

DID # 0102194001

208091

FLETCHER & SIPPEL LLC

Two Prudential Plaza, Suite 3125
180 North Stetson Avenue
Chicago, Illinois 60601-6721

Thomas J. Litwiler
(312) 540-9440
tlitwiler@fletcher-sippel.com

Phone: (312) 540-0500
Fax: (312) 540-9098
www.fletcher-sippel.com

June 16, 2003

VIA FEDERAL EXPRESS

Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, DC 20006

FEE RECEIVED

JUN 17 2003

**SURFACE
TRANSPORTATION BOARD**

RECEIVED
JUN 17 2003
MANAGEMENT

Re: **Finance Docket No. 34192 (Sub-No. 1)**
Hi Tech Trans, LLC -- Petition for Declaratory Order --
Rail Transload Facility at Oak Island Yard, Newark, NJ

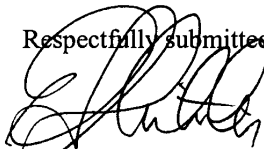
Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of the **Petition of Hi Tech Trans, LLC for Declaratory Order**, dated June 16, 2003. A check in the amount of \$1,400, representing the appropriate fee for this filing, also is enclosed.

An extra copy of the Petition and of this transmittal letter are included as well. I would request that you date-stamp those items to show receipt of this filing and return them to me in the provided envelope.

Should any questions arise regarding this filing, please feel free to contact me. Thank you for your assistance on this matter. Kind regards.

Respectfully submitted,



Thomas J. Litwiler
Attorney for Hi Tech Trans, LLC

FILED

JUN 17 2003

TJL:tl

Enclosures **SURFACE
TRANSPORTATION BOARD**

cc: Parties on Certificate of Service

**ENTERED
Office of Proceedings**

JUN 17 2003

**Part of
Public Record**

208091 ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34192 (SUB-NO. 1)

HI TECH TRANS, LLC
-- PETITION FOR DECLARATORY ORDER --
RAIL TRANSLOAD FACILITY AT OAK ISLAND YARD, NEWARK, NJ

RECEIVED
JUN 17 2003
MANAGEMENT
SIB

FILED

JUN 17 2003

**PETITION OF HI TECH TRANS, LLC ^{SURFACE} TRANSPORTATION BOARD
FOR DECLARATORY ORDER**

FEE RECEIVED

JUN 17 2003

**SURFACE
TRANSPORTATION BOARD**

James A. Fletcher
William C. Sippel
Thomas J. Litwiler
Fletcher & Sippel LLC
Two Prudential Plaza, Suite 3125
180 North Stetson Avenue
Chicago, Illinois 60601-6721
(312) 540-0500

ATTORNEYS FOR HI TECH TRANS, LLC

ENTERED
Office of Proceedings

JUN 17 2003

**Part of
Public Record**

Dated: June 16, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34192 (SUB-NO. 1)

HI TECH TRANS, LLC
-- PETITION FOR DECLARATORY ORDER --
RAIL TRANSLOAD FACILITY AT OAK ISLAND YARD, NEWARK, NJ



**PETITION OF HI TECH TRANS, LLC
FOR DECLARATORY ORDER**

Hi Tech Trans, LLC ("Hi Tech") hereby seeks issuance of a declaratory order that the Board has exclusive jurisdiction over a rail transloading facility at Oak Island Yard in Newark, New Jersey operated by Hi Tech as a licensee of Delaware & Hudson Railway Company, Inc., d/b/a Canadian Pacific Railway ("D&H"), and that the attempted regulation and closure of that facility by the New Jersey Department of Environmental Protection ("DEP") is preempted under federal law pursuant to 49 U.S.C. § 10501(b).

This case is a companion to Hi Tech Trans, LLC -- Petition for Declaratory Order -- Hudson County, NJ, Finance Docket No. 34192 (STB served November 20, 2002) ("Hi Tech I"), in which the Board determined that local regulation of truck movements from various points in New Jersey to the Oak Island Yard transload facility were not preempted under the relevant provisions of the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 ("ICCTA"). While the Board in Hi Tech I strongly implied that operations at the Oak Island Yard transload facility itself fell within the preemptive scope of ICCTA, the Board did not formally reach that issue. DEP has now abruptly sought to shut down the Oak Island Yard transload facility, claiming that Hi Tech has failed to obtain required state environmental permits and certificates for the rail transloading operation it conducts as D&H's licensee. It thus has

become necessary for the Board to resolve the issue that it addressed but did not conclusively decide in Hi Tech I.

As the Board knows well, judicial and agency precedent overwhelmingly establishes that rail transload facilities like the one at issue here are integral components of "rail transportation" and are subject to the exclusive jurisdiction of the Board under 49 U.S.C. § 10501(b). DEP has itself expressly recognized the binding and preemptive scope of the Board's jurisdiction in this area, and has proposed draft regulations that would exempt rail carrier transload facilities and operations from the very permitting and licensing requirements that DEP now seeks to impose on the Hi Tech rail transloading facility at Oak Island Yard. The distinction on which DEP would seemingly rely -- between transload facilities operated by rail carriers themselves and identical facilities operated by third parties as agents, contractors or licensees of rail carriers -- has no basis in the statute, in precedent or in logic. The Board should issue the requested declaratory order finding that the rail transloading facility at Oak Island Yard operated by Hi Tech falls squarely within ICCTA's preemptive scope.

As is explained in Hi Tech's petition for emergency relief filed concurrently herewith in this proceeding and in Finance Docket No. 34192, it is imperative that the Board take whatever immediate action is necessary and appropriate to avoid a forcible state-imposed shut-down of the Oak Island Yard rail transloading facility while the Board considers and rules on this declaratory order request. In the absence of such emergency action, DEP will apparently move to shut down the rail transloading facility on or soon after June 17, 2003 -- thus depriving the public of access to important interstate rail service, likely causing the demise of Hi Tech, and effectively depriving this agency of its exclusive jurisdiction over that facility. Hi Tech similarly requests that the Board act on this declaratory order request at the earliest possible time.

FACTUAL BACKGROUND

The Board is likely familiar with the facts regarding the Hi Tech rail transloading facility at Oak Island Yard as a result of the proceedings in Hi Tech I. Oak Island Yard is a major freight classification yard located in Newark, New Jersey that is owned by Consolidated Rail Corporation ("Conrail"). D&H has leased a portion of the yard from Conrail for many years, and conducts a range of intermodal and bulk commodity transload operations there. D&H was interested in developing a transloading service for construction and demolition ("C&D") debris at Oak Island Yard, and in November of 2000 entered into an Operational License Agreement with Hi Tech under which Hi Tech would develop and operate such a transload facility at Oak Island as D&H's licensee. Service at the rail transloading facility commenced in September, 2001. Verified Statement of David C. Stoller ("Stoller V.S.") at 1-3 and Exhibit A thereto.¹

Operations at the rail transload facility are relatively straightforward. Trucks carrying C&D debris from locations across New Jersey and New York arrive at Oak Island Yard and proceed to a large hopper located adjacent to a yard track. The C&D debris is dumped into the hopper and then is conveyed by Hi Tech from the hopper into gondola cars spotted on the adjacent track using an excavator. Stoller V.S. at 2. The gondola cars are leased by Hi Tech and dedicated to this service. D&H crews spot and pull the gondolas on the yard tracks, and D&H handles the cars in line-haul service to interchange with other carriers pursuant to a long-term transportation contract between Hi Tech and D&H. Stoller V.S. at 2.

¹ Mr. Stoller's verified statement is attached to Hi Tech's petition for emergency order and other relief filed concurrently herewith in this docket and in Finance Docket No. 34192, and is incorporated herein by reference.

Hi Tech's operations at Oak Island Yard do not involve -- and have never involved -- processing or storing any C&D debris. Title to the C&D debris remains with the customer. Hi Tech merely transloads the materials into the rail cars for movement by D&H, as would be required for any rail transportation of this commodity. Stoller V.S. at 2. The Hi Tech rail transloading facility at Oak Island Yard is now utilized by a large number of C&D debris customers in New Jersey and New York, many of whom would otherwise have no access to rail transportation for shipment of their traffic. Stoller V.S. at 2.

While Hi Tech has always believed that any state licensing or environmental permitting processes that otherwise might apply to the Oak Island Yard transload facility were preempted under ICCTA, Hi Tech sent extensive information regarding the facility to DEP, and DEP officials have inspected the facility and met with Hi Tech. Stoller V.S. at 4. DEP confirmed that the facility fell within the Board's exclusive jurisdiction under ICCTA and would not require any state permit or license. Stoller V.S. at 4. Hi Tech also sought and received two informal opinions from the Board's Office of the Secretary advising that the transload facility would be within the exclusive and preemptive jurisdiction of the Board. Stoller V.S., Exhibits B and C thereto.

After operations began, several New Jersey counties approached Hi Tech regarding alleged violation of state and county "flow control" regulations by motor carriers delivering C&D debris to Oak Island Yard. Stoller V.S. at 4-5. "Flow control" laws require that all C&D debris in a specified county be delivered to one or more designated transfer points or disposal facilities. In response, Hi Tech sought a declaratory order from the Board in Finance Docket No. 34192 that local flow control requirements were preempted under ICCTA to the extent they were applied to trucks transporting C&D debris to the rail transloading facility at Oak

Island Yard. The two relevant New Jersey counties and DEP were each parties to the declaratory order proceeding in Finance Docket No. 34192. Hi Tech also commenced a constitutional challenge to the flow control scheme in federal court in New Jersey. Stoller V.S. at 5.

On November 20, 2002, the Board issued its decision in Hi Tech I. The Board concluded that it did not have jurisdiction over the trucking operations that were the subject of Hi Tech's declaratory order petition -- i.e., the transportation by trucking companies of C&D debris to the Oak Island Yard transloading facility. Hi Tech I at 3-4. As a consequence, the Board concluded that ICCTA did not preempt the application of the New Jersey flow control laws to those trucking operations. Hi Tech I at 4.

In its decision, the Board did not formally determine whether the Oak Island Yard rail transloading facility itself was subject to the Board's jurisdiction under 49 U.S.C. § 10501(b), nor whether ICCTA has preempted New Jersey environmental permitting requirements to the extent those requirements would otherwise be applicable to the facility. However, the Board hinted rather strongly at what the outcome on that question would be:

[I]t will not be necessary for the Board to institute a declaratory order proceeding here, because it is clear that the Board does not have jurisdiction over those activities described here that extend beyond the rail-related activities at the CP transloading facility.

. . . .

Preemption under section 10501(b) hinges on what can reasonably be considered part of "transportation by rail carriers" under section 10501(a) The only Hi Tech activity that might be considered integral to the rail transportation of C&D debris would be transfer of C&D debris from trucks to rail cars at the CP transload facility itself.

Hi Tech I at 3, 4 (emphasis added).

On April 1, 2003, in the course of an order denying a Hi Tech motion for leave to amend its complaint, the judge in Hi Tech's federal court lawsuit against the flow control laws reviewed the Board's decision in Hi Tech I and concluded that the Board had determined that Hi Tech "is not a rail carrier." Stoller V.S., Exhibit D at 3. That order apparently caused DEP to reconsider its position concerning the applicability of ICCTA preemption to the Hi Tech rail transloading facility at Oak Island Yard -- which had not been an issue since the commencement of transloading operations in September, 2001, and had never been raised by DEP as a concern during the Board proceedings on Hi Tech I.² Without warning, on May 28, 2003, DEP served a cease and desist order on Hi Tech with respect to the Oak Island Yard facility. Stoller V.S. at 6-7 and Exhibit E thereto.

In its cease and desist order, DEP concludes that Hi Tech has violated New Jersey law by failing to obtain a construction or operating permit for its rail transloading facility or a state "certificate of public convenience and necessity" to engage in the business of transloading C&D debris from trucks into railcars at Oak Island Yard. DEP has ordered Hi Tech to "cease and desist the operation of the illegal solid waste facility," and given Hi Tech 20 days to shut down the Oak Island Yard rail transloading operations. Stoller V.S., Exhibit E at 3. At the end of that period, DEP has made it clear that it will commence an enforcement action against Hi Tech and Mr. Stoller. Stoller V.S. at 7.

² See DEP Reply to Amended Petition for Declaratory Order, June 6, 2002, filed in Finance Docket No. 34192, at 6-7 (arguing with respect to the application of ICCTA preemption to Hi Tech that the Board did not have jurisdiction over "the activities of Hi Tech in arranging for truckers to gather such debris from construction sites and to transport that debris to a truck-rail transfer facility," over "the activities of the construction companies that generate such construction/demolition debris," or over "the activities of the truckers that haul that debris from construction sites," without mentioning or addressing rail transloading operations at the Hi Tech facility in Oak Island Yard).

In response to the May 28, 2003 cease and desist order, Hi Tech has asked both the Board and the federal court to prevent DEP from closing down the C&D debris rail transloading facility at Oak Island Yard until the scope of the Board's exclusive jurisdiction and ICCTA's preemptive reach with respect to the facility can be determined. Hi Tech is filing this petition for declaratory order in order to obtain such a determination: that the Oak Island rail transload facility and Hi-Tech's operation of that facility are within the exclusive jurisdiction of the Board under 49 U.S.C. § 10501(b), and that ICCTA has preempted New Jersey environmental permitting requirements to the extent those requirements are otherwise applicable to that transloading facility.

DISCUSSION

1. A Declaratory Order is Warranted

Under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. See, e.g., North San Diego County Transit Development Board -- Petition for Declaratory Order, Finance Docket No. 34111 (STB served August 21, 2002) at 4 (declaratory order proceeding instituted and decided where "there is controversy on the present record regarding the applicability of 49 U.S.C. 10501(b)."). Here, DEP has issued a cease and desist order against an existing rail transloading facility that will take effect on June 17, 2003. That order is predicated on a misconstruction of a prior Board decision, and if allowed to go into effect would have severe adverse consequences on rail operations at Oak Island Yard and on interstate rail transportation service provided through that facility. There is certainly sufficient controversy and significance here to warrant issuance of a declaratory order.

2. ICCTA Preemption Applies Here

Almost since the moment that ICCTA was enacted, decision-makers of all stripes have recognized the expansive nature of the Board's jurisdiction and of state law preemption under the new act. Indeed, one of the very first courts to address the subject explained that "it is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations." CSX Transp., Inc. v. Georgia Public Service Comm'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996).

Under 49 U.S.C. § 10501(a)(1)(A), the Board has jurisdiction over "transportation by rail carrier that is . . . by railroad" The definition of "railroad" includes "a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation," 49 U.S.C. § 10102(6)(C), while the definition of "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 passenger and property . . .

49 U.S.C. § 10102(9) (emphasis added).

As broadened by ICCTA, the Board now has exclusive jurisdiction over "transportation by rail carriers" as well as over 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)(1) and (2). ICCTA's express preemption clause provides that "[e]xcept as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49

U.S.C. § 10501(b). As numerous courts have held, the statutory preemption conferred by the language of Section 10501(b) applies to the construction and operation of ancillary railroad facilities covered by 49 U.S.C. § 10906, even though the Board lacks licensing authority over such projects and therefore does not conduct its own environmental review. E.g., Flynn v. Burlington N.S.F. Corp., 98 F. Supp. 2d 1186, 1189-1190 (E.D. Wash. 2000); Borough of Riverdale -- Petition for Declaratory Order -- The New York, Susquehanna & Western Railway Corporation, Finance Docket No. 33466 (STB served September 10, 1999) ("Riverdale I") at 5-9 (collecting cases). The rail transloading facility at issue here plainly falls into that category.³

In the face of the pervasive jurisdictional and preemptive reach of ICCTA, local efforts such as that being undertaken by DEP to regulate rail facilities out of existence simply cannot stand. "State and local permitting and preclearance requirements (including environmental requirements) have been found to be preempted because, by their nature, they interfere with rail transportation by giving the state or local body the ability to deny the carrier the right to construct facilities or conduct operations." Green Mountain Railroad Corporation -- Petition for Declaratory Order, Finance Docket No. 34052 (STB served May 28, 2002) at 4-5 (citing Auburn and Kent, WA -- Pet. for Declar. Order -- Stampede Pass Line, 2 S.T.B. 330 (1997), aff'd sub nom. City of Auburn v. STB, 154 F.3d 1025 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999)). Far from being a construct of the Board or the courts, this outcome is directly mandated by the statute itself: "[C]ongressional intent to preempt a state or local permitting

³ E.g., Joint Petition for Declaratory Order -- Boston and Maine Corporation and Town of Ayer, MA, Finance Docket No. 33971 (STB served May 1, 2001) at 7 ("Indeed, '[t]rackage . . . used in the loading, reloading, storage and switching of [rail] cars incidental to the receipt of shipments by the carrier or their delivery to the consignee . . . is 'spur, industrial, team, switching or side tracks' under section 10906." (citing Railway Labor Executives Ass'n v. City of Galveston, 849 F.2d 145, 148 (5th Cir. 1988) (internal citation omitted))).

process for prior approval of rail activities and facilities relating to interstate transportation by rail is explicit in the plain language of section 10501(b) and the statutory framework surrounding it." Ayer at 8, n.24 (citing City of Auburn, 154 F.3d at 1030-1031).

This precedent has been specifically applied to rail transload facilities like the one at Oak Island Yard operated by Hi Tech as D&H's licensee. The seminal Riverdale proceeding involved a rail transloading facility used to heat and transfer materials from railroad tank cars to trucks waiting adjacent to the yard track. Riverdale I at 2. The Board found that local zoning ordinances, land use restrictions and permitting conditions that affected where, when and whether such a facility could be operated were just "the type of interference that Congress sought to avoid in enacting section 10501(b)" and were preempted. Riverdale I at 7. With respect to the precise type of environmental permitting process that DEP seeks to impose on the Hi Tech rail transload facility at Oak Island Yard, the Board explained that "to the extent that they set up legal processes that could frustrate or defeat railroad operations, state or local laws that would impose a local permitting or environmental process as a prerequisite to the railroad's maintenance, use, or upgrading of its facilities are preempted because they would, of necessity, impinge upon the federal regulation of interstate commerce." Riverdale I at 8.

Numerous other decisions directly addressing rail transload facilities are to the same effect. See Green Mountain, supra (bulk cement transloading facility); Ayer, supra (automobile loading facility); In re Vermont Ry., 769 A.2d 648 (Vt. 2000) (salt transfer facility); Norfolk Southern Ry. Co. v. City of Austell, 1997 WL 1113647 (N.D. Ga. 1997) (intermodal transfer facility).

None of this is news to DEP, which on February 21, 2003 sent a letter to "Railroad Proposal Stakeholders" enclosing a draft proposal that would amend the very

regulations that DEP now seeks to enforce against Hi Tech and the Oak Island Yard rail transload facility to reflect the preemption of those regulations by ICCTA. See Exhibit A hereto, February 21, 2003 letter at 1 ("In reviewing several recent cases involving the scope of the preemption under the Act [i.e., ICCTA], the Department has concluded that its authority to permit a facility owned by a rail carrier that is used for transferring shipments of solid waste to or from rail may be preempted by this Act [ICCTA]."); Exhibit A hereto, Draft DEP Proposal at 4 ("It has been determined that the Department's authority to permit a transfer facility owned by a rail carrier and used for transferring shipments of solid waste to or from rail is preempted by the ICC Termination Act."). DEP's own understanding of the preemptive effect of ICCTA confirms that its environmental permitting requirements cannot be applied to rail transloading facilities like that at Oak Island Yard operated by Hi Tech.

3. The Board Has Exclusive Jurisdiction Over Rail Facilities Integral to the Provision of Interstate Rail Transportation Service Regardless of Whether Such Facilities are Operated Directly by a Rail Carrier

The fact that the Oak Island Yard transload facility is operated by a non-carrier (Hi Tech) as the licensee of a carrier (D&H), rather than by the carrier itself, is a distinction without a difference. 49 U.S.C. § 10102(9) defines transportation to include a "yard, property [or] facility . . . of any kind related to the movement of [property] by rail, regardless of ownership or an agreement concerning use." (emphasis added). As this provision makes explicit, the important criterion is the rail-related function served by a particular facility, not the denomination of the entity that may own and/or operate it. Cf. Riverdale I at 9 (regardless of ownership, test is whether facility is integrally related to provision of interstate rail service).

The Board has issued several declaratory orders construing the preemptive scope of ICCTA with respect to rail-related actions of non-carriers. Fletcher Granite Company, LLC --

Petition for Declaratory Order, Finance Docket No. 34020 (STB served June 29, 2001) (return to service of shipper-owned spur trackage); North San Diego County Transit Development Board -- Petition for Declaratory Order, Finance Docket No. 34111 (STB served August 21, 2002) (finding that public transit authority which proposed to construct passing siding was a rail carrier, but alternatively finding that passing siding would benefit freight carrier and that "[b]ecause of this benefit to BNSF's common carrier interstate rail freight operations, there is no doubt that we have jurisdiction and that this case falls within section 10501(b)."). And, of course, the Board's statement in Hi Tech I (at 4) that "[t]he only Hi Tech activity that might be considered integral to the rail transportation of C&D debris would be the transfer of C&D debris from trucks to rail cars at the CP transload facility itself" would have been entirely non-sensical if rail-related activities of non-carriers were automatically excluded from ICCTA's preemptive reach.

Ironically, the ability of non-carriers to invoke ICCTA preemption in appropriate circumstances is conclusively established in the federal court proceeding taking by far the most unduly (in the eyes of many) restrictive view of the scope of ICCTA preemption. See Florida East Coast Ry. Co. v. City of West Palm Beach, 110 F. Supp. 2d 1367 (S.D. Fla. 2000) ("FEC I"), aff'd, 266 F.3d 1324 (11th Cir. 2001) ("FEC II"). FEC involved a third-party tenant on railroad-owned property who was ultimately determined not to be operating a facility or providing service "integrally related to the provision of interstate rail service." Along the way, however, the District Court indicated that whether a carrier or a non-carrier was conducting the operation at issue was irrelevant to the analysis:

FEC devotes significant space in its post-trial brief to arguing that the 15th Street operations fall within the scope of the ICCTA's preemption clause whether conducted by FEC or Rinker. The Court agrees that the phrase "regardless of ownership or an agreement concerning use" suggests that the distinction is meaningless. 49 U.S.C. § 10102(9)(A). However, the Court need

not speak definitively on this point, having based its conclusion on the nature of the operation, not who was at the helm.

FEC I, 110 F. Supp. 2d at 1378, n.4. On appeal, the Eleventh Circuit took a slightly different approach, ultimately concluding that whether the operation was conducted by a carrier or a non-carrier could be one factor that was considered in determining whether ICCTA preemption applied. The court went on to stress, however, that:

In emphasizing that the scope of the preemption provision is limited to the direct regulation of rail transportation, we do not mean to suggest that only regulations applied against railroads are preempted by the ICCTA. Certain local regulations applied against a third-party may be so intertwined with the provision of rail transportation services to the public so as to frustrate the objectives of federal railroad regulation.

FEC II, 266 F.3d at 1337, n.9.

As indicated above, in many ways the FEC decisions are inconsistent with the vast majority of ICCTA preemption precedent in their overly-restrictive interpretation of 49 U.S.C. § 10501(b). Yet even under the stricter test adopted by FEC, it is clear that rail-related operations of non-carriers can fall within the scope of ICCTA preemption when they are integrally related to the provision of interstate rail transportation service. Here, the transloading services performed by Hi Tech at Oak Island Yard are one of the most integral components of interstate rail movements -- it is elementary that C&D debris cannot be transported by rail if it cannot be loaded into rail cars. The court in FEC I recognized just these characteristics in concluding that the third-party activities before it were not "integrally related to the provision of interstate rail service":

In reach this conclusion, the Court relies in part on the narrative direct testimony of the City's expert, [who] maintains that 15th Street [yard] could continue to be used as a transportation facility in the face of the City's regulations. According to [the expert], the City has not prohibited FEC from delivering rail cars to the tracks

at the 15th Street facility or Rinker [i.e., the third party] from unloading the aggregate into trucks for movement to Rinker customers or Rinker facilities. He describes such an arrangement as "a traditional 'team track' situation" in which a "railroad delivers cars to one of its tracks and the consignee unloads the commodity from those cars into a vehicle to take the commodity to the consignee's location."

FEC I, 110 F. Supp. 2d at 1378-1379 (citations omitted). Hi Tech's transloading operations at Oak Island Yard involve the loading rather than the unloading of rail cars, but otherwise are substantially similar to the "traditional team track situation" that the parties and court in FEC I plainly considered within the scope of ICCTA -- regardless of whether the party involved is a rail carrier.

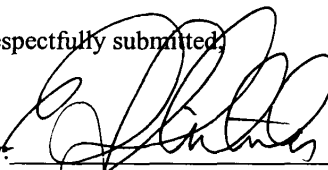
There is no policy or regulatory rationale for any other result. As is explained in the Verified Statement of D&H's Steven Lawrance ("Lawrance V.S."),⁴ D&H has entered into third-party transloading arrangements similar to that with Hi Tech for numerous commodities at numerous D&H facilities. Lawrance V.S. at 1-2. Presumably this is the case for other Class I and Class II rail carriers throughout the nation as well. These arrangements become an integral part of the rail transportation service provided by the railroad, and materially benefit both the railroad and the shipping public. Lawrance V.S. at 1, 2. Forbidding the application of ICCTA preemption to such rail-related activities conducted by third parties would significantly burden such arrangements -- if not eliminate them altogether in some instances. Creating such a distinction would be flatly inconsistent with the incontrovertible statutory goals of ICCTA to both deregulate and strengthen the nation's railroad industry.

⁴ Mr. Lawrance's verified statement is attached to Hi Tech's petition for emergency order and other relief filed concurrently herewith in this docket and in Finance Docket No. 34192, and is incorporated herein by reference.

The Board should enter a declaratory order confirming what the decision Hi Tech I implied: that the Hi Tech rail transload facility at Oak Island Yard falls within the exclusive jurisdiction of the Board, and that DEP's attempt to enforce environmental permitting and licensing requirements against that facility is preempted under ICCTA.

WHEREFORE, Hi Tech Trans, LLC respectfully requests that the Board grant this petition and enter a declaratory order as provided herein.

Respectfully submitted,

By: 

James A. Fletcher
William C. Sippel
Thomas J. Litwiler
Fletcher & Sippel LLC
Two Prudential Plaza, Suite 3125
180 North Stetson Avenue
Chicago, Illinois 60601-6721
(312) 540-0500

ATTORNEYS FOR HI TECH TRANS, LLC

Dated: June 16, 2003



State of New Jersey
Department of Environmental Protection

Division of Solid and Hazardous Waste
P.O. Box 414
Trenton, New Jersey 08625-0414
Tel: (609)984-6611
Fax: (609)984-6874

RECEIVED
FEB 24 2003
LAW DEPT
Barley M. Campbell
Commissioner

February 21, 2003

RE: Railroad Proposal Stakeholder Meeting

On December 29, 1995, the United States Congress enacted the Interstate Commerce Commission Termination Act of 1995 (Pub. L. No. 104-88, 109 Stat. 803, codified at 49 U.S.C. §10101 *et seq.*) (the "Act"). Among other things, this Act has the effect of preempting state and local regulation over railroad construction and transportation, but does not preempt the continued important role of state and local governmental agencies in enforcing federal, state and local environmental laws and regulations in connection with railroad operations. Pursuant to New Jersey law, the New Jersey Department of Environmental Protection (Department) currently regulates all transfers of solid waste from one mode of transportation to another, and requires all solid waste transfer facilities to obtain a permit and obtain approval from the Department prior to receiving, processing or transferring solid waste. In reviewing several recent cases involving the scope of the preemption under the Act, the Department has concluded that its authority to permit a facility owned by a rail carrier that is used for transferring shipments of solid waste to or from rail may be preempted by this Act.

The Department is currently drafting a regulatory proposal to address this partial federal preemption of regulation over railroads, and, at the same time, implementing its essential oversight responsibilities pertaining to the various environmental laws and regulations. This proposal would provide an exemption to the permit requirements of the Department's solid waste regulations (N.J.A.C. 7:26-1 *et seq.*) for rail carriers (as defined at 49 U.S.C. §10102) that transfer solid waste to or from rail cars. The Department is further proposing to add an exemption to the regulations governing the authorization and operation of intermodal container facilities for rail carriers. This proposal may directly

impact your clients if they already are or are planning to engage in the transfer of solid waste.

As part of the rulemaking process, the Department is holding a stakeholder meeting specifically for railroad entities operating in the State of New Jersey. This meeting will take place on Wednesday, March 12, 2003 from 10:00 a.m. to 12:00 p.m. in the conference room known as Prudence Hall, Thomas Edison College, on 101 W. State Street in downtown Trenton. Parking near this facility is limited as indicated on the enclosed directions. As an affected entity, your input into this rulemaking is valuable and we hope that you will choose to attend. Moreover, this meeting will offer you an opportunity to provide comments on this proposal directly to the Department's rulemaking staff.

A copy of the referenced proposal is attached for your review as are directions to the facility. Should you need to review the Department's current solid waste transfer regulations in advance of the meeting, they are available on our web site at www.state.nj.us/dep/dshw/resources/rules.htm. Please contact Terri Slack of my staff at (609) 984-6611 or 6880 to confirm your attendance. If you are not able to attend the meeting and would like to submit comments on the attached proposal, please send your comments to Terri at the above address by no later than March 14, 2003.

Sincerely,

John A. Castner *JP*

John A. Castner, Director
Division of Solid & Hazardous Waste

/s/

Enclosures

C: Michelle DePass w/enc.

w/o enclosures:

Frank Coolick

Thomas Sherman

James Martin, DAG

Wolfgang Skacek

Anthony Fontana

DRAFT

**ENVIRONMENTAL PROTECTION
ENVIRONMENTAL REGULATION
VISION OF SOLID AND HAZARDOUS WASTE**

Used Waste Activities at Rail Yards

Proposed Amendments:

N.J.A.C. 7:26-2.1, 3.6, and

N.J.A.C. 7:26H-1.6

New Rule:

N.J.A.C. 7:26-2D

Authorized By:

Bradley M. Campbell, Commissioner,
Department of Environmental Protection

Authority:

N.J.S.A. 13:1B-1 et seq., 13:1B-3, 13:1D-1
et seq., 13:1D-125 et seq., 13:1E-9, 26:2C-1
et seq., 47:1A-1 et seq., 58:10-23.11, and
58:10A-1 et seq.

Legislative Reference:

, 2002 at N.J.R.

EP Docket No:

Proposal Number:

PRN 2003-

Public hearing concerning this proposal will be held on

Date:

DRAFT

Time: 9:00 am until close of comments

New Jersey Department of Environmental Protection
Public Hearing Room
401 East State Street
Trenton, New Jersey 08625

Submit written comments by (no later than 30 days after publication) to:

Karen Hershey, Esq.

Attention: DEP Docket Number _____

Office of Legal Affairs

P.O. Box 402

Trenton, New Jersey 08625-0402

DRAFT

The Department of Environmental Protection (Department) requests that commenters have access to word processing software submit comments on this proposal to the Department on paper as well as on disk. The Department will use the paper version to ensure the uploading was accomplished successfully. Submission of the disk is not a requirement; the Department will accept all comments submitted in writing prior to the end of the comment period.

The Department prefers Microsoft Word 97, WordPerfect 5.x or 6.0, and ASCII, but can convert and review many other formats as well. Macintosh formats should not be used. Any commenter who wishes to use software not mentioned above may contact Vince Cannali at (609) 68880 to check compatibility.

Text enhancements such as underlines and bolds are often not converted correctly between software documents. Therefore, when suggesting text revisions, commenters should view the text as they desire to see it in the rule.

Comments on the proposal summary should be included with comments on the pertinent portion of the rule text, wherever possible, to eliminate duplicative comments and facilitate the Department's task of organizing and responding to comments. Since comments will be sorted chronologically, the following format should be used for each comment:

Location(tab)COMMENT: Comment text (Company Name).

example:

2.1(g) COMMENT: The exemption from solid waste facility permitting for a rail carrier as provided in 49 U.S.C. §10102 that transfers containerized or non-containerized solid waste to or from rail cars is supported (ABC Corporation).

Copies of this proposal document can be downloaded electronically from the Department's web page at www.state.nj.us/dep/dshw.

DRAFT

agency proposal follows:

Summary

The United States Congress enacted the Interstate Commerce Commission Termination Act of 1995 (Pub. L. No. 104-88, 109 Stat. 803, codified at 49 U.S.C. §10101 *et seq.*) (the "Act") in effort to reduce federal regulation of railroads. The Act abolished the United States Interstate Commerce Commission and transferred certain of its functions to the United States Surface Transportation Board ("STB"), an independent federal agency with jurisdiction over certain railroad regulatory matters. The Act grants jurisdiction to the STB over transportation by carrier that is only by railroad, or by railroad and water when the transportation is under common control, management, or arrangement for a continuous carriage or shipment. 49 U.S.C. 501(a). The Act also has the effect of preempting state and local regulation over railroad construction and operations, 49 U.S.C. §10501(b), but recognizes the important role state and local governmental agencies must play in enforcing federal, state and local environmental laws and regulations.

At N.J.A.C. 7:26, the New Jersey Department of Environmental Protection (Department) currently regulates all transfers of solid waste from one mode of transportation to another, and requires all solid waste transfer facilities to obtain a permit and obtain approval from the Department prior to receiving, processing or transferring solid waste. It has been determined that the Department's authority to permit a transfer facility owned by a rail carrier and used for offering shipments of solid waste to or from rail is preempted by the ICC Termination Act.

Through the instant proposal, the Department is proposing to amend its regulations by adding (at N.J.A.C. 7:26-2.1(c)) an exemption to the permit requirements of its solid waste regulations for rail carriers (as defined at 49 U.S.C. §10102) that transfer solid waste (as defined at N.J.A.C. 7:26-1.4) to or from rail cars ("rail carriers"). The Department is further proposing to amend its regulations by adding (at N.J.A.C. 7:26-3.6) an exemption to the regulations governing authorization and operation of intermodal container facilities for rail carriers. The Department is further proposing to amend its regulations by adding (at N.J.A.C. 7:26-1.6) an exemption to the requirement of obtaining a certificate of public convenience and necessity for

DRAFT

carriers engaged in the business of solid waste disposal. These proposed exemptions are intended to recognize the jurisdiction of the STB over rail construction, permitting and operations. These exemptions are applicable only to rail carriers and will not apply to solid waste haulers that transport containerized or non-containerized solid waste to rail carriers via truck, barge or other non-rail modes. These haulers shall remain subject to all applicable solid waste regulations, including but not limited to registration and district solid waste flow control provisions.

The Department is further proposing to add a new rule, N.J.A.C. 7:26-2D, to ensure compliance by these rail carriers with the various environmental statutes that are intended to protect the health and safety of New Jersey residents and prevent degradation of the state's air and water resources. Due to significant public health, safety, and environmental concerns that must be addressed with the operation of solid waste transfer facilities that fall within the new rule, notwithstanding the proposed exemptions, the Department will continue to require that such facilities operated by rail carriers be subject to the solid waste facility operating, record keeping and reporting requirements that are applicable to non-exempt transfer stations. The exemption shall be conditioned so that exempted solid waste transfer facilities must still comply with various environmental standards including, but not limited to, the requirement that all solid waste processing takes place within the confines of an enclosed building with adequate air and wastewater controls to protect human health, safety and the environment.

The Department reserves the right, however, to revoke these exemptions if the STB, or a reviewing court, determines that solid waste facility design and permitting requirements are not exempted by 49 U.S.C. §10501(b) or if an exempted rail carrier does not comply with the applicable solid waste regulations or district flow control provisions.

Social Impact

By clarifying the scope of the Department's regulation of rail carriers engaged in the transfer of solid waste to or from rail cars, the regulated community will be better able to understand its regulatory obligations. In addition, the proposed exemption from the Department's solid waste regulations for rail carriers engaged in the transfer of solid waste to or from rail cars

DRAFT

y create incentives for such entities to begin or expand handling of solid waste, thereby creating greater competition in the industry.

Economic Impact

The Department expects an overall positive economic impact to the regulated community of the public by exempting rail carriers engaged in the transfer of solid waste to or from rail cars from having to obtain a permit from the Department prior to commencing construction or operation of a solid waste facility. Greater competition in the solid waste industry may lead to reduced waste disposal rates for the public if such activities are exempted from the Department's solid waste regulations. Additionally, rail carriers that engage in such activities will experience cost savings by being exempt from preparing and submitting facility applications for the Department's approval and paying the associated fees.

Environmental Impact

Because waste handled by exempted carriers will remain managed in accordance with the national requirements required for permitted solid waste transfer facilities, environmental impacts should be minimal.

Federal Standards Analysis

Executive Order 27 (1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995, c. 65), require State agencies which adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal Standards Analysis. The purpose of this rulemaking is to amend the Department's permitting regulations to exempt rail carriers operating under the jurisdiction of the STB that transfer solid waste to or from rail cars from solid waste permitting regulations. The proposed amendment will not exceed any Federal standard or requirement because it creates an exemption from State regulation. Therefore, no comparison with Federal standards is required.

DRAFT

Jobs Impact

The proposed exemption should have a positive impact on the creation of jobs in New Jersey. The Department expects rail carrier facilities handling the transfer of solid waste to or from rail cars to open or expand operations as a result of the exemption, which should result in hiring of new employees. The number of employees hired will depend on the scope of operations at such facilities.

Agriculture Industry Impact

The Department believes the proposal to exempt rail carriers transferring solid waste to or from rail cars from solid waste regulation will have no impact on the agricultural industry since the industry as a whole ships agricultural products, not waste, by rail.

Regulatory Flexibility Statement

In accordance with the New Jersey Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has determined that the proposed exemption will not impose reporting, record keeping, or other compliance requirements on small businesses because the proposed amendment exempts all businesses which meet the applicable exemption requirements, including small businesses, from the solid waste permitting regulations. No new requirements are being added.

Smart Growth Impact Statement

Executive Order No. 4 (2002) requires State agencies which adopt, amend or repeal any rule adopted pursuant to Section 4(a) of the Administrative Procedure Act (N.J.S.A. 52:14B-4(a)) to describe the impact of the proposed rule on the achievement of smart growth and implementation of the New Jersey State Development and Redevelopment Plan (State Plan). The Department has evaluated this rulemaking to determine the nature and extent of the proposed amendments' and new rule's impact on smart growth and the implementation of the State Plan.

cause these amendments and new rules do not involve land use policies or infrastructure development, they are not expected to have any impact on the achievement of smart growth or implementation of the State Plan.

Full text of the proposed amendments follow:

CHAPTER 26 SOLID WASTE REGULATIONS

26-2.1 Scope and applicability

(a) This subchapter and N.J.A.C. 7:26-2A [and], 2B, 2C, and 2D shall constitute the rules and regulations of the Department governing the disposal of nonhazardous solid waste unless specifically exempted by N.J.A.C. 7:26-1.1, 1.7, or 1.8.

(b) (No change.)

(c) This subsection sets forth the specific criteria for exempting rail carriers:

1. This subchapter does not apply to a rail carrier as defined in 49 U.S.C. §10102 that transfers containerized or non-containerized solid waste to or from rail cars. However, a rail carrier as defined in 49 U.S.C. §10102 that transfers containerized or non-containerized solid waste to or from rail cars is not exempt from regulation pursuant to the Solid Waste Management Act, and shall be subject to the provisions of N.J.A.C. 7:26-2D.

2. The exemption set forth at N.J.A.C. 7:26-2.1(c)(1), above, shall not apply to a solid waste transporter that transports waste to a rail carrier via truck, barge or other non-rail modes. Such a transporter shall remain subject to all applicable solid waste regulations, including, but not limited to, registration and district plan solid waste flow control provisions.

26-2D Requirements of rail carrier as defined in 49 U.S.C. §10102 that transfers containerized or non-containerized solid waste to or from rail cars.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2003, a copy of the foregoing
Petition of Hi Tech Trans, LLC for Declaratory Order was served by overnight delivery
upon:

Edward D. Greenberg, Esq.
Galland, Kharasch, Greenberg, Fellman & Swirsky, P.C.
Canal Square
1054 Thirty-First Street, N.W.
Washington, DC 20007-4492

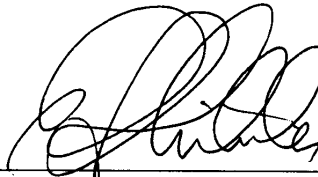
and by first class mail, postage prepaid, upon:

Benjamin Clarke, Esq.
DeCotiis, Fitzpatrick, Cole & Wisler, LLP
Glenpointe Centre West
500 Frank W. Burr Boulevard
Teaneck, NJ 07666

Jonathan M. Broder, Esq.
Vice President and General Counsel
Consolidated Rail Corporation
2001 Market Street, 16th Floor
Philadelphia, PA 19130

Paul Samuel Smith, Esq.
Senior Trial Attorney
United States Department of Transportation
400 Seventh Avenue, S.W.
Washington, DC 20590

Carolyn V. Wolski, Esq.
Leonard, Street & Deinard, P.A.
150 South Fifth Street
Suite 2300
Minneapolis, MN 55402

A handwritten signature in black ink, appearing to read 'T. Litwiler', is written over a horizontal line.

Thomas J. Litwiler