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January 30, 2004

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VIA HAND DELIVERY

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, NW – Room 700
Washington, DC 20423-0001



Re: Finance Docket No. 34429, *Comments of The New Jersey Department of Environmental Protection to the Verified Petition of the New York City Economic Development Corporation for Declaratory Order*

Dear Secretary Williams:

In connection with the above-referenced matter, we have enclosed for filing an original and 10 copies of the Comments of the State of New Jersey Department of Environmental Protection to the Verified Petition of the New York City Economic Development Corporation for Declaratory Order, as well as the requisite 3.5" disk containing the Comments. We have also enclosed a copy of the Comments for date stamping and return to us via our messenger.

Thank you for your assistance with this filing. Should you have any questions, please do not hesitate to contact the undersigned at the direct dial number noted above.

Very truly yours,

David K. Monroe

Enclosures

cc: All Counsel of Record

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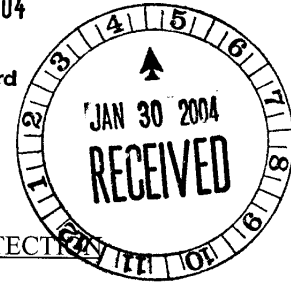
JAN 30 2004

BEFORE THE
SURFACE TRANSPORTATION BOARD

Part of
Public Record

Finance Docket No. 34429

COMMENTS OF
THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION



Pursuant to the Surface Transportation Board's ("Board") Notice of December 10, 2003, and Order of January 8, 2004, in this docket, the New Jersey Department of Environmental Protection ("NJDEP") hereby submits its comments to the Verified Petition of the New York City Economic Development Corporation ("NYCEDC"), acting on behalf of the City of New York, for Declaratory Order.

I. INTRODUCTION

This proceeding arises in connection with a multi-phase, multi-party plan to rehabilitate and reactivate rail lines abandoned by the Staten Island Railroad ("SIRR") in approximately 1991. The SIRR project is intended, *inter alia*, to facilitate the shipment by rail of solid waste from a solid waste transfer station (the "DSNY facility") to be constructed on Staten Island. To the best of NJDEP's knowledge, there have been no rail operations over SIRR rail lines since they were abandoned, and no one currently has authority to operate the former SIRR lines.

The Petition for Declaratory Order at issue in this proceeding was filed by the NYCEDC, which is undertaking the construction of a new rail line (the "New Track") to the DSNY facility as well as construction necessary to rehabilitate certain track and other facilities and structures formerly operated by the SIRR. NYCEDC is not a rail carrier, nor does it seem to contemplate becoming a rail carrier. It appears to be undisputed that the construction of the New Track, and the rehabilitation of the former SIRR lines, will occur in an extremely sensitive environmental setting that encompasses navigable waters, tidal wetlands and wildlife habitats.

The Petition states that NYCEDC has applied to the New York State Department of Environmental Conservation ("NYSDEC") for permits for the construction of the New Track, but that the NYSDEC has impeded the progress of the planned construction by failing to issue appropriate permits and/or imposing environmental safeguards in connection with the construction.¹ As a result of this alleged interference with, and/or delay of, the construction of the New Track and the other construction activities of NYCEDC, NYCEDC seeks from the Board a declaration that the construction of the New Track and the rehabilitation of the former SIRR lines can proceed free of any and all federal and state oversight or regulation. The express purpose of the Petition is to allow NYCEDC to dispense with local, state and federal environmental requirements designed to prevent or minimize damage to tidal and fresh water wetlands, and to forge ahead with construction activities that include, *inter alia*, filling tidal wetlands. If the broad relief requested in the Petition is granted, NYCEDC will have *carte blanche* to proceed as it pleases, and to answer to no one, in connection with its construction activities.

NJDEP does not oppose the plan to reactivate the rail lines abandoned by the SIRR, or the construction of the New Track and other rehabilitation activities. NJDEP is nonetheless compelled to oppose the relief requested in the Petition. NJDEP strongly believes that the construction of the New Track and the other NYCEDC activities which will significantly impact such an important and sensitive environmental resource must be subject to proper environmental oversight at either the state or federal level. NYCEDC's attempt to evade all such oversight by characterizing the New Track as a "spur and switching track" exempted from Board authority under § 10906 and immune from

¹ Contrary to the impression given by the Petition, NJDEP believes that NYCEDC has already obtained a permit for the construction of the New Track and has commenced at least some of the construction activities referenced in the Petition.

state regulation under § 1050(b) is both unfortunate and misguided. Under the Board's established precedent, the proposed New Track is not a spur, but rather a railroad line subject to Board oversight. Moreover, even if the New Track were determined to be a spur or otherwise not subject to the Board's jurisdiction, state oversight would not be preempted by Section 10501(b) in the circumstances involved here.

The Petition also raises important legal and public policy issues that extend beyond the particulars of the SIRR project. NJDEP is concerned about the breadth of the relief requested in the Petition and the effect the grant of such relief would have on the ability of New Jersey to enforce environmental regulation regarding numerous other construction projects. NYCEDC's attempt to evade all environmental oversight through the creative use of Sections 10906 and 10501 is not the first time a non-railroad has sought to use the railroad preemption to escape environmental oversight. To the contrary, such efforts to structure or characterize activities to come within the railroad preemption provision appears to be a growing and troubling trend. As the Board is undoubtedly aware, NJDEP has recently been involved in litigation before the Board, as well as state and federal courts, regarding this very issue. *See Hi Tech Trans, LLC – Petition for Declaratory Order – Hudson County, NJ*, STB Finance Docket No. 34192 (STB served November 20, 2002) ("*Hi Tech I*"); *Hi Tech Trans, LLC – Petition for Declaratory Order – Newark, NJ*, STB Finance Docket No. 34192 (Sub-No. 1) (STB served August 14, 2003) ("*Hi Tech II*").

The widespread availability of the railroad preemption for non-railroads and operations and activities having a tenuous relationship with railroad operations carries with it the potential for the decimation of environmental regulation as we know it at both the state and federal levels. Consequently, the Board should closely scrutinize applications like the Petition that seek to defeat

the legitimate public interest in environmental protection, particularly in circumstances such as those found here where the environmental requirements are not intended to prevent the completion of the project, and would not defeat legitimate rail transportation objectives. NJDEP respectfully urges the Board to deny the requested declaratory order.

II. THE PROPOSED NEW TRACK IS NOT AN EXCEPTED SPUR TRACK,
BUT IS A RAILROAD LINE SUBJECT TO BOARD OVERSIGHT.

NYCEDC seeks to characterize the New Track to be constructed to serve the Staten Island solid waste facility as an excepted “spur and switching track,” rather than an extension or addition to a rail line subject to the Board’s jurisdiction. *See* Petition at 7. However, NYCEDC’s description of the purpose and effect of the proposed New Track, as well as its relationship to existing railroad operations, is misleading. Similarly, NYCEDC has largely ignored the most relevant Board precedent on the classification of the New Track as a rail line or spur, and appears to attempt to skirt the central issue presented – whether the New Track is merely an improvement to existing rail operations or extends into territory not already served by existing rail operations.

In *Effingham Railroad Co. – Petition for Declaratory Order – Construction at Effingham, IL*, STB Docket No. 41986 (served September 12, 1997), the Board described the fundamental difference between spur or switching track excepted from the Board’s authority under § 10906 and rail line subject to the Board’s authority under § 10901:

Whether a particular track is a railroad line or a switching track turns on the intended use of the track segment. *See Nicholson v. ICC*, 711 F.2d 364, 367 (D.C. Cir. 1983). Tracks are frequently constructed either *to improve the facilities required by shippers already served by a carrier, or to supply the facilities to others that are similarly situated within the same territory*, and such construction does not require our approval under 49 U.S.C. § 10901. *See Texas & Pac. Ry. v. Gulf, ETC., Ry.*, 270 U.S. 266, 278 (1926) (Texas & Pacific). Where, however, the proposed trackage extends into territory not already served by the carrier, and particularly where it

extends into territory already served by another carrier, the Supreme Court has found its purpose and effect to be of national concern, and subject to the jurisdiction of the Interstate Commerce Commission (now the Board). *Id.*

Effingham at 2 (emphasis added). The Board went on to note that, “while we may focus on the attendant railroad’s use of the tracks solely for switching operations as the controlling factor in determining the tracks’ character, if those switching operations have the effect of substantially extending the tenant railroad’s lines into new territory, then we may not decline jurisdiction.” See *Effingham* at 3, citing *Brotherhood of Locomotive Engineers v. United States*, 101 F.3d 718, 728 (D.C. Cir. 1996).

The proposed New Track cannot be considered an excepted “spur or switching track” for several compelling reasons. First, the New Track cannot properly be considered an improvement of “facilities required by shippers already served by a carrier,” since the DSNY facility is not now served, nor has it ever been served, by a railroad. By the same token, the New Track cannot be considered an improvement to an existing rail line to “supply the facilities to others that are similarly situated within the same territory,” because there are no similarly situated shippers, or for that matter, *any* rail shippers, in the Staten Island territory.

Although NYCEDC asserts that the New Track is simply a spur connection to an existing railroad, the simple truth of the matter is that there is no existing railroad or railroad operations to which the New Track could be considered to be a spur. The SIRR no longer exists as a railroad. There are no current rail operations, nor does there appear to have been any rail operations, over the former SIRR lines since they were abandoned in the early 1990s. Moreover, no one appears to even have the authority to operate over the former SIRR lines at the present time. Consequently, there is no “existing railroad” to which the New Track could be considered to be a spur or other excepted

improvement.

In addition, because neither NYCEDC nor its intended designated operator currently provides rail service to the Staten Island territory at issue, the New Track by definition must be considered to be an extension into “territory not already served by the carrier.” See *Effingham* at 3 (“what is important under the relevant precedents, however, is that ERRC is proposing to construct and operate in territory it has not previously served”).²

III. STATE OVERSIGHT OF THE CONSTRUCTION OF THE NEW TRACK, AS WELL AS THE RAILROAD REHABILITATION WORK, IS NOT PREEMPTED BY § 10501.

NYCEDC argues that any and all state environmental oversight of the construction of New Track and the rehabilitation of the former SIRR lines is preempted by § 10501(b), and that it is free to proceed with planned construction whenever and however it wishes without interference from the Board, the NYSDEC or NJDEP. Although NYCEDC cites numerous Board and court decisions upholding the application of § 10501(b) to preempt state regulation of rail carriers and their activities, it does not explain how that precedent can be construed to immunize *NYCEDC*’s activities from state regulation. Since § 10501(b) preemption applies only to rail carriers, and NYCEDC is

² Even if NYCEDC were a railroad with existing operations in Staten Island (which is clearly is not), the purpose and effect of the construction of the New Track, as well as its intended use, would constitute an extension into new territory not previously served. See, e.g., *Riverview Trenton Railroad Co.*, STB Finance Docket No. 34040 (served May 15, 2003) (“if track – even track that is used for purposes such as switching – (1) will constitute the entire operation of the new carrier; (2) permits the using carrier to extend operations into, or invade, new territory, and thereby alter the competitive balance between railroads; and/or (3) is essential to the through-movement of traffic from shipper to consignee, then it is deemed to be a railroad line subject to Board licensing requirements, rather than excepted spur or auxiliary track”). In the present circumstances, the construction of a New Track to provide rail service to the DSNY facility appears to be one of the primary, if not *the* primary, reasons for the entire SIRR project. NYCEDC apparently contemplates that unit train service will be provided to the DSNY facility. Clearly, the construction of the New Track is essential to the through-movement of the unit train traffic from DSNY, and cannot be considered spur or auxiliary track.

not a rail carrier, NYCEDC cannot escape state oversight of its activities.

NJDEP is aware of no Board or court precedent applying § 10501(b) preemption to the activities of an entity that is not a rail carrier. To the contrary, the Board has previously indicated that the facilities or operations of a non-rail carrier do not come within the preemptive scope of § 10501(b). In *Borough of Riverdale – Petition for Declaratory Order – The New York, Susquehanna & Western Railway Corporation*, Finance Docket No. 33466 (STB served September 10, 1999), the Board made clear that facilities or operations of a rail carrier are preempted only if they are integrally related to the provision of interstate rail transportation. In discussing an alleged non-transportation facility operated by a rail carrier (a corn processing plant), the Board also made clear that facilities of a non-carrier are not within the preemptive scope of § 10501(b):

If this facility is not integrally related to providing transportation services, but rather serves only a manufacturing or production purpose, then, *like any non-railroad property*, it would be subject to applicable state and local regulation.

Id. at 10 (emphasis added). In other words, facilities or operations fall within the scope of § 10501(b) preemption only if they are operated or performed by a rail carrier and are integrally related to the provision of rail transportation services.

The courts have reached a similar conclusion. In *Florida East Coast Railway Co. v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001) (“*FEC*”), the Court rejected a claim of preemption under § 10501(b) involving a non-carrier operating on railroad property. Similarly, the Court in *CFNR Operating Co. v. City of American Canyon*, 282 F. Supp. 2d 1114 (N.D. Cal. 2003), also refused to find preemption under § 10501(b) with respect to a non-rail carrier’s activities.

In order to come within the preemption provision of § 10501(b), NYCEDC must show that its activities are within the Board’s exclusive jurisdiction over “transportation by rail carrier.” *See*

49 U.S.C. § 10501(a). *See, e.g., Hi Tech Trans, LLC – Petition for Declaratory Order – Newark, New Jersey*, STB Finance Docket No. 34192 (Sub-No. 1) (STB served August 14, 2003) (appeal pending) (“*Hi Tech II*”). In particular, NYCEDC must demonstrate that its activities are “both (1) transportation, and (2) performed by, or under the auspices of, a rail carrier.” *Hi Tech II* at 5. NYCEDC cannot meet the second requirement for preemption under § 10501(b). NYCEDC admits that it is not presently a rail carrier, nor does it intend to become a rail carrier. Instead, NYCEDC apparently contemplates designating CSX and Norfolk Southern to operate over the former SIRR lines pursuant to a Modified Certificate of Public Convenience and Necessity, pursuant to 49 C.F.R. §§ 1150.21-24.³

³ There is a significant question as to whether the modified certificate of public convenience and necessity procedures, as set forth at 49 C.F.R. § 1150.21, are appropriate for use by NYCEDC or any other instrumentality of the State of New York under the circumstances present here. In promulgating these regulations, the Interstate Commerce Commission used the exemption authority in 49 U.S.C. § 10505 in order to eliminate unnecessary procedures that interfered with the continuance or resumption of rail service over lines that either had not yet been or had only recently been abandoned.

In acquiring these lines the States may be contracting with new operators for service over lines which have proven uneconomical to operate. *Service over these lines may be in danger of immediate termination.* Requiring an application under section 10901 to start up operations may result in temporary cessation of service to shippers. The new carriers may also be concerned with the necessity of continuing operations for months should another abandonment application be required. To require applications for the start up and termination of service over these lines serves no public purpose, is an unreasonable burden, and is not necessary to carry out the transportation policy

The purpose of this proceeding is to facilitate the acquisition and operation of lines for which service by the current carrier will in all likelihood not be continued.

Common Carrier Status of States, State Agencies and Instrumentalities, and Political Subdivisions, 363 I.C.C. 132, 136 (1980) (emphasis supplied).

NYCEDC cannot, however, avoid all environmental oversight of its activities by claiming that it is acting on behalf of or under the auspices of CSX and/or Norfolk Southern. As a preliminary matter, NYCEDC has admitted that it is constructing the New Track as a shipper on its own behalf. *See* Petition at 7.⁴ Nonetheless, to the extent that NYCEDC might seek to argue that its construction activities are on behalf of, or under the auspices of, CSX and Norfolk Southern, that admission would trigger an obligation on the part of CSX and Norfolk Southern to make their own applications under § 10901 to extend their rail operations into the Staten Island territory formerly served by the SIRR.⁵ Since neither CSX nor Norfolk Southern has made such an application, it seems apparent that NYCEDC's construction activities cannot be properly attributed to any rail carrier, and accordingly cannot be immune from state regulation pursuant to § 10501(b).

According to NYCEDC, these SIRR lines were abandoned and rail service was completely terminated, pursuant to authority granted by the ICC, over 10 years ago. The operations described in NYCEDC's petition are clearly a new service that is to be provided for at least one new major shipper, New York City itself, from the new origin point of the DSNY. And, in doing so NYCEDC is planning – and may already have commenced – construction of track over what the City concedes to be fragile environmental wetlands.

But as explained by the ICC, the modified certificate procedures of section 1150.21 are not intended for this purpose, since those regulations were intended only to prevent the unnecessary cessation of rail service. As the ICC did not intend to authorize would-be rail operators to bypass the public interest criteria (including environmental review) that is otherwise required by 49 U.S.C. § 10901 when new rail service into new territory is involved, and since that is precisely the nature of the operations proposed here by NYCEDC, its proposal to circumvent all federal and state oversight through the use of the modified certificate procedure would seem to be inappropriate.

⁴ NJDEP is aware of no case holding that the Board's exclusive jurisdiction extends over the activities of a *shipper*, as opposed to a carrier.

⁵ These § 10901 applications would trigger environmental review by the Board under NEPA, thus subjecting NYCEDC's construction activities to the very environmental oversight it seeks to avoid.

Preemption of state regulation over NYCEDC's construction activities would appear to be inappropriate in this case for a wholly independent reason. The Board has previously held that a § 10501(b) preemption cannot be asserted by a carrier to escape regulatory obligations voluntarily undertaken. *See, e.g., Township of Woodbridge, NJ v. Consolidated Rail Corporation, Inc.*, STB Docket No. 42053 (STB served December 1, 2000). NJDEP is informed that NYCEDC has voluntarily assumed an obligation to comply with environmental requirements imposed by the State of New York through the NYSDEC. In particular, NJDEP understands that NYCEDC has assumed such obligations in connection with both the contract with New York City under which it is operating in connection with the SIRR project, as well as in connection with a permit granted to NYCEDC for the construction of the New Track.

Moreover, as the Board has previously pointed out, even where § 10501(b) operates to preempt certain state permitting or licensing requirements with respect to rail carriers, the states retain their inherent police powers to ensure the health and safety of the public. *See, e.g., Union Pacific Railroad Co. – Petition – Rehabilitation of MO-KS-TXRR*, 3 STB 646, 653-54, STB Finance Docket No. 33611 (1998). In that regard, the Board has alluded to the fact that state and local agencies play a significant role under many federal environmental statutes. *Id.* at 654; *Town of Ayer, MA – Joint Petition for Declaratory Order*, STB Finance Docket No. 33971 (served October 5, 2001) (“nothing in Section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes such as the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act, unless the regulation is being applied in such a manner as to unduly restrict the railroad from conducting its operations or unreasonably burden interstate commerce”). Similarly, the Board has indicated that states remain free to prevent a rail carrier from, for example,

“dumping excavated earth into local waterways” even if Section 10501(b) would prohibit the enforcement of state permitting requirements. *See Auburn & Kent, WA – Petition for Declaratory Order – Burlington N.R.R. – Stampede Pass Line*, 2 STB 330, 339, *aff’d*, *City of Auburn v. STB*, 154 F.3d 1025 (9th Cir. 1998).

It is unclear in this case, at least to NJDEP, exactly what environmental requirements are actually being imposed upon NYCEDC, particularly since it would appear that NYCEDC has already received a permit for the construction of the New Track. But if, as the Petition suggests, one of the environmental requirements NYCEDC seeks to evade is the dumping of excavated earth into, or otherwise filling, environmentally-sensitive wetlands, it would appear that NYSDEC could properly exercise its police power in such circumstances consistent with § 10501(b) and Board precedent.

IV. CONCLUSION

For the foregoing reasons, under the circumstances of this case, the Board should deny the request of NYCEDC for a declaratory order.

Respectfully submitted,



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DATE: January 30, 2004

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Comments was delivered to each of the following addressees at the addresses stated by depositing same in the United States mail, first class postage prepaid, this 30th day of January 2004:

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