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July 11, 2006

By Overnight Mail

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, STB Finance Docket No. 34797*

Dear Secretary Williams:

On behalf of the City of Middletown, New York ("Middletown") and its 26,000 residents, we write to provide the following comments in this matter pursuant to the Surface Transportation Board's ("STB") order of June 12, 2006. The City of Middletown is on the brink of an environmental and public health crisis caused by claims of preemption over a solid waste facility to be constructed in its backyard. This problem can be averted if the STB correctly determines that so-called rail-waste facilities are not subject to its exclusive jurisdiction under the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 ("ICCTA") and that regulation of these operations is properly within the jurisdiction of the states and municipalities where it belongs.

The City of Middletown vigorously opposes any suggestion that the STB has exclusive jurisdiction over municipal solid waste operations simply because those activities are operated on land adjacent to a railroad right of way. Municipal solid waste ("MSW") and construction and demolition ("C&D") debris processing is a dirty and sometimes dangerous business, and can place the residents in its proximity in imminent danger if not adequately sited, permitted, and supervised. Intensive local review of

such operations is commonplace throughout the country. However, taking advantage of a perceived loophole in the law, the facility that New England Transrail, LLC ("NET") proposes would circumvent all local regulation, leaving municipalities like Middletown powerless to protect their residents from these inherent dangers.

Faced with such a facility, Middletown knows better than most what is at stake as the STB decides this fundamental jurisdictional issue: nothing short of the health and safety of thousands of our citizens who will work, live, and play in and around areas slated to be unregulated processing facilities for municipal solid waste and construction and demolition debris.

### **Middletown's Railroad History**

The City of Middletown's history is inextricably linked with railroads, and this relationship provides Middletown with a unique perspective on the potential impacts of the STB's decision in this matter. Many of us have worked for the railroads or received economic benefits from their activities. Since the 19th century, Middletown's existing railroad, the Middletown & New Jersey Railway, has played a vital role in the economic development of the city. Beginning in the mid-1800s, the railroad allowed the expansion of area farms and dairies by transporting Middletown's milk into New York City. As this route grew and thrived, creameries and condenseries were built along the rail line, and trade grew in livestock, feed, and coal to supplement and diversify the economy. Middletown developed a large feed mill, a fertilizer plant, and a chemical plant, all of which were dependent on rail service for the transport of goods and materials.

### **The Proposed Rail-MSW Facility in Middletown**

Recent corporate maneuvers targeted to exploit an ambiguity in the STB's jurisdiction, however, threaten to rewrite Middletown's experience with its railroad, and to turn that relationship from a partnership for economic prosperity to divisive battle to protect public health and our environment. Middletown's experience illustrates the ease with which any municipality with a rail line can find itself in the midst of a potential public health crisis.

In 2005, a former investment banker purchased the shell of a publicly traded company, Chartwell International. Chartwell then purchased a solid waste disposal

company, which has, according to Chartwell's February 2006 prospectus on file with the Securities and Exchange Commission ("SEC"), an ownership interest in more than 8,000 acres of land in Ohio, a portion of which Chartwell has stated it intends to permit for landfill operations. Chartwell then purchased a controlling interest in the Middletown & New Jersey Railway.

Almost immediately after this purchase, Chartwell's Chief Financial Officer told a newspaper reporter that its strategy in acquiring the railroad was to construct a transfer station in Middletown under a claim of preemption and that it would do so within the next three months. Indeed, Chartwell's 2006 prospectus and other documents on file with the SEC clearly indicate its strategy "to become a leading vertically integrated provider of solid waste disposal services, through acquiring landfills, disposal sites, intermodal facilities for rail haul, loading and off loading facilities for waste, railcar maintenance companies, focusing on collection, transportation and disposal of solid waste." The prospectus is very clear on Chartwell's intention to become a large solid waste company: "By collecting, transporting and disposing of large volumes of solid waste, we believe we can create economies of scale...."

The City has made several efforts to engage Chartwell in meaningful discussion about its plans for Middletown. Chartwell thus far has been largely evasive and deceptive and the minimal information it has provided is somewhat inconsistent with reports the City has received from other sources. Only with repeated prodding has the company been willing to provide specific facts. As a result, Middletown, like several other cities in the Northeast, is on the front lines of this jurisdictional issue. Ambiguity about the STB's jurisdiction has allowed companies like Chartwell to intentionally disregard localities and act with a bravado born of a conviction that *any* facility set up near a rail line will be exempt from all meaningful local oversight and regulation.

### **NET's Proposed "Transloading" Operations are Solid Waste Processing**

With its extensive history with railroads, the City of Middletown understands the underpinnings of Congress's grant of exclusive jurisdiction to the STB for particular types of economic railroad regulation. Clearly a patchwork of local rules imposing differing *economic* regulations would inhibit nationwide railroad service. However,

Middletown also understands the limitations that Congress placed on that jurisdiction and the scope of the resulting preemption.

NET would have the STB believe that what it proposes is no more than a typical transloading facility and, therefore, subject to the exclusive jurisdiction of the STB and effectively untouchable by state and local regulators. NET's proposed facility is not just a transloading operation. Transloading involves receiving goods, changing from one transportation method to another, and shipping them. Sometimes it also involves temporary storage of the goods, but only for the purpose of accommodating the next transportation connection.

The NET proposal, however, is not limited to transloading MSW and C&D debris. NET states in its filings that it will dump containers full of waste onto a concrete slab on the ground. Once the waste is free of its container, NET states that it will process the waste, including the conduct of sorting, grinding, shredding, and crushing operations and waste separation. What other transload facilities sort, grind, shred and crush their cargoes? What other transload facilities separate out parts of their cargoes? There is little dispute that these activities are classic solid waste processing operations, a point that has been raised by a number of commenters on the NET proposal. Once NET proposes to dump its transported cargo onto the ground for processing, rather than merely transfer its contents to another container for further transport, its facility stops being a transload facility and becomes a solid waste processing facility.

Legitimate transloading is integral to rail transport and the City of Middletown has no problem with the concept that this activity is appropriately regulated by the STB. True transloading facilities do not generally create public health or environmental problems. What NET proposes is quite different. The spilling of MSW and C&D debris onto the ground is fraught with environmental peril and public safety concerns ranging from contamination of surface and drinking water supplies, to blowing and drifting garbage and dust, to nuisance odors, to rodent and other disease vector infestations. Such concerns are inherently local in scope and have traditionally been regulated under state and municipal police powers.

Faced with the prospect of a similar facility within its boundaries, Middletown implores the STB to adopt a strict construction of transloading facilities that provides

federal preemption only when true transloading is occurring. Anything more than the transfer of cargo from one container to another, or the temporary storage of closed containers, should be outside the STB's exclusive jurisdiction. Only the transfer of wastes from one container to another, the loading and unloading of those containers onto or off of trucks or trains, and the temporary storage of wastes inside of shipping containers, should be determined to be within the STB's exclusive jurisdiction. All other waste management activities should be recognized for what they are - waste management, not rail activities - and they should be regulated by the state and local governments which best understand local concerns and issues.

### **NET's Waste Processing Operations Are Not Transportation And Are Not Integrally Related to Rail Service**

The courts and the STB have made distinctions between transloading and processing activities. Existing case precedent demonstrates that NET's proposed waste processing is outside the accepted interpretations of "transportation" and are not "integrally related to the provision of interstate rail service," which are required for federal preemption.

For example, in the recent cases of *Green Mountain R.R. Corp. v. State of Vermont*, 404 F.3d 638 (2nd Cir. 2005) and *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3rd Cir. 2004), the courts found that goods that arrived, were temporarily stored, but were not processed, were "transloaded." The STB has made similar differentiations. See *Town of Milford, MA – Petition for Declaratory Order*, STB Finance Docket 34444 (STB served August 12, 2004) (STB distinguished between transportation operations that off-loaded steel and transferred it to trucks, and steel fabrication activities); *Borough of Riverdale, Petition for Declaratory Order*, STB Finance Docket No. 33466 (service date September 10, 1999), (STB determined that a corn processing plant was not related to transportation if it served only a manufacturing or production purpose). These cases demonstrate the accepted distinction between transportation and non-transportation-oriented processing operations.

Similarly, NET's proposed processing activities are not "integrally related" to the provision of rail service. In the case of *Florida East Coast Railway v. City of Palm Beach*, 266 F.3d 1324 (11th Cir. 2001), the Court evaluated whether a building material

supply business located at a rail yard was protected from local regulation by ICCTA's preemption. The Court found that the building supply activities were neither rail transportation nor related to rail transportation, instead these activities were the operation of a separate business at the railroad site. *Id.* at 1377. See also *Borough of Riverdale, Petition for Declaratory Order, The New York Susquehanna and Western Railway Corporation*, STB Finance Docket 33466 (STB served Sept. 9, 1999). Although NET proposes to conduct some transportation activities as well as waste processing, its wholly separate waste management operations primarily serve a manufacturing purpose and are not integrally related to rail transportation.

Perhaps most pointedly, the Superior Court of New Jersey just weeks ago issued an injunction stopping precisely the same type of activities proposed by NET ("sorting, processing, grinding, crushing, aggregating, segregating, and/or bailing of solid waste"), finding that ICCTA "does not preempt state regulation of the processing of solid waste." Order for Preliminary Injunction, *New Jersey v. J.P. Rail, Inc.*, Docket No. C-41-06 (June 22, 2006), p. 2.

Even Congress has noted this gathering storm and has come to the correct conclusion about where to draw the line as to the STB's jurisdiction. The House of Representatives Committee on Appropriations, in its Report on the FY 2007 Transportation, Treasury and Housing and Urban Development, the Judiciary, District of Columbia Appropriations, noted the growing problem that waste processors are trying to hide behind the STB's exclusive jurisdiction and stated that "The Committee disagrees with this interpretation of ICCTA preemption since the operation of solid waste facilities is not integral to transportation by rail. The Committee encourages the STB to clarify that these types of facilities are indeed subject to the same local, state, and federal laws and regulations as other solid waste facilities." H. Rep. No. 109-495, at 89 (2006). The U.S. Senate Subcommittee on Transportation, Treasury, the Judiciary and Housing and Urban Development is also considering similar language for its committee report.

## **Conclusion**

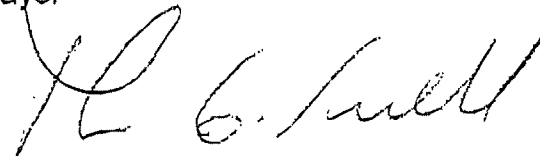
For the City of Middletown and other similarly situated municipalities, the stakes are extremely high. Solid waste facilities have always been subject to intense scrutiny

at the local level because of the inherent risks to the public health and environment that these facilities pose. Rogue solid waste facility operators should not be able to exploit a loophole in STB jurisdiction to circumvent state and municipal public health and environmental protections. Regulating solid waste facilities will not interfere economically or otherwise with railroads' ability to operate. The City of Middletown requests that the STB follow the guidance of various courts around the country, Congressional committees, its own case law, and the wishes of the 26,000 residents of Middletown, in clarifying that the exclusive jurisdiction of the STB does not include the management or storage of any wastes outside of containers at a transload facility.

Sincerely yours,



Marlinda Duncanson  
Mayor

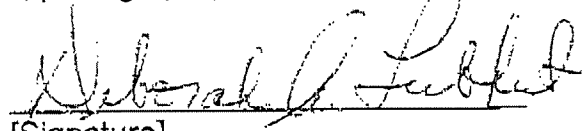


Thomas Farrell, Esq.  
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cc: Service List for STB Finance Docket No. 34797 (by regular mail with attachment)

### Certificate of Service

I hereby certify that on this 11th day of July, 2006, I served the foregoing letter from the Mayor and Corporation Counsel of the City of Middletown, New York, by causing a copy to be delivered by first class mail, postage prepaid, to the following.

  
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