

LAW OFFICES  
**BEVERIDGE & DIAMOND, P.C.**  
SUITE 120  
45 WILLIAM STREET  
WELLESLEY, MA 02481-4004  
(781) 416-5700  
(617) 737-2602  
FACSIMILE (781) 416-5799

STEPHEN M. RICHMOND  
(781) 416-5710  
srichmond@bdlaw.com



March 17, 2005

**VIA FEDERAL EXPRESS**

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street NW  
Washington, DC 20423

ENTERED  
Office of Proceedings

MAR 18 2005

Part of  
Public Record

Re: New England Transrail, LLC d/b/a Wilmington & Woburn Terminal Railway-  
Petition for Exemption- Construction, Acquisition and Operation as a Rail Carrier  
on Tracks and Lands Acquired from Olin Corp.  
FD No. 34391

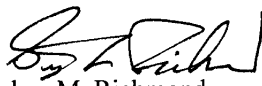
Dear Secretary Williams:

Enclosed for filing with respect to the above referenced matter please find an executed original and 10 copies of National Solid Wastes Management Association's, et al ("NSWMA") Response to the Reply of New England Transrail, LLC ("NET"), dated March 7, 2005. NET's reply was itself in response to NSWMA's Petition for Declaratory Order, Petition to Revoke Conditional Exemption and Request for Informal Hearing.

As NSWMA's Petition was designated as a Reply to NET's Petition for Conditional Exemption, it was our understanding that no Reply would be allowed from NET. As NET has now filed a response to the NSWMA Reply, we respectfully request that the Board consider our brief response to NET's filing.

We very much appreciate the careful consideration of the Board. If there are any questions regarding this filing, please do not hesitate to contact me.

Very truly yours,

  
Stephen M. Richmond

Enclosures

Secretary Williams  
March 17, 2005  
Page 2

cc: John F. McHugh, Esq., Counsel for New England Transrail  
Daniel R. Deutsch, Esq., Counsel for Town of Wilmington  
Margaret Stolf, Esq., MA DEP General Counsel  
James Milkey, Esq., MA Office of Attorney General

BEVERIDGE & DIAMOND, P.C.

**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

---

**RESPONSE OF  
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, ET AL  
TO REPLY OF NEW ENGLAND TRANSRAIL, LLC**

---

The reply of New England Transrail, LLC ("NET") to the petition and request for hearing filed by National Solid Wastes Management Association, et al (the "Petitioners"), demonstrates the depth of disagreement between NET and the broad coalition of solid waste facility owners and operators and government officials who are represented by the Petitioners.

In NET's view, this matter pits the beleaguered railroad industry against entrenched industry members dependent on trucking interests, in a battle for the right to compete in offering transportation services. To the Petitioners, this matter has virtually nothing to do with transportation. Instead, NET is using its need to transport material from its processing facility as a smokescreen in order to attempt to misapply the Surface Transportation Board's (the "Board") authority under the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the "ICCTA"). NET is seeking to distort the exclusive jurisdiction language in the ICCTA to obtain an enormous and improper economic and anti-competitive benefit.

MAR 18 2005  
RECEIVED

ENTERED  
Office of Proceedings

MAR 18 2005

Part of  
Public Record

Notwithstanding NET's repeated and persistent attempts to convince the Board otherwise, the Petitioners do not question the exclusive jurisdiction of the Board to regulate rail carriers and transportation by rail. Were NET simply a common carrier proposing to build and operate a traditional transload facility for the transfer of commodities to rail, Petitioners would not have filed a petition in opposition. Similarly, if NET were proposing simply to transload non-waste commodities at its facility, there would be no petition in opposition. The fundamental problem with the NET proposal is that the facility is not a traditional transload facility, and in fact the transportation component of the proposal is purely incidental to its true economic purpose as a waste processing facility.

If one reaches beyond the rhetoric,<sup>1</sup> the primary argument NET makes is that the waste processing capabilities of its proposed facility, which are identical to the waste processing capabilities of many of the companies represented by the Petitioners, are all exclusively transportation functions, or at least integrally related to transportation. Consequently, NET argues, the Board has exclusive jurisdiction over the proposed facility. In a telling footnote, NET asserts the following in support of its argument: "Just as Petitioners' activities add no value to the material, neither does NET's despite Petitioners' statement to the contrary." NET Reply at 10, fn 5.

In making this statement, NET demonstrates either that it: (i) fundamentally misunderstands the economic basis for the entire solid waste processing industry; (ii)

---

<sup>1</sup> NET variously labels the Petitioners as "protectionist", "parochial", and "entrenched". See NET Reply at 7. These labels are used in conjunction with NET's characterization of Petitioners' request for relief as little more than an attempt to subvert the Board's jurisdiction by subjecting NET's facility to "local veto" authority. As explained *infra* at Point II, this is a complete misrepresentation of the Petition and intentionally obfuscates the disagreement between the parties.

fundamentally misunderstands the solid waste regulatory structure in Massachusetts; or (iii) intends to mislead the Board to gain an unfair competitive advantage over the solid waste processing industry in New England by attempting to bypass the solid waste regulatory structure.

1. NET's Waste Processing Activities Will Add Tremendous Value to Waste Commodities Independent of Any Transportation Function

Solid wastes are expensive to manage. Generators, including municipalities and businesses, pay for the safe management and disposal of their wastes, typically in fees assessed on a per ton basis reflecting the direct relationship between the weight of the wastes, the costs to manage them, and a profit margin. Consequently, generators pay by the ton to get rid of their wastes, and once the wastes leave the possession of these generators, the wastes have a negative economic value - a fee has already typically been paid, on a per ton basis, reflecting the cost to safely manage those wastes, and anyone receiving them would need to get paid a competitive rate to manage them.

There is a segment within the solid waste industry that is comprised of solid waste processors who receive and process solid wastes to reduce their ultimate management costs. These processors create economic value by sorting, aggregating, baling, crushing, shredding, and otherwise transforming the wastes. These activities include removing from the disposal stream portions of the wastes that can be recycled at either a profit or at a cost that is less than the cost of disposal, and segregating wastes that can be disposed of at lower cost from those that must be disposed of at higher cost. *See attached Verification.*

There is an entire industry segment devoted to these activities, completely independent from any transportation function. In all cases, the facilities that conduct these activities are heavily reliant on transportation, and a combination of rail, truck and intermodal transport is used as a support function to the businesses. Rail is an important component of the transportation

network used by the solid waste industry. In 2003 alone, 41,497,000 tons of waste and scrap materials were transported by rail, providing gross revenue to rail companies of \$799 million. *See Class 1 Railroad Statistics, Association of American Railroads - Policy & Economics Department, October 28, 2004.*

NET would have the Board believe that the grinding, baling, sorting and other processing functions proposed at its facility would add no value to the waste material and would relate solely to transportation, "only to assure that commodities shipped out are sent to the proper destinations", and that these functions "are well within the established obligations of common carriage". NET Reply at 10. Since when did the rail hauler become the entity determining where commodities consigned to it should be shipped? Since when did the rail hauler become a business that profited from choosing locations for the destination of its goods? To conclude that NET is engaged in traditional common carriage activity, the Board would need to ignore the history of common carriage and would also need to ignore the entire non-transportation segment in the solid waste industry that is devoted to the processing and management of waste materials.

NET's explanation for the waste processing it will conduct is to draw analogy to the handling of livestock by a railroad, and the need of the carrier to sort, feed, water and load cattle. *See NET Reply at 11-12.* This analogy is preposterous. Cattle are fed and watered to keep them alive, so that the cargo tendered at delivery will have the same economic value as it had when custody was transferred to the carrier. Wastes, on the other hand, are processed to create economic value, to reduce disposal costs for the processor and to generate profit for that processor. Any carrier who processes wastes is conducting a business for profit that is completely unrelated to the transportation function that a carrier traditionally performs.

The creation of economic value in waste processing facilities such as that proposed by NET is diametrically in opposition to NET's claim that it will merely operate a transportation terminal. *See* NET Reply at 9-10; and attached Verification. NET's processing will be conducted to create a valuable commodity, independent of a transportation function, and is therefore neither "related to the movement of...property...by rail" nor "services relating to that movement." 49 U.S.C. 10102(9).

As the Board has recently stated, "there are limits on the scope of section 10501(b)... For example, section 10501(b) preemption does not extend to operations that are not part of the national rail network." *CSX Transportation, Inc. - Petition for Declaratory Order*, STB Finance Docket No. 34662 (STB served March 14, 2005). Where processing activities to create economic value independent of rail function are proposed, those activities cannot be within the exclusive jurisdiction of the Board.

2. Massachusetts Law Regulates the Processing of Solid Wastes, Not the Transport of Those Wastes by Rail

NET argues that the Petitioners seek to partially repeal the ICCTA to provide a state and local veto over rail transportation. *See* NET Reply at 1-2, 5, 6. This assertion is critical to NET's argument that its processing facility should be considered integral to rail transportation and therefore subject to the exclusive jurisdiction of the Board. However, as discussed above, to the extent the proposed facility will function as a solid waste processing facility, it will not be engaged in a rail transportation function - it will be engaged in a solid waste management function for profit - and this activity falls well outside the scope of the ICCTA and squarely within the scope of state and local law.

In Massachusetts, state law requires substantial state and local permitting prior to the construction of solid waste processing facilities. *See* G.L. c.111, §150A. The Department of

Environmental Protection (“DEP”) has adopted a comprehensive body of regulations to address this permitting, to impose construction design standards, and to regulate facility operations. *See* 310 CMR 16.000 and 19.000. In addition, DEP regulations ban the disposal, and the transfer for disposal, of various recyclable materials, creating an obligation under state law for all solid waste processors, without regard to their selected modes of transporting materials to or from their facilities, to separate from solid wastes not just materials that have economic value but also materials that DEP has mandated must be recycled, even when there is no economic value in doing so. *See* 310 CMR 19.017.

NET seeks to avoid each and every one of these requirements by presenting its processing facility as a rail transportation facility. NET argues that the state laws and rules referenced above would “give a municipality the power to prohibit a rail operation or facility which had been authorized by the Board”. *See* NET Reply at 14. This argument is a wholesale distortion of the position that the Petitioners have previously presented to the Board and is facially absurd.

The Petitioners seek nothing more than a level playing field in the solid waste industry. Notwithstanding NET’s gross mischaracterizations, the Petitioners do not argue for a local veto over rail projects. *See* NET Reply at 1-2, 4-5, 7-8. The Petitioners recognize the exclusive jurisdiction granted by the ICCTA and have offered no arguments against it.

The Petitioners do argue for a fair application of solid waste laws to all solid waste facilities. Rather than admit that it is attempting to avoid having its proposed solid waste facility become subject to these laws, NET resorts to calling the Petitioners “protectionist” and “entrenched.” *See* NET Reply at 7. Indeed, it is NET that wants to stretch the exclusive

jurisdiction granted in the ICCTA beyond its limits, and it is NET that seeks to obtain the benefits of protectionist policies not otherwise available to the solid waste processing industry.

The Board should see through this ruse. A solid waste processing facility is not a rail facility, and DEP regulations, along with their attendant costs and responsibilities, must apply equally to all such processing operations.

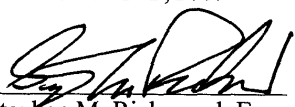
For the foregoing reasons, the Petitioners reiterate the requests made in their initial petition to the Board: a request for a declaratory order limiting the scope of the conditional exemption granted to NET, or in the alternative a request to revoke the conditional exemption granted to NET, and a request for an informal hearing.

Respectfully submitted,

NATIONAL SOLID WASTES MANAGEMENT  
ASSOCIATION  
and  
SOLID WASTE ASSOCIATION OF NORTH  
AMERICA - MASSACHUSETTS CHAPTER  
and  
MASSACHUSETTS MUNICIPAL ASSOCIATION  
and  
CONSTRUCTION MATERIALS RECYCLING  
ASSOCIATION  
and  
NEW BEDFORD WASTE SERVICES, LLC

By their attorneys,

BEVERIDGE & DIAMOND, P.C.

By: 

Stephen M. Richmond, Esq.

Michael Murphy, Esq.

Paula Schauwecker, Esq.

45 William Street. Suite 120

Wellesley, Massachusetts 02481-4004

David Biderman, Esq., General Counsel  
NATIONAL SOLID WASTES MANAGEMENT  
ASSOCIATION  
4301 Connecticut Avenue, Suite 300  
Washington, D.C. 20008

and

INTEGRATED WASTE SERVICES  
ASSOCIATION

By its attorney,

By: \_\_\_\_\_  
Maria Zannes, Esq.  
Vice President

[Signatures Continued on Next Page]

AMERICAN REF-FUEL COMPANY LLC

By: \_\_\_\_\_  
Mark W. Romefelt, Esq.  
Vice President, General Counsel

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was served this day via first class mail upon the following:

John McHugh, Esq., Six Water Street, Suite 401, New York, NY 10004;

Margaret Stolf, Esq., General Counsel, Department of Environmental Protection, One Winter Street, Boston, MA 02108;

James Milkey, Esq., Office of Attorney General, One Ashburton Place, Boston, MA 02108; and

Daniel R. Deutsch, Esq., Deutsch Williams Brooks Derensis & Holland, P.C., 99 Summer Street, Boston, MA 02110-1235.

\_\_\_\_\_  

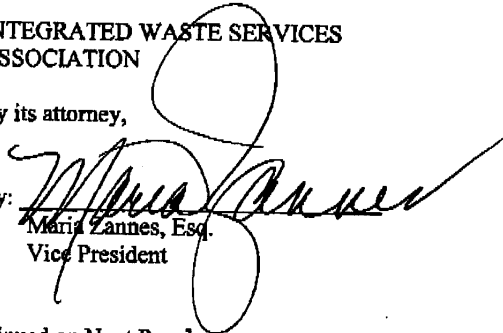

NATIONAL SOLID WASTES MANAGEMENT  
ASSOCIATION  
4301 Connecticut Avenue, Suite 300  
Washington, D.C. 20008

and

INTEGRATED WASTE SERVICES  
ASSOCIATION

By its attorney,

By:

  
Maria Zannes, Esq.  
Vice President

[Signatures Continued on Next Page]

AMERICAN REF-FUEL COMPANY LLC

By: 

Mark W. Romefelt, Esq.  
Vice President, General Counsel

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was served this day via first class mail upon the following:

John McHugh, Esq., Six Water Street, Suite 401, New York, NY 10004;

Margaret Stolfa, Esq., General Counsel, Department of Environmental Protection, One Winter Street, Boston, MA 02108;

James Milkey, Esq., Office of Attorney General, One Ashburton Place, Boston, MA 02108; and

Daniel R. Deutsch, Esq., Deutsch Williams Brooks Derensis & Holland, P.C., 99 Summer Street, Boston, MA 02110-1235.

---

**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

---

**RESPONSE OF  
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, ET AL  
TO REPLY OF NEW ENGLAND TRANSRAIL, LLC**

---

**Verification Statement**

New Bedford Waste Services, LLC ("New Bedford") is a party to a Petition and a Response filed by the National Solid Wastes Management Association, et al, to the Surface Transportation Board (the "Board") relating to an application for exemption filed by New England Transrail, LLC ("NET") under Section 10501(b) of the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (the "ICCTA").

The Petition and Response contend, among other things, that NET's proposed solid waste facility is not integrally related to the provision of rail service and we are providing this verified statement to supplement and explain in further detail the way in which our facility in New Bedford, Massachusetts (the "Facility") performs the same functions as the facility proposed by NET by converting solid wastes received with no economic value into commodities with independent economic value.

Our Facility, as with the facilities of our many competitors in New England, serves a screening function for wastes that are destined for disposal. At our Facility, we receive wastes and process by aggregating the wastes, sorting and segregating them, grinding and densifying the

materials, and removing recyclables. Following such processing, the materials are transported from our Facility for distribution in commerce, either for disposal, further processing, or recycling. Shipments can occur by truck, rail or barge, depending on destination and intermodal options.

When wastes are received at our Facility, they generally have a negative value; we are paid to accept them. These wastes cannot be sold in the form that they arrive and they are generally destined for disposal. Our Facility uses the various processing techniques mentioned above on different waste streams to separate them or change their physical form or content, and at the end of the processing we have generated a variety of commodities that can be sold into the market for reuse or can be sent for less expensive use or disposal than would have been the case if the wastes were disposed of in the form in which they arrived.

Examples of this processing and value creation follow:

- We receive loads of solid waste that have high cardboard content. We separate the cardboard from the remaining waste, we bale the cardboard and then we sell it as a raw material to recycling mills.
- We receive loads of construction and demolition material that have high wood and/or metal content. We screen out the wood and grind it, and then sell the wood chips as a fuel to power plants. We also separate out metals, such as iron, steel, copper, aluminum and brass, we bale some of these metals and sell all of them as commodities for processing into new metals at steel mills.
- We also grind construction and demolition material so that the aggregate can be reused for road construction. Fines generated in the grinding process are provided

to landfills for use as a substitute daily cover at a far lower cost than regular tip fees for disposal.

Each ton of material that we divert represents a ton of disposal cost saved, for which we have been paid, plus we receive revenue for commodity sales.

The processing we perform does not appear to be any different than the processing that is described in NET's various filings with the Surface Transportation Board. NET admits that it intends to store, segregate and bale loose waste materials, grind C&D Debris and other waste streams, transport waste materials on a conveyor system and crush waste materials using heavy mobile equipment. These activities are integral to the operation of facilities such as ours, and are the basic requirements to convert wastes with negative economic value to commodities with positive economic value.

We believe from reviewing the NET filings that NET intends to build a facility that serves precisely the same function as ours, but is attempting to do so without having to comply with all of the expensive state and local environmental permitting, construction and operational requirements and controls that we are subject to. This will give NET an unfair advantage in the marketplace.

For the foregoing reasons, the Surface Transportation Board should determine that the activities proposed by NET are not an integral part of the operations of a railroad, and are therefore outside the jurisdiction of ICCTA, and that the preemption of state and local laws provided by Section 1050(1) of the ICCTA does not apply to the proposed facility.

# VERIFICATION STATEMENT

I, Steven A. Camara, Vice President of New Bedford Waste Services, LLC, verify under penalties of perjury that I have reviewed the foregoing statement and that the facts set forth therein are true and correct based upon my personal knowledge, and that I have authorized counsel for NSWMA to file the foregoing statement with the Surface Transportation Board.

Signed on this 15 day of March, 2005.

Steven A. Camara V.P.  
Steven A. Camara, Vice President