

March 10, 2006

VIA ELECTRONIC FILING

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

Re: *New England Transrail, LLC d/b/a Wilmington & Woburn Terminal Railway – Petition
for an Exemption from 49 U.S.C. § 10901 to Acquire, Construct and Operate as a Rail
Carrier on Tracks and Land in Wilmington and Woburn, Massachusetts,
Finance Docket No. 34797*

Dear Secretary Williams:

Enclosed for electronic filing is our opposition to New England Transrail, LLC's Motion
for Leave to File Sur-Reply, filed on behalf of National Solid Wastes Management Association,
Solid Waste Association of North America (National and Massachusetts chapters),
Massachusetts Municipal Association, Construction Materials Recycling Association, Integrated
Waste Services Association, and New Bedford Waste Services, LLC.

Thank you for your attention to this matter.

Sincerely yours,



Stephen M. Richmond

SMR:mjg
Attachment

cc: Service List for STB Finance Docket No. 34797 (by mail with attachment)

Beveridge & Diamond, P.C.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34797

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

**OPPOSITION OF NATIONAL SOLID WASTES MANAGEMENT
ASSOCIATION, ET AL
TO REQUEST OF NEW ENGLAND TRANSRAIL, LLC
FOR LEAVE TO FILE SUR-REPLY**

Counsel for National Solid Wastes Management Association, et al

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The National Solid Wastes Management Association, Solid Waste Association of North America, Solid Waste Association of North America - Massachusetts Chapter, Massachusetts Municipal Association, Construction Materials Recycling Association, Integrated Waste Services Association, and New Bedford Waste Services, LLC (collectively, the “Coalition Parties”) respectfully file the following opposition to the request of Petitioner, New England Transrail, LLC (“NET”), for leave to file a reply-to-reply in the above-referenced proceeding. While NET has attempted to disguise its motion as a request to file a consolidated reply to comments, this is nothing more than a reply-to-reply, which is prohibited by the rules of practice of the Surface Transportation Board (the “Board”).

Pursuant to 49 CFR § 1104.13(c), the Board’s regulations expressly prohibit the filing of a reply-to-reply. In practice, the Board has consistently expressed that this prohibition will not be waived unless good cause is shown for departure from the rule. *See Union Pacific Corporation - Control and Merger*, STB Finance Docket No. 32760 (STB served July 27, 2005). In particular, the Board has stated that the prohibition on a reply-to-reply should not be

waived where the information to be submitted simply repeats arguments made previously (*see WTL Rail Corporation - Petition for Declaratory Order*, STB Docket No. 42092 (STB served July 27, 2005)), or responds to information that was available at the time of the initial filing (*see Keokuk Junction Railway Company - Feeder Line Acquisition*, STB Finance Docket No. 34335 (STB served Feb. 7, 2005)), or where a party had the opportunity to discuss an issue or make arguments previously [*see City of Lincoln - Petition for Declaratory Order*, STB Finance Docket No. 34425 (STB served August 12, 2004); *WTL Rail Corporation - Petition for Declaratory Order*, STB Finance Docket No. 42092 (STB served June 23, 2005)].

NET's sur-reply does not attempt to respond to new facts. Nothing in its filing remotely suggests that it presents or analyzes information not previously available. Instead, NET's lengthy pleading repackages its previous arguments and mischaracterizes the arguments made by commenters on its underlying petition. NET baldly claims that its motion is "designed to aid the Board by providing a 'road map' to the record". *See Petitioner's Motion for Leave to File Consolidated Reply to Comments* at 2. In fact, NET simply seeks another bite at the apple, trying to reargue where its prior analysis was weak. It is simply antithetical to the Board's rules of practice that a party would be allowed to file a reply-to-reply in an attempt to strengthen its prior arguments and redefine the comments of its critics, absent a showing that the pleading is necessary to correct a manifest injustice. *See* 49 CFR § 1100.3; *Keokuk Junction* at 5.

As examples, we note the following:

1. NET claims that all of the arguments made by the many commenters in opposition to its petition can be categorized into four simple issues. In so doing, NET attempts to redirect the Board's attention to the issues NET wishes to

discuss and to exclude from consideration many important arguments that have been made and never addressed by NET.

2. NET reargues the statutory history of the ICCTA, notwithstanding that this statutory history was completed many years before NET filed its petition in December, 2005.
3. NET curiously asserts that the Coalition Parties have resorted to “name calling” by identifying the NET proposal as a “processing facility,” but then fails even facially to respond to the several economic and industry facts now in evidence that establish the commodity value of the materials NET has *admitted* it will remove from the waste stream while the materials are under its control.
4. In a misapplication of a U.S. Supreme Court case, NET suggests that the Board should analyze its petition consistent with *U.S. v. Union Stock Yard & Transit Co.*, 226 U.S. 286 (1912). This case involves interlocking companies in the cattle business seeking to avoid the establishment of tariffs and engage in unfair competition. This case does not stand for any proposition that is applicable in the present matter, except that those who seek to gain an unfair competitive advantage should not attempt to manipulate the regulatory structure established for railroads. Even if this case were relevant to NET’s petition, there is no possible reason why NET was prevented from citing to a case decided in 1912 when filing its petition in December, 2005.
5. NET provides a slanted and misleading analysis of several cases cited by commenters in opposition to its petition. These are all reported cases, and NET

would have been well aware of them when filing its petition in December, 2005.

Again, there is no justification for NET's newly filed arguments.

6. In its analysis of cases, NET challenges the commenters to cite "a single decision by the Board or any court in which the Board denied jurisdiction when a rail carrier sought to construct and operate an intermodal transload facility".

Petitioner's Consolidated Reply to Comments at 9. In a recent decision from the federal district court of New Jersey that was cited and discussed by the New Jersey Department of Environmental Protection in its filing with the Board on this matter, the Court imposed a preliminary injunction against a rail carrier seeking to construct and operate a solid waste transfer facility. *See Comments of the New Jersey Department of Environmental Protection and New Jersey Meadowlands Commission* at 13. In this case, *J.P. Rail, Inc. v New Jersey Pinelands Commission*, Order and Preliminary Injunction, Civ. No. 05-2755 (December 22, 2005), the Court found that "the proposed facility will probably not involve 'transportation by a rail carrier' and, thus, that Defendant will likely succeed on its claim that the Surface Transportation Board does not have exclusive jurisdiction over the regulation of the facility." *Id* at 3.

For the foregoing reasons, NET has failed to establish that there is good cause shown to justify its request for leave to file a sur-reply. In the event that the Board should determine that NET's motion for leave to file its sur-reply will be accepted, the Coalition Parties respectfully request that the Board grant them and the other parties to this proceeding with an opportunity to file a formal response to NET's sur-reply so that the record will contain a full and complete rebuttal.

WHEREFORE, the Coalition Parties request that the Board deny NET's request for leave to file a sur-reply.

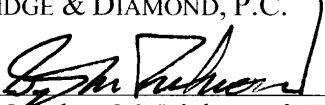
DATED: Wellesley, Massachusetts

March 10, 2006

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

By their Attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March, 2006, I served the foregoing Opposition of the National Solid Wastes Management Association, et al, to the request of New England Transrail, LLC for leave to file a sur-reply by causing a copy to be delivered by first class mail, postage prepaid, to the addresses listed below.


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