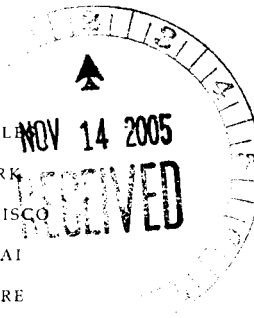


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November 14, 2005

By Hand Delivery

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

ENTERED
Office of Proceedings

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Public Hearing

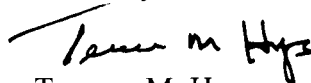
Re: STB Docket No. 34776, *National Solid Wastes Management Association, et al – Petition for Declaratory Order*

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceedings are an original and ten (10) copies of the Reply of The New York, Susquehanna, and Western Railway Corporation in Opposition to the Petition of the National Solid Wastes Management Association, et al. for Declaratory Order. A diskette containing an electronic version of the Reply is also enclosed.

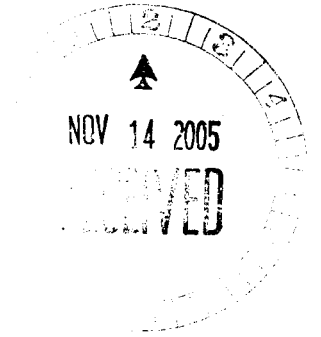
Please acknowledge receipt of the Reply for filing by date-stamping the enclosed extra copies and returning them via our messenger. If you have any questions, please contact the undersigned counsel.

Sincerely,


Terence M. Hynes

TMH:aat
Enclosures

215138



**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34776

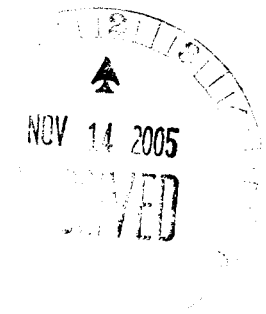
**REPLY OF THE NEW YORK, SUSQUEHANNA, AND
WESTERN RAILWAY CORPORATION IN OPPOSITION TO PETITION OF
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, ET AL
FOR DECLARATORY ORDER**

Office of the
General Counsel
U.S. Department of Transportation
Washington, D.C. 20590
November 14, 2005
Public

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Dated: November 14, 2005

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



Finance Docket No. 34776

**REPLY OF THE NEW YORK, SUSQUEHANNA, AND
WESTERN RAILWAY CORPORATION IN OPPOSITION TO PETITION OF
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, ET AL
FOR DECLARATORY ORDER**

The New York, Susquehanna and Western Railway Corporation (“NYS&W”) submits this reply in opposition to the “Petition of National Solid Wastes Management Association (“NSWMA”), et al. for Declaratory Order” filed in the above-captioned proceeding by NSWMA, New Jersey State League of Municipalities, City of Newark, Village of Ridgefield Park, Hainesport Township, Burlington County, The United States Conference of Mayors, Solid Waste Association of North America, Integrated Waste Services Association, and Construction Materials Recycling Association (the “NSWMA Petition”).¹ For the reasons set forth below, the NSWMA Petition should be dismissed as moot, or, at a minimum, should be held in abeyance pending further proceedings before the United States District Court for the District of New Jersey in *New York, Susquehanna and Western Railway Corporation v. Campbell* (Civil Action No. 05-4010 (KSH)) (*NYS&W v. Campbell*).

The NSWMA Petition asks the Board to issue a declaratory order, pursuant to 5 U.S.C. § 554(e) and 49 U.S.C. § 721(b)(4), finding that certain transloading operations conducted at NYS&W’s truck-rail transload facility located at 16th Street, North Bergen Township, Hudson County, New Jersey (the “16th Street Facility”) and at “other similarly situated locations”

¹ The petitioners are referred to collectively hereinafter as “NSWMA.”

(NSWMA Pet. 8) are not subject to the Board's exclusive jurisdiction, and that state and local regulation of such facilities is not preempted by 49 U.S.C. § 10501(b). Specifically, NSWMA asks the Board to find that the activities associated with transloading bulk shipments of construction and demolition debris ("C&D") from trucks into rail cars at the 16th Street Facility is "not integrally related to rail transportation" and "do[es] not constitute transportation by rail carrier." NSWMA Pet. 8.

While the Board has the authority (and has demonstrated its willingness) in appropriate cases to issue declaratory orders addressing the scope of ICCTA preemption, this is not such a case. The NSWMA Petition should be rejected, and this proceeding should be dismissed, for several reasons:

First, operations at the 16th Street Facility that is the subject of the NSWMA Petition have been discontinued, and that facility has been permanently closed. Accordingly, no active case or controversy exists with respect to the 16th Street Facility, and the NSWMA Petition is moot as to that facility.

Second, NSWMA's request for a broader declaratory order regarding "similarly situated facilities" is improper. Whether operations conducted at particular facilities constitute "transportation by rail carrier" under Section 10501(b) is an issue that must be determined on a case-by-case, fact-specific basis. Finance Docket No. 34192 (Sub-No. 1), *Hi Tech Trans, LLC – Petition for Declaratory Order – Newark, NJ* (served August 14, 2003) at 5. The NSWMA Petition contains no facts upon which the Board might base a declaratory order regarding the status of any other rail transload facility.

Third, NSWMA's Petition raises the very same issues, and is based upon many of the same facts, as those currently before the United States District Court in *NYS&W v. Campbell*. In

that case, NYS&W contends that certain regulations promulgated by the New Jersey Department of Environmental Protection (“NJDEP”) governing the design, construction and operation of truck-rail transload facilities, and NJDEP’s action in imposing monetary penalties on NYS&W for purported violations of those regulations, are preempted by 49 U.S.C. § 10501(b). A substantial record has been developed in that proceeding, and the parties are currently engaged in further discovery with respect to the very same issues as those raised in the NSWMA Petition (*i.e.*, whether the transload facilities operated by NYS&W are, in fact, “rail facilities” at which “rail transportation” takes place, within the meaning of ICCTA). The Court has scheduled an evidentiary hearing on December 12-13, 2005 to address those issues. A suggestion that the issues before the Court be referred to the STB for resolution was opposed by counsel for NJDEP, and was not accepted by the Court. *See* Exh. 1 (excerpts from transcript of hearing held in *NYS&W v. Campbell* on October 24, 2005) at 53-54. In these circumstances, issuance of the declaratory order requested by NSWMA would usurp the jurisdiction of the District Court, and could lead to inconsistent determinations with respect to identical issues of law and fact.

Accordingly, the Board should reject the NSWMA Petition or, at a minimum, defer any proceedings with respect to the Petition until the Court in *NYS&W v. Campbell* has had an opportunity to rule on the matters before it.

I. STATEMENT OF FACTS

A. The 16th Street Facility

NYS&W has ceased providing transportation services to Rail-Tech at the 16th Street Facility, and has permanently closed that facility. NYS&W is currently in the process of replacing its open-air facilities (including the 16th Street Facility) with new facilities at which C&D transloading operations will be conducted inside a building.

NSWMA errs in relating the facts about the operations that used to occur at the now defunct 16th Street Facility. Although it is impossible to address all the errors here, some glaring examples include:

- NSWMA’s position regarding the status of the 16th Street Facility is based almost exclusively on a July 25, 2002 Operating License between NYS&W and Rail-Tech, LLC.² Yet, NSWMA concedes that the Operating License “may not currently be in effect.” *Id.* In fact, it is not. As NSWMA acknowledges, other agreements submitted to the Court in *NYS&W v. Campbell* show that, the Operating License was superceded by other agreements to comply with the Board’s *Hi Tech* decision.
- Activities at the 16th Street Facility were not unfettered, as NSWMA would like the Board to believe. NSWMA’s assertion that the Operating License permitted Rail-Tech “to segregate, store, and remove from the Site an unlimited quantity and undefined types of incoming materials” (NSWMA Pet. 12.), is contradicted by the plain language of the Operating License.³

² NSWMA appears to have obtained a copy of this Operating License from the New Jersey Meadowlands Commission (a party to the *NYS&W v. Campbell* litigation). NSWMA Pet. 11, n.1; *see id.* at Exhibit A.

³ Section 1.1 of Operating License authorized Rail-Tech to use the facility “to perform transportation and Bulk Materials loading operations and for no other purpose.” NSWMA Pet., Exh. A, Operating License § 1.1 (emphasis added). Likewise, Section 2.1 of the Operating License stated explicitly that Rail-Tech’s use of the facility “shall be limited to activities related to loading Bulk Materials to railcar.” *Id.* § 2.1. Section 2.3 of the Operating License expressly prohibited the storage of materials at the facility, and restricted Rail-Tech’s right to “extract” items from materials tendered for rail shipment to those “materials not conforming to Bulk Materials standards” (*i.e.*, items, such as old tires, that might cause a rail shipment of C&D materials to be rejected at the destination landfill).

- NSWMA’s allegation that the Operating License “allow[ed] Rail-Tech to use the Site for truck to truck shipments” (NSWMA Pet. 12) is flatly contradicted by Section 2.2, which stated that “Operator may not use the Facility for any commercial trucking business other than as directly related to loading of Bulk Materials to railcars.” *Id.* § 2.2. NSWMA’s further assertion that “[p]resumably, some materials and wastes are also shipped from the Site by truck” (NSWMA Pet. 17) is not supported by any factual showing.

Finally, NSWMA’s Petition is based entirely upon allegations concerning the 16th Street Facility, which, NSWMA vaguely asserts, is a “representative” transload facility. NSWMA Pet. 7. NSWMA does not specify whether the 16th Street Facility is (in NSWMA’s view) “representative” of other NYS&W facilities at which C&D is transloaded or of all such facilities operated by any rail carrier. In either case, NSWMA proffers no facts whatsoever to support its claim that the business arrangements relating to, or the operations conducted at, the 16th Street Facility are in any way “representative” of the arrangements or operations at any other truck-rail transload facility.

In short, the factual allegations made by NSWMA to support its claim that operations performed at the 16th Street Facility did not constitute “transportation by rail carrier” are fatally undermined by the very evidence upon which NSWMA purports to rely.

B. The Pending District Court Litigation

The issue raised by NSWMA’s Petition – *i.e.*, whether the 16th Street Facility is a “rail facility” at which activities constituting “rail transportation” take place — is currently being litigated before the United States District Court for the District of New Jersey in *NYS&W v. Campbell*. That case involves certain NJDEP regulations concerning “Solid Waste Activities by

Rail Carriers” (codified at N.J.A.C. § 7:26-2D) (the “Transload Facility Regulations”). The Transload Facility Regulations apply specifically to rail transload facilities that handle “solid waste” (as that term is defined by NJDEP), and impose numerous requirements relating to the design, construction and operation of such facilities. NYS&W has argued that ICCTA preempts the application of the Transload Facility Regulations to its transload facilities — including the 16th Street Facility. NJDEP (like NSWMA) has taken the position that the operations conducted at the 16th Street Facility may not be “rail transportation” performed by a “rail carrier,” and that, if so, regulation of the 16th Street Facility is not preempted by Section 10501(b).

On July 27, 2005, NJDEP served NYS&W with an Administrative Order and Notice of Civil Administrative Penalty Assessment (“AONOCAPA”), alleging numerous violations of the Transload Facility Regulations at the 16th Street Facility and at four other truck-rail transload facilities operated by NYS&W. Among other things, the AONOCAPA ordered NYS&W immediately to modify the design and operation of its transload facilities to comply with the Transload Facility Regulations, and imposed a \$2,500,000 fine for alleged violations of those regulations. This fine included a penalty of \$500,000 for alleged violations at the 16th Street Facility.

NYS&W filed an action in federal district court, seeking a determination that the Transload Facility Regulations are preempted by Section 10501(b), as well as an injunction barring the state from enforcing the terms of the AONOCAPA. On August 16, 2005, the Court entered a temporary restraining order preventing the state from enforcing the AONOCAPA or otherwise interfering with NYS&W’s operations, pending a determination on the merits. Both parties subsequently moved for preliminary injunctive relief, presenting to the Court a voluminous record consisting of written testimony, documents relating to the ownership and

operation of the transload facilities at issue – including the agreements that governed the operation of the 16th Street Facility – and photographs depicting the current state of the facilities.

On October 24, 2005, the Court held a hearing on the motions for preliminary injunction. At the hearing, NYS&W demonstrated that, notwithstanding its position that the Transload Facility Regulations are preempted by Section 10501(b), NYS&W has voluntarily taken numerous steps to address NJDEP’s concerns about the health and safety impact of its transload operations. In particular, NYS&W advised the Court that it intended to close the 16th Street Facility (and NYS&W’s other open-air C&D transload facilities) and to replace them with covered facilities at several locations. *See* Exh. 1, Tr. at 46. NYS&W has, in fact, terminated its rail transportation contract with Rail-Tech on account of certain defaults by Rail-Tech under that contract, and has closed the 16th Street Facility. *See* Exh. 2 (Letter dated November 4, 2005 from N. Fenno (NYS&W) to F. O’Rourke (Rail-Tech)). The Court acknowledged that NYS&W had addressed many of NJDEP’s concerns, *see id.* at 6, and it further noted the public interest in transporting C&D by rail. *See id.* at 46-47.

At the October 24 hearing, NJDEP sought leave to conduct further discovery regarding the relationships among NYS&W, its C&D shippers and the parties engaged by NYS&W to perform loading services at the 16th Street Facility (and NYS&W’s other transload facilities), in order to determine whether those operations constitute “transportation by a rail carrier.” The Court authorized NJDEP to conduct limited discovery with respect to those issues, and scheduled a hearing for December 12-13, 2005. The Court indicated that it will hear testimony and argument at the December hearing concerning “the current and planned conditions of . . . NYS&W facilities” and the “[p]arties’ positions as to the preemption of the Transload Facility Regulations.” *See* Exh. 3, *NYS&W v. Campbell*, Order issued November 1, 2005, ¶ 7.

Significantly, at the October 24 hearing, NYS&W suggested that the Court consider referring the case to the STB to permit the Board to opine on the question of “whether indeed these are rail facilities, and whether this is [rail] transportation.” *See* Exh. 1, Tr. at 53. However, NJDEP opposed such a referral (*see id.* at 54), and the Court did not act on that suggestion.

II. ARGUMENT

A. NSWMA’s Petition Should Be Dismissed As Moot

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board has discretion to issue a declaratory order to terminate a controversy or to remove uncertainty. *See Intercity Transportation Co. v. United States*, 737 F.2d 103 (D.C. Cir. 1984); *Delegation of Authority -- Declaratory Order Proceedings*, 5 I.C.C.2d 675 (1989). The Board is clearly willing in an appropriate case to issue a declaratory order to address issues relating to the scope of ICCTA preemption. *See, e.g.*, STB Finance Docket No. 34662, *CSX Transportation, Inc. - Petition for Declaratory Order* (decided Mar. 14, 2005). The Board has, in fact, previously issued a declaratory order discussing the application of Section 10501(b) preemption to the operation of truck-rail transload facilities that handle C&D materials. Finance Docket No. 34192, *Hi Tech Trans, LLC – Petition for Declaratory Order – Newark, NJ* (served August 14, 2003).

However, there is no controversy or uncertainty that could be resolved by the issuance of a declaratory order in the instant proceeding. NSWMA’s request for declaratory relief is premised entirely upon (erroneous) allegations of fact relating to a single truck-rail transload facility – NYS&W’s 16th Street Facility. NYS&W has ceased providing service to Rail-Tech via the 16th Street Facility, and has closed that facility. *See* Exh. 2. NYS&W does not intend to reopen the 16th Street Facility in the future. Rather, as NYS&W has advised the Court at the October 24, 2005 hearing in *NYS&W v. Campbell*, NYS&W is in the process of replacing the 16th Street Facility, and its other open-air C&D transload facilities in New Jersey, with new

facilities at which C&D transloading operations will be conducted inside a building. When those facilities are completed, NYS&W's open-air C&D transload facilities will be permanently closed. *See* Exh. 1, Tr. at 46, 53.

In these circumstances, the issues raised by NSWMA with respect to the 16th Street Facility are moot, and the NSWMA Petition should be dismissed. *See, e.g.*, Docket No. 41258, *United Transportation Union – Petition for Declaratory Order – Kelley's Creek and Northwestern Railroad*, (served August 23, 1994) (petition seeking declaratory order regarding alleged unlawful abandonment dismissed as moot upon filing of abandonment exemption petition); Docket No. 40220, *Bessemer and Lake Erie R. Co. – Petition for Declaratory Order – Interchange Facilities and Trackage Rights*, (decided July 10, 1990) (declaratory order petition arising from railroad strike dismissed as moot upon settlement of strike). *See also* Finance Docket No. 34020, *Fletcher Granite Company, LLC – Petition for Declaratory Order*, (served June 29, 2001) (petition seeking declaration as to preemption of state/local regulation of prospective resumption of rail service denied where no state/local action to regulate had taken place); Docket No. MC-C- 30205, *USX Corporation, U.S. Steel Group – Petition for Declaratory Order*, (served November 9, 1992) (petition for declaratory order dismissed where there was no active controversy).

NSWMA's request for declaratory relief with respect to (allegedly) "similarly situated facilities" (NSWMA Pet. 8) should likewise be dismissed. The NSWMA Petition contains no facts whatsoever to support a finding that the business arrangements relating to, or the operations conducted at, NYS&W's 16th Street Facility are in any way "representative" of the arrangements or operations at any other truck-rail transload facility. In any event, "[w]hether a particular activity constitutes transportation by rail carrier under section 10501(b) is a case-by-case and

fact-specific determination.” Finance Docket No. 34192 (Sub-No. 1), *High Tech Trans, LLC – Petition for Declaratory Order – Newark, NJ* (served August 14, 2003) at 5. In the absence of a specific demonstration of facts regarding the nature of, and operations at, any truck-rail transload facility other than the 16th Street Facility, there is no basis in the record upon which the Board could properly issue a declaratory order relating to such other facilities at this time.

Accordingly, NSWMA’s Petition should be dismissed in its entirety.

B. At A Minimum, The Board Should Hold This Proceeding In Abeyance Pending Further Order of the District Court.

Even if the Board does not dismiss the NSWMA Petition as moot – and it should – the Board should, at a minimum, hold this proceeding in abeyance pending further action by the Court in *NYS&W v. Campbell*. The same issue presented by NSWMA’s Petition (*i.e.*, whether NJDEP regulation of the 16th Street Facility is preempted by ICCTA) is currently pending before the Court in that case. The Court did not adopt the suggestion that the preemption issue be referred to the STB, but instead scheduled a further evidentiary hearing at which the Court indicated it would address that issue. *See* Exh. 3, *NYS&W v. Campbell*, Order issued November 1, 2005, ¶.

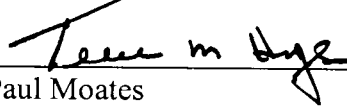
In these circumstances, the Board should adhere to its past practice of not exercising its discretion to issue a declaratory order where a district court “has made clear its desire to resolve the issues raised without referring the matter to the Board.” *See* Finance Docket No. 34052, *Green Mountain R.R. Corp. – Petition for Declaratory Order* (May 28, 2002) (refusing to grant petition where district court that was considering identical ICCTA preemption issue declined to refer matter to Board). Where a Court has chosen to decide the applicability of ICCTA preemption itself, comity and the need to prevent inconsistent outcomes suggest that the Board should not institute a competing declaratory order proceeding to address the same issue.

That conclusion is particularly applicable in this case, where the Court is in a better position than the Board to evaluate the facts relevant to the ICCTA preemption issue. The Court has access to a substantial factual record that includes details regarding the nature of the business arrangements at each of NYS&W's C&D transload facilities, the manner in which operations at each of those facilities are being conducted, and the actions taken by NYS&W in response to the health and safety concerns expressed by NJDEP regarding its transload activities. Discovery with respect to those issues is ongoing, and further testimony and evidence will be presented to the Court at a hearing scheduled for December 12-13, 2005. In contrast, the only "evidence" available to the Board at this time consists of allegations by NSWMA regarding a single transload facility — the 16th Street Facility — that is no longer in operation. Even as to that facility, NSWMA's allegations are based entirely upon a defunct Operating License and several photographs taken nearly a year ago (in December 2004 and January 2005), before the remedial actions described by NYS&W to the Court were undertaken. NSWMA's conclusory (and facially inaccurate) assertions do not provide any basis upon which the Board could make a "fact-specific determination" as to whether operations at the 16th Street Facility — much less any other transload facility — constitute "transportation by rail carrier" under Section 10501(b). Finance Docket No. 34277, *H&M Int'l Transp., Inc. – Petition for Declaratory Order* (Nov. 12, 2003). Accordingly, if the Board does not dismiss the NSWMA Petition (which it should), it should hold this proceeding in abeyance until the Court has had an opportunity to rule on the preemption issue, based upon the more complete record before it.

CONCLUSION

For all of the foregoing reasons, NYS&W respectfully requests that the Board deny the NSWMA Petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Terence M. Hynes", is written over a horizontal line.

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Attorneys for The New York, Susquehanna and
Western Railway Corporation

Dated: November 14, 2005

CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of November 2005, I served the foregoing Reply of The New York, Susquehanna, And Western Railway Corporation In Opposition To Petition Of National Solid Wastes Management Association, Et Al for Declaratory Order by causing a copy thereof to be delivered by overnight courier to:

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and by first class mail, postage prepaid, to:

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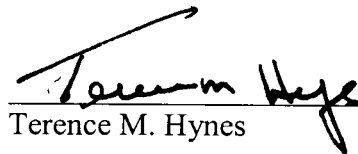
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Terence M. Hynes

IN THE UNITED STATES DISTRICT COURT

Exhibit 1

FOR THE DISTRICT OF NEW JERSEY

CIVIL NO. 05-04010

NEW YORK SUSQUEHANNA AND
WESTERN RAILWAY CORP,

Plaintiffs,

-vs-

BRADLEY M. CAMPBELL, et al

Defendants

: MOTIONS

Newark, New Jersey

October 24, 2005 2 p.m.

B E F O R E:

THE HONORABLE KATHARINE S. HAYDEN, U.S.D.J.

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Pursuant to Section 753 Title 28 United States Code, the following transcript is certified to be an accurate record as taken stenographically in the above-entitled proceedings.

Ralph F. Florio
Official Court Reporter

regulations preempted the Congress swept away and swallowed up local and state enforcement of local and state laws with respect to it as a railway, and we were off and running on both some fairly esoteric risk and important issues of law as well as day-to-day operation of the plaintiff's transload facilities, five of which are located in North Bergen and are the focus of the applications to the Court.

Recognizing that we would have an opportunity to more fully develop a record for the Court, and finding that the preliminary showing had been made by the plaintiff, I entered an order and that order essentially provided the relief requested.

Consistent with the terms of the order, counsel for the state has had an opportunity to brief and make submissions of its own in opposition to the relief granted and the theory of the lawsuit. And the plaintiff has had an opportunity more fully to file papers seeking to make preliminary restraints permanent, or at least preliminary enough to take us beyond this return date.

The specific relief that was granted was that that the defendant shall cease and desist from implementing enforcing or permitting implementation or enforcement of the AONOCAPA, A-O-N-O-C-A-P-A, all initial caps, no dots, against the plaintiff Railway and that the defendant shall cease and desist from attempting to collect the penalties assessed in the AONOCAPA or from calculated interest or additional penalties, and that the defendant cease and desist from otherwise implementing enforcing and permitting the implementation or enforcement of the transload facility regulations against the plaintiff in any way.

The order further provided that the defendant, Campbell, may move to dissolve or modify the restraints set forth upon two day's

notice. The parties agreed to reasonable inspection by DEP during normal business hours, or any time or emergency at the facility. And the return date then was September 22, 2005, and by consent-- maybe the return date was a little bit later than that. It was the 26 of September, and by concept it was extended until today.

So in essence between the middle of August and now the plaintiff has had the benefit of protections of this Court, while I understand certain undertakings have been going on in the case to improve the condition of its transload facilities.

Today I want to hear from both sides, because the state is not merely opposing but seeking an injunction of its own, whereby the transload facilities we have been talking about and will be talking about at more length, be shut down until they are in full compliance with the regulations. And we're going to call them the 2D regulations for reasons that I am sure will become clear during the argument of counsel.

I don't want to be the exclusive introducer of jargon, when you folks know it so much better than I, but that's the jargon to date. So I want to hear from the plaintiff.

I want to assure everybody that I have read carefully the moving briefs. I had gotten a general idea of the specific certifications the state has submitted. And I understand why it was submitted. I have reviewed certain attachments, which indicate the condition of some the transload facilities in the course of the summer.

I have heard informally from counsel that some of the more disturbing situations as described in good detail by the state have been attended to. And I'm aware that counsel have expended a great deal of time and effort in presenting their respective positions and that the

positions emanate from very embedded and fundamental and traditional legal concepts that any citizen would understand.

For its part, the plaintiff argues that because it is a railway carrier it comes under the sway of federal legislation which has preempted local and state authorities from seeking to regulate in that area. That's about as fundamental, as constitutional and solid a statement as one could make. No one is surprised that under the Interstate Commerce, railways enjoy a long standing protection from the reach of local and state regulations.

And for its part, New Jersey, and what state could speak more authority than New Jersey, speaks of its long standing commitment and tremendous need for an environmentally conscience regulatory system to deal with the problem of industrial waste and hazardous material.

So we have the classic confrontation of two strongly held and well-established legal principles. And the good and welfare of the people of the state of New Jersey and the way in which commerce has conducted all, I won't say hang in the balance, that would be ridiculous. And as hard as counsel has worked, I don't think anybody is asking me to say that. But we are dealing with serious issues that involve serious thoughtful, principled and responsible action.

So with that in mind, I ask counsel to bring me up to date, to refrain from extreme positions and to give me your best picture about what is going on in the here and now that affects these particular transload facilities.

This room is quite full of good lawyers and people who are more than interested. There are actually parties to a third-party litigation brought on by the state of New Jersey, which I will ask Mr. Auerbacher, when he argues, to explain to me so that this record

THE COURT: Can I keep you by the microphone, Mr. Auerbacher. I'm losing you a little bit.

MR. AUERBACHER: Sorry, your Honor. I am soft spoken. Just to respond to that a little bit. In terms of moving solid waste by rail. This isn't an effort to block movement of waste by rail. This is rather an effort to make sure these types of facilities are operated properly. There's a lot in the papers concern about complying with Ohio law. We would like to see the railroad comply with New Jersey law, dealing with public safety, considerations here in New Jersey.

This is in the context of their argument that they're simply removing non-compliant waste so that they could comport with law out in Ohio. We want to make sure the movement of waste here in New Jersey is done properly.

The other thing is, I think we discussed this being a new industry. One of the concerns of the department in the Meadowlands is that we don't have a movement of waste-- the waste industry into simply moving over to get the benefit of a preemption defense when they are really not truly operation by rail carrier, as we have indicated. That's something we intend to explore in our expedited discovery.

Turning back to the specific sites. The Secaucus road site. There's a habit of rain events that at water accumulates on the pad and discharged into adjoining storm sewers, which is ultimately discharged into the Penhorn Creek (ph), which leads into the Hackensack river.

It's been suggested by the department that streets sweepers need to be used to check waste residue at the end of every day so you don't have some of these storm water runoff issues at Secaucus Road site.

All of the building need to meet the fire code when they are

constructed. So, while it's is a good thing that the buildings are constructed because it eliminates some of the pollution associated with these operations, they need to be done in a way that meets the fire code.

On 16 Street. I guess there was some argument concerning the 16 Street being suspended. Does that mean the 16 Street facility is not going to operates anymore? May I address that to counsel.

THE COURT: Sure.

MR. MOATES: My understanding that 16 Street facility, the operation have been suspended. I use that word intentional by the railroad. I am not representing that under no circumstances it might not operate it. But I would repeat, and hope to put counsel's concern at rest. We are not going to operate any closed C&D facilities, not until the end of this year. So even for whatever reason, and I don't know one right now, other than the seven trucks that got over there over the weekend, for any reason there's got to be any more movement of material through that facility, it won't go any later than December.

I believe from what I was told at the break, that the railroad's position, it is closed now, suspended, we will have to deal with whatever happened.

MR. AUERBACHER: That is the easy one to deal with if it is closed, so I guess it's gray, suspended.

THE COURT: Let me ask you something, Mr. Auerbacher.

MR. AUERBACHER: Yes.

THE COURT: We heard the railway explain that fully a quarter of its revenues are going to be coming from this, apparently not only virgining, but fairly new industry that has risen up in response to the need to do something with bulk waste and unavailability of more local

landfills to get rid of it. Along with the location and endorsement of landfills, specifically for that purpose far away, that requires long distance hauling.

And I didn't hear you disagree that rail transportation in that context is efficient and probably environmentally a decent thing. Am I right about that? I will put you right back by the microphone.

MR. AUERBACHER: Right. The waste is going to move regardless of whether it's rail or truck. Are there advances to rail? I suspect there may be.

THE COURT: We are not saying its better than. We are saying it has a place to, a role to play in this.

MR. AUERBACHER: It has a role as long as the role is not operations that are designed to evade any form of regulations and health and safety regulations.

THE COURT: I'm hearing you. Believe me, I'm hearing you. I am taken with something that's developed because of the dialogue. Off the record.

(Discussion held off the record).

THE COURT: One of the things that has come out of this dialogue, as opposed to adversary argument, is that we are all on relatively new ground, littered, muddy, strewn, but new, and we are in a state that has been duly recognized by everyone for its hard working and sometimes Herculean efforts to deal with the problem.

One of the amazing things to do, and I invite you to do it, Mr. Moates, is to drive around the state of New Jersey. It is both heartening and bewildering how many faces this state has. There are rolling hills that you think will never end. There is of course a shore. There are areas such as we are looking up here. There are very

filed.

These photographs show you that we are getting our act together. We've moved forward in good faith. And again, by end of this year, all this stuff is going to take place in an enclosed facilities.

Is there more to do? Yes. Are we prepared to do everything those 2D regulations tell us to do, literally? No.

We respectfully submit, we do not have to as a matter of law.

We keep saying it, and I'll say it again, we want to negotiate a good faith with the state on waste, to kind of get to resolve concerns they have, legitimate concerns they have in way both satisfactory to them and satisfactory to and cost effective for the Susquehanna.

As far as third-party litigation, your Honor, this is going to be difficult. It's going to be, I'm afraid, complex and expensive, and I would at least suggest as I did in there, and I'll say it for the record here. One alternative that your Honor might consider, would be referral of this matter to the Surface Transportation Board, which is the expert federal agency given exclusive jurisdiction over rail transportation by Congress, to ask that agency to advise you, not to issue an injunction, whatever, counsel is right, they don't have that authority. They really do, but not in this kind of a matter. But not to send it for that purpose, but to ask them for their expert view as to whether indeed these are rail facilities, and whether this is transportation, and therefore, whether this is preempted activity.

Thank you, your Honor.

THE COURT: Thank you.

MR. AUERBACHER: Two quick points, your Honor?

THE COURT: Yes.

MR. AUERBACHER: Yes.

THE COURT: Could one of your colleagues take the stuff down so counsel will resume while talking?

MR. AUERBACHER: Sure. With respect to also point by STB. The current situation needs expedited relief. The proceeding before STB is a difficult cumbersome process. It not affect the remedy we need in this matter.

In closing, your Honor, the point I made earlier, this is a moving target without an order requiring compliance; we cannot rely on voluntary compliance. We urge the Court to respectfully to grant the order. Thank you.

THE COURT: Thank you very much, counsel. I will give you my decision on the matters raised today in 10 minutes. I won't be long. I just want to give everybody a chance to clear their heads, including the Court. Thank you, I'll be right back.

THE COURT: Off the record.

(Short Recess).

THE COURT: Back on the record. Something you said caught my ear, Mr. Auerbacher. I just want a little bit of clarification.

When you were defending the right of the state to enforce the 2D regulations, you indicated that the position of the railway that these were environmental regulations was not correct. That they were in fact health and safety regulations. I think that was the distinction you were making, that was the characterization you were putting on the 2D.

MR. AUERBACHER: Yes.

THE COURT: Is that because, or does that lead to-- to the legal inference that if that is the characterization of these regulations, preemption would not control and that there is a

The New York, Susquehanna and Western Railway Corporation
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607-547-2555
Fax: 607-547-9834
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November 4, 2005

Via Fax 201-840-7799

Frank O'Rourke, Executive V.P.
Rail-Tech, LLC
1034 Hudson Avenue
Ridgefield, NJ 07657

RE: Railroad Facility at 16th Street, North Bergen
Rail Transportation Contract dated June 2, 2005

Dear Mr. O'Rourke:

This letter is in regard to the above-referenced facility and agreement, as well as the ongoing litigation and our August 11, 2005 letter to you, all of which are incorporated by reference.

Under the Rail Transportation Contract, Rail-Tech committed to make certain payments on or before July 31, 2005. Rail-Tech has not made the required payments, and its representatives recently indicated that such payment would not be forthcoming. Accordingly, Rail-Tech is in default under the terms of the Rail Transportation Contract. This letter serves as NYS&W's notice of termination of the Rail Transportation Contract pursuant to Section 13.

As you are also aware, Rail-Tech's default under the agreement is a direct cause of NYS&W's inability to forestall the force majeure conditions referred to in our August 11, 2005 letter. Accordingly, NYS&W has no alternative but to close the existing facility on November 7, 2005. We will make reasonable efforts to handle your material at other railroad facilities, subject to existing contractual commitments to others, should you so desire.

Sincerely,

A handwritten signature in black ink, appearing to read 'Nathan R. Fenno', with a stylized flourish extending to the right.

Nathan R. Fenno
Executive Vice President-General Counsel

NRF:ksp

WOLFF & SAMSON PC

John A. McKinney, Jr., Esq. (JAM-3635)

One Boland Drive

West Orange, New Jersey 07052-3698

973-530-2036

Counsel for Plaintiff The New York, Railroad and Western

Railway Corporation and Third-Party Defendant Susquehanna Bulk Systems, Inc.

Exhibit 3

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

NEW YORK, SUSQUEHANNA AND	:	Civil Action No. 05-4010 (KSH)
WESTERN RAILWAY CORPORATION,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
BRADLEY M. CAMPBELL, in his	:	
official capacity as Commissioner of the	:	ORDER CONTINUING RESTRAINTS,
New Jersey Department of Environmental	:	DENYING APPLICATIONS FOR
Protection, NEW JERSEY	:	PRELIMINARY INJUNCTION
MEADOWLANDS COMMISSION, et al.,	:	WITHOUT PREJUDICE AND
	:	GRANTING LEAVE FOR LIMITED
	:	DISCOVERY
Defendants/Counterclaimants/	:	
	:	
Third Party Plaintiffs,	:	
	:	
v.	:	
	:	
MHF LOGISTICAL SOLUTIONS, INC.,	:	
SLANE RAIL TRANSPORT, LLC,	:	
PRECISE CONSTRUCTION	:	
CONTRACTING, INC., RAIL-TECH, LLC,	:	
HUDSON-NATIONAL, LLC, CARDELLA	:	
TRUCKING CO., INC., ON TRACK	:	
LOADING COMPANY, INC.	:	
MILLENIUUM RESOURCE RECOVERY,	:	
LTD., X-PRESS RAIL TRANSFER, LLC	:	
d/b/a 94th STREET RAIL TRANSFER,	:	
LLC, SCOTT EXCAVATING, LLC,	:	
CROSSROADS RECYCLING, INC. and	:	
SUSQUEHANNA BULK SYSTEMS, INC.	:	
Third Party Defendants.	:	

THIS MATTER having been opened to the Court by Wolff & Samson PC, attorneys for Plaintiff The New York, Susquehanna & Western Railway Corporation ("NYS&W") and

Susquehanna Bulk Systems, Inc., on notice to Defendants; and the Court having entered the Order to Show Cause with Temporary Restraints on August 16, 2005 which, *inter alia*, compelled Defendant Bradley Campbell, Commissioner of the New Jersey Department of Environmental Protection (“Campbell”), to cease and desist (a) from implementing, enforcing, or permitting the implementation or enforcement of the July 27, 2005 Administrative Order and Notice of Administrative Penalty Assessment (“AONOCAPA”) against NYS&W, (b) from attempting to collect penalties assessed in the AONOCAPA or from calculating interest or additional penalties, and (c) from otherwise implementing, enforcing, or permitting the implementation or enforcement of the N.J.A.C. 7:26-2D-1 et seq. (the “Transload Facility Regulations”) against NYS&W in any way; and NYS&W seeking a preliminary injunction on the return date similarly restraining and enjoining Defendant Campbell during the pendency of this action; and Defendants having filed opposition to NYS&W’s application for preliminary injunctive relief, having filed a Counterclaim & Third-Party Complaint, and having moved for (a) a preliminary injunction enjoining NYS&W and the Third-Party Defendants from conducting any activities at the facilities located in North Bergen, New Jersey, specifically, 5800 West Side Avenue, 2480 Secaucus Road, 16th Street, 43rd Street, and 94th Street (collectively, the “NYS&W facilities”), other than removal of existing waste at the sites, until said facilities are in compliance with the Transload Facility Regulations and until NYS&W fully complies with a certain Stipulation entered into in March, 2001, and (b) for leave to conduct limited expedited discovery with respect to the Third-Party Defendants on the issue relating to the control of said facilities; and NYS&W having filed opposition to Defendants’ motion; and the Court having reviewed the submissions of the parties, having heard arguments of counsel, and for the reasons more specifically set forth on the record on October 24, 2005,

IT IS on this 1st day of November, 2005, **ORDERED** as follows:

1. The restraints contained in the August 16, 2005 Order to Show Cause with Temporary Restraints shall remain in full force and effect until further order of this Court;
2. NYS&W's application for a preliminary injunction is denied without prejudice;
3. Defendants' motion for a preliminary injunction is denied without prejudice;
4. Defendants' motion for leave to conduct expedited discovery is granted;
5. Defendants are granted leave to conduct limited discovery, under the direction of Magistrate Judge Mark Falk, of the Third-Party Defendants on the issue of the role of the Third-Party Defendants in NYS&W's freight rail operations, said discovery to be conducted by the Defendants in a method that minimizes the Third Parties' costs in connection with said discovery;
6. Reasonable inspections of the NYS&W facilities by New Jersey Department of Environmental Protection during normal business hours, or at any time during an emergency at the facility, will be permitted until further order of this Court;
7. A hearing will be held on December 12, 2005 at 10:30 a.m. and December 13, 2005 at 10:00 a.m. for the purpose of providing to the Court information concerning the current and planned conditions of the NYS&W facilities as of that date and by the end of the year, the Defendants' position as to said conditions and as to any additional changes to the facilities to be requested of the NYS&W by Defendants, if any, and the Parties' positions as to the preemption of the Transload Facility Regulations. Counsel shall exchange witness lists by December 1st anticipating that live testimony will be completed within the two hearing dates provided;
8. The Plaintiff and Defendants, simultaneously, shall file written submissions in conjunction with the hearing set down in paragraph 7 no later than December 1st. Any reply

documents, which must be limited to matters deemed strictly necessary for the Court to know about, shall be filed no later than December 8, 2005. **Courtesy copies (2) of electronically filed submissions shall be supplied to the Court by directing hard copies to the Clerk's Office, Attn. Judge Hayden.**

9. A Copy of this Order shall be served upon all parties of record within 5 days
Wolff & Samson PC's receipt of this Order.

/s/ Katharine S. Hayden

HON. KATHARINE S.HAYDEN, U.S.D.J.