



Canadian National

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September 5, 2003

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

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:

Enclosed for filing in this proceeding are an original and ten copies of the Petition for Leave to Late File and Intervene and Comments of Canadian National Railway.

Respectfully submitted,

Theodore K. Kalick

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Enclosure

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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 FOR LEAVE TO LATE FILE AND INTERVENE
AND COMMENTS OF
CANADIAN NATIONAL RAILWAY COMPANY**

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ATTORNEYS FOR CANADIAN NATIONAL
RAILWAY COMPANY

Dated: September 5, 2003

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SURFACE TRANSPORTATION BOARD

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**PETITION FOR LEAVE TO LATE FILE AND INTERVENE
AND COMMENTS OF
CANADIAN NATIONAL RAILWAY COMPANY**

Canadian National Railway Company ("CN"), pursuant to 49 C.F.R. 1112.4, requests that the Board permit it to late-file and intervene in the above-entitled proceeding in connection with the appeal of Hi-Tech Trans, LLC ("Hi-Tech") to the August 14, 2003 decision of the Board's Director of the Office of Proceedings (Director), and to file these comments herein. CN's intervention will not disrupt the Board's consideration of this matter¹ or unduly broaden the issues.

The Director's decision denying Hi-Tech's petition to commence a declaratory order proceeding raises important industry-wide concerns. To the best of CN's knowledge, the decision represents the first time that the Board has squarely addressed the extent to which 49 U.S.C. 10501(b) preempts state and local permitting and licensing requirements for rail-related facilities and services that are provided by third parties. Despite finding that Hi-Tech's truck-to-

¹ CN is filing these comments one day beyond the appeal period provided at 49 C.F.R. 1115.2(e) and is serving them by overnight delivery on the parties of record, so no party's ability to timely respond within the 20-day reply period should be compromised.

rail transloading facility and activities, located and performed on the property of Delaware & Hudson Railway (d/b/a Canadian Pacific Railway (CP)), constitute qualifying transportation, the Director determined that to qualify for preemption the operations must also be “performed by, or under the auspices of, a rail carrier.” August 14 Decision, at 3. Finding that Hi-Tech’s operations did not satisfy that requirement, the Director determined that the Board did not have jurisdiction over the operations and that section 10501(b) preemption does not apply to the state and local regulations that the State of New Jersey seeks to enforce.

CN respectfully urges the Board to thoroughly review the Director’s decision. CN and its U.S. affiliates, and to our knowledge most of the other large Class I rail carriers, often enter into arrangements with independent third parties who use property adjacent to carrier tracks to provide truck/rail transload services that are integral to the provision of rail transportation service. These arrangements permit CN to share investment risks in needed transload facilities and to improve overall efficiency by having parties well-experienced in the marketing, billing, and coordination of the collection and distribution of various kinds of freight provide needed rail-related service, such as Hi-Tech’s gathering and transloading of construction and demolition debris onto CP trains in the matter at issue here.

In an industry with substantial capital requirements that increasingly call for creative and innovative arrangements to share capital-investment risks, CN is concerned that the Director’s decision would have a chilling effect on the development of such arrangements to the detriment of the shipping public. CN acknowledges that section 10501(b) provides that the Board has exclusive jurisdiction only over “transportation by rail carriers” and, as the Director noted in his decision, that this jurisdiction is not meant to embrace “any third-party activity that even remotely supports” rail service. August 14 Decision, at 4. ICCTA, however, broadly defines the

relevant terms of section 10501(b) in a way that discloses Congress' intent that the preemption statute have an expansive reach,² and the Board has properly and consistently approached its preemption analyses with that in mind, insulating rail-related facilities and service from state and local permitting and licensing requirements so long as they are "integrally related to the provision of interstate rail service." *See, e.g., Borough of Riverdale—Petition for Decl. Order—The New York, S. & W. Ry.*, Finance Docket No. 33466, slip op. at 9 (STB served Sept. 10, 1999). Not only is this functional, more inclusive approach consistent with the statutory definitions of railroad transportation, it is consistent with the broader notions of Congressional rail deregulatory policy, both before and after ICCTA, to provide a more uniform, less intrusive federal oversight of the interstate rail industry, to limit State and local regulation of the industry and its services, and to free and encourage the industry to find non-regulatory, private-sector solutions in structuring its services and addressing its economics.

By interpreting section 10501(b) to also require rail-related services, for preemption purposes, to be only "performed by, or under the auspices of, a rail carrier," the Director may well discourage such efforts. Not only is this more restrictive test not necessarily required from the combined reading of sections 10501 and 10102 and its "under-the-auspices" language ill-defined, the Director appears to depart, without explanation, from precedent indicating that rail carrier ownership and provision of, and/or control over, rail-related facilities and services is not necessary for preemption under section 10501(b) to attach. Rather, the proper focus, the

² Thus, "transportation" is broadly defined to include a "facility . . . of any kind related to the movement of . . . property . . . by rail . . . regardless of ownership and agreement concerning use" and "services related to that movement" (section 10102(9)(A), (B)), while, following the definition of "rail carrier" as "a person providing common carrier railroad transportation" (section 10102(5)), a "railroad" is broadly defined in like fashion to include stock, structures, and equipment "used by or in connection with a railroad," and infrastructure and facilities (including "a yard and ground") "used or necessary for transportation." Section 10102(6)(A), (C).

Eleventh Circuit observed, is on a third party's role in the overall provision of rail transportation and the benefits that the third-party's activities provide the carrier and the public. *See Florida East Coast Ry. v. City of Palm Beach*, 110 F. Supp.2d 1367 (S.D. Fla. 2000), *aff'd*, 266 F.3d 1324, 1336 (11th Cir. 2001). Indeed, as the court points out, State and local regulations "applied against a third-party may be so intertwined with the provision of rail transportation service to the public so as to frustrate the objectives of federal regulation." 266 F.3d at 1337 n.9.

The preemption provisions of ICCTA clearly have been important to the industry and, in turn, the rail-shipping public, and the Board should rightfully be concerned and guard against efforts to misuse it.³ But these provisions should not be unnecessarily interpreted in a way that could curtail innovative and beneficial industry arrangements with legitimate third-party providers of rail-related services. Given the potential impact of the Director's decision on the future of such arrangements, CN believes that it is incumbent upon the Board not to leave undisturbed in a lower-level agency decision denying declaratory relief what amounts to a declaration of new policy. To that end, the Board may wish to reopen the proceeding and invite comments from other interested parties and additional evidence from the current parties of record.⁴ In any event, CN urges the Board to fully address the issues raised on appeal and either

³ Certainly, some entities could creatively seek rail carrier status as way to evade the reach of State and local regulation, but the Board has been alert to that possibility and, as the Director noted, "will not approve rail authority that is a sham or intended solely to avoid local regulations." August 14 Decision, at 4 n.12. Should the Board find that its notice-of-exemption procedures, often used to gain section 10901 authorization in as little as 7 days, do not leave concerned parties enough time to raise, or the Board enough time to examine, potentially questionable operations before they become effective, it is certainly within the agency's discretion to modify its rules to allow for greater notice periods or other means to effectively consider them.

⁴ Certainly, given the Director's announcement of a new test for which Hi-Tech and CP had no notice, and for which the Director had no factual record to apply against it, it would appear that the Board, at the very least, should afford the relevant parties the opportunity to supplement the

set the Director's decision aside or otherwise provide clarification and guidance on the application of the "under-the-auspices" test.

Respectfully submitted,

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RAILWAY COMPANY**

Dated: September 5, 2003

record with evidence on whether or not Hi-Tech's services were, in fact, sufficiently "under the auspices" of CP.

CERTIFICATE OF SERVICE

I hereby certify that I have, this 5th day of September, 2003, caused the foregoing Petition for Leave to Intervene and Comments of Canadian National Railway Company Pursuant to 49 C.F.R. 1112.4 to be served by overnight delivery on the following parties:

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