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September 3, 2003

Via Overnight Courier

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, D.C. 20006

ENTERED
Office of Proceedings

SEP 4 2003

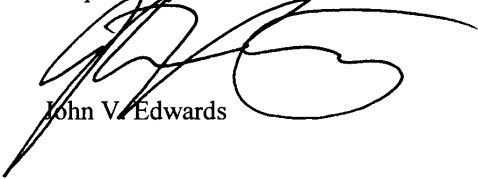
Part of
Public Record

Re: STB 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:

I enclose for filing an original and ten copies of the Petition to Intervene and Reply Comments of Norfolk Southern Corporation and Norfolk Southern Railway Company on the Appeal of Hi Tech Trans, LLC ("Petition and Reply Comments"). I also enclose an extra copy of each of this cover letter and the Petition and Reply Comments, which I ask you to date stamp as received and return to me via the enclosed self-addressed stamped envelope.

Respectfully submitted,



John V. Edwards

Enclosure

Cc: Parties of Record

IN THE UNITED STATES
SURFACE TRANSPORTATION BOARD

STB 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 TO INTERVENE AND REPLY COMMENTS OF
NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY
ON THE APPEAL OF HI TECH TRANS, LLC



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this Record

On June 17, 2003, Hi Tech Trans, LLC ("Hi Tech") asked the Surface Transportation Board ("STB" or "Board") to institute a declaratory order proceeding. Hi Tech hoped to receive a determination that the Board had exclusive jurisdiction of a truck-to-rail transloading facility operated by Hi Tech and located on the property of the Delaware & Hudson at Oak Island Yard in Newark, N.J. On August 14, 2003, the Board's Director of the Office of Proceedings issued a decision ("Hi Tech II")¹ declining to institute a proceeding because "the Board does not have jurisdiction over truck-to-rail transloading activities that are not performed

¹ We refer to the decision served on August 14, 2003 as "Hi Tech II" to distinguish it from an earlier decision of the Board, Hi Tech Trans, LLC -- Petition for Declaratory Order -- Hudson County, NJ, STB Finance Docket No. 34192 (served November 20, 2002) ("Hi Tech I"), which found that local regulation of trucks carrying construction and demolition ("C&D") debris on public roads en route to Hi Tech's truck-to-rail facility was not preempted by the Board's exclusive jurisdiction over interstate rail transportation under 49 U.S.C. Section 10501(b).

by a rail carrier or under the auspices of a rail carrier holding itself out as providing those services.” On August 25, 2003, Hi Tech submitted an appeal of the Hi Tech II decision (“Appeal”) to the full Board.

Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively, “Norfolk Southern”) hereby petition the STB to permit Norfolk Southern to intervene in this appeal, so that they may submit brief reply comments on a matter of industry-wide importance -- the validity of the Board’s enunciated jurisdictional test. Norfolk Southern believes that Hi Tech II sets forth a clear statement of the law that is consistent with past precedent established by the Board, its predecessor, the Interstate Commerce Commission, and the courts. Norfolk Southern takes no position with regard to the application of that test in this particular case or any other matters raised. Intervention at this point in the proceeding, for this narrow purpose, will not result in either a broadening of the issues nor create undue burden on any party.

Essentially, Hi Tech argues that Hi Tech II “adopts a new, substantive and restrictive view of the scope of the Board’s jurisdiction and federal preemption under 49 U.S.C. 10501(b) (as broadened by the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat 803 (“ICCTA”)) that is contrary to the relevant statutory provisions, all prior precedent on the subject, and the transportation and deregulatory policies underlying ICCTA.” Appeal at 1. Norfolk Southern disagrees.

The Board was more explicit in Hi Tech II as to what activities come within the bounds of ICCTA preemption than it had been in the past: "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." The Board was faced with a fact pattern involving a third party's operations, and so needed to make explicit the second portion of the test, which to date had been implicit. Otherwise nothing about that test is new. Certainly the test is fully consistent with both the statutory framework and relevant past administrative and court precedent.

Norfolk Southern will not dissect the statutes.² It will leave that task to others. Instead, this pleading will focus on the past administrative and court precedent -- and particularly that precedent Hi Tech cites in support of its position. Hi Tech cites a few STB and ICC decisions, a few court decisions, and one recommended initial decision of an administrative law judge. Contrary to the assertions of Hi Tech, most of these cases provide support for the Hi Tech II test. Notwithstanding any spin given by Hi Tech, those cases cited by Hi Tech that do not directly support the Hi Tech II test are simply not even relevant.

Hi Tech attempts to support its claim by extracting narrow phrases from a select handful of cases, but in each case the principals involved were all railroads. Hi Tech cites Norfolk Southern Ry. Co. V. City of Austell, 1997 W.L. 1113647 (N.D. Ga. 1997). In that case, though, the court begins its statement of the factual basis for the proceeding with a detailed description of Norfolk Southern Railway Company, the Central of Georgia Railway Company, and the intermodal facility that was being constructed and would be operated by the same. Hi

² Norfolk Southern believes that the Hi Tech II test is entirely consistent with the existing statutory framework.

Tech also cites Borough of Riverdale -- Petition for Declaratory Order -- The New York, S. & W. Ry. Corp., STB Finance Docket No. 33466 (served September 10, 1999). The construction activities that were the subject of that preemption inquiry were being performed by an established rail carrier. In citing Village of Ridgefield Park v. New York, S. & W. Ry. Corp., 163 N.J. 446, 750 A.2d 57 (2000), Hi Tech also cites a case that involves a railroad. In that case, involving a train maintenance facility constructed by a rail carrier, the court begins its opinion with the simple, direct statement that “This appeal requires the Court to decide the extent to which the [ICCTA] preempts the state regulation of railroads.” (Emphasis added.) Hi Tech also cites City of Auburn v. U.S., 154 F.3d 1025 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999). In that case, the 9th Circuit Court of Appeals dealt with the effect of ICCTA preemption on the reopening of a mainline by a Class I rail carrier. Hi Tech claims that the case of North San Diego County Transit Development Board – Petition for Declaratory Order, supports the argument that “a finding of preemption is not precluded simply because the facility is not owned or ‘controlled’ by a rail carrier,” Appeal at 17, but the line in question in North San Diego County Transit was owned by a carrier and operated over by both it and The Burlington Northern Santa Fe Railway Company. If there was not an emphasis on the fact that the ICCTA preemption test had a railroad aspect to it, it was because, in each of the cases examined, that part of the test was satisfied without question.³

³ As noted, however, the fact that the preemption case involved activities of a rail carrier were not ignored, but noted by the relevant tribunal.

Hi Tech makes much of the decision issued in Fletcher Granite Company, LLC – Petition for Declaratory Order, STB Finance Docket No. 34020 (served June 29, 2001). It claims that “The Board itself considered the application of ICCTA preemption to shipper facilities and activities” in that case. Appeal at 15. This is a disingenuous reading at best. The Board quite clearly and simply stated that “It would be premature for the Board to institute a declaratory order proceeding at this point, as there is not now, and there may never be, a controversy that needs to be terminated.” The Board then proceeded to summarize several of the then-recent preemption cases, as it had done in other circumstances at that period. Contrary to the assertions of Hi Tech, the Board could not have issued a declaration resolving the controversy under the circumstances, precisely for the reasons set forth by the Board in that decision.⁴

Hi Tech also argues that the Board’s decision is inconsistent with a recommended initial decision of an administrative law judge (“ALJ Initial Decision”) in the offices of the New Jersey Department of Environmental Protection (“NJDEP”). Although Hi Tech places great weight of authority on the ALJ Initial Decision, from what Norfolk Southern can discern from the text of that decision, as submitted by Hi Tech, the ALJ Initial Decision is only a recommended decision that may be adopted, modified or rejected by NJDEP (the primary party that happens to be opposing Hi Tech in this proceeding). The ALJ Initial Decision is therefore of questionable significance. Moreover, the argument of Hi Tech that led to the ALJ Initial Decision is entirely consistent with the test set forth in Hi Tech II: “[Hi Tech] argues that the effect of federal

⁴ In addition, the operations in Fletcher Granite can be distinguished from those involved in the Hi Tech II case, because in Fletcher Granite the shipper sought guidance as to the reactivation of a rail spur and the movement of rail cars over that spur, not as to the shipper’s loading of those rail cars.

legislation has been to preempt most State and local regulation of railroads and of activities carried on by 'rail carriers,' a status to which it [Hi Tech] makes claim." ALJ Initial Decision at 6 (emphasis added).⁵

Finally, Hi Tech argues that the distinction that the Board made clear in Hi Tech II is supported by no public policy justifications. That is incorrect.

The statutory preemption of 49 U.S.C. 10501(b) is very powerful and should not be wielded lightly. It is an integral part of a comprehensive regulatory scheme which, at its core, provides the STB with jurisdiction over transportation by railroads. Hi Tech may be one of "a growing breed of third-party intermediaries" that serve to consolidate traffic for the rail industry much in the manner of a consolidator in the trucking industry. That is not relevant, however, to the question of whether Congress sought to grant these enterprises the same preemptive protections that it provided railroads.

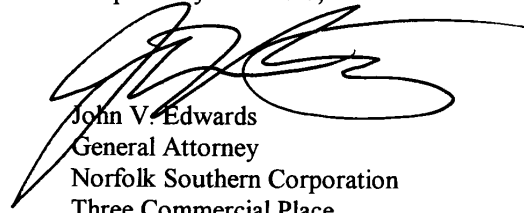
Moreover, as is evident by the Board's reference in footnote 12 of Hi Tech II, there seems to be a new proliferation of non-carrier entities seeking to avoid state and local

⁵ Hi Tech also makes much of Florida East Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001), but in that case the 11th Circuit Court of Appeals found that the rail-to-truck activities conducted by a non-rail carrier were not "transportation," and thus not entitled to preemption, much as the Board in Hi Tech II found that the truck-to-rail activities conducted by a non-rail carrier were not entitled to preemption.

regulation through abuse of the Board's regulatory processes. The distinction made by the Board in Hi Tech II provides a focus for the detection and elimination of this abuse.

Norfolk Southern supports affirmance of the Hi Tech II test without modification.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'John V. Edwards', is written over the typed name and title.

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Dated: September 3, 2003

Certificate of Service

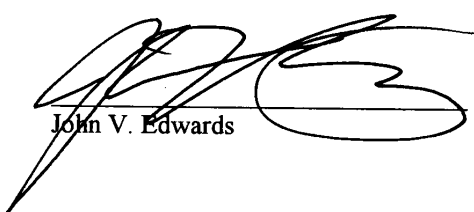
I hereby certify that on this 3rd day of September, 2003, I have caused a copy of the foregoing "Petition to Intervene and Reply Comments of Norfolk Southern Corporation and Norfolk Southern Railway Company on the Appeal of Hi Tech Trans, LLC" to be served by first class mail postage pre-paid, or more expeditious manner, on the following persons:

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AS OF SEP 03 2003 11:37 PAGE.01

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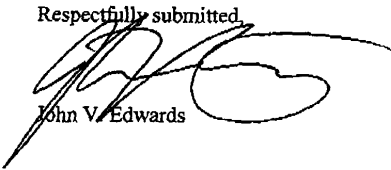
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John V. Edwards

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Post-it® Fax Note	7671	Date	9-3-03	# of pages	9
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Operating Subsidiary: Norfolk Southern Railway Company