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June 13, 2005

VIA MESSENGER and U.S. MAIL

Mr. Vernon Williams, Secretary
Office the Secretary
Surface Transportation Board
1925 K Street, NW, Room 700
Washington, DC 20423-0001

ENTERED
Office of Proceedings

JUN 13 2005

Part of
Public Record



**Re: STB Finance Docket No. 34690
New Haven National Rail Terminal Transportation Company, L.L.C. --
Lease And Operation Exemption -- Cedar Hill Yard, New Haven**

Dear Secretary Williams:

Enclosed please find an original and 11 copies of our Petition Of Providence And Worcester Railroad Company To Reject Notice Of Exemption Or, In The Alternative, For Stay Of Effectiveness, in the above-referenced proceeding, along with a disk containing said submission. Please date stamp and return 1 copy to our messenger for our records.

If you have any questions concerning this, please to not hesitate to contact me.

Best regards,

Edward D. Greenberg

Enclosures

cc: John Fiorilla, Esq. (via Facsimile and U.S. Mail)
Paul Hitchcock, Esq. (via Facsimile and U.S. Mail)
David Konschnik (via Facsimile)

EXPEDITED CONSIDERATION REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34690

**NEW HAVEN NATIONAL RAIL TERMINAL
TRANSPORTATION COMPANY, L.L.C. --
LEASE AND OPERATION EXEMPTION --
CEDAR HILL YARD, NEW HAVEN**



**ENTERED
Office of Proceedings**

JUN 13 2005

**Part of
Public Record**

**PETITION OF PROVIDENCE AND WORCESTER RAILROAD COMPANY TO
REJECT NOTICE OF EXEMPTION OR, IN THE ALTERNATIVE, FOR STAY OF
EFFECTIVENESS**

Pursuant to the provisions of 49 C.F.R. §§ 1117.1 and 1150.31, the Providence and Worcester Railroad Company ("P&W") requests that the Board stay the effectiveness of the Notice of Exemption ("Notice") filed in this docket by New Haven National Rail Terminal Transportation Company, L.L.C. ("NHTR"). Unless stayed by the Board, the Notice of Exemption will become effective on June 15, 2005.

I. THE NOTICE IS DEFECTIVE AND SHOULD BE REJECTED.

While the Class Exemption regulations set forth in 49 C.F.R. § 1150.31, *et seq.*, are intended to provide an efficient, summary procedure to permit acquisitions of rail

property by non-carriers and changes of operators, applicants are still required to provide a number of details concerning the nature of the proposed transaction to the Board and other parties who might be interested in or affected by the transaction. Yet, a review of the information contained in the Notice reveals little about the nature of the transaction, what is involved, what operations are contemplated, the property over which operations are to be conducted, or indeed whether the transaction is even jurisdictional.

For example, NHTR styled the title of its Notice as “Notice Of Lease And Operation Of Rail Line . . .” Other than the recital (Notice, at 3) that an entity called “NICESCA, LLP,” an entity somehow related to NHTR, leased five parcels of land from Conrail in 1996 in the Cedar Hill Yard, NHTR provides no information concerning any lease it may have of this or any other property over which it intends to operate. Nor has it provided any information explaining what right it would have to operate over any rail tracks. While would be users of 49 C.F.R. § 1150.31 are required to provide only a “brief summary of the proposed transaction.” (49 C.F.R. § 1150.33(e)), that description must still enable the Board and other parties to discern the nature of the transaction and what activities are being contemplated. NHTR has not satisfied that obligation.

It is similarly evident that NHTR has failed to provide information required by § 1150.33(e), such as “the proposed time schedule for consummation of the transaction,”¹ “the mile-posts of the subject property,” or the “total route miles being acquired.” Nor does Exhibit A to the Notice, which is virtually illegible, constitute the “map that clearly indicates the area to be served, including origins, termini,” While

¹ The Notice states only that NHTR “proposes to commence operations” soon after the date this Verified Notice of Exemption is filed.” (Notice at 4.)

NHTR alleges that it intends to “initially serve the needs of twenty-five different shippers within the leased premises” (Notice, at 4), it is impossible to discern where those industries are located, whether they are currently receiving rail service, the nature of the service that will be provided, or over which lines the service will be provided.

This is not an academic issue for P&W. P&W has operating rights within Cedar Hill Yard and is entitled to know whether and how the activities of NHTR will affect its operations. Yet, NHTR has not explained where or how it will operate or whether it intends to operate over tracks that P&W uses. Through agreements dated August 9, 1991 and March 12, 1993 with Conrail, P&W is authorized to operate over certain of the tracks leading to and within the Cedar Hill Yard.² Despite P&W's clear and present interest in the operation and condition of the Cedar Hill Yard Tracks and its actual presence in Cedar Hill Yard, neither NHTR nor CXS has even provided notice of what is going on or otherwise discussed this issue with P&W, let alone provided any indication in the Notice as to the extent to which P&W's operations might be affected.

Moreover, it is not at all clear that whatever transaction NHTR is proposing is even subject to Board jurisdiction. Based upon the sketchy details provided to date, it appears that the entirety of NHTR's existing and proposed service consists exclusively of operations upon tracks that are spur, industrial, team, switching, or side-tracks. All of the property described in the Notice is located within the Cedar Hill Yard, and NHTR appears to be providing switching service of some nature for a number of industries located on those premises. If that is the case -- and the Notice provides no indication that anything other than that might be involved -- the Board would have no jurisdiction

² The March 12, 1993 Agreement was actually entered into between Conrail and Connecticut Rail Systems, Inc., which was a wholly-owned subsidiary of P&W that was subsequently merged into P&W.

over the acquisition or operation of those tracks. 49 U.S.C. § 10906. *Brotherhood of Locomotive Engineers v. U.S.*, 101 F.3d 718, 727-28 (D.C. Cir. 1996); *Nicholson v. I.C.C.*, 711 F.2d 364, 367-70 (D.C. Cir. 1983).

Accordingly, since the Notice is procedurally defective and as the Board appears to have no jurisdiction over the proposed transaction, the Notice must be rejected.

II. IF JURISDICTIONAL, THE PROPOSED OPERATIONS ARE PRECLUDED BY THE ORDER OF THE SPECIAL COURT.

On April 13, 1982, the Special Court created by the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 985 (1974) issued its order ("1982 Order") approving and directing the consummation of expedited supplemental transactions, by which, as relevant here, P&W acquired certain of Conrail's rail assets in Connecticut and Rhode Island. In addition, pursuant to ¶ 21 of the 1982 Order, P&W was granted the exclusive right to succeed to Conrail's freight operations and freight service obligations at New Haven Station.³ In Decision No. 89 in STB Finance Docket 33388, *CSX Corporation and CSX Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company -- Control And Operating Leases/Agreements -- Conrail, Inc. And Consolidated Rail Corporation ("CSX/NS -- Control -- Conrail")*, the Board found that CSX would essentially be substituted for Conrail with respect to the rights and obligations established in the 1982 Order. And, in its Decision No. 101 in that docket, served November 19, 1998, the Board clarified its prior decision, concluding that

³ Paragraph 21 provides in pertinent part:

If Conrail elects to withdraw from or abandon or discontinue freight service obligations . . . on the terminal properties known as " New Haven Station" . . . Conrail shall sell said railroad properties at a reasonable price and on reasonable terms and conditions to be agreed upon by Contrail and P&W. . . .

CSX would succeed to Conrail's obligations with respect to the 1982 Order of the Special Court and that any withdrawal or discontinuance of service by CSX at the location would trigger P&W's rights to acquire those properties.⁴

As the Board may also recall, to preserve its rights under the 1982 Order, P&W also initiated suit in the federal district court against Conrail and CSX. (*Providence and Worcester Railroad Company v. Consolidated Rail Corporation, CSX Corporation and CSX Transportation, Inc.*, Civil Action No. 98-2195 (D. DC). That litigation was ultimately concluded when Judge Sporkin entered an order denying P&W's attempt to enjoin the defendants from transferring and/or encumbering the New Haven Station properties on the condition that CSX take no action to transfer and/or encumber those properties without providing two-weeks notice to the court and P&W. (Decision of Judge Sporkin, October 16, 1998.) CSX has provided no such notice to P&W.

With this background in mind, it is clear that CSX cannot properly enter into any agreement that has the effect of releasing CSX from its service obligations without triggering P&W's rights under the 1982 Order. While the nature of the activities proposed by NHTR is not explained, to the extent that the proposed transaction would create a new rail carrier that would be taking over CSX's common carrier responsibilities on these premises, by consenting to NHTR's presence as a rail carrier and entering into

⁴ That decision stated:

As appropriate under § 11321, we clarify that we only intended to override the 1982 Order of the Special Court to the extent necessary to permit the CSX/NS/Conrail transaction to go forward. In other words, our preemption was only to the extent that the Special Court order could be read to block this transfer. When CSX obtains the New Haven facilities, it will stand in Conrail's shoes. CSX will continue to honor the Special Court order, as it has agreed in this proceeding to honor other obligations of Conrail. Thus, if CSX "withdraws, abandons or discontinues" service at New Haven Station, P&W's rights under the 1982 Order will be activated.

an interchange agreement with that party, CSX would appear to be withdrawing from and discontinuing its service on the premises. In that event, P&W's rights under ¶ 21 of the 1982 Order of the Special Court would be triggered and it, not NHTR or any other third party, would have the right to acquire those properties and provide the rail carrier service. And, P&W does intend to exercise its rights under the 1982 Order to acquire any eligible property in Cedar Hill Yard.

Again, in view of the paucity of information provided in the Notice, it is not possible to understand the nature of NHTR's present or proposed operations. Nor does NHTR explain the nature of its arrangements with CSX, except to note that it expects "to enter into a formal interchange agreement with mutually acceptable terms in the near future" with that party. (Notice, at 3.) Although this Notice should be rejected for the reasons stated above, at the very least the Board should stay its effectiveness pending an explanation by NHTR and CSX as to the nature of their proposed arrangements and why this would not contravene the provisions of the 1982 Order as well as Judge Sporkin's 1998 Order. In the event NHTR and/or CSX elects to provide such an explanation, P&W should be entitled -- and reserves the right -- to submit a reply concerning this issue.

III. THE NOTICE IS IMPERMISSIBLY VAGUE CONCERNING THE SUBSTANCE OF THE PROPOSED ARRANGEMENTS.

In view of P&W's concerns for the condition of the properties in the Cedar Hill Yard (to which it has a clear successor interest) and that there be no cause for Congress to re-examine the scope of the preemption provision in § 10501(b), NHTR should be required to provide more information to the Board and other potentially interested parties as to the precise nature of its proposed activities.

Due to the scant information provided, it is not clear why NHTR has initiated this proceeding. P&W believes that this action may have been set in motion due to serious and continuing CSX service deficiencies in the area of New Haven Station. P&W understands that NHTR's affiliate is engaged in the solid waste disposal business in the New Haven area. The solid waste is tracked to Cedar Hill Yard, immediately transferred to rail cars, and transported by CSX to disposal sites. P&W understands that CSX's service problems have made it unable to timely provide rail cars to handle the solid waste shipments coming into the Cedar Hill Yard by truck. As a result, P&W believes that NHTR's affiliate has determined that it has become necessary to operate a solid waste storage/transload facility, at Cedar Hill Yard. Apparently, in-bound truck shipments of solid waste will be dumped on the ground and stored awaiting the eventual arrival of rail cars. Consequently, it appears that the real reason for the creation of NHTR and its filing of a Notice to become a railroad may be to evade federal, state and/or local environmental oversight over the siting, construction and operation of a facility engaged in the dumping, storing and handling of solid waste.

The Board is well aware of the growing practice of companies engaged in the disposal of solid waste to attempt to misuse the preemption provision in § 10501(b) for that purpose. See, e.g., STB Finance Docket No. 34192 (Sub-No. 1), *HiTechTrans LLC -- Petition for Declaratory Order -- Newark, New Jersey*, (decision served August 14, 2003). Such misuse is made possible when applicants using the exemption procedures avoid disclosure of the true nature of their plans and activities. Hence, where the Notice is devoid of meaningful operational details, it is incumbent on the Board to ensure that the process is not abused.

In this case, the Notice provides nothing to support the notion that NHTR intends, is willing or is able to actually provide common carrier railroad transportation for compensation. It has provided no details of its proposed activities, other than the fact that it or some other party has leased property in Cedar Hill Yard and that it intends to “interchange” with CSX. There is no statement of whether NHTR intends to operate locomotives, own or lease rail cars, provide either local or overhead rail operations, establish through rates and divisional arrangements with any other rail carriers, or otherwise actually operate as a railroad common carrier. Nor is there any indication as to whether the owners or management of NHTR have any experience in the railroad business, whether they are knowledgeable about the safety regulations administered by the Federal Railroad Administration, whether NHTR has any employees, whether it intends to establish a truck/rail transload facility where waste will be dumped and stored pending loading in rail cars, or whether, in short, it will really be a railroad.

If NHTR does intend to operate as a true railroad, and assuming the Board has jurisdiction over the transaction and NHTR cures the procedural and contractual defects noted above, then it may well be entitled to the exemption. However, if NHTR is actually a company primarily engaged in the solid waste disposal industry and is attempting to evade state and environmental safety and health oversight by creating a sham railroad in order to misuse the preemption provision of § 10501(b), that is a different matter.

When the Interstate Commerce Commission (“ICC”) promulgated the class exemption procedures, it contemplated that interested parties -- including the various States -- would have sufficient information concerning applicant’s operations to

determine whether a challenge was necessary (*Class Exemption -- Acq. & Oper. of R. Lines under 49 U.S.C. § 10901*, 1 I.C.C. 2d 810 (1985)). For example, in determining whether the procedure should include a specific comment period before becoming effective, the ICC concluded that this would not generally be necessary since “. . . as a practical matter, State and local governments receive actual notice well before the proposal is filed.” (*Id.*, 1 I.C.C. 2d at 816.) Here, local authorities were not included on the service list when the Notice was filed and it may well be that those entities were not so apprised. If that is the case, that shortcoming would appear to particularly problematic in this situation, since the Cedar Hill Yard is located adjacent to wetlands and abuts the Quinnipiac River. Indeed, when P&W approached CSX several years ago concerning its request to build a fueling station and several offices in Cedar Hill Yard, CSX advised that this would not be acceptable due to environmental concerns. Thus, even CSX is aware that the potential for serious environmental degradation on the premises in question in the absence of responsible governmental over-site might be a real possibility.

P&W's successor rights under the 1982 Order of the Special Court also provides P&W with a compelling reason to be concerned about the potential for environmental contamination at Cedar Hill Yard. Neither P&W nor any other legitimate rail carrier has an interest in permitting third parties to operate over its property if the result may lead to air or water contamination or other significant environmental concerns.

It is also worth noting that suggestions were made in the course of the Class Exemption proceeding that the ICC should require applicants to provide detailed financial and operating data. The ICC concluded that this was generally not necessary.

[T]hose directly involved (including the State) are, in fact, well aware of the financial condition of the potential acquirer, expected traffic, volumes and commodities, as well as intended operation.

(*Id.*, at 817.) Again, P&W does not know whether any other parties, including the State of Connecticut, has been privy to such information, but P&W has at least not received any. It is accordingly impossible to ascertain from the meager information supplied in the Notice whether the proposed arrangements constitute bona fide railroad operations within the meaning of § 10102(5).

In view of the clear concerns of potential abuse, the Board has not hesitated in the past to seek additional information from applicants when their notice filings were inadequate. For example, in STB Finance Docket 34281, *LB Railco, Inc. -- Lease and Operation Exemption -- Providence and Worcester Company* (served November 27, 2002), that applicant ultimately withdrew the Notice of Exemption it filed once the Board stayed its effectiveness. In that case, the Board concluded that Railco's Notice of Exemption contained "insufficient information to enable the Board to determine the extent to which environmental review is required. Nor does the Notice describe the track involved."

Similarly, in STB Finance Docket 34392, *New Jersey Rail Carrier LLC -- Acquisition and Operation Exemption -- Former Columbia Terminals, Kearny, NJ.* (decision served August 13, 2003), the Board issued a stay of the Notice of Exemption to allow the applicant to provide specific information concerning the nature of its

proposed operations. The Board specifically noted that the applicant's environmental certification was incomplete, that the New Jersey Department of Environmental Protection had raised serious concerns regarding the nature of the proposed operation, and that a significant question had been raised as to whether the proposed operations were really that of an intermodal transfer facility rather than a *bona fide* railroad. The Board, the Connecticut state regulatory agencies, P&W and the Nation's railroads have the right and need to know that the Class Exemption procedures are not being abused to establish sham railroads in attempts to evade legitimate and essential state oversight of the solid waste industry.

Accordingly, if the Notice is not rejected for the *reasons* stated above, P&W requests that the Board enter a stay of the effectiveness of exemption in this docket to require NHTR to provide an explanation of its proposed operations, whether it intends to operate a solid waste rail/truck transload facility, the nature of the freight it intends to handle, the names of its management and their qualifications to provide railroad transportation, the names and affiliations of any industries it intends to serve that are engaged in the solid waste disposal industry and any other information relevant to a determination of whether it would in fact be a railroad as that term is defined in § 10102(5). P&W also requests that the Board order NHTR to provide this information

to the appropriate Connecticut state regulatory authorities and P&W and that these parties be given a reasonable opportunity to respond.

Respectfully submitted,

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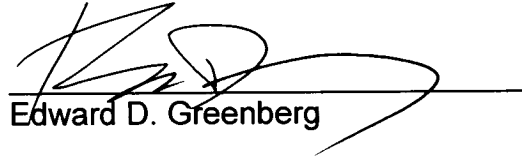
CERTIFICATE OF SERVICE
PETITION FOR EXEMPTION

The undersigned hereby certifies that a copy of the foregoing was served via
facsimile and U.S. mail on June 13, 2005 to the following:

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DATED: June 13, 2005


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