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December 17, 2002

VIA FEDERAL EXPRESS

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, D.C. 20423

ENTERED
Office of Proceedings

DEC 18 2002

Part of
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206 877

RE: LB Railco, Inc.
Reply

Dear Secretary Williams:

Enclosed please find an original and 10 copies of our Reply on behalf of the National Solid Wastes Management Association, Jet-A-Way, Inc. and New Bedford Wastes Services, LLC to LB Railco, Inc.'s December 10, 2002, Petition to Lift Stay. We are also submitting an original and 10 copies of our Notice of Intent to Participate.

In addition, I have enclosed an extra copy of our reply and a self-addressed, stamped envelope, and would appreciate receiving a date-stamped copy of the reply in return.

Thank you very much for your consideration.

Sincerely yours,

Stephen M. Richmond

SMR/mab
Enclosures

cc: John F. McHugh, Esq. (w/encls. via regular mail)
Mary Jude Pigsley, Esq. (w/encls. via regular mail)
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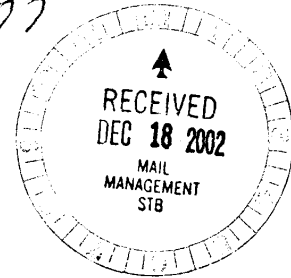
BEFORE THE
SURFACE TRANSPORTATION BOARD

ENTERED
Office of Proceedings

DEC 18 2002

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FINANCE DOCKET NO. 34281



LB RAILCO, INC.
-- LEASE AND OPERATION EXEMPTION --
PROVIDENCE AND WORCESTER RAILWAY COMPANY

**REPLY TO LB RAILCO, INC.'S PETITION TO LIFT STAY
AND MOTION TO DISMISS NOTICE OF EXEMPTION ON THE GROUND THAT
WASTE HANDLING OPERATIONS OF LB RAILCO, INC. ARE NOT SUBJECT TO
EXEMPTION UNDER 10501(b) OF THE ICCTA,
OR ALTERNATIVELY, MOTION TO REQUIRE ENVIRONMENTAL IMPACT
STATEMENT PURSUANT TO 40 CFR SECTION 1105.6(d) ON ACCOUNT OF THE
PROBABILITY OF SIGNIFICANT ENVIRONMENTAL IMPACTS**

PRELIMINARY STATEMENT

The National Solid Wastes Management Association, Jet-A-Way, Inc. and New Bedford Waste Services, LLC (the "Industry Parties") request that the Board grant this Motion for an Order from the Surface Transportation Board (the "Board") determining that LB Railco, Inc. (the "Petitioner") is not entitled to an exemption under Section 10501(b) of the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (the "ICCTA"), and the implementing regulations at 49 CFR Section 1150.43, as requested by the Petitioner in a Notice of Exemption filed with the Surface Transportation Board on November 18, 2002.

The Industry Parties consist of a significant grouping of companies that have developed and operate thriving construction and demolition debris recycling facilities in Massachusetts and throughout the country. The Industry Parties filed this motion to prevent the Petitioner from using an improper claim of preemption under the ICCTA to site and operate a solid waste

processing facility for uncontainerized wastes without the environmental and public health protections required by state and local law and permitting processes.

In its filings with the Board, the Petitioner attempts to minimize the nature of the facility proposed for construction by painting a picture for the Board that suggests the proposed solid waste processing facility is an integral part of the interstate operations of a railroad. However, this is far from the case. The Petitioner is actually attempting to substantially disrupt an existing solid waste processing and recycling industry that currently operates without being co-located on rail lines. The Petitioner has proposed to construct and operate a free standing industrial facility for the processing and handling of uncontainerized solid waste, and to place that facility adjacent to a rail line so that it can operate without the environmental and public health protections required of all other similarly situated facilities in the Commonwealth of Massachusetts. Such a facility would be capable of avoiding the significant costs of permitting and environmental controls, at a substantial detriment to the environment and public health, and to the lawful operations and reputations of the rest of the industry.

BACKGROUND

On November 18, 2002, the Petitioner filed with the Board a Notice of Exemption seeking to establish a solid waste transfer station and construction and demolition debris processing facility in Millbury, Massachusetts (the "Notice of Exemption"). A number of individuals and organizations commented adversely on the Notice of Exemption, including US Representative Richard E. Neal, the United States Department of the Interior, the John J. Chafee Blackstone River Valley National Heritage Commission, the Massachusetts Department of Environmental Protection ("DEP"), and the Town of Millbury, Massachusetts. On November

22, 2002, the Board stayed the effect of the Notice of Exemption, stating that the Notice contained insufficient information to enable the Board to determine the extent to which environmental review is required. The Board noted that communications from other parties had raised "significant environmental concerns".

On December 10, 2002, the Petitioner filed a reply (the "Reply Brief") containing its responses to opposition motions that were filed by the DEP and the Town of Millbury.

FACTS

The Commonwealth of Massachusetts has established a comprehensive statutory scheme for regulating solid waste handling facilities in order to ensure that these facilities "will not represent a threat to the public health, safety or the environment." MGL c. 111 §150A. State laws regulating the siting and operation of these facilities include requirements that establish performance standards prohibiting the construction or operation of solid waste facilities in certain areas and requiring adherence to substantive design and operational standards, procedures and limitations. See MGL c. 111 §150A½, 310 CMR 16.00 and 310 CMR 19.00. In addition to these solid waste requirements, the Commonwealth of Massachusetts requires such facilities to comply with many other substantive environmental requirements that are imposed to protect both the environment and public health. See, inter alia, MGL c. 111, §§142A through 142J (air), MGL c. 21C (hazardous waste), MGL c. 21E (oils and hazardous substances), MGL c. 21 §43 (water pollution), and MGL c. 131 §40 (wetlands).

These state requirements, among others, impose significant limitations and controls on the construction and operation of solid waste facilities throughout the Commonwealth of Massachusetts in a nondiscriminatory manner. Consequently, all solid waste facilities, whether

they are located adjacent to a roadway, a rail bed or a barge dock, are required to comply with these statutory and regulatory requirements in order to protect both the environment and the public health. In particular, facilities such as those operated by the Industry Parties are required to comply with these requirements to conduct the exact same receiving, processing, handling, aggregating and loading activities that are proposed by the Petitioner. These statutes and regulations apply to facilities handling or processing wastes within the state regardless of whether the wastes will be further processed or disposed of wholly within the state or outside of the state. Consequently, these statutes and regulations do not distinguish or discriminate in any way between wastes that are managed wholly inside the state and those that may enter the interstate stream of commerce.

The Petitioner has proposed to construct a facility for the receiving, processing, handling aggregating and loading of uncontainerized solid waste, including C&D Debris and soils contaminated with hazardous substances and petroleum. See Reply Brief, Attachment 3. The proposed facility might accept a wide variety of uncontainerized waste materials. These materials will be managed in open areas, and may contain state listed hazardous wastes (so long as they are not federally listed hazardous wastes). Id. Under state regulations, all facilities that process or transfer solid wastes must operate with waste ban plans demonstrating how the facilities will comply with the DEP's solid waste transfer and disposal bans. See 310 CMR 19.017. The Petitioner has not proposed to comply with this requirement other than to discourage receipt of such material. Id.

The Petitioner has asserted in the Notice of Exemption that it is entitled to operate a solid waste processing and handling facility pursuant to 49 CFR §1150.41. The Petitioner has further asserted in the Notice of Exemption and Reply Brief that this project will have no significant

environmental effect and that the development of the site will comply with applicable state and local regulatory schemes other than licensing and/or permitting.

The Industry Parties dispute these assertions as provided below.

DISCUSSION

1. Petitioner's Solid Waste Facility is Not Entitled to an Exemption under 10501(b).

The Petitioner is proposing to receive , process, handle, aggregate and load construction and demolition debris ("C&D Debris") and contaminated soils from hazardous waste remediation sites at the facility. See Petitioner's Reply Brief, page 7. C&D Debris and contaminated soils will be handled outdoors outside of containers at the facility and will be aggregated and processed on site using mobile equipment. Dust generation and spillage are contemplated, as addressed in Petitioner's Operations and Maintenance Plan. See Petitioner's Reply Brief, Attachment Three.

The handling and processing of C&D Debris and contaminated soils in Massachusetts is not related to the provision of interstate rail service. There is a large and established industry in Massachusetts devoted to both the handling and processing of C&D Debris and the management of contaminated soils. The Industry Parties are comprised of many of the companies that run successful businesses managing C&D Debris and contaminated soils. These companies accept deliveries of materials, process these materials, aggregate and sort them, remove recyclables as required by state law, and use a variety of sources of transportation to move materials from their sites to disposal locations and recycling markets, including rail transportation. Consequently, there is no established nexus between the proposed activity at Petitioner's facility and the provision of interstate rail service.

The Board has previously addressed the circumstances under which facilities are entitled to claim preemption from state and local requirements, and entitled to take advantage of the exemption offered in §10501(b) of the ICCTA. In *New York Susquehanna and W.Ry. Corp.*, *STB Fin.* Docket No. 33466 (Sept. 9, 1999) (hereafter “Riverdale”), where a railroad proposed to construct a truck terminal and corn processing plant in a residential area, the Board determined that “manufacturing activities and facilities not integrally related to the provision of interstate rail service are not subject to our jurisdiction or subject to Federal preemption.” Riverdale, at 7. The Board further opined that if a

facility is not integrally related to providing transportation services, but rather serves only a manufacturing or production purpose, then, like any non-railroad property, it would be subject to applicable state and local regulation. Our jurisdiction over railroad facilities...is limited to those facilities that are part of a railroad’s ability to provide transportation services... . Id.

The Board’s analysis in Riverdale is supported by the analysis of the 11th Circuit Court of Appeals in Florida East Coast Railway Company v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001) (hereafter “Florida East”). In Florida East, the Court noted that there is a presumption against preemption recognized by the U.S. Supreme Court, Id. at 1327-1328, and emphasized that the Senate Report on the final form of the bill that became the ICCTA stated that the exclusivity in the bill “is limited to remedies with respect to rail regulation – not State and Federal law generally ... because they do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation..” Id. at 1338. Consequently, both the Board and the 11th Circuit Court of Appeals have identified a clear constraint on the use of the exemption provided in the ICCTA.

The solid waste industry in Massachusetts is comprised of regional facilities receiving wastes from generators at facilities such as the one proposed by the Petitioner. These companies

then sort the material, remove recyclables as required by state law, aggregate the remaining materials, and load them for transport and distribution in commerce, either for disposal, further processing, or recycling.

The Commonwealth of Massachusetts has established a policy framework for solid waste management pursuant to MGL c. 16, §21 that contemplates a significant diversion of solid wastes from disposal outlets to recycling outlets in order to protect public health, safety and the environment. The state has promulgated as a key objective the shifting of the waste industry's role from providers of primarily waste disposal services to providers of broader waste management services, including recycling services. See Beyond 2000: Solid Waste Master Plan, A Policy Framework (EOEA, December 20, 2000). The DEP has established a comprehensive system of regulation that applies uniformly to all waste handlers and that requires these handlers to divert numerous materials from disposal in order to promote recycling and waste reduction. This system includes waste bans established at 310 CMR 19.017 that ban not just the disposal of various waste materials but the transfer for disposal of these materials.

In anticipation of the DEP's announced ban on the disposal or transfer for disposal of C&D Debris to be enacted in 2003, many of the Industry Parties have made substantial and costly investments in technologies necessary to manage C&D Debris. These investments serve to further the state's goals of protecting public health, safety and the environment by reducing disposal and establishing a recycling infrastructure.

The Petitioner is attempting to bypass the disposal and transfer ban by linking its activity to that of a railroad. If successful, the Petitioner will attempt to avoid application of the C&D Debris ban, and will thwart the achievement of the state's public health, safety and environmental recycling goals. The Petitioner's proposed solid waste handling facility is in no

regulated by state and local law and permit processes without an impermissible burden on interstate commerce. In addition, some of these facilities currently transfer wastes to railyards for transport by railroads. Under the Board's decision in Riverdale, such a facility cannot be viewed as integrally related to providing transportation services. The Board determined in Riverdale that its jurisdiction extends only to facilities that are part of a railroad's ability to provide transportation services. See Riverdale, at p. 9. The Petitioner's proposed facility is not related to a railroad's ability to provide transportation services.

Consequently, the Petitioner's proposed facility should not enjoy a preemption from state and local permitting and preclearance requirements because they would not unduly interfere with interstate commerce or deny a railroad the right to construct facilities or conduct operations that are integrally related to the function of a railroad.¹

The Industry Parties request that, for the foregoing reasons, the Board determine that the Petitioner's proposed facility is not subject to the jurisdiction of the Board and is not entitled to the requested exemption.

2. **If the Board Asserts Jurisdiction, a Full Environmental Impact Statement is Required.**

In the event that the Board does not agree that the Petitioner's facility is not within its jurisdiction, as discussed above, the Industry Parties request that the Board require the preparation of an Environmental Impact Statement ("EIS") pursuant to 49 CFR Part 1105.

¹ If the Petitioner's position that its solid waste handling facility should enjoy preemption from state and local permitting were taken to its logical extreme, one would have to take the position that a nuclear fuels processing facility could be co-located by a rail track and that the facility would be exempt from state and local permitting because state and local permits would impermissibly burden interstate commerce and the functioning of the railroad. It is critical that the Board recognize the distinction between facilities that are integrally related to railroad operation and facilities that are merely postured as integrally related in order to gain protection from state and local permitting processes.

Under the National Environmental Policy Act, 42 USC 4332 ("NEPA"), the Board must prepare an EIS for a major federal action significantly affecting the quality of the human environment. Under the Board's NEPA regulations, "the Board is guided by the definition of 'significantly' at 40 CFR 1508.27." See 49 CFR 1105.5(a). The referenced definition of "significantly" requires considerations of both context and intensity. In both cases, the Board should determine that the grant of exemption status would qualify as significant action.

With respect to context, the Board must consider that the significance of an action must be analyzed in several contexts such as the society as a whole, the affected region, the affected interests and the locality. 40 CFR 1508.27(a). In the instant case, there are already allegations in the record that the Petitioner will likely handle asbestos containing materials in an area open to the environment, that the site is entirely within a 200 foot riverfront area protected under the state's Rivers Protection Act, is within a wellhead protection area of two public water supply wells downgradient of the site and that the facility could not be located in the proposed area under the state solid waste facility siting law, which is by its terms intended to protect public health. See DEP Motion to Reject. In addition, the industry parties have indicated above that the facility proposed by the Petitioner would have a significant adverse impact upon the solid waste recycling and handling industry in Massachusetts. Consistent with the NEPA regulations, the context to be considered by the Board must include both short-term and long-term effects such as these.

With respect to the Board's consideration of intensity, the NEPA regulations direct the Board to consider the severity of impact, including the degree to which the proposed action affects public health or safety, unique characteristics of the geographic area such as proximity to historic or cultural resources, wetlands, and wild and scenic rivers, the degree to which the

effects on the quality of the human environment are likely to be highly controversial, highly uncertain or involve unique or unknown risks, the degree to which the action may establish a precedent for future actions with significant effects, the degree to which the action may adversely affect or cause loss or destruction of significant historical resources, and whether the action threatens a violation of federal, state or local environmental law. All of these impacts are likely to occur if the Petitioner's Notice of Exemption is granted.

The record before the Board indicates that the site is directly adjacent to a new bicycle and pedestrian pathway which is part of the Blackstone River Valley National Heritage Corridor. Federal law requires that any federal entity conducting or supporting activities directly affecting this corridor must consult with the Secretary of the Interior and the Blackstone River Valley National Heritage Corridor Commission to avoid adverse effect on the corridor. The site is located just a few hundred feet from two schools, raising significant questions about public health impacts from outdoor waste handling and processing operations. The Town of Millbury has expressed serious reservations about the project, a Member of Congress has requested information and input into the Board's decision making process. The Massachusetts DEP has determined that the Petitioner's Notice of Exemption was "false and misleading" in discussing environmental issues. The DEP has also determined that the state environmental regulations prohibit the operation of the facility in the sensitive area proposed. Finally, the Industry Parties have raised the likelihood that the proposed facility will have significant adverse consequences on the recycling and materials processing industry in Massachusetts.

The Petitioner asserts that there are no alternative sites to consider in an environmental analysis because as a private entity, it does not have the ability to use alternative sites. See Petitioner's Reply Brief, page 5. This position is not consistent with NEPA and is not tenable.

The facilities operated by the Industry Parties are direct proof of the ability of private parties to consider and implement facilities at alternative sites. The underlying rationale for Petitioner's proposal is to compete with established facilities at an unfair economic advantage created by the less stringent environmental standards that Petitioner hopes to be subject to. An obvious alternative to the Petitioner's proposed activities would be to send all C&D Debris to a licensed solid waste handling facility for processing, sorting, aggregation and loading, then sending the material on to the rail yard for rail transport. The Petitioner does not want to consider this alternative because it might limit the economic advantage that it seeks to gain by running an unlicensed solid waste handling facility.

All of these facts support a determination by the Board that the Petitioner's Notice of Exemption, and the Board's decision on that application, should be deemed a major federal action that has the potential to affect significantly the quality of the human environment. Consequently, the Industry Parties request that the Board determine that an EIS will be required prior to taking action on the Notice of Exemption.

3. **A Historic Report Should Be Required Under 49 CFR 1105.**

In accordance with the National Historic Preservation Act, the Board must determine whether its proposed action is the type of activity that has potential to cause effects on historic properties. The location of the Petitioner's proposed facility within the Blackstone River Valley National Heritage Corridor creates substantial concerns about the effects of the facility on a nationally significant landscape recognized under federal law. If the Board determines that it has jurisdiction over the Petitioner's facility then it should require the preparation of a Historic Report pursuant to 49 CFR 1105.8.

Consequently, the Petitioner should be required to prepare a Historic Report containing the information required by 49 CFR 1105.7 and 1105.8.

4. **The Board Should Require Compliance With the Coastal Zone Management Act.**

The Petitioner has proposed to locate the facility in close proximity to the Blackstone River. The Blackstone River flows into a state coastal zone designated pursuant to the Coastal Zone Management Act, 16 USC 1451 (the "CZMA"). Section 307 (c)(3)(A) of the CZMA provides that "... any applicant for a required Federal license or permit to conduct an activity, in or outside the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide ... a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program." Similar requirements are included for activities conducted by or funded by a federal agency. Consequently, the Petitioner must comply with the procedures set forth at 49 CFR 1105.9 and the Board should require compliance with these federal consistency review requirements.

Conclusion

The Board should determine that the proposed facility does not fall within the jurisdiction of the ICCTA because it is not an integral part of the interstate operations of a railroad. The Board should furthermore determine that the preemption of state and local law provided in Section 10501(b) of the ICCTA does not apply to the facility.

Alternatively, if the Board should determine that it has jurisdiction over the proposed facility, the Board should require the preparation of an EIS and a Historic Report, and compliance with the federal consistency review requirements of the Coastal Zone Management Act.

Respectfully Submitted,



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Date: December 17, 2002

CERTIFICATION OF SERVICE

I, Stephen M. Richmond, declare under penalty of perjury on this 17th day of December, 2002, I served a true copy of this motion upon:

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