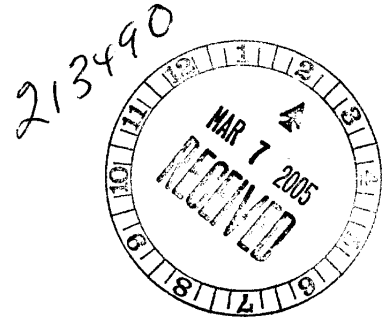


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Of Counsel
W. Patrick Quast
164 Franklin Tpk.,
Waldwick, N.J. 07463,
201-444-5990
Fax 201-444-5094

March 3, 2005

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, D.C. 20423

RECEIVED
Office of Proceedings
MAR 7 2005
Part of

Re: New England Transrail, LLC, d/b/a Wilmington & Woburn
Terminal Railway-Petition for Exemption-Construction and
Operation as a rail carrier on tracks and lands acquired
from Olin Corporation.
FD 34391

Dear Mr. Williams:

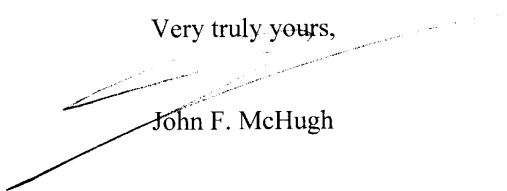
Enclosed please find:

1. the original and ten copies of New England Transrail's Reply to the
Petition of the National Solid Waste Management Associations Petition to Revoke
the Conditional Exemption etc.
2. the certification of Thomas Murphy,
3. the certification of Robert W. Jones III.
4. filed under seal the confidential certification of Robert W. Jones III,
5. New England Transrails Motion for a Protective Order,
6. my certification of service,
6. my check for \$200 as well as
7. a 3 ½ disk containing the same documents except that the letters

attached to Mr. Jone's confidential certification are not on the disk.

Thank you for your attention to this matter.

Very truly yours,



John F. McHugh

Cc: Daniel R. Deutsch
Deutsch Williams Brooks Derensis & Holland, P.C.
Attorneys for Wilmington, Massachusetts
99 Summer Street
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Department of Environmental protection
One Winter Street
Boston, MA 02105

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Wellesley, MA 02481-4044

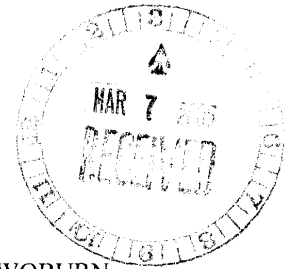
BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34391

NEW ENGLAND TRANSRAIL, LLC, d/b/a WILMINGTON AND WOBURN
TERMINAL RAILROAD CO. – CONSTRUCTION, ACQUISITION AND
OPERATION EXEMPTION- IN WILMINGTON AND WOBURN, MA

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, ET AL
PETITION FOR DECLARATORY ORDER
OR, IN THE ALTERNATIVE,
PETITION TO REVOKE CONDITIONAL EXEMPTION
AND
REQUEST FOR INFORMAL HEARING

MOTION FOR A PROTECTIVE ORDER



ENTERED
Office of Proceedings

MAR 7 2005

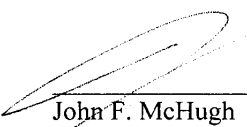
Part of
Public Record

Pursuant to 49 C.F.R. 1104.14 New England Transrail requests that communications between NET and potential customers of its facility at Wilmington Ma. not be made a part of the public record but that access be limited only to the Board and to the attorneys for the parties directly interested. For the purpose of this motion, the only relevance of these letters is that they evidence NET's concerted efforts to attract a wide range of cargos to its facility and that these efforts are showing signs of success.

Wherefore NET respectfully requests that the communications submitted with the certification of Robert W. Jones, III be maintained as confidential and not be made part

of the public record.

Dated, New York, N.Y.
March 3, 2005

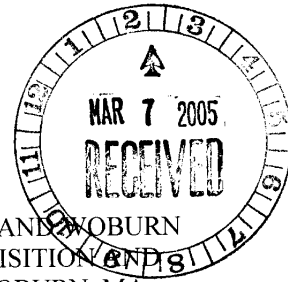


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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34391

NEW ENGLAND TRANSRAIL, LLC, d/b/a WILMINGTON AND WOBURN
TERMINAL RAILROAD CO. – CONSTRUCTION, ACQUISITION AND
OPERATION EXEMPTION- IN WILMINGTON AND WOBURN, MA



NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, ET AL
PETITION FOR DECLARATORY ORDER
OR, IN THE ALTERNATIVE,
PETITION TO REVOKE CONDITIONAL EXEMPTION
AND
REQUEST FOR INFORMAL HEARING

REPLY OF NEW ENGLAND TRANSRAIL, LLC

Office of the
Secretary
MAR 7 2005
J. [unclear]

PRELIMINARY STATEMENT

The National Solid Waste Management Association, Et Al. (Petitioners), representing the owners of truck to truck waste transfer facilities which are threatened by the advent of access to rail transportation in Massachusetts—where the veto power of municipal governments over new facilities has maintained the Petitioners' hold on the waste trade to date, seeks to subject New England Transrail (NET) along with all other potential rail competition to such laws. The laws in issue are only remotely related to health and safety but would subject a rail carrier franchised by the Board to local power to forbid common carrier services mandated by Federal Law. The Petition seeks to have rail transportation of waste products subject to

local veto. No such determination is allowed under the terms of the Interstate Commerce Commission Termination Act (ICCTA) which preempts any law which prevents a rail carrier from discharging its responsibilities under its Federal franchise as a common carrier. No basis exists to revoke NET's conditional exemption nor is there any basis for an informal hearing.

I

THE PETITION SHOULD BE DISMISSED

The Supreme Court of the State of New Jersey rejected arguments similar to those the Petitioners make here as follows, "We are ... mindful, ... of the declaration by Congress that states may not interfere with the operational aspects of railroading and that localized concerns may not burden the nationwide system of railroads..." Village of Ridgefield Park v. New York Susquehanna & Western Railway Corporation, 750 A. 2d 57, 67 (2000), which affirmed that the STB exercises exclusive regulatory jurisdiction over matters relating to construction and operations of railroad facilities to the exclusion of local and state building and environmental permits.

This Petition, as did that by Ridgefield Park, seeks partial repeal of the ICCTA. Petitioners' argument that the Board or the Courts should modify a law to protect a particular vested interest even under the guise of environmental permitting, is not new. It must be rejected as it has been before. Indeed, the first case challenging ICCTA preemption was City of Auburn v. United States, 154 F.3d 1025, 1029 (9th Cir. 1998). There local officials sought licensing authority on environmental protection grounds so

that they could block the reopening of a major rail line, the Stampeed Pass. Had their challenge been successful, a town could have barred relieving north western port congestion caused by lack of rail capacity to the east. Indeed, as that case established, "[b]y preempting state regulation of railroad operations, and granting exclusive jurisdiction over the regulation of almost all aspects of railroad operations to the [Board], Congress removes the ability of states to frustrate its policy of deregulating and reviving the railroad industry." CSX Transportation, Inc. v. Georgia Public Service Commission, 944 F.Supp. 1573, 1583 (N.D.Ga.1996), "The Act obviously intended that national transportation interests dominate over parochial concerns and impulses." Village of Ridgfield Park *supra* 63.

One of the principal goals of the ICCTA was to reduce regulatory barriers to entry into the railway business. 49 U.S.C. §10101 (7). This is precisely the barrier the Petitioners seek to re-impose, albeit a State imposed barrier. The Act specifically preempts all such State regulation twice, the first at 49 U.S.C. 10501,

"The jurisdiction of the Board over Transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules, (including car service, interchange, and other operating rules), **practices**, routes, **services and facilities** of such carriers . . . is exclusive. . . . 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."

The second assertion is at 49 U.S.C. § 11321(a) which restates this principal that a

"person participating in (an) approved or exempted transaction...is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier, corporation, or person carry out the transaction, hold, maintain and operate property and exercise control of the franchises acquired through the transaction." (emphasis added)

The thrust of the Petitioners' argument is that Congress did not intend to exempt the movement of waste from the local regulations which protect Petitioners' members' truck dependant facilities from rail competition. The legislative history of ICCTA indicates strongly that Congress did intend to preempt those laws and knew exactly what it was doing. The Senate Committee Report states that State authority over any rail activity was preempted and that it was well aware that that would leave some rail activity unregulated;

...nothing in this bill should be construed to authorize States to regulate railroads in areas where Federal regulation has been repealed by this bill. . . . The railroad system in the United States is a nationwide network. The hundreds of rail carriers that comprise the railroad industry rely on a nationally uniform system of economic regulation. **Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry's ability to provide "seamless" service that is essential to the shippers and would weaken the industry's efficiency and competitive viability.**

S. Rep. 104-176,*5-6, 104th Cong 1st Sess, 1995 WL 701522.

The House Report at H.R. Conf. Rep. No. 104-422, Dec. 18, 1995; pg. 97 also makes it clear that preemption of all State regulatory authority was intended.

Section 10103. Remedies are exclusive

To reflect the replacement of the Staggers Act system of optional certification of State regulatory agencies to administer economic regulation of railroads using Federal standards, this provision is conformed to the bill's direct and general preemption of State jurisdiction over economic regulation of railroads. As used in this section, "State or Federal law" is intended to encompass all statutory, common law, and administrative remedies addressing the rail-related subject matter jurisdiction of the Transportation Adjudication Panel. The bill is intended to standardize all economic regulation (and deregulation) of rail transportation under Federal law, without the optional delegation of administrative authority to State agencies to enforce Federal standards, as provided in the relevant provisions of the Staggers Rail Act.

Section. 10301. General jurisdiction

This provision replaces the railroad portion of former Section 10501. Conforming changes are made to reflect the direct and complete pre-emption of State economic regulation of railroads. The changes include extending exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or side tracks formerly reserved for State jurisdiction under former section 10907. The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system. Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation....

In the ICCTA Congress has spoken firmly, twice.¹ Its intention was made clear in the Act and confirmed by the Legislative History. ICCTA specifically precludes any requirement that a rail carrier obtain a 'permit' from any State or any local community to move any commodity or to build the facilities to do so and the argument that the words economic regulation do not encompass environmental issues was rejected in City of Auburn, Supra.

It is well understood that the STB is bound by Federal Law applicable to its decision making process and that only the STB can make determinations regarding the application of the technical requirements of what it considers to be legitimate health, safety and environmental laws. Petitioners' argument that Congress did not mean what it said has been dismissed previously,

Despite this wide grant of exclusive jurisdiction to the STB, the City argues that its implementation of Minnesota and City law concerning the public health, safety,

¹ In Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992), the Supreme Court found that: "When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a 'reliable indicium of congressional intent with respect to state authority,' Malone v. White Motor Corp., 435 U.S., at 505, 98 S.Ct., at 1190, 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions' of the legislation. California Federal Savings & Loan Assn. v. Guerra, 479 U.S. 272, 282, 107 S.Ct. 683, 690, 93 L.Ed.2d 613 (1987) (opinion of Marshall, J.)."

environment, and historic preservation, consistent with various Federal statutes, is not preempted by the ICCTA. The STB, however, has adopted regulations pursuant to the ICCTA that specifically address such concerns. For example, the regulations require the preparation of Environmental Impact Statements and call for the STB to conduct the consultation process required by the National Historic Preservation Act. 49 C.F.R. § 1105.8(a). The regulatory framework of the ICCTA so pervasively dominates the field in which the City is attempting to act that, in addition to express preemption, congressional intent to occupy the field can also be inferred. See 49 C.F.R. §§ 1105.1-1105.12.

Soo Line Railroad, d/b/a Canadian Pacific Railway v. City of Minneapolis, 38 F. Supp. 2d 1096, 1099 (D. Minn. 1998) The Board has complied with the Congressional mandate that it assure compliance with all Federal Law by submitting NET's petition to the Section of Environmental Analysis (SEA) which examined every aspect of this project pursuant to those requirements. The SEA has determined that the project will have no significant effect on the human environment. The STB and no other agency, State or Federal, is the sole authority and it has done its job pursuant to its mandate.

Therefore, the petition should be dismissed. The language of the Act and the legislative history do not support the argument for an exception from the Board's exclusive jurisdiction simply because waste will be one of the numerous commodities to be handled by NET's or any other rail carrier. "By conferring exclusive jurisdiction over railroad matters to the STB the ICCTA imposes a binding obligation on the states not to regulate railroads with respect to those matters" Boston and Maine Corp v. Town of Ayer, 206 F. Supp. 126, 131 (D. Mass. 2002) (reversed on other grounds 330 F. 3d. 12).²

² In a lengthy discussion regarding the history of the ICCTA, the court in Wisconsin Central Ltd. v. The City of Marshfield, 160 F.Supp.2d 1009, 1014 (W.D.Wis.2000) found "The Staggers Rail Act, the predecessor to ICCTA, had been recognized as one of the most pervasive and comprehensive federal regulatory schemes. Yet, two ICCTA amendments to the Staggers Rail Act expanded federal dominion over rail transportation. First, the ICCTA deleted policy statements concerning regulatory cooperation between federal and State authorities as well as a section providing for joint state-federal regulatory bodies. See CSX Transp. Inc. v. Georgia Public Service Comm. 944 F.Supp 1573, 1584 (N.D. Ga.1996). Second,

II

NET WILL CREATE COMPETITION, AS INTENDED BY ICCTA

Massachusetts generates more solid waste than its in-state disposal capacity can absorb. Massachusetts has failed to site adequate in-state disposal facilities to handle its solid waste disposal needs largely due to the effect of the laws the Petitioners seek to impose on NET.

Access to an efficient rail transportation system will allow solid waste generators and companies to reach lower priced distant out-of-state landfills at a lower cost than by truck—thus providing significant savings for their overall transportation and disposal costs.³

III

PETITIONER MISS STATES THE FACTS AND THE APPLICABLE LAW

Shawn of its rhetoric, Petitioner's plea is for the Board to ignore Congress' clear intent under ICCTA and allow protectionist "regulatory barriers to entry" (p. 24 of the Petition) controlled by a parochial "focus on local concerns" (p 12 of the Petition) to shield entrenched economic interests, dependent on long-distance trucking or local

it expressly granted the STB exclusive jurisdiction over all matters of rail transportation, including intrastate railroad tracks. See 49 U.S.C. Section 10501(b)(2). "With the extension of exclusive federal jurisdiction over wholly intrastate tracks, one of the few railroad matters previously within the jurisdiction of the states, the ICC Termination Act evinces an intent by Congress to assume complete jurisdiction, to the exclusion of the states, over the regulation of railroad operations. See H.R.Conf.Rep. No. 422, 104th Cong., 1st Sess. 167 (1995), U.S.Code Cong. & Admin.News 1995, p. 852.

³ Petitioner is left with the assertion that these savings are solely the result of NET's ability to avoid paying an arbitrarily determined fees to the local government in order to obtain "host community agreements" (p. 10) Even if this were a relevant criteria under ICCTA, which it is not, this is a false assumptions for several reasons. The certification of Thomas Murphy submitted herewith establishes that, less than one quarter of the truck-to-truck transfer stations in Eastern Massachusetts pay a host community fee, which tend to be minimal, that post closure bonds are required for landfills and incinerators not transfer stations.

incineration of solid waste, from the rigors brought by railroad competition. Petitioners repeat arguments (also asserted by Wilmington) which misrepresent the law and facts:

- A. *NET's operations will be exempt from compliance with local health and safety laws and regulations;*
- B. *NET's grinding and bailing of waste to facilitate efficient handling is not related to rendering rail operations safer and more efficient.*
- C. *Under Massachusetts law Wilmington has veto power over the location of any facility handling waste within its borders; and subjecting a rail carrier to Massachusetts' licensing or 'site assignment' laws will not unreasonably interfere with rail transportation;*
- D. *Federal RCRA applies to transportation of non-hazardous solid waste;*
- E. *NET will be a disguised truck-to-truck transloading facility;*
- F. *NET is not a rail carrier because it will interchange with another rail carrier for the long-haul portion of its transportation..*

The following responses corrolate to each of these assertions:

- A. NET'S OPERATIONS WILL BE SUBJECT TO LOCAL HEALTH AND SAFETY LAWS AND REGULATIONS BUT NOT TO LOCAL LICENSING. As the Board stated in almost every preemption case it has heard, NET must comply local and State health and safety laws and regulations except for those requiring permits or those which if enforced would interfere with NET's operation as a rail carrier. These regulations compel NET to have and maintain the same types of facilities as are maintained by any entity handling waste or any other commodity in Massachusetts. This fact, which the petition fails to mention, is established in NET's mitigation commitments contained in the Environmental

Assessment (EA) and Nos. 14, 18 and 33 in the Post Environmental Assessment (PEA). Indeed, the SEA further reinforced these commitments by providing a specific procedure for the Massachusetts Department of Environmental Protection (MaDEP) to proffer additional health and safety requirements which it desires the SEA to consider to be imposed on NET. (See SEA's Recommended Mitigation, No. 13, Solid Waste at p. 1-2, and discussion at pp 2-18 to 2-19 of the PEA).

Therefore, NET will not be exempt from compliance with health and safety or environmental protection regulations and standards and will have expenses related thereto which are similar to those of the Petitioners.

B. GRINDING AND SORTING IS HANDLING OF MATERIALS WHICH IS PART OF RAIL TRANSPORTATION. 20 CFR 202.7 defines rail transportation to be:

“The service rendered or the operation of equipment or facilities persons or companies owned or controlled by or under common control with a carrier is in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, if such service or operation is reasonably directly related functionally or economically, to the performance of obligations which a company or person or companies or persons have undertaken as a common carrier by railroad, or to the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. (Emphasis added)

While this section is not a regulation of the Board but of the Railroad Retirement Board, the regulation reflects the well accepted scope of a common carrier's obligations.

Petitioners complain that grinding, bailing, sorting and moving commodities from truck to a rail car by conveyor belt is not part of rail transportation. These functions, Petitioners claim, are the same as “processing” which is also performed by State licensed

truck to truck transfer stations prior to transloading.⁴ It should be noted that Petitioners' functions also sort material only to assure that commodities shipped out are sent to the proper destinations, a process when conducted by NET they label as "management" of material, but which is no different from the function of any other transportation terminal.⁵ The similarity between the operation of a State regulated transfer station and a Federally regulated truck-rail transfer of the same type of cargo is proof only that both modes must similarly load cargos in transit to provide an efficient transportation service.

Indeed, the functions in issue are all related solely to transport, to consolidating smaller cargos into larger shipments and to sizing the cargo for efficient on common carriage out of a local area.

All these functions are well within the scope of railroad transportation as defined in the ICCTA, to wit, "services related to that movement, including **receipt, delivery, elevation, transfer,... handling** and interchange of passengers and property..." 49 USC §10102 (9)(B). (Emphasis added).⁶ This language is simply a statement of activities that historically have been deemed well within the established obligations of common carriage to wit "...the duty of the carrier to furnish reasonable trackage facilities and

⁴ Transfer stations also receive cargo in local trucks. They transfer that cargo into long distance trucks as part of transportation from the source of the product to its destination.

⁵ Just as Petitioners' activities add no value to the material, neither does NET's despite Petitioners' statement to the contrary.

⁶ Petitioners, as Wilmington did in its prior Petition, tries to claim that grinding and baling of solid waste in preparation for rail transportation is something other than "transfer in transit" or "handling" of material. Congress' use of the phrase "including" prior to a listing of "services related to that movement" indicates that such list is by way of example and not meant to be an exclusive listing of such services. Thus, even if NET's described operations is considered to involve something other than "transfer in transit" or "handling" (provided it does not involve non-transportation or manufacturing related services), as long as it is "services related to [rail] movement", it is under the Board's exclusive jurisdiction. Petitioners claims that because NET will "transfer" solid waste from trucks to rail cars it should be subject to prior local and State approvals and permitting. This reasoning flies in the face of the mandate and plain language of ICCTA to exempt activities by a railroad related to rail transportation, which includes, but is not limited to "transfer" services.

means to serve the consignees at the particular station as measured by the volume of business handled in and out of the station. Each consignee and shipper at the station is entitled to the service which reasonable facilities ought to afford him.” St. Louis, Southwestern Railway Co. v. Mays, 177 F. Supp. 182, 184-85 (D. Ark. 1959). Delivery into the railroad’s possession at the designated station is deemed delivery for common carrier purposes even where the railroad must still load the cargo onto the rail car. See: Illinois Central Railroad v. Moore, 228 F.2d 873 (6th Cir. 1956). Indeed, common carrier rail service includes whatever services the railroad agrees to provide by contract or by tariff. Even extensive handling services rendered prior to shipment by the railway and its agents are part of interstate commerce covered by federal law (requiring the publication of tariffs) was fully addressed in, United States v. Union Stock Yard and Terminal Co. 226 U.S.304-305 (1912).

Together, these companies, as to freight which is being carried in interstate commerce, engage in transportation within the meaning of the act, and perform services as a railroad when they take the freight delivered at the stock yards, load it upon cars, and transport it for a substantial distance upon its journey in interstate commerce, under a through rate and bill furnished by the trunk line carrier,...

That commodity was livestock which needed to be sorted, fed, watered and then loaded onto rail cars, and as with NET, moved a short distance to interchange with a trunk line. That carrier sought to avoid status as a railroad due to the numerous services it rendered to the live stock. The Court held the stock yard to be entirely a rail carrier and that all of its services were part of its transportation services. Indeed, even motor vehicle services connecting customers to a railroad are rail transportation when conducted by a railroad or by its contractor. United States v. Motor Freight Express, 17 F.Supp. 655, 658 (D.N.J. 1945).

The duty of unloading carload freight ordinarily rests with the shipper or consignee. Pennsylvania R. Co. v. Kittaning Co., 253 U.S. 319, 323. But it is a transportation service within the meaning of the Interstate Commerce Act. Atchison, Topeka & Santa Fe Ry. Co. v. United States, 295 U.S. 193, 200, 55 S.Ct. 748, 752, 79 L.Ed. 1382; Barringer & Co. v. United States, 319 U.S. 1, 6, 729, 63 S.Ct. 967, 971, 87 L.Ed. 1171. Its cost may be included in the line-haul tariffs or separately fixed or allowed as an additional charge. Adams v. Mills, 286 U.S. 397, 410-415, 52 S.Ct. 589, 592-594, 76 L.Ed. 1184; Loading and Unloading Carload Freight, 101 I.C.C. 394; Berg Industrial Alcohol Co. v. Reading Co., 142 I.C.C. 161, 163-164; Livestock Loaded and Unloaded at Chicago, 213 I.C.C. 330, 336, 337. See, Haberman v. Pennsylvania R. Co., 234 I.C.C. 167, dealing with less-than-carload lots.

Railroad Retirement Board v. Duquesne Warehouse Co., 326 U.S. 446, 453 (1946).

C THE NON DISCRIMINATORY OR REASONABLE NATURE OF STATE LAW REQUIRING PRE-APPROVAL OF RAIL OPERATION DOES NOT OVERCOME PREEMPTION. The issue here has been decided by the Supreme Court.⁷ No further discussion is required. Petitioners argument that due to the Board's general rule under ICCTA that 'a railroad must follow local laws provided that they are uniformly applied in a non-discriminatory manner and do not unduly interfere with rail transportation' does not extend to a relinquishment of the Board's jurisdiction to allow for any state or local pre-approval of a railway facility or service.

⁷ No state or local governmental authority may determine that an entity operating under authority of Federal Law is unauthorized to do what such Federal law not only allows but mandates, Gibbons v. Ogden 22 U.S. 1, 221 (1824). 49 U.S.C. §11321(a) states in relevant part that "...a rail carrier...**is exempt from the antitrust laws and from all other law, including state and municipal law**, as necessary to let that rail carrier...hold, maintain and operate property...acquired through..." (a transaction approved or exempt from approval by the Surface Transportation Board) See: City of Auburn v. United States, 154 F.3d 1025, 1029 (9th Cir. 1998). The exemption from State law contained in the §11321, is to be interpreted broadly, See; Ex Norfolk & Western Ry. V. American Train Dispatchers, Assn. 499 U.S. 117, 127-34. (1991) "The... language in §11321(a) exempting carriers from ...State and municipal law is clear broad and unqualified". See also, CSX Transportation v. Georgia Public Service Commission, 944 F. Supp. 1573, 1585 (N.D. Ga. 1996).

D. NET'S TRANSPORTATION OF SOLID WASTE IS NOT SUBJECT TO LOCAL REGULATION DUE TO THE RESOURCE RECOVERY ACT (RCRA). Petitioners claim that MaDEP transfer station permit requirements were mandated under the federal RCRA laws, and, therefore, are not preempted by the Board's jurisdiction or ICCTA. First, this assertion is a complete misreading of RCRA which does not apply to transportation. Second, even if it did so apply, the Board, and not MaDEP, would retain jurisdiction regarding its application.

As to the first point, RCRA applies to waste management facilities which dispose of waste, such as landfills and incinerators, but (other than hazardous waste or regulated medical waste) not to general service rail transportation facilities. RCRA and the USEPA have no requirements regarding transfer or transportation of non-hazardous or non-regulated medical solid waste. Consequently, contrary to Petitioner's inference, there are no federal requirements regarding transfer and transportation of non-hazardous or non-regulated medical solid waste. The law is inapplicable to NET's proposed terminal railroad and its transloading facilities which transport but do not manage or dispose of waste.

As to the second point as stated above, the specific preemption language used by Congress in the ICCTA is that a person granted operating authority by the STB "...is exempt from the antitrust laws and from **all other law**, including State and municipal law as necessary to let that rail carrier...hold, maintain and operate property...acquired ..." (emphasis added). This language specifically preempts the provisions of RCRA which would make local law applicable if NET were managing waste as alleged. As Congress

has done previously, where the imposition of national standards were deemed necessary, it has preempted all inconsistent law. Indeed, the Board's

rules are designed to assure adequate consideration of environmental and energy factors in the Board's decision making process pursuant to the National Environmental Policy Act... the Energy Policy and Conservation Act... and related laws, including the National Historic Preservation Act... the Coastal Zone Management Act... and the Endangered Species Act...)

Soo Line Railroad, d/b/a Canadian Pacific Railway v. City of Minneapolis, 38 F. Supp.

2d 1096 (D. Minn. 1998

Applying RCRA, as the Petitioners request, would allow Massachusetts "site assignment" laws, cited by Petitioners, to give a municipality the practical authority to bar the construction of any waste handling facility within its jurisdiction, a result completely contrary to the intention and language of ICCTA.

Article VI of the Constitution of the United States provides, in part, "... This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; ...". If this article of the Constitution means anything it must mean that a county may not pass an ordinance, the effect of which is to totally frustrate an entire statutory plan enacted by the Congress for the protection of citizens in all fifty states. Were the Court to approve this ordinance, no doubt the other ninety-nine counties in North Carolina would quickly enact identical bans. What, then, would North Carolina do with the PCB laced soil? Surely our neighbors in Virginia and Tennessee, South Carolina and Georgia would also object to our carrying such wastes into their states. The Warren County ordinance clearly stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress under the Toxic Substances Control Act"

Warren County v. State of N. C., 528 F.Supp. 276, 290 (E.D.N.C. 1981). Any law which would give a municipality the power to prohibit a rail operation or facility which had been authorized by the Board is preempted by ICCTA.

E. NET WILL ONLY TRANSPORT SOLID WASTE FROM ITS FACILITY BY RAIL, AND WILL NOT TRANSFER SOLID WASTE FROM TRUCK-TO-TRUCK FOR OUTBOUND TRUCK TRANSPORT.

Petitioner incredulously claims that "most of the materials received by the NET Solid Waste Facility may leave by truck, not rail." This assertion is absurd and has no foundation in any of the filings or statements of NET. NET is a rail carrier and should it engage in long haul trucking, not as part of a rail movement, except due to a short term embargo due to impossibility, its activities would not be exempt from local regulation.⁸

F. NET'S INTERCHANGE WITH THE BOSTON & MAINE RAILROAD FOR PART OF ITS LONG HAUL CARRIAGE (AS DOES EVERY OTHER SHORT LINE RAILROAD IN THE NATION) DOES NOT MEAN THAT NET ITSELF IS NOT A RAIL CARRIER. As NET stated in its Petition for Exemption, the Board has fully reviewed the issues related to the development of a common carrier by rail within a small area on tracks formerly used only to switch railroad customers in Effingham RR Co. - Pet. For Declaratory Order, 2 S.T.B. 606 (1997, Effingham Railroad Company - Petition for Declaratory Order - Construction at Effingham, IL, STB Docket No. 41986, et al. (STB served Sept. 18, 1998) (Effingham), aff'd sub nom. United Transp. Union v. Surface Transp. Board, 183 F.3d 606 (7th Cir. 1999) (UTU). At 609-10 of that initial decision, the Board developed the criteria upon which to determine whether the creation of a Class III railroad to serve an industrial park, i.e., spur, industrial, team, switching or side tracks was subject to its exclusive jurisdiction. The Board found that such a rail operator was subject to its licensing

⁸ The courts have long held that:

'Congress may be presumed to have legislated with knowledge of the court decisions previously mentioned, holding that pick-up and delivery service is within the meaning of 'transportation' as defined in section 1(3) of the Interstate Commerce Act (49 U.S.C.A. §. 1(3)) as well as with knowledge of our own administrative findings to the effect that while railroad terminal service by motor truck was subject to regulation under the Interstate Commerce Act, the use of motor trucks by railroads in line-haul service was not subject to that act.

American Trucking Ass'ns v. United States, 17 F. Supp. 655, 657. (D.C., D.C. 1936).

authority under 49 U.S.C. 10901, notwithstanding the small size of its planned operations, because: (1) the larger purpose and effect of the transaction were to create a new railroad that would be competing with other carriers in territory that the new carrier had not previously served; (2) the track would constitute the new carrier's entire line of railroad; and (3) the new railroad would interchange traffic with the national rail system.

In the case at bar, as in Effingham: (1) the larger purpose and effect of the transaction is to create WWTR, a new railroad that is specifically designed to compete with common carrier truckers for the business of industries tributary to the facility; (2) the track of WWTR will constitute its entire line of railroad; and (3) the WWTR will be interchanging traffic with the national rail system. This precedent has been followed in similar circumstances: Bulkmatic Railroad Corporation-Acquisition and Operation Exemption-Bulkmatic Transportation Company, FD-33414 (November 19, 2002), Southwind Short line Railroad Company—Acquisition And Operation Exemption--Indiana Port Commission FD-32114, decided with Indiana Ports Railroad Holding Corporation--Continuance In Control Exemption--Clark Short line Railroad Company and Southwind Short line Railroad Company FD- 32114 (May 5, 1998). Several exemptions have also been granted for similar projects without extensive discussion, See, ex.: Pennsylvania Southwestern Railroad Inc.-Lease and Operation Exemption-J&L Special Steel, LLC FD-34145 (April 24, 2003; Penn Jersey Rail Lines, Inc-Acquisition and Operation Exemption-WMI Properties, Inc. FD 32104 (June 24, 1997).

Therefore the small size of NET's line of railroad is irrelevant to its status as a rail common carrier. The petition's admission that NET's facility will successfully compete with the petitioner's members is proof that NET is indeed a rail carrier fully within the

criteria set by the Board. It also is proof that NET is an intermodal facility deemed necessary by Congress to draw traffic off the highway in sufficient quantity to cause the truck dependant petitioners concern.

IV

CASES CITED BY PETITIONER DO NOT STAND FOR THE PROPOSITION CLAIMED BY PETITIONER

Petitioners have cited numerous cases in support of their positions. These cases as a general rule do not support the propositions for which they are cited or are absolutely inapplicable to NET.

1. In Town of Milford, MA, Petition for Declaratory Order- STB Finance Docket No. 34444 (STB served Aug. 11, 2004) the Board held that a steel fabricator which leased space from a rail carrier was not a rail carrier. The steel fabricator was receiving only its own steel which it was planning to fabricate on site prior to distribution. The steel fabricator was not a party to the proceeding. The Board found that in the absence of any evidence as to the nature of the lessee's activity, leasing property alone from a railroad does not make a company's services those of a railroad.

2. Petitioners rely on Hi Tech Trans, LLC v. New Jersey 382 F. 3d 295 (3d Cir. 2004) and H&M Transportation, Inc.- Petition for Declaratory Order, STB Finance Docket 34277 (STB served Nov. 11, 2003) and Florida East Coast Railway v. City of West Palm Beach, 266 F. 3d 1324 (11th Circuit. 2001) for the proposition that NET's activity is not that of a rail carrier. None of these cases so held, and indeed held the opposite. In Hi Tech and H&M the Board found that the activities in issue were those well within the definition of rail transportation but it held that the activity was not within

its jurisdiction as neither Hi Tech nor H&M were rail carriers or under the control of rail carriers. In marked contrast, NET has filed a petition for an exemption to become a rail carrier and therefore the activities in issue are those of a rail carrier and based on those two cases, within the Board's exclusive jurisdiction. Of course the Hi Tech case cited by the petitioner was not that before the Board. It was an appeal of an adverse decision by the District Court, not of the Board. The Board's decision relating to that operation is in Hi Tech Trans, LLC-Petition for Declaratory Order, FD-34192 (Sub-No. 1) in which the Board held that Hi Tech's activity would be within the long accepted definition of transportation by rail if it were being performed by a rail carrier. In Florida East Coast, the activity was clearly that of a customer distributing only its own products through property leased from the railway.

3. Petitioners' reliance on Hub City Foods, Inc. v. Commissioner of Internal Revenue, 884 F. 2d 320, 323-35 (7th Cir. 1989) is of interest. That case stands for the principal that where a company is engaged in a primary business which incorporates various services, it is in the primary business and that each ancillary service does not place it in another business. Here, the petitioner asserts that that tail wags the dog, i.e. that ancillary services provided by NET to one of the numerous commodities it will handle on its rail facility dictate that it is in the ancillary business, processing waste, rather than in its primary business of transloading and transporting waste and other products. Hub City Foods, id holds that a grocery wholesaler is not in the transportation business just because it trucks product to and from its warehouse. But, Hub is a tax case and not a transportation case.

4. In Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna and Western Railway Corporation, STB Finance Docket 33466. Petitioners cite the Board's dicta indicated that manufacturing facilities owned by a railroad which were unrelated to transportation would not be under the Board's jurisdiction. In Riverdale a car heating facility needed to discharge cargo from a car was deemed to be transportation related, as grinding is to the cargos the Petitioners complain of regarding NET's operations. The Board, referring to local regulations, stated "recent precedent made it clear 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 its facilities are preempted because they would, of necessity, impinge upon the federal regulation of interstate commerce.... Railroads are required to provide adequate facilities for their traffic."

5. Petitioners' citation of Flynn v. Burlington Northern Santa Fe Corp., 98 F, Supp. 2d 1186 (E.D. Wa. 2000), is of no moment. That case involved a locomotive servicing facility which was concededly within the exclusive jurisdiction of the Board. The case merely restates the holding of Riverdale that manufacturing facilities on railway property which are not related to transportation are not within the Board's exclusive jurisdiction. The case does stand for the proposition that entities, like these petitioners, who can show no injury relating to the facility being built, have no standing to complain. Here the Petitioners only complaint is that due to its efficiency, NET's facility can compete with them effectively. They have no standing where as here rail service is concededly more efficient and all NET is doing is providing access to that more efficient

mode, access even these entities may take advantage of. Indeed, one of the Petitioners seeks to use NET to ship baled waste.

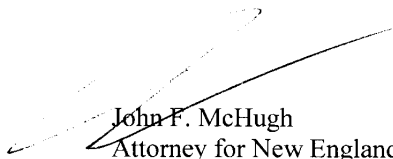
6. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 545 (2001) states that state zoning regulations can apply to the location of cigarette advertising and that Federal legislation merely related to the content of that advertising. The case holds that in that particular act Congress which preempted state laws relating to cigarette advertising did not preempt zoning laws effecting the location of billboards. Petitioners therefore argue that as Congress in ICCTA did not specifically state that it was preempting waste regulations they are not preempted and somehow are not within the term “all other law” used by Congress. Indeed in the ICCTA, Congress chose not to single out any of the hundred’s of commodities subject to rail transportation. It clearly wanted rail transportation extensively deregulated and set no limits of that effect.

CONCLUSION

Petitioners, waste processors, dependant on all truck transportation, have been protected by Massachusetts law for some time. Under that law the local interests can and do prevent any waste facilities from being located in any place. That is precisely, however, the type of obstacle to rejuvenating the railway system the ICCTA sought to end. The petition should be dismissed, the Report of the Section of Environmental

Analysis should be accepted and the Petition of NET should be granted with the mitigation measures recommended by the SEA.

Dated, New York, N.Y.
March , 2004



John F. McHugh
Attorney for New England
Transrail, LLC
6 Water Street
New York, N.Y. 10005
212-483-0875

BEFORE THE
SURFACE TRANSPORTION BOARD

FINANCE DOCKET NO. 34391

NEW ENGLAND TRANSRAIL, LLC, d/b/a WILMINGTON AND WOBURN TERMINAL RAILROAD CO.
- CONSTRUCTION, ACQUISITION AND OERTATION EXEMPTION- IN WILMINGTON AND
WOBURN, MA

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, ET AL
PETITION FOR DECLARATORY ORDER
OR, IN THE ALTERNATIVE,
PETITION TO REVOKE CONDITIONAL EXEMPTION
AND
REQUEST FOR INFORMAL HEARING

REPLY OF NEW ENGLAND TRANSRAIL, LLC

CERTIFICATION OF THOMAS MURPHY

I, Thomas Murphy, do hereby certify under penalty of perjury pursuant to 28 U.S.C. §1746 as follows:

1. I have been in the waste business in Eastern Massachusetts for 17 years. Most recently I was the senior officer in charge of BFI's and then Allied Waste's transfer operations in that region. I am personally familiar with the facts set forth herein based upon my participation in the industry and my responsibility for managing numerous waste facilities in this region. I am submitting this affidavit in connection with the Reply of New England Transrail (NET) to the Petition filed by the National Solid Wastes Management Association, Et Al.
 2. The Petitioners infer that all truck-to-truck transfer stations in Massachusetts pay host community fees which represent a substantial cost of their doing business, which NET will avoid. That is not correct. The vast majority of transfer stations in Eastern Massachusetts do not pay host community fees. For those that do pay a fee or other charge to the host community, the payment is minimal. In most cases is less than \$1.00 per ton.
 3. The Petition claims that NET will avoid significant costs by not having to post closure and post closure bonds (p. 8 of the Petition). This is completely false. Massachusetts does not require transfer stations to post such bonds. Only of disposal facilities such as landfills and incinerators must post bonds.
-

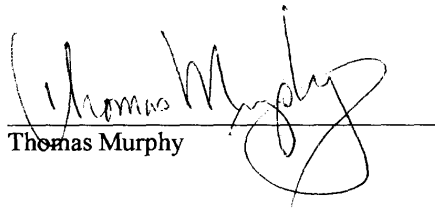
4. Indeed, the mitigation measures agreed to by NET and adopted as recommendations of the Section of Environmental Analysis of the Surface Transportation Board require NET's waste operation to adopt industry best practices. These measures require NET to invest in equipment which will either be equal to or superior to that in service in any of the Petitioners' facilities at this time. The result is that NET's terminal operating and capital costs will be similar to if not greater than those of the Petitioners'. Indeed, many private transfer stations, for example, pay Social Security (SSI) only for employees, NET as a railroad must provide Railroad Retirement nearly twice the cost of SSI.

5. NET's competitive advantage has nothing to do with avoiding local or state imposed fees nor does NET avoid any expense related to maintaining health or safety standards. NET's advantage is its ability to ship by rail out of state in 100 ton cars whereas truck to truck facilities must ship in trucks which can usually load no more than 22.5 tons. As the distances to affordable disposal capacity get longer with the passing of time, due to the shortage of disposal capacity in New England, the efficiency of rail transportation renders truck service non competitive.

6. NET has agreed to contribute \$50,000 to allow Wilmington to improve a local intersection, although NET will utilize a small fraction of the traffic which passes through that intersection (See. Applicant's Voluntary Mitigation, No. 17 in Section 1.2 of the *Post Environmental Assessment* at p. 1-3).

7. The environmental advantages of rail over truck are well known. However, in my experience, in Massachusetts local communities have the right to bar the siting of any facility which will handle waste. Older facilities that exist are all built for the market they dealt with when built, one where trucks took locally collected waste to landfills a few miles away. That world has vanished, yet, the law makes the siting of any new facility nearly impossible. Thus, if local law applies, few if any rail facilities will be built and the waste will stay on the highway traveling ever longer distances with the taxpayers and businesses paying for the inefficiencies both in dollars and in the inherent environmental costs of inappropriate use of the highway mode.

Dated, Holliston, Massachusetts
March 1, 2005


Thomas Murphy

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34391

NEW ENGLAND TRANSRAIL, LLC, d/b/a WILMINGTON AND WOBURN
TERMINAL RAILROAD CO. – CONSTRUCTION, ACQUISITION AND
OPERATION EXEMPTION- IN WILMINGTON AND WOBURN, MA

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, ET AL
PETITION FOR DECLARATORY ORDER
OR, IN THE ALTERNATIVE,
PETITION TO REVOKE CONDITIONAL EXEMPTION
AND
REQUEST FOR INFORMAL HEARING

CERTIFICATION OF ROBERT W. JONES III IN OPPOSITION TO THE PETITION

Robert W. Jones III, certifies under penalty of perjury pursuant to 28 U.S.C.
§1746 at Clifton, N.J. this 2nd day of March, 2005 as follows:

1. I am a managing member of New England Transrail, LLC (NET) and as such am familiar with the matters discussed herein.
2. The thrust of the various submissions in opposition to the Wilmington and Woburn Terminal Railroad project we seek to develop in Wilmington, Massachusetts is focused on only one commodity that terminal will serve, waste. Contrary to the representations made by the Town of Wilmington, the Massachusetts Department of Environmental Protection and the National Solid Wastes Management Association (NSWMA), the Wilmington terminal is to be a general service transload facility. Waste is

expected to be less than half the terminal's business upon start up and to become far less than half as time goes on.

3. I am submitting, under seal specific inquiries from shippers who have approached NET to move products through the terminal. As can be seen from those inquiries, one inbound shipper alone projects a daily movement which equals about half the projections of outbound waste. That is one non waste shipper. As these discussions are preliminary and are confidential for both NET and the potential shippers I am, in a separate motion, asking that these exhibits be deemed confidential as well as my additional certification explaining them, and open only to attorneys who are bound to maintain our confidences. I need not point out that in the charged atmosphere we now face in Massachusetts, shippers seeking to use our terminal could be subjected to harassment, particularly those who are named as petitioners in the NSWMA submission opposing our project. Clearly, even members of that organization understand that our project affords a useful service but apparently loyalty to their organization or fear of retaliation from local authorities has forced them to oppose our project. Their actions in seeking to ship via our terminal speak louder, however, than the words chosen by NSWMA attorneys.

4. We are also in discussions with a company which operates transload terminals nation wide for rail companies and is an expert in doing so. We are discussing the possibility of providing them with a location inside the NET Terminal or, in the alternative, the prospects of their assuming the day to day operation of the transload terminal as the agent of the Wilmington & Woburn Terminal Railroad. They have identified numerous products which they will seek to move via the terminal and have

provided us with a rate schedule for their services which would serve as the basis for NET's tariff. Any agreement with that company or any other entity will limit the use of the terminal in a manner consistent with NET's agreed mitigation measures, including the agreement not to handle hazardous substances.

5. That company has identified the following commodities it seeks to handle at the terminal which would be within the limits agreed to by NET: Lime, Soda Ash, Cement and Fly Ash, Roofing Granules, Plastics, Ethanol, Used Oil, Tall Oil, Glycols, Petroleum Wax, Diesel fuel, Lube Oils, Av Gas, CO2, Argon, Flour, Corn Sweeteners and Vegetable oils. It has identified with specific companies in the area which could use the service economically and who apparently do use such services elsewhere.

6. NET's project is precisely what it was represented to be to the Board at all times, a general service truck-rail transfer terminal which will allow the Wilmington and Woburn Terminal Railroad to connect the Boston regional transportation market to the nation's railway system via an efficient and strategically located intermodal facility. As can be seen by these communications, NET has been soliciting freight traffic from multiple sectors.

7. Waste is going to be a commodity any transload facility must consider handling in the Northeastern United States at this time. There is a shortage of disposal capacity sufficient to serve the needs of the entire eastern monoples including all of New England, New York and New Jersey. Due to local permitting laws and regulations, the siting of any such facility is nearly impossible. Nobody wants a waste handling facility in their town, neighborhood or county. Local laws in Massachusetts in particular, give local communities essentially complete veto power over the location of any waste

facility. Any application to the state must begin with local site approval. Thus, there are almost no facilities to load waste onto railcars. Most existing waste facilities were built when waste was trucked to local disposal sites. As those sites fill up, and as waste must travel further to find available capacity, the pressure to find access to rail increases. Trucking waste more than three hundred miles is horrendously inefficient, both financially and environmentally.

8. Because NET is a new company developing a new railroad which requires new construction, its petition has been subjected to a full environmental review. No aspect of NET's project has been hidden or avoided such review. No adverse environmental effect has been discovered. Indeed, this project has been subjected to a review which is the full equivalent of anything local regulation would have subjected it to. The only difference is that before the Surface Transportation Board the decision will be based upon the merits of that environmental review and not on the power of 'not in my back yard' interests which would veto this project if State Law applied. That was the intention of Congress when it exempted rail facilities from all Local and State regulation.

9. As we have stated previously citing studies by the American Association of State Highway and Transportation Officials, www.transportation.org and the Texas Public Policy Institute, www.texaspolicy.com/pdf/2001-10-30-transportation-freight.pdf, urban America faces a major crisis due to the projected increases in truck traffic expected by 2020. It is critical to the national interest as well as to the greater interest of the Boston metropolitan region that means be found to place as much of this projected traffic on the railroads, which can handle it with a fraction of the environmental effect imposed on the region by continued reliance on highways. To do this, terminals must be provided

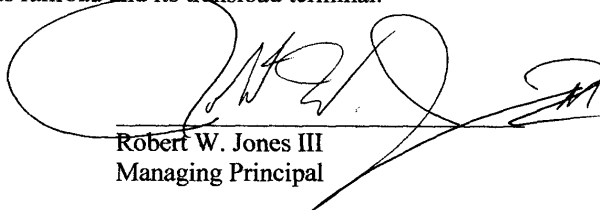
in urban areas, replacing terminals the capital strapped rail industry has generally given up over the last half century.

10. The only sites available for these facilities are brown fields, such as this site. All such development would be impossible, except as State built projects, if local law applied. Capital sources simply will not invest in such developments if the regulatory hurdles are nearly or entirely insurmountable. Therefore, it is critical that where, as here, a full environmental review has failed to find any significant environmental effect of a rail-truck intermodal terminal, that project be approved as expeditiously as possible. This is required both to provide this facility to the Boston region but to encourage the development of such facilities as needed by setting an achievable standard which will attract needed capital to build such facilities in the future.

10. I am the member of our company who deals on a regular basis with our financiers. With every new assault on our proposal by a new entity and with every new argument, no matter the source or quality of that argument, their will to stay the course is weakened and their will to fund more such projects vanishes. The Board must make it clear to the commercial world that decisions on needed rail investments will be consistent with the law and rational if projects similar to this are to be encouraged. If this project is not successful, terminals needed to meet the nation's needs, particularly those intermodal facilities deemed critical by Congress as stated in 49 U.S.C. §10101 (7) will not come from the private sector.

Wherefore, no logical basis for carving an exception to the mandate of the ICCTA having been put forth by any party to this dispute, I respectfully request that the petition

conditional preemption be make unconditional and that NET be granted leave to
proceed with the construction of its railroad and its transload terminal.



Robert W. Jones III
Managing Principal

John F. McHugh certifies under penalty of perjury pursuant to 28 U.S.C. §1746 that on this 3rd day of March, 2005 I served copy of this reply to the Petition of the national Solid Waste Management Association et al. as well as a copy of New England Transrail's Motion for a Protective Order on:

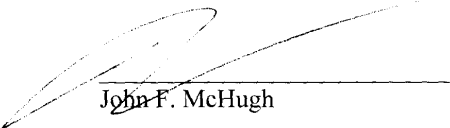
Deutch Williams
99 Summer Street
Boston, MA 02110-1213

Margaret Stolf, General Counsel
Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of Environmental protection
One Winter Street
Boston, MA 02105

Beveridge & Dimond, P.C.
45 William Street
Wellesley, MA 02481-4044

By regular United States mail.

Dated, New York, N.Y.
March 3, 2005



John F. McHugh