.

⁶ See Exhibit A: "Norfolk Southern provided an educational briefing on how exactly the process will function. The target date to begin operation has been identified as April of 2008."

⁷ See e-mail from Michele Evans (Alexandria Deputy City Manager) to John Catlett (Alexandria Director of Code Enforcement), Ignacio Pessoro (Alexandria City Attorney) and another unnamed person, dated January 2, 2008 (Exhibit D) ("Please do not communicate with Norfolk Southern further until we have determined the status of this"). The prohibition on communication with Norfolk Southern continued for several months. See e-mail from Robert Rodriguez (Alexandria Chief Fire Marshall) to Ignacio Pessoro and Richard Josephson (Alexandria Department of Planning and Zoning), dated April 1, 2008 (noting that the City had received communication from Norfolk Southern's contractor about commencing operations, but expressing concern that he has not received any further direction regarding communication with Norfolk Southern since receiving the instruction to "monitor and report"). Appendix E.

The City's Efforts to Remove the Facility

Notwithstanding this significant interaction with the City, the Mayor and the City Council have claimed that they were taken by surprise by the presence of the Facility in its community.⁸ They are determined to have it removed: "The City is moving forward [to do] everything we can to shut down this facility...."⁹

To accomplish the removal of the Norfolk Southern Facility, Alexandria first tried to apply a city ordinance that, on its face, applied only to the hauling of construction equipment and supplies, and dirt and debris or fill of any type, to the movement of ethanol. That City Ordinance is reproduced in Exhibit I. On June 3, 2008, the City unilaterally issued Norfolk Southern a hauling permit pursuant to that ordinance, placing limits on the time that the Facility could be open, and the number of trucks that could enter or leave the Facility, as well as truck routing restrictions. The permit is reproduced as Exhibit J. Not surprisingly, Norfolk Southern declined to accept the permit that (1) it did not request, (2) was issued pursuant to a City ordinance that on its face did not apply to the movement of ethanol, and (3) was otherwise preempted. Norfolk Southern's letter declining the permit is reproduced as Exhibit K.

⁸ The City was not taken by surprise by the presence of the Facility. The City has posted on its website a four-page chronology of the internal and external communications that took place with regard to the Facility over the past 2 years. That chronology is reproduced in Exhibit F. Norfolk Southern does not agree with all of the entries, and cannot vouch for the entries concerning communications to which it was not a party, but does note that the evidence demonstrates that there were no surprises. The memorandum from the Chief Fire Marshall to the City Attorney, dated January 25, 2008, is illustrative of the amount of information available to the City. That memorandum is attached as Exhibit G.

⁹ "Statement of the Mayor and City Council on the Norfolk Southern Ethanol Transloading Facility," undated, reproduced as Exhibit H.

The Mayor called Norfolk Southern to a City Council meeting on May 27, 2008.¹⁰ At that meeting, the Alexandria Fire Chief informed the City Council that the Facility, in its present configuration, “meets all requirements of [the] Statewide Fire Prevention Code” for facilities of this type.¹¹ After being informed by the City Attorney that the Facility is a railroad facility covered by 49 U.S.C. Section 10501(b),¹² the Mayor made it clear that the law did not matter, stating that “we are going to do everything we can to cease operations, shut you down and get you out of the city – o.k. – plain and simple.”¹³ The Mayor was not alone. The Vice Mayor spoke of a “three-mile” accident impact area and another Council member compared Norfolk Southern’s presence to “a neighbor who moves into the vacant house and turns it into a crackhouse.”¹⁴

Notwithstanding this, Norfolk Southern continued to cooperate with city officials. When informed that the City had no equipment to deliver the foam it had asked Norfolk Southern to provide, Norfolk Southern purchased for the City the requested AR-AFFF Foam delivery equipment and a heavy duty pickup truck dedicated to pull that equipment. Norfolk Southern donated its own AR-AFFF Foam and continued use of the climate control container to Alexandria, and purchased substantially more AR-AFFF Foam for

¹⁰ The video of this May 27, 2008 City Council meeting is available on the world wide web at http://alexandria.granicus.com/ViewPublisher.php?view_id=2, and references to that video will be made by a reference to the “City Council Meeting Video” followed by a time stamp location within that video.

¹¹ See the presentation by the Alexandria Fire Chief in Exhibit L, page 5 (unnumbered pages); see also, City Council Meeting Video at 1:16:52.

¹² The Alexandria City Attorney advised the Alexandria City Council that it was his conclusion, arrived at after further investigation, that the facility was operated as an integral part of the railroads operations covered by 49 U.S.C. Section 10501(b). City Council Video at 1:55:35.

¹³ Id. at 2:18:40.

¹⁴ Id. at 1:28:00 and 2:30:51.

use by the City.¹⁵ Over an extended period, Norfolk Southern provided facilities for firefighter training and support. This equipment, AR-AFFF Foam and training benefit the City of Alexandria and its mutual aid jurisdictions with respect to any ethanol incident regardless of origin.

Alexandria was not satisfied. It modified the construction equipment and supply hauling ordinance in direct response to the presence of the Facility¹⁶ so that it now applies to the transloading of all bulk commodities – flour, corn syrups, and other bulk transload commodities – moving from a rail head to a non-retail facility. That City Ordinance is reproduced in Exhibit M.

Other Legal Actions involving the Facility

Finally, due to the City's continued public threats to close the Facility and Norfolk Southern's unsuccessful efforts to resolve the City's objections to the Facility by addressing the City's expressed safety concerns, Norfolk Southern had no recourse but to file suit in the U.S. District Court for the Eastern District of Virginia seeking a declaration that the haulage ordinances and the permit issued thereunder do not apply or otherwise are preempted. That complaint is reproduced in Exhibit N. Norfolk Southern called the City Attorney to inform him of the suit, and ensured that he had a copy of the complaint.

The complaint enunciated facts clearly in conflict with those later contained in the City's Petition, in particular with regard to two central (but erroneous) claims essential to

¹⁵ The equipment Norfolk Southern purchased for the City has an on-board supply of foam. The 1,640 gallons of foam that Norfolk Southern purchased remains just outside of the Facility in the specially-equipped climate controlled container.

¹⁶ Id. at 2:00:09.

that Petition – whether: (1) the Facility was leased to RSI (it is not) and (2) whether RSI operated the Facility independent of Norfolk Southern (it does not). Despite having the complaint in hand, and despite the several avenues of communication open with Norfolk Southern and the demonstrated cooperative efforts taken by Norfolk Southern, the City filed its Petition for Declaratory Order.¹⁷

The Petition claims that Norfolk Southern lied to Alexandria¹⁸ and, apparently, the U.S. District Court for the Eastern District of Virginia.¹⁹ It states:

In this case, Norfolk Southern claims that the ethanol transloading operation is being conducted by or on behalf of the railroad, and that local regulation is preempted. However, the facts of the operation demonstrate otherwise. Norfolk Southern appears to be simply a landlord renting to an independent operator.

Petition at 7. Further, the Petition claims:

At the Alexandria facility, the ethanol from the railway tank cars is directly offloaded to the roadway tanker trailers. * * * The operation is being conducted as if the railway tank cars are being unloaded by a private operator, not a rail carrier. * * * RSI's president publicly stated in January 2008 that the subject facility is his company's "newest terminal in Alexandria, Virginia, which will open early next year and be dedicated exclusively to the shipment of ethanol."

Petition at 8.

¹⁷ According to the City's timeline, the Petition and the Complaint were filed on June 18, 2008. See, Exhibit F. This is incorrect. Norfolk Southern filed the Complaint on June 16, 2008 and the City filed its Petition on June 17, 2008.

¹⁸ Given the facts, coming from the City this allegation is simply astounding.

¹⁹ It is not clear when the City Attorney's office changed its mind about the nature of the operations at the Facility. As discussed above in note 12, the City Attorney advised the Mayor and the City Council of his conclusion that the Facility was operated by or on behalf of Norfolk Southern in pursuit of its interstate rail operations, and preempted by 49 U.S.C. 10501(b).

The only piece of evidence that Alexandria relies upon to demonstrate its central and determinative alleged fact that the Norfolk Southern – RSI relationship is that of landlord-lessee is a single article appearing in January 2008 in the Greater Lansing Business Monthly. The “public statement” attributed to the RSI president is the Greater Lansing Business Monthly’s characterization of something RSI’s president said.

Assistant City Attorney Christopher Spera is quoted as saying: “We don’t know the actual wording of the arrangement between Norfolk Southern and RSI because they have not shared that with us,”²⁰ but Alexandria has not asked Norfolk Southern for the RSI Agreement (it is provided as an exhibit to this Response), clarification or documentation regarding the facts. It is to these facts that this Response now turns.

THE FACTS

Norfolk Southern provides, as Exhibit P, a redacted copy of the contract between Norfolk Southern and RSI relating to the operation of the Alexandria ethanol transload facility. If the Board does not dismiss this proceeding, Norfolk Southern, upon the issuance of a protective order in this proceeding, will produce to Alexandria and the Board, an unredacted copy of the same.²¹ That contract (the “RSI Agreement”) demonstrates:

²⁰ “City Files Petition Against Norfolk Southern: Mayor issues apology to the citizens for ethanol operation,” Alexandria Gazette Packet, June 19, 2008, attached as Exhibit O.

²¹ There are two pieces of information redacted, both found in Appendix C to the RSI Agreement. The first is the per-gallon transloaded rate that Norfolk Southern pays to RSI as compensation for RSI providing the transloading services for Norfolk Southern. The second is the percentage of other amounts (track occupancy charges (“TOCs”) that Norfolk Southern charges its customers) which RSI collects and remits over to Norfolk Southern. This latter payment made by Norfolk Southern to RSI is compensation for the billing and collecting of the TOCs. One exhibit to the RSI Agreement should have been

- RSI is a contractor, providing its services to Norfolk Southern.
- RSI does not lease the property, and has no right to admit, deny, sell or market the Facility's services to anyone.
- The Facility is Norfolk Southern's, and Norfolk Southern's alone.

But the Petition is as much about what is being transloaded and the Facility as it is about the legal arrangements between RSI and Norfolk Southern.

Ethanol

Ethanol is a clean-burning, high-octane motor fuel that is produced from renewable sources. At its most basic, ethanol is grain alcohol, produced from crops such as corn. Pure ethanol is not generally used as a motor fuel; instead, ethanol generally is combined with unleaded gasoline at blending facilities with a resulting mixture to be provided to local gasoline filling stations for use in commercial and private vehicles.

Unlike gasoline, ethanol does not transport well in pipelines. It has a chemical affinity to water and other contaminants. Therefore, over long distances it must travel by truck, train or barge. If the ethanol moves over long distances by train, it often must be transloaded from the train car to a truck to move between the rail transloading facility and the blending facility.

Norfolk Southern did not introduce ethanol transportation to the City of Alexandria. As the City's fire chief noted to the City Council, "it is important to note

an indemnity agreement that all truck operators would be expected to sign before obtaining access to the Facility. Unfortunately, what was attached to the RSI agreement was a form appropriate to a different type of facility. In any event, the form provides no rights on RSI or change the nature of the underlying agreement.

that, ... as long as you have been hearing about 'live green, go yellow,' ... that product has been traveling through the area."²²

Van Dorn Street Yard and the Facility

As discussed above, Norfolk Southern and its predecessors have operated in Alexandria for over a century. In Alexandria, just off of the Van Dorn Street exit from the Capital Beltway, is a rail yard that has a long history in this mixed use neighborhood.²³ At one time, circus trains were unloaded in the yard. Up until a couple years ago, the yard also held an intermodal facility dedicated to the movement of United Parcel Service traffic, with trucks entering and leaving the facility at a rate sometimes as high as 100 per day.

The yard is uniquely located near major interstate highway and rail facilities. This is important when it comes to the movement of intermodal, ethanol and other bulk commodities that require transloading for movement to the product's final destination.

At this yard, Norfolk Southern operates several through and local trains daily, both within and through Alexandria. The movements of rail cars within the Van Dorn Street Yard and switch service to the Facility are performed by Norfolk Southern employees.

Encompassed within the Van Dorn Street Yard is an area that is segregated by physical barriers (berms, spill containment, full track and tank car electrical grounding system, and fences) that is used for the transloading of ethanol – the "Facility."

²² City Council Meeting Video, at 1:41:20.

²³ The immediate neighborhood includes a [concrete/asphalt] transloading, a waste-to-energy facility, a waste oil recycling plant and an impound lot, in addition to the residential and the educational facility. Id., statement of Vice Mayor Pepper at 2:24:25.

Currently, one train daily enters Van Dorn Street Yard transporting rail tank cars loaded with ethanol which is being shipped from various locations in the Mid-Western and Western United States. The loaded ethanol tank cars are placed at the Facility by a Norfolk Southern switch crew Monday through Friday on the specially designed and built twenty-car unloading track located within the bermed spill containment area.²⁴

The ethanol in the tank cars is subsequently transloaded from the rail cars to empty trucks by Norfolk Southern's contractor, RSI.²⁵ Another Norfolk Southern switch crew on Monday through Friday pulls the "residue" tank cars after they have been unloaded so these tank cars can be returned to their origins (the various ethanol production facilities in the Mid-Western and Western United States) or otherwise are used in the interstate rail transportation system.

As is typical of railroad facilities, the Facility is capable of operations twenty-four hour per day. Due to interstate rail operations, rail cars are generally delivered and pulled from the Facility at night (5 pm to 5 am), and transloading operations are generally conducted between 7 am and 6 pm, but the Facility is able to operate around the clock.

The ethanol arrives at the Facility in railroad tank cars that hold approximately 29,000 gallons each. The Facility can hold up to 20 rail tank cars on the specially designed unloading track. Additional loaded tank cars can also be stored incidental to transportation inside the fenced Facility. Currently up to three rail cars can be transloaded to trucks at a time. Norfolk Southern is transloading ethanol into

²⁴ The bermed spill containment area is capable of containing 515,282 gallons, or the equivalent of liquid that would be released if eighteen tank cars simultaneously lost their entire load. See id., statement of Alexandria Fire Chief, at 1:14:26.

²⁵ The transloading takes place pursuant to a "closed loop system" where even the vapors are recovered. See id., statement of Alexandria Fire Chief, at 1:17:53. "There is nothing that escapes into the atmosphere during the transfer operation." Id. at 1:18:16

approximately 24 trucks per day. This number, however, can and will go up or down on a daily basis, depending upon interstate rail operations, the number of ethanol rail tank cars in the transportation system, and ethanol customer demands.

When empty trucks arrive for transloading at the Facility, the trucks are queued within the Facility or inside the railroad yard (notably not on any city street). After the ethanol has been transloaded into the trucks, the ethanol is then transported in the trucks to various gasoline blending facilities located elsewhere in the Commonwealth of Virginia. Customer use of the transportation and transloading services offered by the Facility is increasing.

The Norfolk Southern/RSI Agreement

The Norfolk Southern/RSI Agreement clearly sets up a contractor relationship, not a leasing relationship. It requires RSI, as Norfolk Southern's contractor, to operate the Facility during certain set hours, maintain the site, perform transloading services, test the product transloaded, and collect and pay over to Norfolk Southern certain payments. It requires RSI to provide those other miscellaneous additional services which Norfolk Southern deems reasonably necessary for the efficient operation of the Terminal. Norfolk Southern, in turn, pays RSI for its services on a per gallon basis, with a minimum annual payment, plus, as special compensation for certain billing and processing services, a percentage of Track Occupancy Charges collected from Norfolk Southern rail customers.

The RSI Agreement requires RSI to provide the proper employees and equipment, and to train the employees and maintain its equipment. It requires RSI to perform

employee screening on any of the employees that RSI uses at the Facility. Notwithstanding that, Norfolk Southern still retains the right to exclude any person from working at the Facility.

Under the RSI Agreement, RSI has no right to market the Facility's services to anyone. RSI does not have the right to set or collect fees from any third party for its services. If Norfolk Southern decides that it wants to change the nature of the Facility from an ethanol transload facility to any other type of railroad facility, Norfolk Southern has the right to terminate the RSI Agreement on thirty (30) days notice.

Alexandria makes several erroneous statements in its Petition, and has made other misstatements in the public arena,²⁶ but the central erroneous statement is that the Facility is leased to RSI. The Facility is not.

The Law

Both Norfolk Southern and the City agree on the applicable statutory provision.

Section 10502(b) of Title 49 currently reads:

(b) The jurisdiction of the Board over –

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

²⁶ For example, in the Petition, the City complains that “[n]either Norfolk Southern nor RSI provided any public information or outreach prior to commencing operation.” Petition at 4. Throughout this Response, Norfolk Southern demonstrates that it began and sustained outreach to the City to the best of its ability. The City cannot complain about any lack of communication with it intentionally cuts off that communication. See Exhibit E. Further, any claims by the City that Norfolk Southern did not communicate with the City about the impending opening of the Facility are wrong, as demonstrated by the City's own documents. See Exhibit Q, e-mail from Jeffrey Farner (Alexandria Planning and Zoning Division Chief) to Richard Josephson, dated April 4, 2008 (e-mail seeing direction because Norfolk Southern “want[s] to open next week”).

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

“The purpose of the Federal preemption is to prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce.”²⁷ In short, Section 10501(b) provides that the Surface Transportation Board (“STB” or the “Board”) has exclusive jurisdiction over transportation performed by or on behalf of a rail carrier, and over the associated transportation facilities.²⁸

The term “rail carrier” is defined, in relevant part, as “a person providing common carrier railroad transportation for compensation.”²⁹ The term “transportation” is defined as well. According to Section 10102(9), the definition of “transportation” is as follows:

- (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
- (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

²⁷ STB Finance Docket No. 34797, New England Transrail, LLC d/b/a/ Wilmington & Woburn Terminal Railway – Construction, Acquisition and Operation Exemption – In Wilmington and Woburn, MA, served July 10, 2007 (“NET”), slip op. at 8, petition for reconsideration filed, July 30, 2007, appeal docketed, sub nom., Commonwealth of Massachusetts v. STB, Docket No. 07-2393, September 11, 2007 (citing H.R. REP. NO. 104-311, at 95-96 (1995), as reprinted in 1995 U.S.C.C.A.N. at 807-08).

²⁸ STB Finance Docket No. 34192 (Sub-No. 1), Hi Tech Trans, LLC – Petition for Declaratory Order, served August 14, 2003 (“Hi Tech II”), slip op. at 5 (“To come within the preemptive scope of 49 U.S.C. 10501(b), [the] activities [under scrutiny] must be both: (1) transportation; and (2) performed by, or under the auspices of, a rail carrier”).

²⁹ 49 U.S.C. § 10102(5).

The term “transportation” is to be broadly interpreted. According to the Board, “‘transportation’ is not limited to the movement of a commodity while it is in a rail car, but includes such integrally related activities as loading and unloading material from rail cars and temporary storage.”³⁰ It “encompass[es] the facilities used for and services related to the movement of property by rail, expressly including ‘receipt, delivery,’ ‘transfer in transit,’ ‘storage,’ and ‘handling’ of property.”³¹ As such, the transloading operation is a rail operation under §10502(b).

The only question before the Board, therefore, is whether RSI is a contractor of Norfolk Southern or, to the contrary, an independent operator that is performing its own business on property leased to it by Norfolk Southern.³² As the Petition itself states, at 6: “The Board’s jurisdiction extends to the rail-related activities that take place at transloading facilities if the activities are preformed by a rail carrier or the rail carrier holds out its own service through the third party as an agent or exerts control over the third-party’s operations.”³³ See also, Canadian National Railway Co. v. Rockwood, Civil

³⁰ NET, slip op. at 2.

³¹ Id.

³² At one point, the City seems to argue that the question is whether RSI is a railroad. See Petition at 6 (“The Interstate Commerce Commission (ICC) . . . developed standards to determine whether terminal-type companies that are commonly owned by, or contract with, railroads to provide services are themselves rail carriers.”) There is no assertion that RSI is a railroad in its own right. Instead, it acts as a contractor to Norfolk Southern in the performance of Norfolk Southern’s rail operations.

³³ Norfolk Southern concurs with the City’s statement of the law in this regard, which is itself a quote from the Board’s decision in Town of Babylon and Pine Lawn Cemetery – Petition for Declaratory Order, STB Finance Docket No. 35057 (served February 1, 2008) (“Babylon”), petition for reconsideration filed, February 20, 2008, slip op. at 4. Some of the cases cited by the STB in that paragraph seem to particularly on point. The STB compared Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 640-42 (2nd Cir. 2005) (transloading and temporary storage of bulk salt, cement and non-bulk foods by a rail carrier preempted) with Town of Milford, MA – Petition for Declaratory Order, STB Finance Docket No. 34444 (served August 12, 2004) (Board lacked jurisdiction over non-carrier operating a rail yard where it transloaded steel pursuant to an

Case No. 04-40323, U.S. District Court for the Eastern District of Michigan, Southern Division, 2005 U.S. Dist. LEXIS 40131, at *18 (June 1, 2005) (attached as Exhibit R) (the relationship of operator of a transloading facility is one of a contractor performing services for the rail carrier, and the activities occurring at the facility are therefore subject to the Board's jurisdiction, with the attempted local regulation preempted).

Under the facts, and pursuant to the agreement produced, the inescapable conclusion is that RSI indeed is a contractor of Norfolk Sothern, and the Facility is a railroad facility operated by and on behalf of a rail carrier. The Petition must be denied.

Two other issues remain. The first is whether the DOT regulation cited by the City has any relevance to the issue presented to the Board (it does not). The second is whether discovery should be permitted (it should not).

Lack of Relevance of Cited DOT Regulation

Alexandria claims that a DOT regulation – specifically 49 C.F.R. §174.304 – prohibits railroads from transporting Class 3 flammable liquids in tank cars unless the

agreement with the carrier but the transloading services were not being offered as part of common carrier services offered to the public). Alexandria adds to the Babylon excerpt a reference to the Babylon decision itself, but characterizes that decision holding as: “no STB jurisdiction where tenant of licensed rail carrier, not rail carrier itself, had exclusive right to conduct transloading operation for construction and demolition debris and exclusive responsibility to construct and maintain facilities and to market and bill public for services.” Railroads often enter into agreements with contractors to construct buildings and other railroad facilities, and to perform electrical and other maintenance on those facilities. The real question is whether the railroad transloading performed at the facility is being performed by or on behalf of the railroad, or instead by or on behalf of the contractor. The real holding of the Babylon decision is that the totality of the facts in the case fail to establish that the lessee's activities are being offered by the railroad or though the lessee as the railroad's agent or contract operator. “In sum, the record here, including in particular the parties' rights and obligations under their own agreement, does not establish that Coastal is acting as an agent under the auspices of NYAR.” Babylon,

movement of the tank car begins on a private track and ends on a private track. In essence, the City argues that it would be illegal for any railroad to operate any facility for the transloading of a Class 3 flammable liquid. The City assumes from this (mis)interpretation of the regulation that the track on which the ethanol transloading takes place therefore must be a private track. The City then takes its strained logic one further step, leaping to the conclusion that Norfolk Southern cannot be anything but a landlord to that track.

The City has mistakenly alleged that 49 C.F.R. §174.304 – which applies to delivery of rail cars containing Class III materials to private track used by a consignee for storage/unloading of rail cars after the rail car has been delivered to its final destination – also applies to spotting of rail cars at interim transloading facilities. The City misunderstands the regulation, for 49 C.F.R. §174.304 does not apply to transloading.

As information, the Hazardous Materials Transportation Act (“HMTA”) requires DOT to “prescribe regulations for the safe transportation, including security, of hazardous material in intrastate, interstate, and foreign commerce.” 49 U.S.C. §5103(b)(1). The Term “transportation” is defined in HMTA as meaning “the movement of property and loading, unloading, or storage incidental to the movement.” 49 U.S.C. §5102(12) (emphasis added).

In 2003 DOT originally issued its final rule in a proceeding designated as HM-223. That rule differentiated between “transportation” functions – i.e. those that generally occur between the time a rail carrier takes possession of the rail car containing hazardous materials until the time that the rail car is delivered to a consignee – and “post-

slip op at 5. Of course, the facts regarding the Alexandria Facility indicate just the opposite.

transportation functions” which occur after a rail car is finally delivered to the consignee. “Transportation” functions, including storage incidental to movement of hazardous material, are regulated by the DOT. “Post-transportation” functions, including storage of rail cars on “private track” after delivery to a consignee, are not regulated by DOT.

In 2004, in response to an Administrative Appeal filed by the Association of American Railroads and Norfolk Southern, among others, DOT clarified any ambiguity by ruling that delivery of a rail car to a transloading facility and “transloading” between rail and cargo tank truck is a “transportation” function regulated by the DOT. See DOT Pipeline and Hazardous Materials Safety Administration, Docket No. PHMSA-98-4952 (HM-223), 70 Fed. Reg. 20018, 20020-20021 (April 15, 2004). These DOT regulations apply to the “operator” of the transloading facility, regardless of whether it is the railroad, the railroad’s agent, or a lessee of railroad property who is operating the transloading facility. See 49 C.F.R. §174.67. Unlike transloading, storage of a rail car containing hazardous materials on a consignee’s private track after delivery by the rail carrier is considered to be a post-transportation function and is not regulated by DOT. See 70 Fed. Reg. at 20021.

In any event, it is not for the STB to decide whether the City has correctly argued that 49 C.F.R. §174.304 prohibits a railroad from operating a facility for the transloading of a Class 3 flammable liquid. It is the DOT - not the STB – that has the power to enforce regulations issued under HMTA. The question of whether the rail carrier is complying with any DOT regulation that applies (or not) to the Facility is not relevant to the question of whether the Facility is operated by or on behalf of a rail carrier.

Discovery

If there was ever a declaratory judgment proceeding in which a decision should be rendered on the initial pleadings, this is it. The facts are not in dispute – all of the facts cited in this pleading are undisputed, come from the City itself, or are documented. The law generally is not in dispute – with the exception of the relevance of the cited DOT regulation, the parties agree as to the applicable law. The Board has enough to make its determination.

Of more importance is the demonstrated fact that this proceeding is a political one. The City has ignored its own legal counsel and proceeded to file this action. It has ignored several opportunities to discuss the dispute. It had the opportunity even the day before the Petition was filed to ask for the RSI Agreement, but it instead buried its head. It ignored and failed to inform the Board of the fact that Norfolk Southern and the City were already in court, and it put blinders on with regard to the facts that were revealed in the District Court complaint.

The Board should not permit its processes to be abused for political gain. It should dispense with discovery and deny the petition.

CONCLUSION

The City has asked for the institution of a declaratory order proceeding. None is needed. The relevant facts set forth herein are undisputed, supported with documentation or come from the City itself. The parties agree as to the relevant law. Under those circumstances, the Board need not institute a declaratory order proceeding, and discovery

would only serve to permit the City to use this Board's processes for its own political ends.

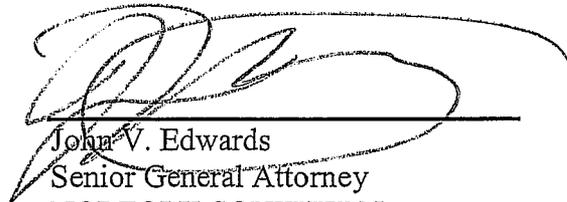
The City seeks "a declaratory order finding that the [Facility] does not constitute 'transportation by rail carrier'..." Petition at 2. The Board should decline to provide that order because such a finding would be contrary to the facts and the law.

The City has asked the Board to determine that "the City's proper regulatory authority" over the Facility is not preempted by federal jurisdiction. The City does not define what it means by that term. In any event, at least one aspect of that regulatory authority (the attempt to regulate the Facility by regulating access thereto) was put into question before a U.S. Federal District Court prior to the submission of the City's Petition to the Board. The Board need not reach that issue.

Respectfully submitted,

Gary A. Bryant
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July 1, 2008



John V. Edwards
Senior General Attorney
NORFOLK SOUTHERN
CORPORATION
Three Commercial Place
Norfolk, Virginia 23510-2191
(757) 629-2838

*Attorneys for Norfolk Southern
Railway Company*

Certificate of Service

I hereby certify that on this first day of July, 2008, I have caused to be served, by overnight courier to the persons listed below, a copy of the Response of Norfolk Southern Railway Company to Petition for Declaratory Order.

Ignacio B. Pessoa
Christopher P. Spera
Office of the City Attorney
301 King Street
Suite 1300
Alexandria, VA 22314
703-838-4433

Charles A. Spitulnik
W. Eric Pilsk
Allison I. Fultz
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John V. Edwards
Senior General Attorney
Norfolk Southern Corporation.

July 1, 2008

Irrelevant Exhibits omitted from this PDF for the sake of brevity:

A, C, D, E, F, G, H, O, and Q

These exhibits, which comprise either documents copied from the City's Norfolk Southern Ethanol Transloading Web Page, or the Norfolk Southern Lawsuit filed in the U.S. District Court in Alexandria, can be viewed on the Surface Transportation Board web site at:

<http://www.stb.dot.gov/filings/all.nsf/6084f194b67ca1c4852567d9005751dc/4a2070331ac4b1d18525747a006272d4?OpenDocument>



Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-9241

William A. Galanko
Vice President & Law

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September 18, 2006

Via Overnight Mail

Mr. Rich Josephson
Deputy Director
Department of Planning and Zoning
City of Alexandria
301 King Street
Alexandria, VA 22314

Dear Mr. Josephson:

David Lawson has asked me to respond to your e-mail of August 25, 2006, concerning the Norfolk Southern Railway Company transload facility in Alexandria, Virginia. As you are aware, Norfolk Southern intends to modify this railroad operating facility to receive rail cars and to transload ethanol from those rail cars to trucks. Norfolk Southern will operate the facility through a contractor. You have ventured that this use would be a use not permitted under the current UT zoning, and thus Norfolk Southern could only modify and operate the facility under a special use permit. The transload facility, however, is quintessentially a rail transportation facility that will be used by a freight rail common carrier subject to the jurisdiction of the U.S. Surface Transportation Board ("STB") in order to perform transportation operations. As such, pursuant to 49 U.S.C. § 10505(b), the UT zoning ordinance is preempted to the extent that it would require a permit or a special use permit to be issued before modification and/or operation.

The facility will be merely an adaptation of the former so-called Alexandria Intermodal Facility, which property has a long history of use for various railroad purposes. It will be open to any Norfolk Southern customer seeking ethanol transloading as a part of the Norfolk Southern transportation service package. Norfolk Southern already has received several indications of interest from its customers. The facility will not be devoted to any particular customer. Norfolk Southern will commence work in the very near future, and anticipates that the facility will be open no later than January 2007.

We believe it important to be a good corporate citizen -- to work with local officials in order to address concerns that might arise in the modification and operation of our facilities, and we believe we have achieved that here. Accordingly, since June 19, 2006, Norfolk Southern has met with, and provided facility plans to, various Alexandria officials. This includes Mayor Bill Euille, City Manager Jim Hartmann and Deputy City Manager Mark Jinks, as well as D.T. Perry and Art Dahlberg from the Alexandria Fire Department. We have integrated all modifications proposed by Alexandria fire officials to address perceived safety and fire concerns, including but not limited to special spill containment facilities, additional fire hydrant locations (including a mobile fire hydrant), foam capability, and additional portable fire extinguishers. The facility will be fenced, gated and secured, and will be operated in a safe manner in conformance with any applicable health and safety requirements.

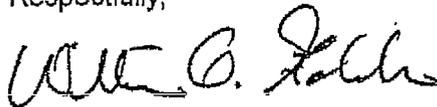
Mr. Josephson
Page 2
September 18, 2006

Having said that, however, we do note that the Interstate Commerce Commission Termination Act ("ICCTA") provides that the jurisdiction of the Surface Transportation Board ("STB") over "transportation by rail carriers" and the construction and operation of rail facilities "is exclusive." 49 U.S.C. § 10501(b). Further, the ICCTA provides that, "except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." *Id.* "Transportation" is defined as including rail cars, warehouses, wharfs, piers, yards, property, facilities "or other equipment of any kind related to the movement of passengers or property, or both, by rail ... and ... services related to that movement, including receipt, delivery, elevation, transfer in transit, ... storage, handling, and interchange of passengers and property..." 49 U.S.C. § 10102(9). ICCTA was passed in an effort to strengthen the rail transportation system by reducing the regulation of railroads and other modes of surface transportation. See 49 U.S.C. § 10101. Application of this section preempts Alexandria's zoning statute to the extent that it would require any permit prior to the modification or operation of the facility.

Courts have repeatedly invoked 49 U.S.C. § 10501(b) as a basis for preemption of state and local zoning, land use planning and permit requirements in the construction of rail facilities to be operated by or on behalf of rail carriers. See City of Auburn v. United States Government 154 F.3d 1025 (9th Cir. 1998), cert. denied, 119 S.Ct. 2367 (1999) (relating to the construction of a rail line); Canadian National Railway Co. v. City of Rockwood, Civ. Case No. 04-40323 (U.S. District Court, E.D. of Michigan, Opinion and Order Granting Preliminary Injunction) (activities taking place at a transload facility are considered "transportation," relating to the preemption of permit requirements for the construction and operation of a transload facility); Norfolk Southern Railway Company, et al. v. City of Austell, et al., 1997 WL 1113647 (N.D. Ga., 1997) (intermodal facility). There are several other cases along similar lines.

These decisions, and the statute that they interpret, implement Congress' expressed intention to preempt such regulations that may stand as an obstacle to an interstate rail carrier's ability to construct facilities or conduct interstate rail operations. Nevertheless, we believe it incumbent upon us to work with the local community to address its concerns. We have done so in the past and we will continue to do so where it makes sense in modifying the facility and opening it on a timely basis to operation. Please let me know if there is anything further I can provide you. Further, if desired, I will be happy to speak with your legal counsel concerning this matter.

Respectfully,



William A. Galanko
Vice President - Law

cc: David Lawson

Exhibit B

CONTRACT NO.19543

A G R E E M E N T

This Agreement made and entered into as of the February 1, 2008, by and between Norfolk Southern Railway Company (hereinafter called "Railway") and RSI Leasing, Inc. (hereinafter called "Contractor"). This Agreement includes the attached appendices to the same extent as if the provisions of appendices were set forth verbatim herein, and the term "this Agreement" as used hereinafter shall include the appendices.

W I T N E S S E T H

WHEREAS, Railway holds itself out to the public as offering to provide transportation and other specified services with regard to denatured ethanol and other products; and

WHEREAS, Railway desires to enter into an agreement with Contractor, for the performance of certain services incidental to such transportation and other services, as set forth herein and under the conditions hereinafter set forth below; and

WHEREAS, such services by Contractor include the rail-highway intermodal transloading of denatured ethanol from tank cars at Railway's transportation facility described in Appendix A (hereinafter called the "Terminal"), and the performance of certain other support services described more fully below; and

WHEREAS, Contractor is willing to perform the services described herein for the transloading of denatured ethanol; and

WHEREAS, the Parties desire the set forth a framework pursuant to which rates and terms for the transloading of products other than denatured ethanol can be determined and integrated into this Agreement.

NOW, THEREFORE, for and in consideration of the mutual undertakings set forth below, the parties hereto agree as follows:

SECTION 1. CONTRACTOR OBLIGATIONS.

A. Transload Process.

(i) Until Appendix C hereto is amended to include pricing for the transload of other commodities, a reference herein to "the Product" shall be a reference to denatured ethanol. After Appendix C hereto is amended to including pricing for the transload of other commodities, a reference to "the Product" shall be a reference to all commodities covered by Appendix C pricing. Contractor shall not transload any Product designated as hazardous pursuant to 49 C.F.R. Parts 171 and 172, including Section 172.101 (Hazardous Materials Table), as may be revised or replaced from time to time, including but not limited to denatured ethanol, until: (a) Railway agrees, in writing (including via e-mail), to permit the same, subject to such conditions as Railway deems appropriate, and taking into account the nature and characteristics of the

Exhibit P

commodity as well as safety considerations in handling the Product; and (b) Contractor certifies that it is fully knowledgeable on how to handle and transload the Product in full accordance with all applicable safety and environmental regulations and conditions Railway deems appropriate, and that its employees, agents and contractors have received the proper training and safety protective equipment to transload the Product.

(ii) Contractor shall perform all activities required to transload the Product from rail tank cars and/or, in the case of commodities other than denatured ethanol, other rail cars, on the one hand, and trucks, on the other hand (such activities hereinafter called the "Transload Process"), including but not limited to the following:

- i. Perform, and ensure shipper compliance with, Tariff 9328-C, or any successor or replacement thereof.
- ii. Check in procedures for trucks showing up at the gate.
- iii. Manning the gate during open hours, which shall be at a minimum 7 a.m. to 6 p.m., five (5) days per week (Monday through Friday), but regular hours of service can be in addition to the minimum, if it is necessary to match the level of business at the terminal and the needs of the customers
- iv. Maintaining the site, including but not limited to the gates, fences, grounds, the building, in an orderly, clean state of good repair.
- v. Directing trucks within the loading site.
- vi. Completing paper work for truck drivers.
- vii. Attaching transload equipment to rail cars.
- viii. Attaching transload equipment to trucks.
- ix. Providing security, which shall mean, at a minimum, that the facility is occupied at all times during open hours, and that the facility is secured with locked gates during periods when the facility is not open.
- x. Determination of the Quality of the Product (upon request of Railway).
- xi. Supervision of independent inspector for the determination of the quality of the Product.
- xii. Actively manage the inventory pipelines of all customers to insure proper levels of Product at the terminal.
- xiii. Providing all necessary transload equipment to handle the Product.
- xiv. Collection of Track Occupancy Charges (TOC) from all terminal customers acting as NS' third party billing agent.

(iii) Contractor shall supply the necessary staffing, including a Terminal Manager (as a single point of contact for Contractor), drivers and qualified loaders, portable office, if necessary, and equipment, to provide the Transload Process on a timely basis for Railway's customers. All utilities will be paid by the Contractor. Personnel will be trained. The transfer process will be supervised and staffed with the appropriate number of OSHA and DOT

trained personnel. At least two (2) people will perform transfers of hazardous materials. This is in addition to the truck driver. Contractor will provide multiple unloading stations to match the anticipated daily volume and avoid delays in tank truck loading. Contractor shall be responsible for the purchase, maintenance and replacement of all equipment, fuel, lubricant, supplies, depreciation and parts used by Contractor pursuant to this Agreement. From time to time and upon mutual agreement of the parties, the minimum number of unloading stations shall be set and adjusted upward or downward to match material changes in anticipated daily volumes and hours of service.

(iv) Contractor will provide to Railway's customer Contractor's completed customary inspection report with respect to all of the Railway customer's rail cars entering the Terminal carrying a Product to be transloaded for the customer. All transloading equipment used by Contractor shall be equipped with a volume transloading meter. Contractor shall ensure that all transloading activities will be accurately metered and volume transloaded recorded. Contractor shall, at its sole cost, have an independent party perform a meter calibration test on all meters and shall provide the results of said test to Railway. If the amount of volume transloaded from any rail car varies from the customer reported volume by 500 gallons or more, then Contractor shall immediately visually inspect the cars and reported the variance to the customer.

(v) If requested by Railway, Contractor shall determine the quantity of the Product handled hereunder shall be determined by Contractor, or at Railway's customer's option by an independent inspector mutually acceptable to both parties. The charges for an independent inspector shall be borne by parties other than Contractor. Either party may dispute a determination under this section by delivering written notice thereof to the other party promptly upon receipt of the determination. The parties shall resolve any disputes in good faith.

(a) The quantity of denatured ethanol handled hereunder shall be determined as follows:

- (i) The quantity of Product received from rail cars shall be determined by the rail car's bill of lading from the origin point.
- (ii) The quantity of Product delivered to a tank truck shall be determined as follows: Contractor's loading meters, or in the case of meter failure or absence of meters, tank truck calibrations shall be used when the Product is loaded to the compartment measuring finger. RSI shall maintain seals on its meters and shall test and calibrate its meters at maximum intervals of six (6) months, or more often as found necessary (or as required by federal, state or local authorities), in accordance with approved methods.

(iii) For the purpose of the Agreement, a barrel shall consist of forty-two (42) U.S. gallons and a gallon shall contain two hundred thirty-one (231) cubic inches when corrected to 60°F. All measurements shall be in accordance with API standards. All quantities, however measured, shall be corrected to 60°F, using the applicable volume correction table for chemical products.

(b) The quality of commodities other than denatured ethanol shall be determined pursuant to a process developed at the time that the Parties amend Appendix C, and shall be appropriate to the commodity being transloaded.

(vi) Contractor shall not permit any motor carrier to enter onto the Facility unless such motor carrier has entered into an Indemnity and Hold Harmless Agreement with Railway substantially in the form attached hereto as Appendix E. Contractor shall not permit any motor carrier to enter onto the Facility, regardless of whether said motor carrier has entered into an Indemnity and Hold Harmless Agreement with Railway, if Railway denies such motor carrier access to the Facility.

B. Accessorial Yard Services.

Contractor shall also provide any additional services which are determined in Railway's sole but good faith judgment to be reasonably necessary for the efficient operation of the Terminal (hereinafter called "Accessorial Yard Services"), which shall include at a minimum those operating and administrative services specifically described in Appendix B, provided, however, that no language in Appendix B, or omission of language from Appendix B shall reduce or limit, in any manner, Contractor's obligation to provide all support and incidental services ordinarily and reasonably required in the operation of a rail-highway, denatured ethanol intermodal transload facility.

C. Supervision and Performance of Work.

Contractor is and shall remain an independent contractor. Contractor shall be solely responsible for, and Railway shall not participate in, the employing or supervising of each person engaged in discharging Contractor's responsibilities under this Agreement; all such persons shall be the sole agents, servants and employees of Contractor. The Contractor shall pay all expenses and charges involved or incurred in any way in the performance of its obligations under this Agreement, including without limitation compensation of personnel, fringe benefits, Social Security, Worker's Compensation unemployment insurance and any other employment taxes as may be required by State or Federal law). Should Contractor engage the services of a contractor or agent to carry out any of Contractor's activities under this contract, Contractor assumes full responsibility and shall indemnify and hold harmless Railway from any consequences of the acts and omissions of such contractor or agent. It is the intention of the parties that Contractor shall

remain an independent contractor and nothing herein shall be deemed to constitute a joint venture, partnership or agency of any kind for any purpose. Contractor shall not use the Facility other than for the purposes set forth in this contract, and shall not use the Facility to transload rail cars placed at the Facility by parties other than Railway.

D. Protection of Persons and Railway Property.

(i) Contractor shall require any person performing any obligation of Contractor under this Agreement, including, without limitation, Contractor's employees, prospective employees, agents, representatives, and subcontractors (hereinafter called "Workers"), to comply, while on or about Railway property, with the Operating Rules, if any, that apply to their activities and are supplied to Contractor by Railway, and also to comply with any other rules or regulations concerning operations or safety that Railway furnishes in writing to Contractor.

(ii) Contractor will provide any information reasonably requested by Railway about any of Contractor's Workers who may come on Railway property or perform any work for Railway under this Agreement. Contractor represents and warrants that, as to each of Contractor's Workers who will come onto Railway's premises or who will perform work hereunder, Contractor has performed, and such Contractor's Worker has passed, the required background check and a drug screening test, each of which shall be reasonably acceptable to Railway and otherwise in compliance with applicable laws, including, but not limited to the Fair Credit Reporting Act as applicable to background checks.

(iii) Except as provided in Section 1.A.(i), this contract does not cover the handling of any commodity designated as hazardous pursuant to 49 C.F.R. Parts 171 and 172, including Section 172.101 (Hazardous Materials Table), as may be revised or replaced from time to time. Contractor shall not bring on or permit the presence of, or permit or suffer others to bring on or permit the presence of, such materials without the expressed written approval of Railway.

(iv) Contractor shall ensure that spill containment will be used and will be, as appropriate, the placement of Product-resistant catch pans under hose connections during the transfer and breakdown.

(v) Contractor shall ensure that the transfer process will be performed: (a) only on grounded track; (b) isolated from other commodities to the degree possible as track space allows; (c) only through a pumping system with a "closed loop" vapor recovery system; (d) using hoses secured with straps/seals; (e) under conditions where all transfer equipment, car and tank trunk is grounded; (f) only using bonded tanks; and (g) inside the containment area for hazardous products.

(vi) Contractor shall ensure that all personnel involved in the transfer will: (a) wear selected protective clothing, including goggles, work boots, PVC gloves, and long-sleeved

uniforms, and (b) be trained, and receive regular and appropriate refresher training, regarding the hazards posed by the Product being transferred (such hazards as are set forth in the MSDS) and in the appropriate emergency response in the event of a release of the Product being transferred (such appropriate response as are set forth in the emergency response plan identified in Section 1.D.(viii) below.

(vii) Contractor shall ensure that all necessary safety equipment, including blue flags, rail chocks, spill kits, safety showers, fire extinguishers, and eyewashes, shall be in place and in good working order.

(viii) Contractor shall ensure that the following will be maintained in the office of the Terminal during relevant Transfer Operation: (a) all Material Safety Data Sheet (MSDS) covering the specific Product being transferred; (b) the proper Emergency Response Guide covering the specific Product being transferred; (c) a working emergency response plan that incorporates response for the specific Product being transferred (which plan will also be provided to the local emergency response agency); and (d) a security plan.

(ix) Contractor shall implement the security plan identified in Section 1.D.(viii) above.

(x) Contractor shall report any and all accidental releases to Railway.

(xi) Contractor shall contain and dispose of any and all accidental releases in accordance with all applicable Federal, State, and local requirements.

E. E-Verifile.com

(i) Contractor must secure background investigations of its employees through e-VERIFILE.com. Contractor employees successfully undergoing the background investigation will be issued a picture identification card which will be required for the Contractor's employees to enter and work on Railway property or perform services for Railway. Contractor employees without the identification card will not be allowed to work on Railway property. Employees leaving the employment of Contractor must surrender the identification card to either Contractor or to Railway. While Railway has negotiated on the behalf of Contractor standard volume rates with e-VERIFILE.com for the investigations, identifications cards and other products, all charges incurred in the use of e-VERIFILE services and products are the sole responsibility of Contractor. Where a contract permits Contractor to charge travel and business expenses to Railway, the e-VERIFILE.com charges are not included among such recoverable expenses. Contractor may include such charges as a part of its overhead costs in determining its price proposals. Contractor must execute e-VERIFILE.com's standard Subscriber Agreement—failure to do so voids this Agreement. The contact information for e-VERIFILE.com is as follows: e-Verifile.com (770-859-0717 ext 212).

(ii) In the event that Railway ceases the use of e-VERIFILE.com for background investigations or switches to another similar service, Contractor will be notified by Railway of the termination and/or transfer. In the event that Railway switches to another vendor for similar services the requirements of this Section will apply to Contractor with regard to the use of the alternative vendor's services.

(iii) Railway does not warrant or guarantee either the accuracy or completeness of the services performed by e-VERIFILE.com; and Railway shall have no responsibility to Contractor for the services performed by e-VERIFILE.com. Contractor uses such services as between Railway and Contractor solely at the risk of Contractor. It is the sole discretion and responsibility of Contractor as to performing other background investigations of Contractor's employees.

(iv) A sample copy of e-VERIFILE.com's standard Subscriber Agreement is attached for information.

F. Other Investigations.

As to any of Contractor's Workers who have or may come onto Railway's premises or perform work hereunder, Contractor will perform any other investigation or procedure reasonably requested by Railway for the protection of Railway's property or operations, the protection of lading, and the protection of third parties.

G. Indemnification.

Contractor agrees that it will hold Railway harmless and will indemnify Railway in the event any actions are filed against Railway in connection with Contractor's completion of any of the foregoing, including but not limited to the conduct and communication of the background check and the drug screening test.

H. Waiver.

If Railway elects to waive the requirement of any background check, drug screen, or other investigation or procedure before permitting one of Contractor's Workers to perform work hereunder or to come on any Railway property, such waiver shall not constitute a waiver of Railway's right to subsequently require any such check, screen, investigation or procedure for that Worker after he or she has begun working under this Agreement.

I. Without limiting the generality of the foregoing in any way, Contractor shall also perform the following acts:

(i) Arrange an urinalysis screen for any substance specified by Railway for each of Contractor's Workers who will perform work under this Agreement, and

(ii) Before any Worker comes on Railway's property or performs any work hereunder, provide Railway with a certificate from the doctor, clinic, or hospital performing the urinalysis drug screen for that Worker certifying the results thereof.

(iii) Upon request by Contractor, Railway will furnish it with a list of doctors, clinics, and hospitals that perform drug screening urinalysis.

(iv) Railway reserves the right to bar from the Terminal or other Railway property any of Contractor's Workers who, in Railway's sole judgment, could create any risk or operating or administrative problems either because of the excluded person's refusal to comply with operating safety procedures, questions about his or her honesty, discipline problems he or she creates with Railway's own employees, or any other reason Railway has for reasonably believing that person might cause risk or disruption to Railway's operations. Upon request by Railway, Contractor will exclude from the performance of any work under this Agreement and bar from the Terminal or other Railway property any of Contractor's Workers designated by Railway as excluded under this Agreement. Railway shall not be required to specify, in any such request or otherwise, either the basis for its decision or which of the foregoing objections it has to the excluded person.

(v) Railway's right under this section to exclude any person from its property or from work under this Agreement shall not be waived by its failure to require any background check, drug screen, or other investigation or procedure under the other provisions of this Section 1.I, by its prior failure to act upon any information that was, or should have been, included in such check, screen, investigation or procedure, by the successful passing by Contractor's employee of the required or any other background check or by any other act or omission of Railway.

(vi) Before permitting any of its Workers to perform any service under this Agreement, Contractor shall inform him or her of all of Railway's rights under this Section 1.I.

J. Conflict of Interest.

Contractor shall not permit any person, firm or corporation, or employees thereof, in any manner interested in the freight to be handled hereunder to perform any of Contractor's obligations under this Agreement or to become financially interested in Contractor's business. Contractor shall not employ, lease or rent any vehicle used in the usual course of business by such person, firm or corporation, and Contractor shall not permit any monies paid for services performed hereunder to be refunded, directly or indirectly, to any shipper, consignee or anyone interested in the freight so handled.

K. Damage and Injury Reports.

Contractor shall immediately notify the Railway employee specified on Appendix A of (i) any death of, or injury requiring medical treatment to, any person, including but not limited to

employees of Contractor while on Railway property or performing services hereunder, and (ii) any loss or destruction of or damage to any property whatsoever, including but not limited to the rail cars and the Product. Contractor agrees to furnish full details of any such accident or incident. Contractor acknowledges its knowledge of Railway's responsibility to report deaths or injuries to Federal agencies and its full knowledge of all penalties and damages to which Railway may be subjected if such reports are not made because of Contractor's failure to notify Railway.

L. Audit.

(i) The Contractor shall, during the existence of this Agreement and for one calendar year thereafter, upon written request of Railway, furnish Railway within sixty (60) days from the receipt of a written request, a detailed accounting of its expenses of operation and its charges to Railway verified by a written report of a Certified Public Accountant which contains no qualification of the verification of such expenses and charges in accordance with generally accepted accounting principles.

(ii) Contractor shall also permit Railway full and complete access to such books and records (including those of Contractor and of any corporate parent, subsidiary, or affiliate) as may be required to conduct a proper audit, in accordance with generally accepted accounting principles, of Contractor's operations, charges and accounting under this Agreement. Contractor shall also permit Railway to copy any portion of those books and records that Railway is entitled to examine under the foregoing sentence. In the event of any dispute about what records are required for a proper audit under this Subsection 1.L., Railway may designate as arbitrator any of the eight largest accounting firms in the United States, and both parties shall accept as final and binding that firm's decision about what records are subject to Railway's examination under this Subsection 1.L. The expense of such accounting firm for such services as arbitrator shall be borne equally by Railway and Contractor, unless it rules that all requested documents shall be made available to Railway, in which case the Contractor shall pay the entire fee, or that none of the requested documents shall be made available to Railway, in which case Railway shall pay the entire fee.

M. Demurrage, Car Hire and Transportation Charges.

As Railway's contractor, Contractor shall not be responsible for demurrage, car hire or transportation charges for the movement of the Product to and from the Facility. Contractor shall be responsible to act as a third party billing agent on Track Occupancy Charges applicable pursuant to Bulk Tariff 9328.

SECTION 2. COMPENSATION.

Railway covenants and agrees to pay, and Contractor agrees to accept, as full compensation for all services provided hereunder by Contractor and all obligations assumed hereunder by Contractor the amounts or rates of compensation set forth in Appendix C. Without

limiting the generality of the foregoing, the compensation shown in Appendix C includes all activities covered by the Transload Process Trailer and all Assessorial Yard Services, and Contractor shall not be entitled to any additional compensation for any such services.

SECTION 3. LIABILITY, INDEMNITY AND INSURANCE.

A. Indemnity for Railway.

(i) Contractor shall indemnify and hold harmless Railway and the other Indemnified Parties listed in Subsection 3.B below from and against any and all liability, damages, claims, suits, judgments, costs, expenses (including, but not limited to, litigation costs and attorney fees) and losses resulting from:

- a. Injury to or death of Contractor's agents, servants, or employees and loss or destruction of or damage to property or equipment of Contractor or its agents, servants or employees arising directly or indirectly from this Agreement or the presence at or about the Terminal, or any other Railway property, of any of Contractor's agents, servants or employees, except to the extent such injury, death, loss or damage is caused directly or indirectly by the negligence of Railway, its agents, servants, or employees, or otherwise;
- b. Except as provided in Subsection 3.A.(1).a, injury to or death of any person whomsoever (including, but not limited to, employees of Railway) and loss or destruction of or damage to any property whatsoever (including, but not limited to, property of Railway) caused directly or indirectly by the acts or omissions of Contractor, its agents, servants, or employees or arising in any manner either from the presence of Contractor, Contractor's agents, servants, or employees at or about the Terminal or any other Railway property in connection with this Agreement or from Contractor's performance or attempted performance of this Agreement (and regardless of whether a Trailer involved in such loss and damage or injury is in Contractor's possession at the time of loss, damage or injury), unless such injury, death, loss, or damage is caused solely by the negligence of Railway, its agents, servants, or employees; or
- c. Any failure by Contractor to comply with any covenant of this Agreement, including but not limited to Contractor's obligation to pay any applicable payroll, unemployment compensation, social security or other employment taxes arising in any manner, directly or indirectly, from or in connection with the Transfer Operation or

with the assertion by any federal, state, or local government of any such tax liability.

- d. Contractor shall not be responsible for the pre-existing environmental condition of the premises or any problem or condition caused or created by any person other than Contractor or its contractors or agents; provided, however, that in the event of any such problems or conditions (which is not a pre-existing environmental condition) is caused or created at the Facility and it cannot be determined who caused or created such problem or condition, then Railway and Contractor shall share equally in the cost of cleaning up or correcting such problem or condition.

B. Indemnified Parties.

Contractor shall indemnify and hold harmless the following parties (herein the "Indemnified Party" or "Indemnified Parties") to the extent described in Subsection 3.A above: (i) Norfolk Southern Corporation; (ii) any direct or indirect subsidiary of Norfolk Southern Corporation; and (iii) any officer, director, employee or agent of Norfolk Southern Corporation or of any of its direct or indirect subsidiaries.

C. Insurance.

- (i) Contractor, shall at its expense, obtain and maintain during the period of this Contract in a form and with companies satisfactory to Railway, the following insurance coverages:
 - (a) Workers' Compensation Insurance to meet fully the requirement of any compensation act, plan or legislative enactment applicable in connection with the death, disability or injury of Contractor's officers, agents, servants or employees arising directly or indirectly out of the performance of the services herein undertaken;
 - (b) Employers' Liability Insurance with Limits of not less than \$1,000,000 each accident, \$1,000,000 policy limit for disease, and \$1,000,000 each employee for disease;
 - (c) Commercial General Liability Insurance with a combined single limit of not less than \$5,000,000 per occurrence for injury to or death of persons and damage to or loss or destruction of property. Such policy shall be endorsed to provide products and completed operations coverage and contractual liability coverage for liability assumed under this Contract. The contractual liability coverage shall be of a form that does not deny coverage for operations

conducted within 50 feet of any railroad hazard. In addition, said policy or policies shall be endorsed to name Railway as an additional insured and shall include a severability of interests provision;

- (d) If the use of motor vehicles is required, Automobile Liability Insurance with a combined single limit of not less than \$5,000,000 each occurrence for injury to or death of persons and damage to or loss or destruction of property. Said policy or policies shall be endorsed to name Railway as an additional insured and shall include a severability of interests provision;
- (e) In the event Contractor leases or otherwise uses Railway's equipment in order to perform the services specified in this Agreement, Contractor shall maintain all risk property insurance at replacement cost value on said equipment.

(ii) Contractor shall furnish certificates of insurance to Railway's Director Risk Management, Three Commercial Place, Norfolk, Virginia 23510-2191, certifying the existence of such insurance. Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in coverage or limits without (30) days advance written notice to Railway. Upon request, Contractor and its subcontractors, if any, shall furnish Railway with copies of the insurance policies or other satisfactory evidence of such insurance. Contractor shall require all subcontractors who are not covered by the insurance carried by Contractor to maintain the insurance coverage described in this Section.

(iii) The insurance coverage required herein shall in no way limit the Contractor's liability under this Contract.

SECTION 4. LIENS

Contractor shall not cause any lien, claim or encumbrance to be placed against the Facility. If any such lien, claim or encumbrance caused by Contractor shall be filed or placed against the Facility or any part thereof, Contractor agrees to discharge the same within thirty (30) days after Contractor has notice thereof. If Contractor fails to do so, Railway shall have the right (but not the obligation) to pay or discharge any such liens, claims or encumbrances without inquiry as to their validity and any amounts so paid, including interest, fees, charges and expenses shall be paid by Contractor to Railway.

SECTION 5. TERM AND TERMINATION.

A. This agreement shall have an initial term (the "Initial Term") beginning on the first day that the Facility is open and operational, which date shall be determined by an exchange of

letters between the Parties (the "Effective Date") and ending on the second anniversary of the Effective Date (the "Termination Date"). This agreement will automatically continue during a renewal term (the "Renewal Term") from month to month after the Termination Date until either party provides the other with thirty (30) days prior written notice of termination ("Renewal Term," and, collectively with the Initial Term, the "Contract Term").

B. Notwithstanding anything in this Agreement to the contrary, Railway may terminate this Agreement at any time for any reason upon giving Contractor at least sixty (60) days' notice. Notwithstanding anything in this Agreement to the contrary, Contractor may terminate this Agreement upon at least sixty (60) days' prior written notice to Railway's Distribution Services Department, Norfolk Southern Corporation, Three Commercial Place, Norfolk, VA 23510. If this Agreement is terminated during the Initial Term pursuant to this Section 5.B, the minimum payment set forth in Appendix C nevertheless will apply.

C. Notwithstanding anything in this Agreement to the contrary, if Contractor breaches any material provision of this Agreement, including, without limitation, any of its obligations under Sections 1, 3, 6.B and 6.G (all of which provisions are considered material), Railway shall have the right to terminate this Agreement without further prior notice to Contractor. Notwithstanding anything in this Agreement to the contrary, the minimum payment set forth in Appendix C shall be waived in the event this Agreement is terminated pursuant to this Section 5.C.

D. Notwithstanding anything in this Agreement to the contrary, if Railway decides, as a matter of business judgment and in its sole discretion, that the continued operation of the Terminal as a rail-highway intermodal facility for the transloading of the Product is not justified and that it will cease using the Terminal as a rail-highway intermodal facility for the transloading of the Product, Railway may terminate this Agreement upon at least thirty (30) days prior written notice to Contractor of its intent to cease using the Terminal as a rail-highway intermodal facility for the transloading of the Product. If this Agreement is terminated during the Initial Term pursuant to this Section 5.D, the minimum payment set forth in Appendix C nevertheless will apply.

SECTION 6. RAILWAY ACCESS TO THE FACILITY.

In addition to access to the Facility normally required for Railway operations, at any time during the term of this contract, Railway shall have the right to enter upon and inspect the Facility and the operations of Contractor, among other reasons, to ensure that Railway's premises are not being contaminated and Railway's employees are not at a health risk arising from Contractor's operations. If Railway detects any violation that results from such condition, including any contamination of the premises, Railway shall notify Contractor of such violation, provided, however, that the giving of said notice, or the failure of the giving of said notice, shall in no way affect the allocation of any liability arising there from or in connection therewith.

SECTION 7. GENERAL CONTRACT PROVISIONS.

A. Notices. All notices required to be given under this Agreement shall be in writing, signed by or on behalf of the party giving the same, and transmitted to the addresses shown below or such successor address(es) as that party may specify by notice hereunder. Such notices shall be transmitted by United States registered or certified mail return receipt requested, or by telegram or fax, with confirmed receipt, addressed to the following offices and addresses:

For Railway: Distribution Services Department
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510
Fax # (757) 823-5425

For Contractor: RSI Leasing, Inc.
P.O. Box 1396
Okemos, MI 48805-1396
Attention: Robert B. Tucheck — President

All notices shall be effective on day following confirmed receipt of the letter, telegram, or fax.

B. Assignment.

Neither this Agreement nor any of the services to be performed hereunder shall be assigned or sublet without the prior written consent of Railway. The proceeds to be paid hereunder by Railway to Contractor shall not be assigned, sublet or factored by Contractor; and such assignment, sublet or factoring shall constitute a material breach of this Agreement. Subject to the foregoing restrictions, this Agreement shall inure to the benefit of and be binding upon all successors and assigns.

C. Amendment.

No terms or conditions, other than those stated herein, including any Appendix hereto, and no agreement or understanding, oral or written, in any way purporting to modify this Agreement, shall be binding on either party unless hereafter made in writing stating that it is intended as a change to this Agreement and signed by an authorized representative of both parties.

D. Integration.

This Agreement constitutes the entire agreement between the Parties as to the subject matter hereof, and supersedes all previous oral or written understandings, agreements and commitments as to the subject matter hereof.

E. Counterparts.

This Agreement may be executed simultaneously in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instruction.

D. Non-Waiver.

The waiver of any breach of any of the terms and conditions hereof shall be limited to the act or acts constituting such breach and shall not be construed as a continuing or permanent waiver of any such terms and conditions, all of which shall be and remain in full force and effect as to future acts or happenings notwithstanding such waiver. The parties intend that none of the provisions of this Agreement shall be thought by the other to have been waived by any act or knowledge of the parties, but only by a written instrument signed by the party waiving a right hereunder.

E. Severability.

If any provision in this Agreement is found for any reason to be unlawful or unenforceable, the parties intend for such provision or provisions to be severed and deleted from this Agreement and for the balance of this Agreement to constitute a binding agreement, enforceable against both Railway and Contractor.

F. Remedies Cumulative.

Any rights or remedies under this Agreement, including, without limitation, those provided in the preceding paragraph, are cumulative and in addition to all other rights and remedies hereunder or at law. Any cancellation or termination of this Agreement shall not relieve either party of any obligation or liability accruing under this Agreement prior to such cancellation or termination.

G. Arbitration.

(i) Except as provided in Section 1.L, any claim, dispute or controversy arising out of or relating to this Agreement, the parties' relationship under this Agreement, or the breach of this Agreement, shall be determined by arbitration by a single arbitrator pursuant to the applicable Rules of Practice and Procedure of the American Arbitration Association in effect at the time the demand for arbitration is filed. Unless, within sixty (60) days of the date of the notice initiating arbitration, the parties can mutually agree to an arbitrator, the arbitrator shall be chosen in accordance with the Uniform Arbitration Act. Unless otherwise agreed to by the parties, the location of the arbitration shall be in Norfolk, Virginia. The decision of the arbitrator shall be final and binding. Each party to the arbitration shall pay the compensation, costs, fees and expenses of its own witnesses, experts and counsel. The compensation and any costs and

expenses of the arbitrator shall be borne equally by the parties. Judgment to enforce the decision or award of the arbitrator may be entered in any court having jurisdiction.

(ii) Service of process in connection therewith shall be made by certified mail. In any judicial proceeding to enforce this agreement to arbitrate, the only issues to be determined shall be the existence of the Agreement to arbitrate and the failure of one party to comply with that Agreement to arbitrate, and those issues shall be determined summarily by the court without a jury. All other issues shall be decided by the arbitrator, whose decision thereon shall be final and binding. There may be no appeal of an order compelling arbitration except as part of an appeal concerning confirmation of the decision of the arbitrator.

(iii) Neither party shall institute any legal proceeding against the other to enforce any right hereunder, except that either party may institute litigation: (a) to enforce its rights of arbitration hereunder; (b) to confirm and have judgment entered upon any arbitration award issued hereunder; and (c) to stay the running of any statute of limitation or prevent any other occurrence (including, without limitation, the passage of time) which would constitute laches, estoppel, waiver or any other such legal consequence that suit is necessary to avoid, provided, however, that neither party shall pursue litigation under item (c) beyond such action as is necessary to prevent prejudice to its cause of action pending ultimate resolution by arbitration under this Section 6.G.

(iv) If any dispute between the parties arises from or in connection with any claim or litigation initiated by any third party (either as claimant, plaintiff, counter claimant, or defendant/third party plaintiff), then, unless the parties agree otherwise, the resolution of that dispute under the arbitration provisions of this Section 7.G may, at the option of either party, be deferred until the resolution of that third-party claim or litigation, provided, however that in the event of any such dispute in connection with such a claim or litigation so initiated by a third party, either party may at any time initiate arbitration under this Section 7.G to determine prospective liability between the parties upon facts which are stipulated, admitted solely for the purpose of arbitrating prospective liability, or not reasonably in dispute. The issue of whether any fact is "reasonably in dispute" under the preceding sentence shall be subject to mandatory arbitration hereunder upon the demand of either party. In the event Railway is made a party to such claim or litigation so initiated by a third party, Railway shall select its own counsel and have complete control over all claim or litigation decisions concerning its participation in that claim or litigation, regardless of whether Railway is required to, or in fact does, initiate a cross claim, counterclaim or third-party claim under subclause (iii) of Subsection 7.G.(3) above, and regardless of Contractor's indemnity obligations under Section 3 above.

H. Governing Law. The laws of the Commonwealth of Virginia shall govern the construction and interpretation of this Agreement and all rights and obligations of the parties under it, except that the legal effect of any indemnity obligation under this Agreement for claims arising from personal injury or property damage shall be governed by the law of the state in which that personal injury or property damage occurred.

I. Captions.

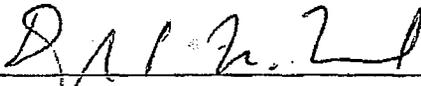
The caption of the paragraphs and sections are inserted for convenience only and shall in no way expand, restrict, or modify any of the terms and provisions hereof.

J. Confidentiality.

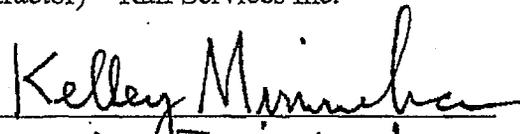
The terms and conditions of this Agreement shall be considered strictly confidential between the parties hereto and neither party shall disclose any such term, condition, or Railway customer information for any other purpose other than such disclosures as may be required by any government authority in order that it may discharge its regulatory functions, or to each parties' accountants, attorneys, agents and subcontractors who have a need to know the information, or as may otherwise be required by law.

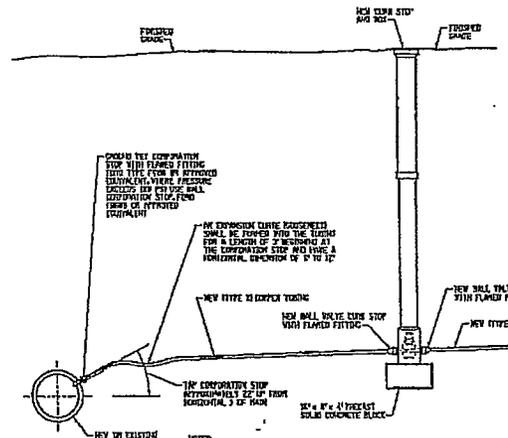
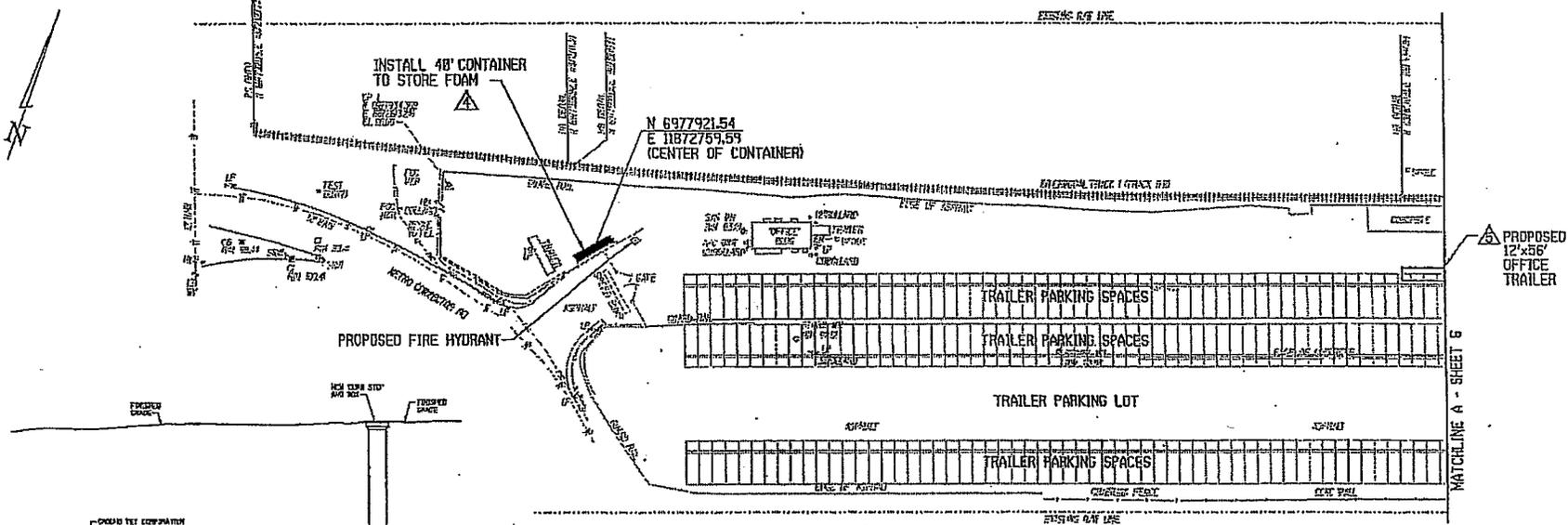
IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day, month, and year first above written.

Norfolk Southern Railway Company

By: 
Title: Director Distribution Services

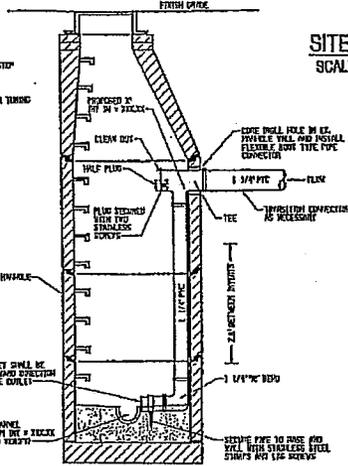
(Contractor) Rail Services Inc.

By: 
Title: Vice President



NEW WATER SERVICE 3/4" TO 2"
NOT TO SCALE

1. THE SERVICE IS TO HAVE A MINIMUM COVER DEPTH OF 3 FEET.
2. USE A BRASS TAPPING SHOVEL WHERE REQUIRED.
3. THE SERVICE TAP IS TO BE MADE ON SIDE OF MAIN FACING DIRECTION.
4. THE SERVICE IS TO RUN PARALLEL TO THE MAIN.
5. ADD A DAMP BUT NOT BASE TO CURB FOR IDENTIFICATION UNLESS THE 1 3/4" DIA.
6. TONGUE PULLER AND REQUIRED ARE APPROVED MANUFACTURERS FOR CONNECTION STOP CONNECTION STOP AND INSTALLING SEE APPROVED PRODUCT LIST AS SUPPLIED BY WATER BUREAU.



DROP CONNECTION MANHOLE
NOT TO SCALE

SITE PLAN
SCALE: 1"=50'

NOTES:

1. PLACE FOUR CONCRETE BOLLARDS AROUND EACH PROPOSED FIRE HYDRANT.
2. CONTRACTOR SHALL SUPPLY 40' STEEL SHIPPING CONTAINER TO SITE. CONTRACTOR SHALL PLACE AT PROPOSED LOCATION AS SHOWN AND RUN POWER TO/IN THE CONTAINER. CONTRACTOR SHALL BE RESPONSIBLE FOR UNLOADING THE CONTAINER FROM A FLATBED TRUCK OR RAIL CAR, MOVING IT TO FINAL LOCATION AND LEVELING THE CONTAINER.
3. CONTRACTOR SHALL PROVIDE FOAM FIRE SUPPRESSION SYSTEM:

1,540 GALLONS OF ANSULITE 3X3 LV AR AFFF FOAM IN 5-GALLON DRUMS INSIDE THE 40' CONTAINER.

(SEE HANDY YOUNG / EAST COAST FIRE PROTECTION / 1407 MILL RACE DR. / SALEM, VA. 24163 / (540) 378-6160).

LEGEND:

- EXISTING TRACK
- ◊ PROPOSED FIRE HYDRANT
- EXISTING FENCE



CONTRACTOR TO CALL MISS UTILITY AT 1-800-552-7001 AT LEAST 3 DAYS BEFORE START OF CONSTRUCTION



ALEXANDRIA, VA	
PROPOSED 1ST FACILITY AT THE INTERMODAL FACILITY THROUGH SITE PLAN - SHEET 1	
DATE: 04/04/2007	SCALE: 1"=50'
BY: [Signature]	DATE: 04/04/2007
TD-2006-0036-R5	

In general, Contractor will perform the rail-highway intermodal transloading of the Product from tank cars at Railway's transportation facility described in Appendix A.

In performance of its duties, Contractor shall:

(A) Obtain a copy of Tariff NS 9328-C Bulk Distribution Tariff and review all sections of this manual with instructional implementation immediately. Contractor agrees to be governed by such rules applicable to the operation as Railway may publish from time to time, which prescribe certain responsibilities and authority concerning the operations and property of others, including those of the Railway, in Contractor's care, custody or control. A copy of the current editions of these publications is attached or will be given to contractor and incorporated by reference as part of this agreement.

(B) Provide and maintain sufficient yard vehicles, operating yard tractors, and transloading equipment to meet service requirements and train schedules. Equipment and tools must be in operating condition at all times with inspections and upkeep provided.

(C) Provide all yard vehicles with back-up alarms, speedometers, flashing strobe lights which are to be working at all times when vehicles are in motion. Provide fire extinguishers in all contractor owned equipment, maintain in serviceable condition, and make monthly inspections as required by Railway policy.

(D) Provide and maintain a two-way radio system for all vehicles used. Use approved Railway frequency. Additionally, provide hand-held radios for transload personnel, yard checkers, and office managers. Provide cell phone for Contractor's on site Managers to provide direct communication when necessary.

(E) Provide structured guidelines, documentation, and training for all personnel with emphasis on hazmat training. Provide noise monitoring and equipment to assure compliance with Railway/OSHA standards, and enforce hearing protection requirements, if any, for all transload operators at all times while performing duties.

(F) Maintain sufficient personnel at all times both inside and outside to perform quality, safe, and sufficient service in accordance with Railway requirements. This includes qualified outside supervisors during all loading and unloading times, management staff to oversee and insure that duties are coordinated and performed in a safe, courteous, efficient manner. Supervisors will be responsible for training and discipline. Maintain a minimum work force which must be approved and reviewed by Railway's Division Manager and have flexibility to respond to volume adjustments as necessary. Contractor will provide sufficient manpower to support the

operations of the Facility with a goal of providing 100% safety and customer satisfaction and in accordance with Railway's operating instructions and personnel. Contractor shall provide any and all operating and administrative services ordinarily and reasonably required in the operation of a rail-highway intermodal facility for the transloading of denatured ethanol, including but not limited to the performance of proper equipment inspections as requested by Railway management, the maintenance of records relating to such inspections, and any other paper work ordinarily and reasonably generated in the operation of such a facility.

- (G) Perform joint safety audits with Railway's personnel from time to time
- (H) Provide Railway with records of the kind and in the form specified by railroad that are legible, neat, and accurate. Documents must be sufficient to support the facts in the event of any dispute by litigation or otherwise. Contractor must maintain records consistent with the requirements of this Agreement.
- (I) Be responsible for any portable office trailer, office rug service, cleaning of offices, restroom, and driver's room. Supply the cleaning material, toilet supplies, soap, paper towels, and any other items necessary for cleaning and daily use of the facility. Clean these areas daily or as needed to maintain clean healthy work environment. Railway will provide structures for office space for contractor administrative functions, outside personnel, and break room.
- (J) Keep facility and fence lines free of trash and debris, weeds, grass, brush, etc., and cut and or trim vegetation a minimum of four (4) times during the growing season or as directed by Railway Management. Ensure that the loading and unloading tracks are kept free of all trash and other materials at all times. Failure to maintain these areas will result in Railway handling and billed back against the contractor at cost plus 10%.
- (K) Keep all work and maintenance areas clean and organized at all times, provide up-to-date MSDS information, and ensure compliance with all environmental regulations including disposal of used oil, filters, and lubricants. Ensure that all fuels, lubricants, and any other items used for maintenance are properly stored and labeled.
- (L) Ensure that all inbound traffic is transloaded in a timely manner after placement, and that outbound traffic is loaded in accordance with cutoffs, pull times and other service standards. Ensure that all ground transfers are promptly notified and delivered per instructions.
- (M) Contractor shall be responsible for all damages or costs resulting from error of contractor personnel and make immediate arrangements to correct or repair. Contractor shall be responsible, at its sole cost, for all normal maintenance, repair and replacement to and of the Facility and its constituent parts, including but not limited to plumbing, lights, wash systems,

compressors, wash facilities, scales, gates, meters, and lights, and for any required certification thereof.

(N) Prepare necessary summary reports, daily pull and place sheets, end of month recaps, computer updates

(O) Provide all back up paperwork for proof of proper notification and provide proper information in Sims System.

(P) Supply all fuel for cranes, yard tractors, and will provide on site fuel tank, if necessary. Maintain on site fuel tank in compliance with all applicable laws regulating storage, use and labeling requirements, and equipped with a spill over prevention basin capable of holding 110% of total capacity of above ground storage tank.

(Q) Railway's facility will be in operation in conformance with Section 1(A)(ii)iii. Railway reserves the right in its sole discretion to change the hour of operation of its facility and to require Contractor to perform its services on any day and at any time of the day. Contractor shall not be entitled to bonus, extra or overtime compensation for service outside the normal operation hours of the facility or on holidays other than set forth herein.

(R) Comply with all applicable federal, state, and local laws, rules, regulations and ordinances controlling air, water, noise, solid wastes, and other pollution or relating to the storage, transport, release or disposal of hazardous materials, substances, or waste. Contractor shall, at its own expense, make all modifications, repairs or additions to its equipment used in the Transfer Operation and shall install and bear the expense of modifications or repairs to any devices or equipment affecting its operations which may be required under any such laws, rules, regulations or ordinances, or which is needed to safely conduct transloading operations. Contractor shall promptly advise Railway when any of Railway's equipment is in need of maintenance, repairs, or replacement. Contractor shall not dispose of any wastes of any kind, whether hazardous or not, at the Facility.

Contractor will perform the transload services at the following rates of compensation:

Denatured Ethanol:

- Rates: \$ [REDACTED] per gallon, with a minimum of \$ [REDACTED] over the Initial Term.
- Billing for Track Occupancy Charges ("TOC"): Contractor shall retain [REDACTED] % of all collected TOC as compensation for the billing and collection of TOCs.
- Other Services: All other denatured ethanol transload and services to be performed at no further compensation.

The name and address of the Railway employee to be notified under Section 1.G for any death or injury or of any loss or damage to property is:

DIRECTOR DISTRIBUTION SERVICES

3 Commercial Place, Box 252

Norfolk, VA 32510

Phone: 757-823-5428

Fax: 757-823-5425

INDEMNITY AND HOLD HARMLESS AGREEMENT

This Indemnity and Hold Harmless Agreement (this "Agreement") is made by and among _____, a _____ ("Indemnitor"), with a business address at _____, a RSI Leasing, Inc ("Operator") with a business address at 4131 Okemos Rd Okemos MI 48864, and Norfolk Southern Railway Company, a Virginia corporation ("Railroad"), with a business address at 110 Franklin Road, S.E., Roanoke, Virginia 24042-0041.

WITNESSETH:

WHEREAS, Operator is a licensee of Railroad and undertakes various services for shippers and customers of shippers using facilities located on property owned by Railroad (each a "Transfer Facility" and collectively the "Transfer Facilities"); and

Indemnitor may be a shipper and may wish to undertake services for itself and/or for shippers and customers of shippers on and using the Transfer Facilities; and

WHEREAS, Railroad is not willing to allow Indemnitor to perform such services on and using the Transfer Facilities unless Indemnitor enters into this Agreement agreeing to indemnify and hold harmless Railroad and Operator and certain related parties of each of them, as provided herein;

NOW, THEREFORE, in consideration of the premises and the agreements contained herein, the parties agree as follows:

SECTION 1. Access to Transfer Facilities. Railroad may from time to time permit Indemnitor to perform services for itself and/or for shippers and customers of shippers on and utilizing one or more Transfer Facilities. The provisions of this Agreement shall apply to any such services provided by Indemnitor on or using a Transfer Facility and to any act(s) or omission(s) of Indemnitor at any Transfer Facility.

SECTION 2. Indemnitor's Responsibility For Its Contractors and Agents. Should Indemnitor engage the services of a contractor or agent, Indemnitor assumes full responsibility and shall indemnify and hold harmless Railroad and Operator in accordance with the provisions of Section 4 from any consequences of the acts and/or omissions of such contractor or agent.

SECTION 3. Indemnitor's Obligations. In performing any services on or using any Transfer Facility, Indemnitor will promptly clean up or cause the clean-up of any material, commodity or product spilled through the act or omission of Indemnitor or its contractors and/or agents. Indemnitor will comply with all federal, state and local laws, rules, regulations and ordinances controlling air, water, noise, solid waste, and other pollution and relating to the storage, transport, release or disposal of hazardous materials, substances, or waste. Indemnitor

shall not dispose of any wastes of any kind, whether hazardous or not, on any Transfer Facility or any premises owned or operated by Railroad or Operator or any affiliate of Operator. Indemnitor shall immediately take steps to clean up and eliminate any violation of this Section 3 at the sole expense of Indemnitor. In addition, Indemnitor agrees to comply with and perform any duties imposed upon motor carriers in Freight Tariff NS 9328-A or any successor or reissued publications.

SECTION 4. Indemnification. Indemnitor will be responsible for, and will indemnify and hold harmless each of Operator and Railroad and each of their respective shareholders, directors, officers, agents, employees and affiliates from and against, any and all liabilities, losses, damages, claims, suits, judgments, costs and expenses (including without limitation attorneys' fees) resulting from or in connection with injury to or death of any persons whomsoever (including without limitation, agents, employees or representatives of Railroad or Operator or Operator's affiliates), or damage to or loss of any property whatsoever, including commodity, caused directly or indirectly by any of its acts or omissions at a Transfer Facility or relating to the performance of services by Indemnitor at a Transfer Facility; provided, however, that Indemnitor's obligation to indemnify and hold harmless any party shall not apply to the extent that any such injury, death, damage or loss is contributed to or caused by the negligence or wrongful act(s) or omission(s) of such party.

SECTION 5. Governing Law. Except as otherwise expressly provided in this contract, the laws of Virginia shall govern the interpretation and performance of this Agreement.

SECTION 6. Insurance. Indemnitor shall at its sole cost and expense obtain and maintain during the period of this Agreement in a form and with companies satisfactory to Railroad and Operator, the following insurance coverages:

(a) Workers' Compensation Insurance to meet fully the requirement of any compensation act, plan or legislative enactment applicable in connection with the death, disability or injury of Indemnitor's officers, agents, servants or employees.

(b) Employers' Liability Insurance with limits of not less than \$1,000,000 each accident, \$1,000,000 policy limit for disease, and \$1,000,000 each employee for disease.

(c) Commercial General Liability Insurance with a combined single limit of not less than (i) \$5,000,000 per occurrence if Indemnitor will handle hazardous materials at any Transfer Facility, or (ii) \$1,000,000 per occurrence if Indemnitor will not be handling any hazardous materials at any Transfer Facility, for injury to or death of persons and damage to or loss or destruction of property. Such policy shall be endorsed to provide products and completed operations coverage and contractual liability coverage for liability assumed under this Agreement, shall name Railroad and Operator as

additional insureds and shall include a severability of interests provision. The contractual liability coverage shall be of a form that does not deny coverage for operations conducted within 50 feet of any railroad hazard.

(d) Truckers Liability Insurance with a combined single limit of not less than (i) \$5,000,000 per occurrence if Indemnitor will handle hazardous materials at any Transfer Facility, or (ii) \$1,000,000 per occurrence if Indemnitor will not be handling any hazardous materials at any Transfer Facility, for injury to or death of persons and damage to or loss or destruction of property. Said policy or policies shall be endorsed to provide contractual liability coverage for liability assumed under this Agreement, shall name Railroad and Operator as additional insureds and shall include a severability of interests provision. In addition, said policy or policies shall contain Endorsement Form MCS-90 for Motor Carrier Policies of Insurance for Public Liability under Section 30 of the Motor Carrier Act of 1980, or Form MCS-82 motor carrier public liability bond must be obtained.

Licensee shall furnish certificates of insurance to Railroad's Director Risk Management, Three Commercial Place, Norfolk, Virginia 23510-2191, certifying the existence of such insurance. Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in coverage or limits without (30) days advance written notice to Railroad and Operator.

The furnishing and acceptance of the policies or certificates of insurance and bond referred to above shall not in any way or degree alter or lessen the liability of Indemnitor under this Agreement.

SECTION 7. Assignment. No assignment of this Agreement is permitted without prior written consent of the other parties hereto, except to successors in interest of a party.

SECTION 8. Waiver. Waiver by any party of any breach of these provisions shall not be construed as a waiver of any breach.

SECTION 9. Headings. The section headings contained in this Agreement are for convenience of reference only and in no way shall modify any of the terms or provisions of this Agreement.

SECTION 10. Notices. Any notices, requests or other communications hereunder shall be in writing and shall be deemed to have been duly given when made upon a party by personal service at any place where they may be found or by mailing such notices, requests, or communications by certified mail, postage prepaid and return receipt requested, or by internationally recognized courier, or by transmitting such notice by facsimile, in each case to the following addresses or facsimile numbers, as the case may be:

INDEMNITOR:

Telecopy: _____

RAILROAD:

Director, Distribution Services
Norfolk Southern Corporation
3 Commercial Place
Norfolk, VA 23510
Telecopy: _____

OPERATOR:

RSI Leasing Inc
4131 Okemos Rd
Okemos MI 48864
Telecopy: 517-349-7154

or to such other addresses or telecopy numbers as such party may specify in a notice given to the other party as provided in this Section 10.

SECTION 11. Counterparts; Facsimile. This Agreement may be executed simultaneously in several counterparts, and by facsimile, and each of such counterpart and facsimile signature shall be deemed an original, but all of such counterparts and facsimile signatures together shall constitute one and the same instrument.

SECTION 12. Severability. In the event any provision of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, such invalidity or unenforceability shall not affect any other provision of this Agreement.

IN WITNESS WHEREOF, the parties have caused this AGREEMENT to be executed by their duly authorized representatives as of the date first above written.

INDEMNITOR:

By: _____
Title: _____
Date: _____

OPERATOR:

By: Kelley Minnehan
Title: Vice President
Date: 1-30-08

NORFOLK SOUTHERN RAILWAY
COMPANY:

By: D. A. [Signature]
Title: Director Distribution Svcs
Date: 2/22/08

**CANADIAN NATIONAL RAILWAY CO., and GRAND TRUNK WESTERN
RAILROAD, INC., Plaintiff, v. CITY OF ROCKWOOD, and WAYNE COUNTY,
Defendant.**

CIVIL CASE NO. 04-40323

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
MICHIGAN, SOUTHERN DIVISION**

2005 U.S. Dist. LEXIS 40131

June 1, 2005, Decided

COUNSEL: [*1] For Canadian National Railway Company, Grand Trunk Western Railroad, Incorporated, Plaintiffs: Howard E. Gurwin, Detroit, MI.; James A. Fletcher, Fletcher & Sippel (Chicago), Chicago, IL.

For Rockwood, City of, Defendant: Steven A. Roach, Nelson O. Ropke, Miller, Canfield, (Detroit), Detroit, MI.

For Wayne County, Defendant: Kerry L. Morgan, Randall A. Pentiuok, Pentiuok, Couvreur, Wyandotte, MI.

JUDGES: PAUL V. GADOLA, UNITED STATES DISTRICT JUDGE.

OPINIONBY: PAUL V. GADOLA

OPINION:

OPINION AND ORDER GRANTING PRELIMINARY INJUNCTION

In this action for declaratory and injunctive relief, Plaintiffs Canadian National Railway Co., and its subsidiary, Grand Trunk Western Railroad, Inc. ("GTW"), (collectively "CN") move the Court for a preliminary injunction preventing Defendants City of Rockwood and Wayne County from enforcing against CN zoning laws, permitting and preclearance requirements, and other state and local regulations. Although CN's motion seeks a temporary restraining order and a preliminary injunction, CN's counsel has communicated to the Court that they are seeking only a preliminary injunction. As a result of this communication, the court will only consider the request [*2] for a preliminary injunction, which, for the following reasons, the Court will grant.

I. BACKGROUND

CN is an interstate rail transportation carrier operating rail lines and facilities in various states including Michigan. Desiring to enter the market for hauling construction and demolition debris ("CDD"), CN constructed a transload facility on property owned by GTW in the city of Rockwood, Michigan. This facility allows CDD transported from various locales by rail to be moved from rail cars onto trucks, which then haul the CDD to a nearby facility to dispose of it. Construction of the facility began in late October, 2004 and was completed in late November, 2004. The facility has been operational since December 6, 2004.

CN does not operate the transload facility. Instead, it has entered into an agreement with Industrial Waste Group, L.L.C. ("IWG"), to operate the facility. IWG in turn uses its affiliate J.R. Wolfe Co. to perform the actual operation of the equipment at the facility. It is, however, CN, not IWG or its affiliate, which enters into contracts with shippers, bills and collects from the shippers, and is liable to the shippers. CN sets the rates which comprise [*3] all IWG's compensation for services rendered. Furthermore, IWG must use equipment and personnel approved by CN, must meet the requirements set by CN in their shipping contracts, must perform the transloading services to CN's satisfaction, and must comply with CN's safety and behavior rules and guidelines. Nevertheless, the agreement between CN and IWG provides that IWG is to bear the sole responsibility and expense of constructing, maintaining, and operating the transload facility,

as well as ensuring that the facility complies with all applicable laws. The agreement expressly states that IWG is to act as an independent contractor and that the agreement does not create an agency relationship between CN and IWG. Finally, the agreement contains an extensive indemnification clause that requires IWG to indemnify and hold CN harmless from all liabilities, claims, costs, etc., arising from IWG's activities. The indemnification, though, does not extend to consequential, special, incidental, or punitive damages. See generally Terminal Construction and Services Agreement, Pl. Ex. 4 (from hearing).

In early November, 2004, before construction of the facility was completed, the city of Rockwood [*4] delivered to CN a stop work order on the basis that CN had failed to obtain the necessary permits for the construction. The order required CN to cease and desist from further construction on the site until health and safety measures adopted by the state, county, and city have been met. Shortly thereafter, the Wayne County Department of the Environment served CN with an order to cease and desist all earth changing activity until they had obtained a permit pursuant to the Wayne County Soil Erosion and Sedimentation Control Ordinance.

According to Wayne County, CN must comply with Wayne County's Soil Erosion Ordinance and Solid Waste Ordinance. The Soil Erosion Ordinance required that CN obtain a permit for their earth disturbance and erect a silt barrier to prevent silt from washing into a nearby creek. The Solid Waste Ordinance requires that CN pave the interior haul road of the facility, operate the facility in a manner that controls fugitive dust, such as by enclosing the facility in a building, and submit a site plan to the county for its approval. The county is also requiring CN to submit an off-site road maintenance plan and a facility inclusion application. Finally, state law [*5] requires that CN operate the facility in accordance with an approved site plan.

CN denies that it is subject these state and local regulations, because the regulations attempt to regulate transportation by rail and any such state or local regulation is preempted by the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) ("ICCTA"). Defendants, on the other hand, maintain that CN is subject to the regulations regardless of the ICCTA because the activities conducted at the transload facility are not "transportation by rail carrier," because IWG is not transporting by rail, but by truck, and IWG is not a rail carrier, but a refusal hauler. 49 U.S.C. § 10501(a). Defendants also maintain that the regulations at issue are not preempted by the ICCTA because they are environmental regulations that do not prevent the operation of the transload facility and are a valid exercise of Defendants' police power to protect the health and safety of the community. Finally, Defendants argue that any preemption of Defendants' regulations by the ICCTA would be unconstitutional.

II. ANALYSIS

When ruling on a motion for a preliminary [*6] injunction, a district court must consider and balance four factors:

- (1) whether the movant has a strong likelihood of success on the merits;
- (2) whether the movant would suffer irreparable injury without the temporary restraining order;
- (3) whether issuance of the temporary restraining order would cause substantial harm to others; and
- (4) whether the public interest would be served by issuance of the temporary restraining order.

Memphis Planned Parenthood, Inc. v. Sundquist, 175 F.3d 456, 460 (6th Cir. 1999); *Blue Cross & Blue Shield Mutual of Ohio v. Columbia/HCA Healthcare Corp.*, 110 F.3d 318, 322 (6th Cir. 1997); *In re De Lorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985). These four considerations "are factors to be balanced, not prerequisites that must be met." *DeLorean*, 755 F.2d at 1229. A district court must make specific findings concerning each of the four factors unless fewer are dispositive of the issue. *Performance Unlimited v. Questar Publishers, Inc.*, 52 F.3d 1373, 1381 (6th Cir. 1995). As will be explained below, the balance of the factors favors [*7] granting the preliminary injunction.

A. Whether CN and GTW have a strong likelihood of success on the merits.

Congress enacted the ICCTA as a means of reducing the regulation of the railroad industry. The hope was to foster railroad transportation as a safe, effective, competitive, and reasonable mode of transportation. See 49 U.S.C. § 10101.

To this end, the ICCTA created the Surface Transportation Board ("STB") and expressly granted it exclusive jurisdiction over-

- (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
- (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.

49 U.S.C. § 10501(b). The remedies provided by the ICCTA "with respect to rail transportation are exclusive and preempt the remedies provided under Federal or State [*8] law." Id. The jurisdiction of the STB, however, is limited to "transportation by rail carrier." 49 U.S.C. § 10501(a). By definition, "transportation" includes:

- (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
- (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(9). "Rail carrier" is defined as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). Finally, included in the definition of "railroad" are:

- (A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;
- (B) the road used by a rail carrier and owned by it or operated under an agreement; and
- (C) a switch, spur, track, terminal, terminal facility, [*9] and a freight depot, yard, and ground, used or necessary for transportation.

49 U.S.C. § 10102(6). If activities meet this definition of transportation by rail carrier, the STB has exclusive jurisdiction. 49 U.S.C. 10501(b). Generally, any state and local laws or regulations that intrude upon this jurisdiction are preempted. *Railroad Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523, 561-63 (6th Cir. 2002). "To come within the preemptive scope of 49 U.S.C. 10501(b), these activities must be both: (1) transportation; and (2) performed by, or under the auspices of, a rail carrier." *Hi Tech Trans., LLC, Petition for Declaratory Order*, S.T.B. Finance Docket No. 34191, at 5 (Aug. 14, 2003) (Slip Op.). Under this standard, activities occurring at CN's transload facility appear to meet the definition of "transportation by rail carrier," which would cause Defendants' regulations to be preempted.

Defendants argue that this is not the case because the activities do not meet the ICCTA's definition of "transportation." This Court, though, agrees with the decision of other courts and of the [*10] STB, which have held that the activities which take place at such transload facilities are considered "transportation" by the ICCTA. See *Green Mt. R.R. Corp. v. Vermont*, 404 F.3d 638, 644 (2d Cir. 2005) ("[The Railroad] serves industries that rely on trucks to transport goods from the rail site for processing; so the proposed transloading and storage facilities are integral to the railroad's operation and are easily encompassed within the Transportation Board's exclusive jurisdiction over 'rail transportation.'"); *Grafton & Upton R.R. Co. v. Town of Milford*, 337 F. Supp. 2d 233, 239 (D. Mass. 2004) ("Although the [railroad] Yard will clearly have a trucking component, an examination of the analogous scenarios discussed in the cited caselaw demonstrates that such a non-rail component is still subject to the preemptive effect of the ICCTA."); *Norfolk Southern Ry. Co. v. City of Austell*, 1997 U.S. Dist. LEXIS 17236, 1997 WL 1113647, *6 (N.D. Ga. 1997) ("Based upon

the clear and unambiguous language of the ICCTA, the court concludes that the instant intermodal facility comes within the ICCTA's definition of 'transportation by rail carriers' over which the STB is [*11] given exclusive jurisdiction under 49 U.S.C. § 10501(b)(1). It is uncontroverted that intermodal facilities are facilities that are operated in order to transfer containers or trailers of cargo being shipped in interstate and foreign commerce between trains and tractor-trailer trucks in a manner which permits and promotes effective competition and coordination between rail and motor carriers." See also *Hi Tech Trans*, STB Finance Docket No. 24192 (Slip Op. at 5-6) ("There is no dispute that Hi Tech's transloading activities are within the broad definition of transportation. The Board has consistently found such activities to be transportation under 49 U.S.C. 10102(9). See *Green Mountain Railroad Corporation - Petition for Declaratory Order*, STB Finance Docket No. 34052 (STB served May 28, 2002) (*Green Mountain*) (cement transloading facility); *Joint Petition for Declaratory Order - Boston and Maine Corporation and Town of Ayer, MA*, STB Finance Docket No. 33971 (STB served May 1, 2001) (*Ayer*) (automobile unloading facility).").

Defendants further argue that the facility's activities are not "transportation by rail [*12] carrier" because IWG, the facility's operator, is not a rail carrier. Defendants rely on precedent which held that certain bulk distribution centers operated by third-parties on land leased from the railroad were not subject to STB's jurisdiction or federal preemption. See *CFNR Operating Co. v. City of American Canyon*, 282 F. Supp. 2d 1114, 1118 (N.D. Cal. 2003) (holding that the city's regulations were focused on "non-railroad business activities"); *Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1329 (11th Cir 2001) (holding that the city's ordinances did "not constitute 'regulation of rail transportation.'"); *Growers Marketing Co. v. Pere Marquette Ry.*, 248 I.C.C. 215, 226-27 (1941) ("Facilities provided for the display and sale of perishable produce delivered at the produce terminal are facilities for commercial transactions not part of transportation."). These cases are distinguishable by the fact the businesses which leased land from the railroads for their distribution centers were not common carriers, nor were they involved in transportation per se. They were customers of the railroads, i.e. shippers or [*13] receivers, who wished to locate their distribution centers as close to the point of delivery as possible. For example, in *CFNR Operating Company*, the operator of the bulk distribution center contracted with the railroad to deliver pumice and cement to the distribution center. The operator would then haul the goods from the distribution center to customers who had ordered it from the operator. *CFNR Operating Co.*, 282 F. Supp. 2d at 1118. Locating the distribution center on railroad property did not transform the activities taking place into rail-road business or "transportation." *Id.* at 1118-19.

The situation in another case relied on by Defendants, *Hi Tech Trans, LLC, v. New Jersey*, 382 F.3d 295 (3d Cir. 2004), was more subtle. In that case, Hi Tech, the operator of a transload facility nearly identical to that at issue here, brought an action against New Jersey seeking declaratory relief similar to that requested here. The Third Circuit ruled that the transload facility, which loaded CDD from trucks onto rail cars for transportation by rail, did not involve "transportation by rail carrier," such that the ICCTA preempted New Jersey's [*14] waste disposal regulations. *Id.* at 308; 49 U.S.C. § 10501(a). The Sixth Circuit's conclusion was based on the fact that the railroad had virtually no involvement or control over the operation of the facility:

. . . Hi Tech operates its facility under a License Agreement with [the railroad]. Pursuant to the terms of that license agreement, Hi Tech is permitted to use a portion of [the rail yard] for transloading. Hi Tech is responsible for constructing and maintaining the facility and [the railroad] disclaims any liability for Hi Tech's operations. Thus, the License Agreement essentially eliminates [the railroad's] involvement in, and responsibility for, the operation of Hi Tech's facility. Hi Tech does not claim that there is any agency or employment relationship between it and [the railroad] or that [the railroad] sets or charges a fee to those who bring C&D debris to Hi Tech's transloading facility.

Id. at 308 (citations omitted). The Third Circuit assumed, arguendo, that the transload facility met the statutory definition of "transportation" and "railroad," but because Hi Tech was not a rail [*15] carrier, the activities occurring at the facility did not amount to "transportation by rail carrier," but rather "transportation 'to rail carrier.'" *Id.* at 308-309.

Accordingly, it is clear that Hi Tech simply uses [the railroad's] property to load C&D debris into/onto CPR's railcars. The mere fact that [the railroad] ultimately uses rail cars to transport the C&D debris Hi Tech loads does not morph Hi Tech's activities into "transportation by rail carrier."

Id. at 309. Since Hi Tech was not a rail carrier, New Jersey's regulations were not preempted by the ICCTA. *Id.* at 310.

Prior to the Third Circuit's decision, Hi Tech had filed a petition for declaratory relief with the STB seeking a determination that the STB had exclusive jurisdiction over Hi Tech's transload facility. See Hi Tech Trans, STB Finance Docket No. 24192. The STB declined to issue the requested declaratory order because "it is clear that the Board does not have jurisdiction over truck-to-rail transloading activities that are not performed by a rail carrier or under the auspices of a rail carrier holding itself out as providing those services. [*16] " Hi Tech, STB Finance Docket No. 24192, at 5 (Slip Op.) (emphasis added). The STB held that "there is no dispute that Hi Tech's transloading activities are within the broad definition of transportation. The Board has consistently found such activities to be transportation under 49 U.S.C. 10102(9)." Id. at 5-6. Nevertheless, the STB found that Hi Tech's activities did not meet the second half of the statutory equation, that being that the transportation must be performed by a rail carrier. The STB came to this conclusion partly because the license agreement between Hi Tech and the railroad virtually eliminated any involvement in, or liability for, the operation of the facility on the part of the railroad, but also because the transportation agreement between the two made Hi Tech nothing more than a shipper. Id. at 6-7. The transportation agreement provided that

. . . Hi Tech is solely responsible for loading C&D debris onto rail cars at its own expense. [The railroad] does not hold itself out to provide C&D debris transloading service, quote rates for such services, or charge customers for it. [The railroad] is responsible only for transporting [*17] the loaded rail cars.

* * *

The facts of this case establish that Hi Tech's relationship with [the railroad] is that of a shipper with a carrier. Hi Tech brings cargo and loads it onto rail cars, and [the railroad], under the Transportation Agreement, hauls it to a destination designated by Hi Tech. . . . There is no evidence that [the railroad] quotes rates or charges compensation for use of Hi Tech's transloading facility.

Id. at 3, 6-7. Even though Hi Tech's activities were transportation, Hi Tech's position was that of the operators in CFNR Operating Company and Florida East Coast Railway Company: a customer of the railroad. It was Hi Tech who was offering the CDD shipping service to the public, not the railroad. Although Hi Tech contracted with the railroad to carry the CDD, the actual shipping service was **not performed by a rail carrier or under the auspices of a rail carrier holding itself out as providing those services.**" Hi Tech, STB Finance Docket No. 24192, at 5 (Slip Op.). Consequently, the STB concluded that it did not have jurisdiction over Hi Tech's activities because those activities were not "an integral part of [the railroad's] [*18] provision of transportation by rail carrier." Id. at 7.

Here, the relationship of IWG to CN is not one of a shipper to a carrier, but one of a contractor working "under the auspices of a rail carrier." Id. at 5. IWG is not CN's customer. Rather, IWG provides transloading services so that CN may complete its obligations under CN's transportation agreements with its shippers. It is CN, the railroad, who is holding itself out as providing the CDD transloading services. CN interacts with the shippers, quotes rates, contracts, bills and collects. Thus, the CDD transloading services occurring at CN's transload facility are **"performed . . . under the auspices of a rail carrier holding itself out as providing those services."** Hi Tech, STB Finance Docket No. 24192, at 5 (Slip Op.). For this reason, the activities occurring at the Rockwood transload facility appear to be "integrally related to the provision of interstate rail service," and are therefore subject to the STB's jurisdiction and federal preemption. Borough of Riverrdale, Petition for Declaratory Order, STB Finance Docket 33466, 4 S.T.B. 380, 1999 STB LEXIS 531 (Sept. 9, 1999) (Slip Op. at 9).

Defendants also [*19] argue that the state and local regulations at issue are not preempted because they are environmental regulations that do not prevent the operation of the transload facility and are a valid exercise of Defendants' police powers to protect the health and safety of the community. See *Boston and Maine Corp. v. Town of Ayer*, 330 F.3d 12, 16-17 (1st Cir. 2003) ("The STB found state and local regulation to be permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety." (Quotation omitted)); *Flynn v. Burlington Northern Santa Fe Corp.*, 98 F. Supp. 2d 1186, 1189 (E.D. Wash. 2000). While the ICCTA does not preempt a local authority's traditional police powers and environmental regulations enacted in accordance with those powers, the ICCTA does preempt such regulations that stand as an obstacle to a carrier's ability to construct facilities or conduct operations. *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998); *Green Mt. R.R. Corp.*, 404 F.3d at 643-44.

It appears to the Court that the regulations imposed by Defendants [*20] are preempted. See *City of Auburn*, 154 F.3d 1030-31; *Green Mt. R.R. Corp.*, 404 F.3d at 642; *Soo Line R.R. Co. v. City of Minneapolis*, 38 F. Supp. 2d 1096, 1101 (D. Minn. 1998). As for Defendant Wayne County's Soil Erosion and Sedimentation Control Ordinance and Solid Waste Ordinance, it appears to the Court that these environmental regulations are preempted insofar as they would require CN to make substantial capital improvements, thereby necessarily interfering with CN's ability to carry out its operations. See *CSX Transp., Inc. v. City of Plymouth*, 92 F. Supp. 2d 643, 659 (E.D. Mich 2000) (Edmunds, J.); *Green Mt. R.R. Corp.*, 404 F.3d at 644.

Finally, Defendants argue that any preemption of Defendants' regulations would be an unconstitutional use of Congress's commerce power. Defendants' argument is twofold: First, Defendants characterize their regulations not as regulations focused on the transload facility, but as regulations focused on the effect the facility has on the environment. Using this characterization, Defendants then argue that instead of regulating an instrumentality of interstate commerce, [*21] they are regulating an activity that affects interstate commerce, and since the effect is incidental, the *Commerce Clause* does not permit of preemption. See *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995). Second, Defendants argue that the regulations at issue are not the type that demand a national, uniform rule, and that only diverse rules can meet the local necessities involved. See *Cooley v. Bd. of Wardens*, 53 U.S. 299, 13 L. Ed. 996 (1851).

Defendants first argument relies on the three permissible categories of *Commerce Clause* regulation enunciated in *United States v. Lopez*: 1) "the use of the channels of interstate commerce;" 2) "the instrumentalities of interstate commerce;" and 3) "those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59. If a regulation is of the third type, then the regulated activity must actually have a substantial effect on interstate commerce, not just an incidental one. *Id.* at 557-59. However, "where a statute regulates the 'instrumentalities of interstate commerce,' the law need not address conduct having a substantial effect on interstate commerce in order to survive [*22] a constitutional challenge. Rather, the mere character of the activities covered under the statute make them properly the subject of federal regulation." *United States v. Owens*, 159 F.3d 221, 226 (6th Cir. 1998).

Defendants contend that their regulations fall into the third category because they regulate environmental impact, not the railroads. They further argue that because the regulated activity's impact on interstate commerce is only incidental, the regulations are beyond the preemptive power of the *Commerce Clause*. Defendants' characterization, however, is inaccurate. The railroads are one of the archetypical "instrumentalities of interstate commerce," and as such any regulation of them by Congress need not be aimed at "conduct having a substantial effect on interstate commerce in order to survive a constitutional challenge." *Id.*; see *Overstreet v. North Shore Corp.*, 318 U.S. 125, 130, 63 S. Ct. 494, 87 L. Ed. 656 (1943) (analogizing roads to railroad tracks in order to declare them instrumentalities of interstate commerce).

Defendants' alternative argument relies on *Cooley v. Bd of Wardens*, which upheld a state law that required ships to employ a local pilot to navigate [*23] the Port of Philadelphia, and *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S. Ct. 988, 55 L. Ed. 2d 179 (1978), which upheld another state law that required certain ships be escorted by tugboats within the Puget Sound. In each case, the Supreme Court upheld the local regulation because the local necessities involved in navigation demanded specialized rules, not one national, uniform rule. *Cooley*, 53 U.S. at 319; *Ray*, 435 U.S. at 179-80. Defendants argue that local land use regulations similarly require diverse and specialized rules in order to take into account local necessities.

Yet, one need only to look to the extensive federal land use regulations enacted for the protection of the environment and compiled in Title 40 of the Code of Federal Regulations to know that this is not always the case. Furthermore, the opinions in *Cooley* and *Ray* dealt with the limitations on state regulation of interstate commerce imposed by the dormant *Commerce Clause*, which "has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce" and "limits the power of the States to erect barriers against [*24] interstate trade" in areas where Congress has not legislated. *Cooley*, 53 U.S. at 318-19; *Ray*, 435 U.S. at 178; *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87, 104 S. Ct. 2237, 81 L. Ed. 2d 71 (1984); *Lewis v. Bt Inv. Managers*, 447 U.S. 27, 35, 100 S. Ct. 2009, 64 L. Ed. 2d 702 (1980). Whereas, the regulations at issue here are not limited through Congress's inaction, but through Congress's express action, i.e., the ICCTA expressly preempts such regulations, and ICCTA is an affirmative exercise of the *Commerce Clause*. "Because of the plenary nature of the commerce power and because of the primacy accorded federal law by the *supremacy clause*, the balance of interests between the federal and state governments is an inappropriate consideration in determining whether a federal act is a valid exercise of the commerce power." *Texas v. United States*, 730 F.2d 339, 351 (5th Cir. 1984) (footnote omitted). Thus, both of Defendants' constitutional arguments are unpersuasive.

CN has shown a strong likelihood of success on the merits of its case. The Defendants' regulations appear to interfere with CN's operations. The state and local regulations at issue appear to [*25] be both within the jurisdiction of the STB and preempted by the ICCTA.

B. Whether CN will suffer irreparable injury without the preliminary injunction.

CN has alleged that if Defendants' regulations are enforced and it is prevented from operating the transload facility, then CN will suffer the loss of its current contract for transportation of CDD, as well as the loss of future contracts and customer goodwill. The Sixth Circuit has noted that "a plaintiff's harm is not irreparable if it is fully compensable by money damages." *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992). If the "nature of plaintiff's loss would make damages difficult to calculate," then an injury is not "fully compensable by money damages." *Id.* (emphasis added). This does not mean that whenever monetary damages are difficult to calculate that the injury is irreparable. Rather, the very "nature" of the loss must be inherently difficult to calculate. The loss of goodwill from existing customers has also been held to be irreparable by the Sixth Circuit, as well as the loss of goodwill from prospective customers. *Id.* at 512 ("The loss of customer goodwill [*26] often amounts to irreparable injury because the damages flowing from such losses are difficult to compute."); *Michigan Bell Tel. Co. v. Engler*, 257 F.3d 587, 599 (6th Cir. 2001).

With this in mind, the loss of CN's current contract is not irreparable, because it is compensable by easily calculated money damages. However, the loss of goodwill from CN's existing customers is irreparable, as is the loss of goodwill from prospective customers. The loss of future contracts and the loss of the opportunity to enter a market, here the market for transportation of CDD, are inherently speculative, making damages too difficult to calculate. Hence, these losses are also irreparable. *Cf. CNFR Operating Co.*, 282 F. Supp. 2d at 1119. Consequently, based on the loss of goodwill, future contracts and market opportunities, the Court concludes that CN will suffer irreparable injury without the preliminary injunction.

C. Whether issuing the preliminary injunction order would not cause substantial harm to others.

Defendants allege that they will suffer substantial injury if an injunction is issued, because operation of the transload facility will result in environmental [*27] pollution. On the contrary, there is nothing in the record to indicate that CN's facility will cause substantial harm if allowed to operate as intended. Federal environmental statutes and regulations will still be in force to address continuing environmental concerns. See *Grafton & Upton R.R. Co.*, 337 F. Supp. 2d at 239. Moreover, the services agreement between CN and IWG provides additional protections. Also, according to CN, CDD is both non-hazardous and non-putrescent. Pl. Br. at n.1. Therefore, the issuance of the preliminary injunction would not cause substantial harm to others.

D. Whether the public interest would be served by issuance of the injunction

While the issuance of the preliminary injunction would serve the public interest insofar as it would promote industry in the region, the record does not demonstrate that the shipment of CDD would be a significant industry. Though, the benefit of additional industry, when coupled with the protection offered by federal environmental regulations, does balance against the potential harm such an industry might have to the public interest. As it stands, this factor militates neither for, nor against, the [*28] issuance of an injunction.

E. Balancing the four factors for a preliminary injunction

Three of the four factors, including the most important factor of a strong likelihood of success, favor the granting of the preliminary injunction. The fourth factor neither favors nor disfavors the it. The Court will therefore grant the preliminary injunction.

F. Posting of a Bond

Finally, *Rule 65 of the Federal Rules of Civil Procedure* also requires that,

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Fed. R. Civ. P. 65(c) (emphasis added). Application of *Rule 65(c)* has been construed by the Sixth Circuit as being within the sound discretion of the trial judge. *Urbain v. Knapp Brothers Manufacturing Co.*, 217 F.2d 810 (6th Cir. 1954). Failure to consider the question of security has been considered error by the Sixth [*29] Circuit. *Beukema's Petroleum Co. v. Admiral Petroleum Co.*, 613 F.2d 626, 629 (6th Cir. 1979).

The sum posted on bond should reflect the limit that may be recovered by a wrongfully enjoined party, because a party later found to have been enjoined wrongfully will be limited to that amount. Since it appears at this time that Defendant might suffer only minimal loss or damage by reason of the issuance of this preliminary injunction, a bond of \$ 10,000 is required of Plaintiff.

III. CONCLUSION

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiffs' motion for a preliminary injunction [docket entry 5, erroneously refiled as docket entry 20] is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiffs' motion for a temporary restraining order [docket entry 5, erroneously refiled as docket entry 20] is **DENIED**.

IT IS FURTHER ORDERED that Defendant City of Rockwood's motion for leave to file a supplemental response [docket entry 21] is **GRANTED**.

SO ORDERED.

Dated: June 1, 2005

HONORABLE PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE

NS 9328-D
CANCELS
NS 9328-C

NORFOLK SOUTHERN RAILWAY COMPANY
THOROUGHbred BULK TRANSFER

FREIGHT TARIFF NS 9328-D
CANCELS
FREIGHT TARIFF NS 9328-C



BULK TRANSFER TARIFF
PROVIDING SERVICE
ON
DRY AND LIQUID COMMODITIES
AT STATIONS NAMED IN ITEM 110

BULK RAIL -TRUCK TARIFF

Governed by the Uniform Freight Classification UFC Series, See Item 5

ISSUED: April, 17 2008

EFFECTIVE: June 1, 2008

Issued By
C. J. Orndorff - Director Marketing Services
NORFOLK SOUTHERN CORPORATION
110 Franklin Road, S. E.
Roanoke, VA 24042-0047

TARIFF NS 9328-D

**RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS**

PARTICIPATING CARRIER

ABBREVIATION

NS

NAME OF CARRIER

NORFOLK SOUTHERN RAILWAY COMPANY

ITEM 5

GOVERNING CLASSIFICATION AND EXCEPTIONS

Governed by the provisions of UFC 6000 Series, Uniform Classification Committee, Agent, and NS Conditions of Carriage No. 1. (When shipments are made in Tank Cars, they will be subject to Rule 35 of the UFC except as to minimum weight, which will be shown in individual rate items.)

ITEM 15

EXPLOSIVES, DANGEROUS ARTICLES

For rules and regulations governing the transportation of Explosives and other Dangerous Articles by freight, also specifications for shipper's containers and restrictions governing the acceptance and transportation of Explosives and other Dangerous Articles, see Bureau of Explosives Tariff BOE 6000 Series.

ITEM 20

REFERENCE TO TARIFFS, ITEMS, NOTES, RULES, ETC.

(A) Where reference is made in this tariff to tariffs, circulars, items, notes, rules, etc., such references are continuous and include supplements to and successive issues of such tariffs and reissues of such items, notes, rules, etc.

(B) Where reference is made in this tariff to another tariff by number, such reference applies also to such tariff to the extent it may be applicable on intrastate traffic.

ITEM 60

NATIONAL SERVICE ORDER

This Tariff is subject to provisions of various Surface Transportation Board Service Orders and General Permits as shown in National Service Order Tariff NSO 6100 Series.

ITEM 75

METHOD OF CANCELLING ITEMS

As this tariff is supplemented, numbered items with letter suffixes will be used in alphabetical sequence starting with A. Example: Item 445-A cancels Item 445 and Item 365-B cancels Item 365-A in a prior supplement, which in turn cancelled Item 365.

**RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS**

ITEM 100

METHOD OF DENOTING REISSUED MATTER IN SUPPLEMENTS

Matter brought forward without change from one supplement to another will not be designated as "Reissued" by a reference mark. To determine its original effective date, consult the supplement in which the reissued matter first became effective.

ITEM 110

APPLICATION

The provisions of this tariff will apply on Dry and Liquid commodities, in bulk, at designated Thoroughbred Bulk Transfer (TBT) facilities at the following locations:

Delaware	Edgemoor
Florida	Jacksonville Miami
Georgia	Atlanta (Doraville) Augusta Dalton
Illinois	Chicago
Kentucky	Louisville Somerset
Maryland	Baltimore
Michigan	Detroit (Willis) Grand Rapids
New Jersey	Elizabeth Paterson
New York	Buffalo
North Carolina	Charlotte (Pineville) Winston-Salem

(Continued on next page)

TARIFF NS 9328-D

**RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS**

ITEM 110 (Concluded)

Ohio	Cincinnati (Clare) Cincinnati (Norwood) Cleveland (Euclid) Columbus (Fisher Road) Columbus (Frebis Avenue)
Pennsylvania	Pittsburgh (Crafton)
South Carolina	Spartanburg
Tennessee	Chattanooga
Virginia	Richmond (Petersburg) Alexandria

Each TBT listed above is operated by an independent terminal operator (the "Terminal Operator"). The purpose of this tariff is to advise NS shippers of the services they may expect when utilizing a TBT and the services of a Terminal Operator, but arrangements for service at a TBT should be made between the shipper and the Terminal Operator.

Upon request of the shipper, the terminal services named herein will be performed on carload shipments in bulk as described herein (See Note 1), which move in NS line haul service to or from the above terminals, subject to the charges, rules and regulations published herein.

To arrange for terminal services specified in Item 115 at locations specified above, Shipper will notify terminal before actual shipment of product is made, advising the terminal of the commodity and the car number to be shipped.

NOTE 1: TBT facilities will handle Dry and Liquid Commodities in bulk when appropriate infrastructure and equipment for handling such Commodities are available. The Terminals will require shipper to provide Material Safety Data Sheets (MSDS) and will keep same on file at the terminal; product Handling Protocol for hazardous materials and such other information as may be required, including the need for special transfer equipment, personal protective equipment (PPE), pollution control, etc., prior to shipment of the commodity. NS reserves the right to refuse any commodity at its TBT facilities.

**RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS**

ITEM 112

MOTOR CARRIER ACCESS

A shipper may retain a motor carrier to load or unload Commodity at TBT. In order to load or unload Commodity at a TBT, a motor carrier must execute an indemnity agreement among the motor carrier, NS and the Terminal Operator, covering the motor carrier's activities while at the TBT. When this agreement is fully executed, a motor carrier is "pre-approved". Carriers and their employees operating at TBT site are required to conform to all such rules and procedures. A separate indemnity agreement must be executed at each location that the Operator is different.

All pre-approved motor carriers may deliver to or pull loads from a Thoroughbred Bulk Transfer Terminal. Motor carriers may be required to assist in the connection and loading or unloading of the trailer. The motor carrier will be responsible for its equipment at all times and the driver must remain with the vehicle while loading or unloading. The motor carrier will comply with all required safety procedures, which will include the removal of vehicle keys while loading Hazmat products. Authorized terminal personnel will load or unload all hazardous materials.

A motor carrier that is not pre-approved will not be allowed to enter a TBT, and the motor carrier driver must have a valid CDL (Commercial Driver's License) in his/her possession while conducting activities at the TBT. Motor Carrier driver must have a DOT hazardous materials endorsement if transporting hazardous materials.

Concerning self-loading, an administration charge of \$75 per trailer will be assessed to the shipper, if the motor carrier is not the Terminal Operator. This charge applies to the self-loading of dry and non-hazardous liquid products. (See Note 1) The motor carrier should only charge the shipper a transfer fee only with no administration charges.

NOTE 1: For the purposes stated herein, "self loading" shall be defined as a motor carrier using equipment affixed to its equipment to perform the physical transfer of Commodity. Self-loaders must also supply all hoses, fittings, etc. in addition to appropriate spill containment for the transfer of Commodity.

**RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS**

ITEM 115

A. BASIC SERVICES INCLUDED IN A TRANSFER

Unless otherwise agreed upon by the Terminal Operator and the customer, a transfer conducted at a TBT will include the following at no additional cost:

1. Weigh empty trailer.
2. Inspection of terminal transfer equipment for cleanliness. This does not include self-load equipment.
3. Verification of motor carrier's shipment documentation.
4. Sample contents of one compartment of non-hazardous rail car. Samples are to be taken from the bottom of the railcar. (Unless agreed upon by the shipper and terminal operator).
5. Perform non-self load transfer at negotiated charge.
6. Sample contents of inbound loaded non-hazardous trailer.
7. Seal loaded trailer and railcar from which product was removed.
8. Weigh loaded trailer.
9. Provide driver with scale ticket and product sample only if requested by the shipper or beneficial owner.

The Shipper and the Terminal Operator may agree upon the performance of services in addition to those listed above, at rates to be negotiated by the parties.

B. APPLICATION OF TERMINAL SERVICES

1. Prior to acquiring terminal services at a Thoroughbred Bulk Transfer facility listed in Item 110, shipper or beneficial owner must provide said terminal and NS a MSDS covering the commodity to be handled, and, for hazardous materials, a Handling Protocol outlining hazards and procedures for safe handling. All hazardous materials require pre-authorization by the terminal operator prior to billing any shipments to the terminal.
2. Norfolk Southern, through an Independent Contractor, will perform the services named herein on carload shipments of Commodity in bulk, subject to charges, rules and regulations published herein. Norfolk Southern reserves the right to refuse to handle any Commodity at its sole discretion.
3. All commodities must have MSDS sheet and on file at the terminal prior to arriving for terminal services. For shipments of hazardous materials a Handling Protocol must be on file at the terminal prior to arriving for terminal services. Commodity(s) arriving at a terminal before receipt of an MSDS and Handling Protocol (as applicable) will be held subject to Track Occupancy Charges as specified in Item 140 and no transfers will be accomplished until this information arrives.
4. Commodity(s) that Norfolk Southern declines to handle under the charges, rules and regulations published herein may, at Norfolk Southern's sole discretion, be handled under a separately negotiated contract.
5. Terminal services are restricted to carloads received or forwarded in Norfolk Southern line haul service, none of the facilities listed in Item 110 are open to any type of switching.

(Continued on next page)

**RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS**

ITEM 115 (Continued)

C. UNLOADING OF RAIL CARS

Charges for unloading of railcars to trucks and unloading trucks to railcars at a TBT will be determined on an individual basis by the Terminal Operator, but will not exceed the rates set forth in item 115 section D.

The handling characteristics of the commodity, manpower requirements and the transfer equipment required will determine the charges. Any truck detention charges incurred during the loading or unloading process and any overtime charges (Item 150) will be the responsibility of the shipper. However, charges for the services listed below shall be no greater than that set forth below. Further, any shipper may at any time communicate with NS or the Terminal Operator if it believes the transfer charges to be non-competitive based on market conditions.

For safety reasons, TBT procedures require that at least two (2) terminal operator people be present during the transfer of any non-self load products. A truck driver on site qualifies as one of these people only if the product is a non-hazardous product. For self-load products only one (1) terminal operator employee, or one (1) qualified truck driver, will satisfy the safety requirement.

Transfer rates may not be bundled with any assessorial or capital improvement requirements associated with the transfer.

D. MAXIMUM TRANSFER CHARGES

Applicable on shipments transferred **from rail car to truck** at the facilities listed in Item 110.

On commodities transferred in bulk, the following charges, subject to a minimum weight of 45,000 pounds per truckload per transfer, will be assessed for transfer at all Thoroughbred Bulk Transfer facilities.

DRY BULK

	<u>Per 100 pounds</u>
Mechanical Conveyor or Auger Transfers	\$0.35
Plastics (STCC 28-211-XX)Transfers	\$0.33
Pressure Differential Transfers	\$0.33
Other dry Bulk Products	\$0.40
Hazardous Solids (Other than flammables)	\$0.47
Self- Loading [Non-hazardous products only]	\$75.00 per trailer

LIQUID BULK

	<u>Per 100 pounds</u>
Non-hazardous Liquids	\$0.33
Hazardous Liquids (Other than flammables)	\$0.47
Flammables	(Individually Priced)

(Continued on next page)

**RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS**

ITEM 115 (Concluded)

SPECIAL SERVICES

Additional scale weights	\$25.00 per weight
*first set of weights (inbound/outbound) included in transfer	
Tank Car Heating Charge	(Individually Priced)
Recirculation Charge	\$35.00 per hour
Inert Gas supplied by shipper or beneficial owner	\$30.00 per hour
Packaging	(Individually Priced)

NOTE 1: The 49 Code of Federal Regulations, Table 172.101 (Hazardous Material Table), as may be revised from time to time, will be used to determine if a product is hazardous. NS reserves the right to refuse to handle ANY commodity at a TBT. Only authorized Terminal Operator personnel may transfer hazardous commodities. No preloaded tank trailers of hazardous materials are allowed on TBT property while the facility is closed, unless authorized by Operator and NS. in writing.

NOTE 2: Multiple commodities may be loaded in a compartmentalized trailer for a charge of \$60.00 for each additional commodity or compartment loaded.

E. BILLING OF CHARGES

Unless arrangements to the contrary are made prior to shipment, charges for terminal services described herein will be billed to the shipper or beneficial owner by the Terminal Operator, except that Track Occupancy Charges (Item 140) will be charged, established and billed by NS through its third party billing agents.

If credit privileges are granted (a determination made on an individual basis), terms for the payment of Track Occupancy Charges will be 15 days from the invoice date.

ITEM 125

TERMINAL SERVICES

I. COMMODITY SAMPLING and INSPECTION

Transfer charges in Item 115 include the visual inspection of the exterior of the railcar, and the exterior of the trailer.

NS and/or the Terminal Operator reserves the right to take samples of any commodity transferred at TBT facilities for its own purposes.

Top sampling of railcars must be agreed upon in advance by Shipper and Terminal Operator. Sample containers must be provided by Shipper at no cost to Terminal Operator. If a sample is requested, it must be taken at time of transfer; any samples that are requested to be taken at another time will be performed at a charge of \$50 per car.

II. SPECIAL SERVICES

Services beyond the scope of those customarily provided by a terminal will be priced on an individual basis.

**RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS**

ITEM 130

TERMINAL LIABILITY

I. LOSS OF WEIGHT

Allowable transfer losses will be one percent (1%) of the weight of the commodity on a six-month (January-June, and July-December) cumulative basis per shipper, per TBT, and such loss will be considered standard operating loss not assessable against NS or the Terminal Operator (See note)

NOTE 1: Greater loss allowances may be required as a condition of acceptance for specific products when handling characteristics preclude complete unloading of the trailer or the railcar.

II. LIABILITY LIMITS

The liability of NS and/or the Terminal Operator with respect to activities in which each is engaged at TBTs shall be limited to the negligence of NS and the Terminal Operator in the performance of the services described in this tariff. Furthermore, neither NS nor the Terminal Operator shall be liable for consequential, indirect, special or punitive damages, interest, attorneys fees, or any amount in excess of product or car owner's actual loss concerning the commodity shipped or the equipment utilized.

III. CLAIMS

Only one claim for loss, damage and/or injury may be filed for each rail car handled under this tariff. No claim will be paid which is filed more than nine (9) months after product delivery or release of car from the terminal.

**RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS**

ITEM 140

TRACK OCCUPANCY CHARGES, DEMURRAGE, AND RELATED CHARGES

A. PRIVATE CAR TRACK OCCUPANCY CHARGES

To the extent applicable, this item will apply on private cars (See Notes 1 and 2) constructively placed or actually placed at a TBT in lieu of demurrage provisions in Tariff NS 6004-Series. Track occupancy charges will be billed to shipper or beneficial owner of the Commodity on behalf of NS by or through its third party billing agent.

Once a rail car is constructively or actually placed (See Note 2), "free time" (Including Saturdays, Sundays and Holidays) will be allowed as follows:

<u>Car Type</u>	<u>Free Days</u>	<u>Days 11 through 40</u>	<u>All Subsequent Days</u>
Covered Hopper Cars	10	\$40 per day	\$90 per day
Tank Cars	10	\$40 per day	\$90 per day

B. RAILROAD CAR DEMURRAGE

All railroad owned or controlled cars (See Notes 1 and 2) will be subject to demurrage under the provisions of Tariff NS 6004-A. Demurrage charges will be billed to the shipper or beneficial owner of the Commodity.

C. NOTES AND OTHER CHARGES

- NOTE 1:** A private car is a railcar bearing other than railroad reporting marks
- NOTE 2:** Constructive placement is the date the railcar is available to be switched into the TBT Terminal. Actual placement is the date the railcar was physically placed in the TBT Terminal.
- NOTE 3:** When a railcar is constructively or actually placed at a TBT and subsequently reshipped without any transfers having been made, a facility charge of \$500 will be assessed to the party issuing the reshipping instructions, in addition to all other applicable charges.
- NOTE 4:** At any time following actual placement of a railcar on a TBT facility, if 30 consecutive days pass without product being removed from a railcar, NS reserves the right to remove such car(s) from the TBT. The shipper of the railcar shall pay a charge of \$500 for this removal. This charge will be assessed each time a railcar sits for 30 consecutive days without product being removed and it becomes necessary to move the railcar. Track Occupancy Charges per this item will continue to accrue until such time as the car released empty.
-

**RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS**

ITEM 150

HOURS OF SERVICE & OVERTIME CHARGES

Normal working hours at the TBT Terminals are from 7:00 A.M. to 6:00 P.M., exclusive of Saturdays, Sundays and Holidays (See Item 185).

All loading, unloading, & service must be ordered before 5 p.m. the day prior to the day that loading, unloading, & service is needed. Every attempt will be made to accommodate emergencies and requested times, but loading spots and other circumstances may require occasional modifications of requested times.

When service is required prior to 7:00 A.M. or after 6:00 P.M., arrangements must be made with the Terminal Operator in advance. When loading, unloading, & services are to begin after 5 p.m., written authorization for overtime to complete the process (if required) must be submitted before the process begins. The charge for services before or after normal working hours will be at a rate of \$60 per person per hour or fraction thereof, in addition to all other applicable charges (See Exception).

When service is requested at the TBT on Saturdays, Sundays or Holidays (See Item 185), or when terminal personnel are required to make an extra trip to the terminal rather than performing continuous service, arrangements must be made in advance with the Terminal Operator. The charge for this service will be \$60 per hour per person subject to a four (4) hour minimum per person, in addition to all other applicable charges for service provided.

Authorization for overtime must be received in writing from the party responsible for paying terminal service charges.

EXCEPTION: No additional charges will be assessed if the motor carrier is at the TBT and ready for loading before 4:30 P.M., and the delay causing the overtime is the fault of the Terminal Operator.

ITEM 160

ORDER PLACING

The shipper or beneficial owner will be responsible for providing TBT with the name of the motor carrier authorized to transport the product, along with product transfer instructions. Such instructions may be initiated verbally but must be confirmed via facsimile, written communication, or through electronic means. Neither NS nor the Terminal Operator will be responsible for any problems concerning the shipment and performance of terminal services when the Terminal Operator has not received facsimile confirmation, or electronic communication covering each separate trailer from or to which Commodity is transferred.

**RULES AND OTHER GOVERNING PROVISIONS
GENERAL RULES AND REGULATIONS**

ITEM 165

RAIL CAR ARRIVING AT TERMINAL WITHOUT FULL WRITTEN DESCRIPTION OF LADING

Any railcar arriving at a TBT without full written description of lading will be held at shipper's expense awaiting adequate and proper description or further instructions on disposition of lading. If such written description shows that the commodity is not one approved for transfer, that railcar will be released to shipper for disposition, subject to all applicable terminal charges, along with any other charges to which NS might be entitled.

ITEM 185

HOLIDAYS

Wherever in this tariff reference is made to "Holidays" it means the following:

New Years Day	Thanksgiving Day
President's Day	Thanksgiving Friday
Good Friday	Christmas Eve
Memorial Day	Christmas Day
Independence Day	New Years Eve
Labor Day	

(See Note)

NOTE: In the event one of the above Holidays occurs on a Sunday, the following Monday will be considered as the Holiday for the purpose of this tariff.

ITEM 190

EXPLANATION OF ABBREATIONS

<u>ABBREVIATION</u>	<u>EXPLANATION</u>
BOE	Bureau of Explosives
CDL	Commercial Driver's License
MSDS	Material Safety Data Sheet
NS	Norfolk Southern Railway Company
NSO	National Service Order
PPE	Personal Protective Equipment
RER	Railway Equipment Register
STB	Surface Transportation Board
STCC	Standard Transportation Commodity Code
TBT	Thoroughbred Bulk Transfer
UFC	Uniform Freight Classification Committee, Agent

THE END