

213506

John F. McHugh
Attorney at Law
6 Water Street, Suite 401
New York, NY 10004



Phone: (212) 483-0875
Fax: (212) 483-0876

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

March 8, 2005

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

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 the original and ten copies of New England Transrail's Reply to the Petition of the Massachusetts Department of Environmental Protection For A Clarified Conditional Exemption Or In The Alternative Petition To Revoke The Conditional Exemption And Response To Town Of Wilmington's Petition And To New England Transrail's Reply, together with a 3 1/2 disk containing the same in electronic form.

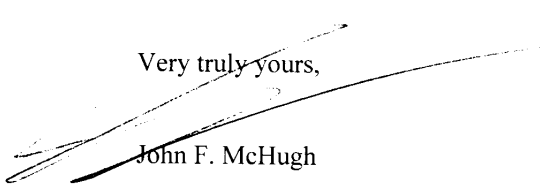
Thank you for your attention to this matter.

ENTERED
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Public Record

Very truly yours,


John F. McHugh

Cc: Daniel R. Deutsch
Deutsch Williams Brooks Derensis & Holland, P.C.

Attorneys for Wilmington, Massachusetts
99 Summer Street
Boston, MA 02110-1235

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

Beveridge & Dimond, P.C.
Attorneys for the National Solid Waste Management Association
45 William Street
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

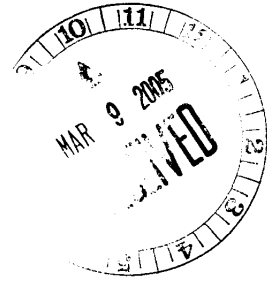
REPLY OF NEW ENGLAND TRANSRAIL TO PETITION OF THE MASSACHUSETTS
DEPARTMENT OF ENVIRONMENTAL PROTECTION FOR A CLARIFIED
CONDITIONAL EXEMPTION OR IN THE ALTERNATIVE PETITION TO REVOKE
THE CONDITIONAL EXEMPTION AND RESPONSE TO TOWN OF WILMINGTON'S
PETITION AND TO NEW ENGLAND TRANSRAIL'S REPLY

The Massachusetts Department of Environmental Protection's (MaDEP) Petition (the Petition) evidences a stark disregard for federal law and judicial precedence to favor powerful "not in my back yard interests" over the greater interest's of the State's other residents and those of the nation. The MaDEP's petition makes no new argument, is filed out of time to be a response to Wilmington's petition and a reply to NET's reply is not allowed under the rules absent a compelling reason, such reason being conspicuously absent here.

NET answered all of the assertions made by MaDEP in response to the two prior petitions. The answer to the MaDEP's Petition is the same.

A- The ICCTA specifically preempts any local law requiring approvals or permits as they pertained to rail transportation and that includes State health and safety laws which require permits or which could otherwise obstruct rail operations and no exceptions were contemplated by Congress.

B- Movement of waste from a truck to a rail car including handling of cargos to facilitate moving them efficiently is "integral" or related to rail transportation whether that material is containerized, bailed or loose.



C- *SEA's proposed mitigation measures protect public health and safety*

I

THE ICCTA PREEMPTS ANY LOCAL LAW REQUIRING APPROVALS OR PERMITS
OTHER THAN THAT ISSUED BY THE SURFACE TRANSPORTATION BOARD
UNDER FEDERAL LAW

MaDEP submits the third petition to the Board seeking to block the development of the transload terminal NET proposes for the Olin property in Wilmington, Massachusetts. All three petitions use nearly identical arguments to seek to carve an exception to the preemption of 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", contained at 49 U.S.C. § 11321(a) of Interstate Commerce Commission Termination Act (ICCTA). Here, MaDEP seeks to exert local control over waste which gives municipalities an absolute veto over the opening of any new waste facility rather than to participate in STB's environmental review process. The SEA has fully reviewed the local concerns related to this rail project and has balanced them against the Nation's interest in revitalizing the railroad system. States cannot allow local governments to block a national policy by excluding activity they deem undesirable from their jurisdictions.

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).

The national interest in the outcome of this matter is substantial. NET stated in its petition for an exemption that,

...any facility which takes freight off the highway and places it on the railway system for transport is environmentally preferable as a matter of general policy. The bases for this general statement is that the taxpayer costs of trucking are high. While it is recognized that externality costs of any mode of transportation vary according to economic and locational conditions, externality costs based upon national averages, adjusted slightly for the much greater population density of the Boston area compared to the rest of the nation, indicate that each car loaded or unloaded by the Applicant will translate directly into public benefits which can be measured. The following table summarizes these costs on the basis of \$'s per ton mile of travel assuming trucks move an average of 20 tons of cargo¹ by each truck and 100 tons per railcar.

	Cost per Ton-Mile of Vehicle Travel (Loaded) ²	
	RAIL CAR	TRUCK
Pavement Wear & Tear	\$0.00	\$0.0090
Excess User Costs	\$0.00	\$0.0043
Congestion Costs	\$0.00	\$0.0025
Air Pollution	\$0.00056	\$0.0025
Noise Impacts	\$0.00111	\$0.0043
Accident Costs	\$0.00044	\$0.0138
Total	\$0.0021	\$0.0364

The conclusion that placing freight on the railway is desirable in terms of air quality was confirmed by the Federal Authorities, "... (T)ruck-based freight movement generates more pollutants per ton-mile of freight hauled than current, unregulated rail-based forms of freight movement. Estimates quantifying the difference indicate that locomotives are on the order of three to five times cleaner than trucks on an emissions per ton-mile basis." Locomotive Emission Standards, Regulatory Support Document, United States Environmental Protection Agency, Office of Mobil Sources, April 1998 pg. 10, [http://www.epa.gov/otaq/regs/nonroad/locomotv/ frm/locorsd.pdf](http://www.epa.gov/otaq/regs/nonroad/locomotv/frm/locorsd.pdf). Thus, the efforts of the

¹ When referring to a 20 ton truck in this petition Applicant is referring to average capacity. This loaded truck is 80,000 Lbs. or 40 tons.

² These costs are determined from various studies pursuant to the methodology explained in Transportation Cost and Benefit Analysis, Techniques, Estimates and Implications, Todd Alexander Litman, Victoria Transport Policy Institute, 27 May 2003, <http://www.vtpi.org/tca/tca01.pdf> ("VTP"), extrapolation performed by Konheim & Ketchum, New York, N.Y. Rev. 4/18/03.

Massachusetts authorities, to protect the ability of municipalities to bar the facilities needed to provide rail services is directly in conflict with the national interest as well as contrary to the interests of the majority of residents of Massachusetts who are asked to bear the financial, safety as well as environmental costs imposed by this policy of giving “not in my back yard” interests the ability to protect themselves from the burden of needed facilities and to impose those burdens on others.

The problem faced by the Board here has significant national ramifications. Clearly, every improvement to the railroad system will face local opposition, even to the reopening of a mothballed main line such as the Stampede Pass, See: City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998). In that action the Board concluded:

If BN were unable to undertake the projects, or if its ability to commence projects to maintain and upgrade its facilities were substantially delayed pending resolution of a state or local permitting or environmental process, its ability to carry rail traffic over the Stampede Pass line could be greatly inhibited, if not foreclosed. Given these circumstances, it appears that state or local permitting or environmental requirements would both interfere with the federal licensing program and unreasonably burden interstate commerce. At the same time, we agree with the Secretary’s informal opinion Permits, by their very nature, allow a permitting agency to refuse a permit.

Cities of Auburn and Kent WA—Petitioner for Declaratory Ordered—Burlington Northern Railroad Company—Stampede Pass Line, FD 33200 July 1, 1997.

In an article in the March 3, 2005 *New York Sun* concerning another rail project—a proposed new rail tunnel across New York Harbor, the following is reported:

“The plan may be good for the city as a whole, but I have some real concerns about impact on the quality of life, especially in Queens,” Council Member Eric Gioia, Democrat of Queens, said. “These are questions that need to be answered.”

Unlike the candor of the Council Member from Queens, who acknowledges the conflict between the larger interest and that of his constituents, most subject to political pressure, such as MaDEP seek to assist the narrowest interest in derogation of their obligations to the public

at large. Congress addressed this well known problem by placing all authority over the railway system in the Board and outside the control of such local interests.

MaDEP focuses (as do all the opponents to this project) on waste, a subject dealt with extensively by the Section of Environmental Analysis (SEA). However, waste is a commodity which is handled by rail in ever increasing volumes. Every new common carrier rail facility has the potential to handle waste products.

In the Post Environmental Assessment (Pg. 1-2), the SEA recommended that the Petitioner here

...be given thirty days following the Board's final decision to consult with the SEA and notify SEA of what additional conditions, if any, the Board should impose on Applicant prior to the institution of transload operations for solid waste materials as the result of this project. In doing so the Massachusetts Department of Environmental Protection shall provide support for why the condition/s is required to mitigate potential harm and protect the environment and public health and safety....

Instead of participating in the process recommended by the SEA the MaDEP has launched a collateral attack on the Board's process attempting to reassert State regulatory authority. The Board rejected a similar attempt to end run the process stated in Cities of Auburn and Kent WA—Petitioner for Declaratory Order—Burlington Northern Railroad Company—Stampede Pass Line, supra:

Petitioners' claim that we ignored or overlooked their local concerns is unfounded. As noted (*see supra* note 11), in *BNSF Control* the Board engaged in an appropriate environmental review under NEPA and our environmental rules and adopted environmental mitigation conditions to address the environmental concerns that had been raised during the environmental review process by petitioners and others, including mitigation in the City of Auburn. Petitioners cannot use this declaratory order proceeding to mount a collateral attack on, or seek to substitute a state or local environmental review process for, the agency's environmental review under NEPA in *BNSF Control*. *See Toye Bros. Yellow Cab Co. v. Irby*, 437 F.2d 806, 810 (5th Cir. 1971). Rather, what we said on the environmental issues that were addressed there is conclusive, subject to the right of the Cities (or any other interested parties) to seek judicial review, under the appropriate standards, if they are dissatisfied with the scope or outcome of the agency's NEPA process.

See also, Joint Petition for Declaratory Order – Boston and Main Corporation and Town of Ayer, MA, STB Finance Docket No. 33971 (2001).

The Board has given MaDEP an open invitation to seek any relief it deems necessary to address a material local concern simply by justifying that need to the SEA. MaDEP ignored the Board's offer and refused to provide any such support; in that vacuum MaDEP seeks instead to repeal the applicable law.

II

THE TRANSFER OF MATERIALS BETWEEN RAIL AND HIGHWAY IS WITHIN THE BOARD'S EXCLUSIVE JURISDICTION NO MATTER THE PROCESS INVOLVED.

In Hi Tech Trans, LLC-Petition for Declaratory Order, FD-34192 (Sub-No. 1) the Board found that the activities in issue, dumping waste into a hopper and then loading it onto rail cars were those well within the definition of rail transportation. However, the Board held that the activity was not within its jurisdiction as Hi Tech was neither a rail carrier nor under the control of a rail carrier. In marked contrast, NET has been granted a conditional exemption to become a rail carrier and therefore the activities in issue will be those of a rail carrier.

MaDEP relies upon a Third Circuit decision which is not relevant as it was not an appeal of the Board's decision. In that case the Court simply confirmed the Board's finding that Hi Tech's activities were not under the Board's jurisdiction. Hi Tech's attorneys had failed to mention to the Court that the reason that the Board determined that Hi Tech's activities were not under the Board's jurisdiction was because Hi Tech was not deemed to be a railroad—not because Hi Tech was not engaged in transportation activities.

In Borough of Riverdale--Petition for Declaratory Order--The New York Susquehanna and Western Railway Corporation, FD 33466, Sept 9, 1999 the Board stated that a facility

which heated cars of corn syrup to facilitate moving it from the rail car to trucks would be integral to rail transportation where the goal is to transload the product between modes³. The bailing and grinding of waste simply to make the handling of the commodity more efficient, is the same type of function as the heating of cars referenced in Riverdale.

MaDEP asserts that because grinding and baling of loose solid waste can and does occur off-site, such activities are not related to rail transportation. What the Petition fails to state is that all such processes, when conducted by NET are, as is the heating of corn syrup in Riverdale, designed solely to facilitate efficient “handling” or “interchange” of materials. Indeed, when performed by a truck to truck transfer station, the goal is also the efficient handling of a cargo in transportation.

As NET has explained in its answer to the other petitions, 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

³ Corn Syrup is a viscous material and flows more freely when heated for transfer from a rail car to a truck. C&D can be handled also more efficiently when crushed into a material which can be poured or moved by conveyor belt without damaging equipment.

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).

The Courts and the Interstate Commerce Commission (ICC) have consistently determined that the loading, off loading, sorting, handling and warehousing of individual items of freight (whether loose or packaged) from vessels to warehouses to rail cars in connection with rail transportation was an intermodal movement all within the definition of common carrier rail transportation and as such within the jurisdiction of the ICC see Interchange of Freight at Boston Piers, 253 ICC 703 (1942) (relating to ICC jurisdiction over the handling of break bulk freight between ships and on the dock rail cars).

III

SEA HAS PROPOSED AN EXTENSIVE LIST OF MITIGATION MEASURES AND HAS PROPOSED A PROCEDURE WHEREBY MaDEP CAN PROPOSE ADDITIONAL MITIGATION MEASURES

MaDEP has complained that the mitigation measures do not adequately cover all necessary issues of concern. MaDEP, however, only cites, one issue—MaDEP's air quality regulations, 310 CMR 7.00 as an area of concern. By recommending that MaDEP be given thirty days to inform the SEA of any specific local concerns which it feels are not adequately

covered by these mitigation measures the SEA has provided MaDEP a time and process to inform the SEA of these regulations, the need to incorporate them into the mitigation measures and the reasons therefore. These are precisely the type of concerns the SEA anticipated and has fully dealt with by leaving this process open for a reasonable time.

IV

NET'S PETITION FOR EXEMPTION SPECIFICALLY REFERS TO HANDLING LOOSE WASTE

NET's Petition called specific attention to the fact that NET would "transload and consolidate outbound loads, including non-hazardous waste". NET could not have made this clearer:

"The cargos anticipated include aggregate, sand & gravel, stone, lumber, plastics, steel, scrap steel, recycled paper and plastic, newsprint, paper products, clay, construction debris, brick, non-hazardous solid wastes, liquids and dry chemicals. The ratios of these commodities cannot be estimated at this time. ... The applicant will **transload and consolidate** outbound loads, including non-hazardous waste,..."[emphasis added]

(p. 5-6 of Petition for Exemption, Section 1150.4(b)).⁴ The statement in the MaDEP petition that NET had never mentioned loose waste is simply wrong, indefensible and renders the MaDEP's position non-credible.

Indeed, as set forth in NET's reply to the National Solid Waste Management Association's similarly disingenuous petition, Robert W. Jones, III submitted evidence under seal establishing that NET has solicited and obtained interest in a significant number of the commodities mentioned in the above paragraph of its Petition for Exemption. Mr. Jones's confidential certification, to which we respectfully refer the Board, establishes that the NET

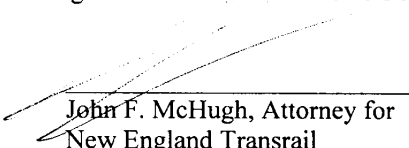
⁴ It should be noted that although NET's Petition for Exemption stated that it would move construction debris, and construction debris when moved by rail or long-haul truck is always moved loose in gondola railcars or dump trucks, MaDEP nevertheless claims that it should be assumed that NET stated in the Petition for Exemption that it would move waste only in containers—a statement that cannot be found or implied anywhere in the Petition for Exemption.

facility will be exactly what NET said it would be in its petition, a general service, common carriage transload terminal handling numerous commodities inbound and outbound.

CONCLUSION

It is respectfully submitted that the MaDEP has stated no basis for its petition. To the extent it seeks to impose State licensing prerequisites to the siting of any waste facility by a rail operator such licensing has been specifically preempted by the ICCTA. To the extent it argues that handling cargos to fit them safely into rail equipment or to efficiently handle them in transit, the Board and numerous Court's have long held that such operations which are related to the movement are within the jurisdiction of the Board and are also within the types of services routinely rendered by common carriers. The mitigation measures recommended by the SEA including the right of the MaDEP to raise any further concerns which it can support with the SEA fully provides for all legitimate local concerns. Finally, the petitions seek to end run and thus delay the Board's proceedings and therefore should be dismissed.

Dated, New York, N.Y.
March 8, 2005


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

Sylvia Cruz certifies under penalty of perjury pursuant to 28 U.S.C. §1746 that on this 8th day of March, 2005 I served a copy of this reply to the Petition of the national Massachusetts Department of Environmental Protection on:

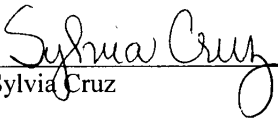
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Dated, New York, N.Y.
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