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Vernon A. Williams, Secretary
Office of the Secretary
Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Appeal of Hi-Tech Trans, LLC
Finance Docket No. 34192 (Sub-No.1)

Dear Secretary Williams:

Enclosed for filing on behalf of respondents Hudson County Improvement Authority and Essex County Utilities Authority, please find an original and 11 copies of a reply to Hi Tech's appeal in the above-referenced matter. If possible, I would request that the extra copy be date-stamped and returned so that our files may properly reflect the filing. Thank you.

Respectfully yours,

DeCotiis, FitzPatrick, Cole & Wisler, LLP
Attorneys for HCIA and ECUA

By: Benjamin Clarke
Benjamin Clarke

Enclosures

cc: Edward D. Greenberg, Esq.
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August 29, 2003

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BEFORE THE
SURFACE TRANSPORTATION BOARD

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

HI TECH TRANS, LLC - PETITION FOR DECLARATORY ORDER
HUDSON COUNTY, NEW JERSEY



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**REPLY OF RESPONDENTS HUDSON COUNTY
IMPROVEMENT AUTHORITY AND ESSEX COUNTY
UTILITIES AUTHORITY TO APPEAL OF HI TECH
TRANS, LLC, PURSUANT TO 49 C.F.R. § 1011.2(a)(7)**

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IMPROVEMENT AUTHORITY AND
ESSEX COUNTY UTILITIES
AUTHORITY**

Dated: August 29, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

HI TECH TRANS, LLC - PETITION FOR DECLARATORY ORDER
HUDSON COUNTY, NEW JERSEY



REPLY ON BEHALF OF RESPONDENTS HUDSON
COUNTY IMPROVEMENT AUTHORITY AND ESSEX
COUNTY UTILITIES AUTHORITY TO APPEAL
PURSUANT TO 49 C.F.R. § 1011.2(a)(7)

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Pursuant to 49 C.F.R. §§ 1011.2(a)(7) and 1115(c), respondents Hudson County Improvement Authority ("HCIA") and Essex County Utilities Authority ("ECUA") submit the following reply to the appeal filed on behalf of Hi Tech Trans, LLC ("Hi Tech") in the above-referenced matter. For the reasons that follow, ECUA and HCIA (hereafter, "the County Authorities") respectfully submit that the Surface Transportation Board ("STB" or "Board") should deny the appeal and affirm the decision of the Director of the Office of Proceedings ("Director"), dated August 14, 2003.

STATEMENT OF FACTS

Since September 2001, Hi Tech has operated an unlicensed solid waste transfer station in Newark, New Jersey. Between April 2000 and September 2001, prior to its commencement of operations, Hi Tech solicited and obtained three informal opinions from Board Secretary Vernon A. Williams. In those opinions, Secretary Williams advised Hi Tech that, based on the information provided -- which was materially inaccurate -- Hi Tech's proposed facility appeared to fall within the preemptive scope of the ICC Termination Act ("ICCTA"), 49 U.S.C. §10501 et seq. Shortly after its

commencement of operations, Hi Tech solicited a fourth informal opinion from Secretary Williams, this time asking whether Hi Tech's customers (i.e., truckers bringing waste to the facility) also fell within the preemptive scope of the ICCTA. Secretary Williams, in an informal opinion dated November 15, 2001, advised Hi Tech that the trucking activities of its customers did not fall within ICCTA's preemptive scope. Nonetheless, Hi Tech proceeded to advise its customers that they were exempted from state solid waste laws because Hi Tech was "legally operating with the authority of the United State Surface Transportation Board." See Affidavit of Benjamin Clarke, dated July 7, 2003, Exhibits B(1) - B(4), C(1) - C(4), and D(1) - D(2).

In April 2002, Hi Tech filed a formal petition with the Board, in which it sought an order declaring that its solid waste operation and the trucking activities of its customers were exempt from state regulation under the ICCTA. By decision dated November 19, 2002, the Board dismissed Hi Tech's petition, and reiterated the informal advice offered by Secretary Williams in his opinion letter of November 15, 2001 -- namely, that Hi Tech's customers enjoyed no federal exemption from state solid waste laws. Hi Tech took no appeal from that decision.

Seven months later, after receiving adverse rulings in two federal suits that it had commenced against the County Authorities and NJDEP, and facing an order from NJDEP directing it to comply with state permitting laws, Hi Tech filed a second petition for a declaratory order. In this petition, Hi Tech sought a ruling that its solid waste operations (viewed in isolation from the trucking activities of its customers) were exempt from state environmental laws governing solid waste facilities. Hi Tech simultaneously filed and pursued a state administrative appeal of NJDEP's order directing it to comply with New

Jersey's solid waste laws.

By letter dated July 31, 2003 (copy attached hereto as Exhibit A), Hi Tech advised the Board of the pendency of its state administrative appeal, and urged the Board to issue a ruling in advance of any decision in that parallel proceeding. Hi Tech advised the Board that the state administrative law judge was expected to issue a decision on August 15, 2003, and stated:

The issue of the Board's jurisdiction (and specifically, whether the Board has jurisdiction over Hi Tech's transloading facility) should be decided by the Board, and not by a state administrative law judge. An immediate decision [by the Board] will ensure that result and avoid the possibility of inconsistent decisions. [Exhibit A at 2.]

On August 14, 2003, the Director (acting pursuant to his delegated authority under 49 C.F.R. §1011.7(b)(6)), issued a decision on Hi Tech's petition, declining to institute a declaratory proceeding. The Director held that Hi Tech's solid waste operations did not constitute "transportation by a rail carrier" within the meaning of the ICCTA, and wrote:

Hi Tech's activities at its transloading facility at CP's Oak Island Yard and related activities are not part of "transportation by rail carrier" as defined under 49 U.S.C. §10501(a). Hi Tech is merely using CP's property to transload cargo. Thus, the Board does not have jurisdiction over those activities, and Section 10501(b) preemption does not apply to the state and local regulations at issue here. [Director's Decision at 7.]

On August 23, 2003, Hi Tech appealed the Director's Decision to the Board. In its appeal, Hi Tech calls the Board's attention to and relies upon an "Initial Decision" -- i.e., a recommended decision -- issued by Administrative Law Judge Jeffrey Masin on August 13, 2003, in Hi Tech's state administrative appeal. In that Initial Decision, ALJ

Masin reaches the opposition conclusion from the Director on Hi Tech's ICCTA preemption claim. Hi Tech fails to mention the most salient legal attribute of ALJ Masin's Initial Decision: namely, that it has no effect under New Jersey law unless or until adopted by the Commissioner of NJDEP. See N.J. Stat. Ann. 52:14B-10(c) ("In reviewing the decision of an administrative law judge, the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so.")

In light of the Director's Decision of August 14, 2003, the County Authorities and NJDEP's Division of Solid Waste Compliance and Enforcement have both urged the Commissioner to reject ALJ Masin's Initial Decision and adopt the Director's Decision. The Commissioner, in a letter to the parties dated August 22, 2003, has indicated that a final agency decision will soon issue.

ARGUMENT

THE DIRECTOR'S DECISION DOES NOT CONTAIN ANY "CLEAR ERROR OF JUDGMENT" OR "MANIFEST INJUSTICE," AND HI TECH'S APPEAL SHOULD THEREFORE BE DENIED.

I. Standard of Review.

Beginning its argument with a false step, Hi Tech contends that its appeal is not governed by 49 C.F.R. § 1115.1. The "seeming" applicability of that provision, Hi Tech asserts, is a codification error (Hi Tech Appeal at 6-7). Hi Tech further contends that the Board's express reference to the standard of review set forth in that rule in a recent decision, Charles M. Sotelo - Petition for Declaratory Order - Line Relocation in Cochise County, AZ, Finance Docket No. 34191 (STB served August 11, 2003), was a mere

oversight or mistake. The mistake is Hi Tech's, not the Board's.

Section 1115.1 unambiguously applies to appeals from decisions of the Office of Proceedings regarding the institution of declaratory proceedings. As the Board stated in Charles M. Sotelo, supra, "Under 49 CFR 1115.1(c), an appeal of the denial of a request to institute a declaratory order proceeding will be granted only to 'correct a clear error of judgment or to prevent manifest injustice.'" (Sotelo Decision at 3.) The Board's adoption of the "clear error of judgment or manifest injustice" standard to such decisions was not, as Hi Tech suggests, an oversight or mistake, but rather a deliberate policy choice -- one designed to ensure that the Board's delegation of authority to the Director under 49 C.F.R. § 1011.7(b)(6) does not have the perverse result of increasing the Board's workload.

In arguing against the "clear error" standard of section 1115.1(c), Hi Tech implicitly concedes that it cannot meet that standard. A review of Hi Tech's arguments will show that it has failed to demonstrate any error in the Director's decision, let alone a clear or manifest one, and its appeal should accordingly be rejected.

II. The Director Correctly Determined Not to Institute a Declaratory Proceeding, and Correctly Interpreted the Scope of the Board's Exclusive Jurisdiction.

After a thorough review of the documentary record, the Director found that Hi Tech's status was that of an ordinary shipper. That finding conforms and gives effect to the plain terms of Hi Tech's contracts with Canadian Pacific, and nothing that Hi Tech has said or can say calls the finding into serious doubt. In consequence, Hi Tech's attempt to portray the Director's decision as a radical departure from past precedents is unfounded. Hi Tech cites no prior decision holding that a shipper's placement of cargo

into a rail car for later transport constitutes “transportation by a rail carrier” under 49 U.S.C. § 10501(b). Nor has Hi Tech offered any persuasive reason why the Board should adopt such an overbroad reading of that phrase now.

The simple truth is that, through the submission of materially inaccurate information to the Board Secretary, Hi Tech managed, for far too long, to portray itself as something that it never was. That mis-portrayal has now been corrected. There is nothing troubling, novel or erroneous about the Director’s recognition that Hi Tech’s solid waste operations fall outside the Board’s jurisdiction, and Hi Tech’s disproportionate consumption of the Board’s limited resources should be brought to a final halt.

In a particularly ill-advised choice of words, Hi Tech terms the Director’s rejection of Hi Tech’s mis-reading of the ICCTA “nonsensical.” (Hi Tech Appeal at 11.) The only nonsense to be found in the record emanates from Hi Tech, and there is an abundance of it. See, e.g., Verified Statement of David Stoller, dated June 16, 2003 (asserting that Hi Tech does not now store, and has never stored, solid waste at its facility). The Director’s decision, far from being nonsensical, is the embodiment of common sense, and correctly recognizes that the preemptive scope of the ICCTA was never intended to allow non-rail-carriers to escape state regulation of activities that (like the handling and disposal of solid waste) have historically been subject to close state regulation.

Hi Tech’s assertion that the Director’s decision will have dire “industry-wide” repercussions (Hi Tech Appeal at 20) ignores the inherently case-by-case nature of the inquiry required to determine whether an activity falls within the Board’s exclusive

jurisdiction. See Director's Decision at 5. ("Whether a particular activity constitutes transportation by a rail carrier under Section 10501(b) is a case-by-case and fact-specific determination.") In this case, the record amply supports the Director's conclusion that Hi Tech is engaged in solid waste collection, storage and shipment for its own monetary gain, and not "transportation by a rail carrier." ALJ Masin's contrary conclusion -- set forth in a recommended decision that has no legal force -- reflects an unfamiliarity with the real world of rail transportation, as well as with the federal statutes and regulations governing it.

On its own terms, ALJ Masin's recommended decision misconstrues the operative precedents and statutory language to reach a conclusion that cannot be squared with the documentary -- and photographic -- record of Hi Tech's operations. Even in the absence of the Director's Decision, the Commissioner of NJDEP would very likely have rejected ALJ Masin's recommended decision. See generally Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988) ("agency head ... is free to 'adopt, reject or modify' the ALJ's recommended decision"); In re Kallen, 92 N.J. 14, 20-21 (1983) ("An agency head has the exclusive right to decide contested cases in administrative hearings," to ensure proper execution of agency's regulatory function). With the issuance of the Director's Decision, the ALJ's Initial Decision has essentially been rendered moot, since ALJ Masin made clear in his decision that he was attempting to adhere to the Board's decisions under the ICCTA. Unfortunately, in preparing his opinion, he did not have the benefit of the Director's definitive ruling in this case.

Ironically, in its July 31 letter to the Board, requesting an expedited decision on its renewed petition for declaratory relief, Hi Tech set forth, with admirable clarity, the

weight that ALJ Masin's then-forthcoming decision should be given; as Hi Tech there stated, "The issue of the Board's jurisdiction ... should be decided by the Board." (Exh. A at 2.) In response to that letter, the Director honored Hi Tech's request for an expedited decision, and reached a conclusion that (unlike ALJ Masin's) construes the language of the ICCTA in accordance with its plain meaning and intent. For Hi Tech, which urged the Board to establish the boundaries of its jurisdiction for itself, now to contend that the Board should adopt the over-expansive views of a state administrative law judge on that issue is an exercise in self-contradiction. Since Hi Tech's history of fast-and-loose conduct has been well chronicled, see Director's Decision at 3, its abrupt about-face should come as no surprise to the Board; more importantly, it should be of no avail. The Director's Decision is sound in its reasoning and result, and should be affirmed.

Hi Tech was right, in its July 31 letter, to note the undesirability of "inconsistent results." The Director's Decision, being wholly consistent with the position that NJDEP has espoused before the Board, harmonizes the Board's view of the law with NJDEP's. Another jurisprudential principle that counsels, with equal force, in favor of affirmance is the principle of finality. Hi Tech has frankly beaten its unmeritorious preemption arguments to death, and has used them to operate outside the law for far too long. In the process, it has consumed -- nay, squandered -- scarce public resources at the local, state and multiple federal levels. The Director's Decision, well-grounded as it is in both fact and law, should be the last word on this tired subject.

CONCLUSION

For the foregoing reasons, Hi-Tech's appeal of the Director's Decision of August 14 should be denied, and the Decision affirmed.

Respectfully submitted,

DeCotiis, FitzPatrick, Cole & Wisler, LLP
Attorneys for Respondents HCIA and
ECUA

By: Benjamin Clarke s/
Benjamin Clarke

Dated: August 29, 2003

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July 31, 2003

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VIA FEDERAL EXPRESS

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

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:

As the Board is aware, the above-captioned proceeding involves an effort by the New Jersey Department of Environmental Protection ("DEP") to shut down a rail transloading facility at Oak Island Yard in Newark, New Jersey operated by Hi Tech Trans, LLC ("Hi Tech") as a licensee of the Delaware & Hudson Railway Company, Inc., d/b/a Canadian Pacific Railway. DEP issued a cease and desist order on May 28, 2003 requiring closure of the facility within twenty days. In the order, DEP claimed that Hi Tech had violated New Jersey law by not obtaining a construction and operating permit and a certificate of convenience and necessity for the facility. Hi Tech filed a petition for declaratory order and a petition for emergency order and other relief with the Board on June 17, 2003, and filed letters updating the Board on recent developments on June 27, 2003 and July 2, 2003.

While the Commissioner of the DEP has issued an order directing the agency to forbear for 60 days from seeking judicial enforcement of the cease and desist order, administrative proceedings have commenced in front of the Hon. Jeff S. Masin, the Acting Director and Chief Administrative Law Judge of the New Jersey Office of Administrative Law. The parties to that proceeding are Hi Tech; its president, David Stoller; the New Jersey Department of Law and Public Safety (acting on behalf of the DEP); and the Essex County Utilities Authority and Hudson County Improvement Authority ("the Counties").

FLETCHER & SIPPEL LLC

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Judge Masin has directed the parties to file briefs with respect to the issue of whether Hi Tech's transloading facility is within the exclusive jurisdiction of the Board and whether, as a result, the environmental permitting and licensing requirements under New Jersey law are preempted by the ICCTA, to the extent DEP is seeking to enforce those requirements against Hi Tech. Those issues, of course, overlap the issues which Hi Tech has asked the Board to decide in its petition for a declaratory order in this case. Judge Masin has also indicated that he will issue a decision with respect to those issues by August 15, 2003. See Exhibit A, attached hereto.

Enclosed with this letter are copies of the briefs filed with Judge Masin by DEP and the Counties (Exhibit B), as well as Hi Tech's reply brief (Exhibit C). As the Board will note, both DEP and the Counties have argued that Hi Tech's transloading facility is not within the Board's jurisdiction and that ICCTA preemption, therefore, does not apply to exempt that facility from the New Jersey environmental permitting and licensing requirements. More importantly, and perhaps more disturbingly, DEP and the Counties claim that the Board has already decided that Hi Tech's transloading facility is not within the Board's jurisdiction, citing the Board's decision in Hi Tech Trans, LLC -- Petition for Declaratory Order -- Hudson County, NJ, Finance Docket No. 34192 (STB served November 20, 2002) ("Hi Tech I"). Needless to say, in its decision in Hi Tech I, the Board did no such thing, something which the Board noted in the decision that it served in Hi Tech I on June 30, 2003.

In light of the imminence of a decision by Judge Masin on the issue of the Board's jurisdiction and in light of the claims made by DEP and the Counties (particularly regarding the "res judicata" effect of the Board's Hi Tech I order), we believe that it is imperative that the Board issue an order as soon as possible deciding whether it will grant Hi Tech's petition in this case and commence a declaratory order proceeding. The Board's order, moreover, should provide guidance to the parties just as the Board's initial order did in Borough of Riverdale -- Petition for Declaratory Order -- New York, Susquehanna & Western Railway Corp., Finance Docket No. 333466 (STB served September 10, 1999).

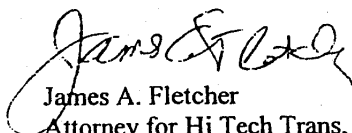
The issue of the Board's jurisdiction (and specifically, whether the Board has jurisdiction over Hi Tech's transloading facility) should be decided by the Board, and not by a state administrative law judge. An immediate decision by the Board will ensure that result and avoid the possibility of inconsistent decisions.

FLETCHER & SIPPEL LLC

Mr. Vernon A. Williams
July 31, 2003
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Ten copies of this letter, with attachments, are enclosed for filing at the Board. One extra copy also is enclosed, and I would request that you date-stamp that copy to show receipt of this filing and return it to me in the provided envelope.

Very truly yours,



James A. Fletcher
Attorney for Hi Tech Trans, LLC

JAF:dg

Attachments

cc: Edward D. Greenberg, Esq. (via Federal Express)
Benjamin Clarke, Esq. (via Federal Express)
Parties of record