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July 13, 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 are our comments to the Surface Transportation Board on the above referenced matter in response to the Board's June 12, 2006 decision requesting comments from interested parties. These comments are submitted 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)

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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FINANCE DOCKET NO. 34797

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NEW ENGLAND TRANSRAIL, LLC, D/B/A WILMINGTON AND 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

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COMMENTS OF 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  
ON JURISDICTIONAL ISSUES ARISING FROM NEW ENGLAND TRANSRAIL, LLC'S  
PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901

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July 13, 2006

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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FINANCE DOCKET NO. 34797

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NEW ENGLAND TRANSRAIL, LLC, D/B/A WILMINGTON AND 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

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COMMENTS OF NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, ET AL.  
ON JURISDICTIONAL ISSUES ARISING FROM NEW ENGLAND TRANSRAIL, LLC'S  
PETITION FOR EXEMPTION FROM 49 U.S.C. § 10901  
AND REQUEST FOR LOCAL HEARING

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**PRELIMINARY STATEMENT**

The National Solid Wastes Management Association, the Solid Waste Association of North America and its Massachusetts chapter, the Massachusetts Municipal Association, the Construction Materials Recycling Association, the Integrated Waste Services Association, and New Bedford Waste Services, LLC (collectively, the "Coalition Parties") jointly file these comments to clarify their position that the Surface Transportation Board (the "Board") does not have exclusive jurisdiction over the sorting, grinding, crushing, aggregating, segregating, and bailing of municipal solid waste and construction and demolition debris (hereinafter "Processing Activities") as proposed to be conducted by New England Transrail, LLC ("NET") in Wilmington, Massachusetts. NET claims that these activities are exempt from virtually all meaningful state and local environmental and public health laws.

On June 13, 2006, the Board agreed to take additional comments on the subject of the Board's jurisdiction over NET's proposed facility and stated that it would decide this threshold

issue before proceeding with further environmental review. These comments on jurisdictional issues are submitted in response to the Board's request of June 13.

Although NET characterizes its facility as a "transloading" operation, NET intends to do far more than move cargo from one transportation mode to another. Instead, its descriptions of Processing Activities establish that NET intends to operate a traditional solid waste management facility. The primary difference between the proposed NET facility and virtually all other similar solid waste facilities is that NET seeks to build its facility without the protective regulatory oversight of state and local government, and without any environmental permits. This would explain its choice to locate the facility in a dense urban area near residential properties and other sensitive receptors and on property recently added to the National Priorities List by the U.S. Environmental Protection Agency ("U.S. EPA").

The NET proposal is nothing more than a business plan based upon vertical integration of solid waste activities. NET is attempting to combine a solid waste processing business with a transportation transloading business. The crisis precipitated by NET's filing is that it has repeatedly petitioned for exemption from 49 U.S.C. § 10901 for both of its planned operations in an effort to avoid compliance with the myriad of state and local environmental and public health regulations that apply to solid waste processing facilities. These regulations were established to provide careful scrutiny of proposed solid waste facilities to prevent potential adverse impacts on the localities, states, and regions in which they exist.

As demonstrated in prior filings of the Coalition Parties, a large segment of the solid waste industry utilizes rail, truck, and barge transportation in performing the same Processing Activities proposed by NET, all subject to federal, state, and local laws and completely independent of the Board's jurisdiction. Importantly, a variety of wastes, including the same

wastes proposed to be handled by NET, are current transloaded and shipped by rail in the region to be served by NET. This confirms that the legal requirements NET seeks to avoid do not restrict the ability of interested parties to ship wastes by rail. The problem with NET's petition is not that it seeks to transload wastes; instead, the problem is that NET proposes to conduct its planned Processing Activities under the protection afforded to the transloading portion of its business, notwithstanding that waste processing is neither "transportation by rail carrier" nor "integrally related to the provision of interstate rail service".

At its core, NET's effort is targeted at obtaining an enormous and improper economic benefit by attempting to conduct Processing Activities without complying with the state and local environmental and public health regulations that its competitors must comply with. The Board should recognize this for what it is: a distortion of the exclusive jurisdiction granted to the Board in the Interstate Commerce Commission Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 ("ICCTA"). The Board should not allow its important regulatory role to be misused to confer anti-competitive benefits and allow evasion of important environmental and public health requirements. Instead, the Board should use this opportunity to demarcate a clear bright line rule that will establish the boundary between solid waste processing and legitimate transloading.

I. **THE NET PROPOSAL INVOLVES SOLID WASTE MANAGEMENT ACTIVITIES THAT DO NOT CONSTITUTE TRANSPORTATION BY RAIL CARRIER**

NET seeks to shroud its Processing Activities in the ICCTA preemption by blending two distinct activities to be conducted at its site, processing and transloading. However, the Board's exclusive jurisdiction exists only for "transportation by rail carriers" or activities that are "integrally related" to the provision of rail service. 49 U.S.C. § 10501(b). While NET's transloading activities may meet this test, NET's Processing Activities do not.

A. **NET's Solid Waste Processing Activities Are Not Transportation.**

The ICCTA defines “transportation” to include:

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(5). NET's proposed waste handling activities go far beyond this definition of transportation.

NET's petition states that the proposed facility will “transload” a variety of commodities, including aggregates, brick, cement, construction and demolition debris (“C&D Debris”), contaminated soils, liquids chemicals, non-explosive liquids and dry chemicals, non-hazardous solid waste, paper products, plastics, scrap steel and recycled paper. *New England Transrail, LLC - Petition for Exemption from 49 U.S.C. § 10901* (STB Finance Docket No. 34797) (“NET Petition”) at 10, n.15. NET proposes to handle “pumpable” materials, bulk materials, and C&D Debris and municipal solid waste (“MSW”). NET plans to dump C&D Debris on a concrete slab and “segregate certain metal and wood or other materials” which will be transported to “an appropriate receiving facility by rail....” NET Petition at 11 (emphasis supplied). Remaining C&D Debris will be conveyed to shredders that will reduce its size. *Id.* MSW arriving as bulk material will be unloaded from trucks to the concrete floor where it will be baled and loaded into rail cars. *Id.* at 12.<sup>1</sup>

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<sup>1</sup> NET indicates that some MSW will arrive pre-baled but provides no quantity or ratio of baled versus unbaled MSW it expects to receive and process.

In short, NET will manage and store loose waste materials, grind different waste streams, sort and separate components of waste streams that are shipped to the facility, ship some of those components off site separate from the remaining waste streams, bale waste materials, manage unspecified non-conforming waste materials, transport waste materials on a conveyor system, and crush waste materials using heavy mobile equipment. As discussed in previous filings by the Coalition Parties, many of these activities will transform the economic value of the received materials.

In an effort to bring these activities within the rubric of “transportation by rail carrier,” NET has gone to extraordinary lengths to cloak its proposed operations as standard transloading, despite the fact that these activities are all identical to the activities performed by traditional solid waste processors prior to transportation and for the purpose of changing the economic value of their wastes. As demonstrated in prior filings by the Coalition Parties, NET’s proposed Processing Activities for C&D Debris and MSW will add considerable value to the wastes they intend to receive and this transformative activity therefore goes well beyond transloading operations. There are no reported cases of which we are aware that suggest a transloading operation may create new economic value in a received material. In all cases addressing this issue, including all prior Board cases, there is a critical distinction drawn between activities necessary for shipping and activities that constitute manufacturing or production.

Courts have consistently interpreted transloading as the movement of cargo between transportation modes, with temporary storage as necessary for the transport change. For example, the Second Circuit Court of Appeals found that a rail carrier’s “transloading facilities” included “(1) unloading bulk salt arriving by rail for local distribution by truck or for temporary storage in a shed pending distribution; (2) temporary storage in a shed of ‘non-bulk goods, such

as steel pipe[s]’; and (3) unloading bulk cement arriving by rail for storage in silos and eventual transport by truck.” *Green Mountain R.R. Corp. v. State of Vermont*, 404 F.3d 638, 639-640 (2nd Cir. 2005). Similarly, the Third Circuit Court of Appeals offered a description of a waste transloading operation that it assumed “arguendo” would fall within the ICCTA definition of “transportation”: “(1) trucks hauling C&D waste arrive at the facility; (2) the trucks discharge C&D into a hopper that (the operator) provides at the facility; (3) the C&D waste is then loaded directly into rail cars from the hoppers. *C&D waste is neither stored nor processed at the facility.*” *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 299 (3<sup>rd</sup> Cir. 2004) (emphasis supplied).

Similarly, in reviewing the preemptive scope of ICCTA, the Federal District Court for the Northern District of Georgia described the “undisputed purpose” of the intermodal facility “to transfer containers or trailers of cargo being shipped in interstate and foreign commerce between trains and tractor-trailer trucks in a manner which permits and promotes effective competition and coordination between rail and motor carriers.” *Norfolk Southern Ry. Co. v. City of Austell*, 1997 U.S. Dist. LEXIS 17236, \*3 (N.D.Ga. 1997). *See also, Canadian National Railway Co. v. City of Rockwood*, 2005 U.S. Dist. LEXIS 40131, \*3 (E.D. Mich 2005)(involving construction and demolition debris transloading, citing with approval the definition used above in *Norfolk Southern*). In each example, the transload operation involved the movement of cargo from one transportation mode to another with at most incidental temporary storage, but in no case was processing found to constitute a transportation related activity.

Transloading involves a change in the mode of transportation, not a change in the goods or commodities being shipped. Hence, transloading does not involve the addition of value to a cargo. That would be manufacturing, and no one would assert that manufacturing is a integral

component of transportation. Indeed, the Second Circuit stated in *Green Mountain* that the railroad “serves industries that rely on trucks to transport goods *from the rail site for processing*; so the proposed *transloading and storage* facilities are integral to the railroad’s operation...”. *Green Mountain* \*5 (emphasis supplied). The Court therefore clearly stated that the transportation function encompasses transloading and storage, but that the processing of goods is not a transportation activity and is conducted elsewhere.

What NET proposes, however, is not to merely move its cargo from one mode of transportation to another. Indeed, if this were all that NET proposed to do, the solid waste industry parties would have no objection, particularly since some of these parties, and their members, regularly use legitimate transload facilities for shipments of wastes.

Instead, in addition to switching between transportation modes, NET proposes to significantly process the MSW and C&D Debris by sorting, processing, grinding, crushing, aggregating, segregating, and bailing. This is not merely the temporary storage that is often necessary of transload facilities. All of the waste cargos shipped through the NET facility will have arrived in trucks, and therefore will have been prepared in advance for transportation in compliance with Department of Transportation shipping regulations. Instead, these Processing Activities introduce significant value added to the cargo. Despite NET’s protestations, there is no question that NET’s proposed Processing Activities are the same activities routinely conducted by solid waste facilities as their primary business for profit. These are activities that are currently occurring upstream of the transportation link, and are the equivalent of the manufacturing process for other cargoes.

NET’s claim that it will perform the Processing Activities in order to protect railcars is simply not credible. This is because these activities are the same as have been described in prior

filings by the Coalition Parties as being currently conducted prior to transportation for the purpose of value creation. The strategies that are employed in this processing business are:

1. Separation and segregation of materials to isolate and separately manage materials with lower disposal costs. This activity reduces disposal costs by allowing the separation of materials with both higher and lower management costs. Without this activity, waste streams would typically need to be directed to the highest cost disposal option. Such separation and segregation has nothing to do with transportation requirements and adds significant value to the received wastes by reducing their disposal cost.
2. Separation and segregation of materials to isolate and separately manage those materials with resale value. This activity reduces disposal costs by allowing the separation of materials with resale value from materials that have a negative disposal cost. This is currently a significant aspect of the management of construction and demolition debris because certain components of that waste stream have market values that are at historical highs, but those values cannot be realized unless the incoming materials are first sorted and processed. This usually involves use of conveyor belts, crushing equipment, shredders and balers. Such separation and segregation have nothing to do with transportation requirements and add significant value to the received wastes by generating profitable raw materials for recycling markets.
3. Alteration of physical state of materials to reduce their disposal costs and facilitate recycling. This activity is part of the processing that occurs in managing materials described in Paragraphs 1 and 2 above. In order to separate some materials, crushing and shredding must be performed. Once materials are separated, they are often further processed to comply with destination facility requirements. This processing can include screening, shredding, baling or densifying. Again, these activities are not conducted for transportation purposes, even though there might be some incidental transportation benefit. They are conducted because they either reduce disposal costs or create value in the recovered materials.

Where material handling activities are not directly related to the unloading, loading, and temporary storage of the transload facility, those activities do not constitute “transportation”.

NET’s processing activities are akin to the steel fabrication activities that the Board determined were outside the definition of railroad transportation in *Town of Milford, MA – Petition for Declaratory Order*, STB Finance Docket 34444 (STB served August 12, 2004). There, the

Board distinguished between transportation operations that “offload steel and haul it by truck to customers throughout New England” and non-transportation operations of cutting and welding and fabrication. *Id.* at \*2-5. *See also, Borough of Riverdale, Petition for Declaratory Order*, STB Finance Docket No. 33466 (STB served September 10, 1999) (if corn processing plant is not integrally related to provision of transportation services “but rather serves only a manufacturing or production purpose,” then it is subject to applicable state and local regulation).

Significantly, the Superior Court of New Jersey recently issued an injunction stopping “sorting, processing, grinding, crushing, aggregating, segregating, and/or bailing of solid waste” by a rail-owned solid waste processing facility along a rail line in New Jersey, finding that the 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.

In short, legitimate transloading activities merely transfer waste from one mode of transportation to another. However, when waste is to be processed prior to transload and that processing results in a change in the economic value of the incoming material, the waste handling operation is not transloading and is not transportation.

**B. NET is Not a Rail Carrier.**

In order to fall within the exclusive jurisdiction of the Board, NET must not only show that its activities are “transportation” but must also show that it is a “rail carrier”. NET’s claim to be a rail carrier is tenuous as it must show that it is engaging in transportation.

The ICCTA defines “rail carrier” as a “person providing common carrier railroad transportation for compensation. 49 U.S.C. § 10102(5). While NET seeks to obtain status as a rail carrier it must show that it will be engaged in common carrier railroad transportation for compensation in order to qualify.

NET is not now a common carrier, but instead was created solely for the purpose of pursuing the NET facility project. NET “has been formed for the purpose of acquiring, constructing and operating the NET Facility”. NET Petition at 11. NET would only become a common carrier if the Board allowed its exemption filing, and NET then satisfied the procedural requirements to operate as a carrier. 49 U.S.C. § 10901; 49 CFR Part 1150. As there is no available history on its activities, a non-carrier has a particular duty to explain why its anticipated future activities are uniquely those of a rail carrier, and not those of the businesses it claims to serve.

The statutory definition of rail carrier requires that the entity claiming to be a carrier provide “railroad transportation for compensation”. As discussed above, NET is vertically integrating two different businesses. Significant aspects of NET’s proposal do not constitute “transportation” and therefore NET should not qualify as a rail carrier with respect to those activities.

C. **NET’s Waste Management Activities Are Not Integrally Related to the Provision of Rail Service.**

The Board has placed an important qualifier on its interpretation of the scope of federal preemption under the ICCTA, finding that “activities and facilities not integrally related to the provision of interstate rail service are not subject to [STB] jurisdiction or subject to federal preemption.” *Borough of Riverdale, Petition for Declaratory Order, The New York Susquehanna and Western Railway Corporation*, STB Finance Docket 33466 (STB served Sept. 9, 1999) at 9. In describing the application of this limitation to transloading, the Board has stated that “the jurisdiction of the agency may extend to certain activities and facets of rail transloading facilities, but that any such activities or facilities must be closely related to providing direct rail

service.” *Hi Tech Trans, LLC, Petition for Declaratory Order*, STB Finance Docket No. 34192 (STB served Nov. 20, 2002) at 3. *See also Town of Milford, supra*.

Many courts have echoed the Board’s determination that an integral relationship must exist between the activity and the provision of rail service in order to conclude that ICCTA preemption applies to the activity. The Eleventh Circuit Court of Appeals determined that the use of a facility for aggregate distribution served no public function and provided no valuable service to the rail carrier. *Florida East Coast Railway v. City of Palm Beach*, 266 F.3d 1324, 1336 (11th Cir. 2001). The Court found that co-location of a business at a rail yard or under claim of railroad control cannot be used to fabricate a claim of integral relationship. *Id.* at 1336 (third party’s “use of the property...and the activities there performed serve no public function and provide no valuable service to” the railroad). Consequently, if a facility serves primarily a manufacturing or production purpose, then it is not integrally related to the provision of rail service and is subject to state and local law and regulations.

In *Flynn v. BNSF*, 98 F. Supp. 2d 1186, 1189 (E.D. Wash 2000), a Federal District Court held a railroad refueling facility was integrally related to rail transportation, but that “manufacturing activities and other facilities owned by railroads which are not integrally related to the railroad’s provision of interstate rail service, i.e., non-transportation facilities, are not subject to STB jurisdiction or subject to federal preemption.” Similarly, in *CFNR Operating Company v. City of American Canyon*, a Federal District Court determined that the preemption language in the ICCTA “does not reach local regulation of activities not integrally related to rail service.” 282 F. Supp. 2d 1114, 1118 (N.D. Cal 2003).

As discussed above, the Superior Court of New Jersey recently issued an injunction against a railroad to prevent the processing of solid waste at a transload facility, “including but

not limited to the disposal, sorting, processing, grinding, crushing, aggregating, segregating, and/or baling of solid waste prior to loading the waste into rail cars or containers for rail shipment.” *New Jersey v. J.P. Rail, Inc.*, p. 2. The Court determined as a matter of law that ICCTA does not preempt state regulation of the processing of solid waste at the facility.

The sorting, grinding, crushing, aggregating, segregating, bailing, and other waste management activities that NET proposes for its facility are not “integrally related to the provision of rail service.” Processing activities designed to add value to incoming wastes are not integrally related to the provision of interstate rail service. Instead, these are independent business activities designed to change the value of the incoming materials. (*see* Coalition Parties’ Reply to Petition for Exemption, January 27, 2006 (“Coalition Reply”), Camara Verification at ¶¶ 3, 13-14; Jeter Verification at ¶¶ 3, 13-14; and Changaris Verification at ¶¶ 11-12).

NET attempts to characterize its waste processing activities as necessary to reduce damage to rail cars and promote efficient transfer of cargoes. *See* Verified Statement of Thomas Egan (Nov. 7, 2005) ¶¶ 5-8. NET would have the Board believe that the processing, sorting, grinding, aggregating, and segregating of solid waste at its facility add no value to the waste material and relate solely to transportation. This defies common sense and industry practice and is an attempt to cloak the company’s true goal: vertical integration of two completely separate businesses, one a solid waste processing business that fundamentally changes the value of incoming materials, and the other a transportation transloading business that transloads cargo once it has been processed.

NET does admit that it will separate out wood and metals from the waste streams it receives. *See* NET Petition at 11. However, NET is ambiguous about its reasons for separation. “NET will segregate certain metal and wood or other materials that may damage NET’s loading

equipment and rail cars.” NET Petition at 11. This description suggests that all material segregation is for purposes of protecting loading equipment and rail cars, but a critical read allows that the language may also mean NET is intending to segregate (1) metal and wood (for purposes unknown) and (2) other materials that may damage NET’s loading equipment and rail cars. In any event, to say that NET intends to separate out materials that “may” cause damage allows for the separation of any valuable material from any load, for any reason.

Scrap metal currently has such a high market value that, according to recent newspaper articles, aluminum siding is being stolen from the sides of buildings and copper fixtures are likewise being stripped from their interiors. *See* Coalition Reply, Changaris Verification at ¶ 12 and Exhibit 1. Aluminum siding and copper fixtures from demolished buildings are exactly the same material that NET would receive at its facility and that NET seems to suggest would be separated solely to protect loading equipment and rail cars.

In order to mask the vertical integration strategy, NET has asserted that certain materials would damage its equipment, but has failed to disclose that this sorting and segregation activity creates significant economic value when extracted commodities are sold for a profit or disposed of at reduced cost.

At legitimate solid waste processing facilities throughout Massachusetts, the same wastes intended to be received by NET are received, crushed to reduce material size, screened, and separated by material type for aggregation, often using a conveyor belt. *See* Camara Verification at ¶¶ 9-11; Jeter Verification at ¶¶ 9-11. The crushing is a necessary component of processing to ensure that certain recyclable materials such as wood, metals, and concrete will be reduced to a size that can be separated from other material and can be handled. The screening and separation are performed to facilitate the separation of different commodities that can be recycled and to

size the material to specifications necessary for receipt by the different customers who purchase the material. *Id.*; Chagaris Verification at ¶ 13. This process creates a product of significant economic value from material that is received at the facility as a waste. *See* Camara Verification at ¶¶ 9-11; Jeter Verification at ¶¶ 9-11.

While there may be some incidental benefit for transportation once material has been crushed, separated, screened, and sized, the true purpose of these activities is to reduce disposal costs and prepare raw materials for market, not to prepare wastes for transportation. *Id.*; Chagaris Verification at ¶ 13. The processing of these wastes is simply not integrally related to the provision of rail transportation. It is only after the Processing Activities are completed that the true transload activity commences - the loading of containers and the shipment of those containers by rail.

## II. **THE SCOPE OF ICCTA PREEMPTION IS LIMITED**

Courts have recognized that the ICCTA preempts a variety of state and local requirements. *See City of Auburn v. United States*, 154 F.3d 1025, 1030-1031 (9th Cir. 1998) (“the preemption of rail activity is a valid exercise of congressional power under the Commerce Clause”); *Green Mountain RR v. State of Vermont*, 404 F.3d 638, 639 (2d Cir. 2005) (ICCTA preempts state permitting requirements). However, courts have also acknowledged clear limits on the preemptive effect of the ICCTA applicable here. Even if NET’s so-called transloading operations were considered transportation by rail carrier, those activities would still be subject to most state and local environmental and land use laws.

A. **ICCTA Preemption Does Not Apply to State Regulations That Have Only An Incidental Effect on Railroads.**

The Eleventh Circuit Court of Appeals has determined that the ICCTA preemption clause must be read to include specific intended limits on the STB's exclusive authority. In *Florida East Coast*, the Court observed that:

express preemption applies only to state laws “with respect to *regulation* of rail transportation”. 49 USC § 10501(b) (emphasis added). This necessarily means something qualitatively different from laws “with respect to rail transportation”. (Citations omitted.) In this manner, Congress narrowly tailored the ICCTA pre-emption provision to displace only “regulation,” i.e., those state laws that may reasonably be said to have the effect of ‘managing’ or ‘govern[ing]’ rail transportation ... while permitting the continued application of laws having a more remote or incidental effect on rail transportation.

266 F.3d 1324, 1331 (11th Cir. 2001) (emphasis added). Consequently, in *Florida East Coast*, a zoning ordinance of general applicability was found to apply, without preemption, to a private entity operating an aggregate distribution facility owned by a railroad. The Court reasoned that the zoning ordinance did not directly regulate rail transportation, but instead regulated the provision of distribution services. The Eleventh Circuit's analysis is supported by a number of cases that distinguish between complete subject area preemption of state jurisdiction and the more narrow preemption of specific regulation by states. See *Cal. Div. of Labor Standards v. Dillingham Constr.*, 519 U.S. 316, 334 (1997) (prevailing wage statute no different from other state laws in areas traditionally subject to local regulation, which Congress could not have intended to eliminate); *Bldg. & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218, 227 (1993) (federal labor relations law was intended to supplant state labor regulation, not all state activity that affects labor). See also *J.P. Rail, Inc. v. New Jersey Pinelands Commission*, 404 F. Supp. 2d 636, 650 (D.N.J. 2005) (citing *Florida East Coast* to

support determination that ICCTA preemption is limited to regulations that manage or govern rail transportation).

Here, NET contends that state and local regulations aimed at the solid waste industry and its activities are swept into the preemptive scope of the STB merely because the activities are to be conducted adjacent to a track and by (or on behalf of) a company claiming to be a rail carrier. However, in accordance with *Florida East Coast*, these state and local regulations are not preempted because they do not constitute regulation of rail transportation. Instead, they are broadly applicable regulations that apply to the solid waste industry – regulations that are applicable regardless of the entity conducting the solid waste operation or location of those operations.<sup>2</sup>

B. **ICCTA Preemption Does Not Apply to State Regulations That Have No Economic Effect on Railroads.**

Since ICCTA preemption applies only to state regulations that have an economic effect on a railroad, state and local regulations regulating the environmental and public health aspects of solid waste operations are not preempted. The legislative history of ICCTA makes clear Congress's intent to preempt state *economic* regulation of railroads, and not to preempt all state regulation. For example, the Report of the Committee on Transportation and Infrastructure of the U.S. House of Representatives at the time of ICCTA enactment states:

Conforming changes are made to reflect the direct and complete preemption of *State economic regulation of railroads*. *The changes include extending exclusive Federal jurisdiction to matters relating to spur, industrial, team, switching or sidetracks formerly reserved for State jurisdiction under former section 10907.* The former disclaimer regarding

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<sup>2</sup> If Congress had intended to preempt state and local regulation of solid waste operations, Congress could have expressly done so. In reviewing the scope of the express preemption of the ICCTA, the Board must “identify the domain expressly preempted” by a statute. *Medtronic v. Lohr*, 518 U.S. 470, 484 (1996), quoting *Cipollone v. Liggett Group*, 505 U.S. 504, 517 (1992). There is no language in the ICCTA to indicate that Congress expressly intended to preempt local solid waste regulations.

residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of *economic regulation of the interstate rail transportation system*. Although *States retain the police powers reserved by the Constitution*, the Federal scheme of *economic regulation and deregulation* is intended to address and encompass all such regulation and to be completely exclusive.”

H.R. Rep. No. 104-311, 104th Cong. 1st.. Sess. 95-96 (1995) (the “House Report”) (emphasis added).

In noting that the preemptive effect of ICCTA is indeed limited, the First Circuit in *Pejepscot Industrial Park v. Grimmell*, 215 F.3d 195, 205 (1st Cir. 2000), cited not only this language but also language from the House Report that “[t]he bill is intended to standardize *all economic regulation* (and deregulation) of rail transportation under Federal law ....”

This limitation to economic regulation of railroads is echoed in two cases concerning the Burlington Northern and Santa Fe Railway Company. In *Oklahoma v. Burlington Northern and Santa Fe Ry Co.*, 24 P.3d 368, 371 (Okla. Civ. App. 2000), the Oklahoma Court of Civil Appeals determined that the state had the authority to require a railroad to maintain fencing along its right of way in the absence of evidence that the requirement had a significant economic impact on the railroad’s operation. The Court found that this was consistent with the legislative history of the ICCTA “which makes clear that Congress’ primary intent was to pre-empt economic regulation of railroads.” *Id.* In addition, the Court cited with approval the decision of the Federal District Court in Montana in *Burlington Northern and Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288, 1296 (D. Mont. 1997), which determined that the area preempted by ICCTA is the field of economic regulation of railroad transportation.

Similarly, the Appellate Court of Illinois in *Eagle Marine Indus. v. Union Pac. R.R.* held just months ago that:

... it is clear that Congress intended the ICCTA to occupy the entire field of *economic* regulation of the interstate rail transportation industry and that the Surface Transportation Board was created to act as the *economic* regulator, engaged in managing the industry's business operations. However, the ICCTA 's exclusive authority over the economic regulation of the railway industry does not foreclose the Secretary of Transportation's authority over safety in all areas of railroad operations ... .

845 N.E. 2d 869, 881 (Ill. App. Ct. 2006) (emphasis added).

While the Ninth Circuit Court of Appeals decision in *City of Auburn* did not accept the position articulated by these other courts, the facts of that case make it inapplicable to the NET matter. In *City of Auburn*, a railroad challenged a local environmental permitting requirement for a track repair project on a major rail line in the Pacific Northwest. Under the facts before the Ninth Circuit, the local permitting requirement clearly was being used to delay or prohibit the railroad from reconstructing and repairing a critical portion of track. There is little question that the reconstruction and repair of track is integral to a rail carrier's transportation function, and the Court found there was "no evidence that Congress intended any such state role under the ICCTA to regulate the railroads." *Id.* at 1031. Unlike *City of Auburn*, however, the NET proposal does not involve the application of state and local law to a critical rail function. Indeed, as discussed above, NET's proposed Processing Activities constitute a separate and distinct business activity and are neither transportation nor integrally related to transportation. Instead of protecting a critical rail function from state and local interference, NET asks the Board to preempt state and local regulatory authority over a wholly separate business – solid waste management. These facts clearly distinguish the decision in *City of Auburn*.

### III. CONCLUSION AND PROPOSAL FOR JURISDICTIONAL TEST

The importance of the Board's decision in this matter cannot be overstated. A decision by the Board that NET's Processing Activities are entitled to the protection of exclusive Board jurisdiction would have several adverse effects. First, this would create a regulation free zone for

solid waste management and allow NET to avoid the a comprehensive network of state and local solid waste facility regulatory requirements, including siting, construction and operating standards, that currently exist to protect public health and the environment. Second, it would undermine the economics of the solid waste management industry by creating an unfair competitive advantage for NET, conferring immunity from comprehensive and protective state or local laws and regulations. Finally, it would undermine the recycling industry in New England and beyond, which relies heavily on feedstock from mandatory separation programs required only by state regulation.

The processing activities conducted by properly permitted solid waste facilities are identical to the Processing Activities described by NET in its petition and supporting materials. Those Processing Activities are a separate business, unrelated to the transportation services that NET will also provide. NET is attempting to vertically integrate waste processing and transportation. Whether or not this proves to be an effective business plan, the Board should not allow this particular combination of activities to cloud its judgment about the extent to which ICCTA has conferred exclusive jurisdiction.

The Coalition Parties request that the Board establish a bright line rule for determining when an integral relationship exists between rail transportation and the transloading of waste materials. Only a clear demarcation will provide the guidance necessary to establish which activities the Board considers to fall within its exclusive jurisdiction and which it considers to fall outside of that exclusive jurisdiction.

We propose the following:

Any activity that is conducted expressly for the purposes of either

- (a) direct transfer of waste materials from a truck to a rail car, and/or

(b) temporary holding of waste materials in closed containers while awaiting transfer operations,

would be deemed integrally related to the provision of rail service. Any other activity associated with management of waste materials, specifically, sorting, grinding, crushing, aggregating, segregating, separating and bailing, would be presumed to be not integrally related to rail transportation and therefore not within the exclusive jurisdiction of the Board.

A presumption that the processing of wastes at a transload site is not integrally related to rail transportation is warranted under established court and Board precedent. In the *Green Mountain* case, the Second Circuit found that legitimate rail functions include unloading from trucks and temporary storage of salt and cement and steel pipe. *Green Mountain* does not stand for the proposition that a rail carrier can refine salt and cement as part of its transload operation, or that it can crush and shred steel to create new products. Similarly, in *Hi Tech Trans*, the Third Circuit noted that transloading operations conducted at the rail yard which might constitute “transportation” activities did not include processing of wastes.

Consistent with this analysis, Federal District Courts in Georgia and Michigan have stated that the purpose of an intermodal facility is to “transfer containers or trailers of cargo ... between trains and tractor-trailer trucks in a manner which permits and promotes effective competition and coordination between rail and motor carriers.” *Norfolk Southern*, 1997 U.S. Dist. LEXIS 17236, \*3 (N.D.Ga. 1997). *Canadian National Railway*, 2005 U.S. Dist. LEXIS 40131, \*3 (E.D. Mich 2005). Transferring containers and trailers does not involve the manipulation and processing of the cargo to change its economic value.

These court cases are supportive of the Board’s previous determination in *Borough of Riverdale* and *Town of Milford* that manufacturing and processing activities are not integrally

related to rail transportation. Transportation activities are associated primarily with the movement of goods, while manufacturing activities change economic value. By demarcating a clear bright line test, the Board can resolve the existing controversy regarding waste transload activities and provide clear guidance to all parties as to where the exclusive jurisdiction of the Board stops and the jurisdiction of state and local governments begins.

DATED: Wellesley, Massachusetts  
July 13, 2006

Respectfully submitted,

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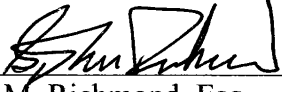
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SOLID WASTE ASSOCIATION OF  
NORTH AMERICA - MASSACHUSETTS  
CHAPTER  
AND

MASSACHUSETTS MUNICIPAL  
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## CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2006, I served the foregoing Comments of National Solid Wastes Management Association, et al. on Jurisdictional Issues Arising from New England Transrail, LLC's Petition for Exemption from 49 U.S.C. § 10901 by causing a copy to be delivered by first class mail, postage prepaid, to:

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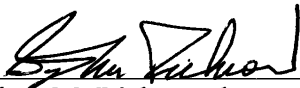
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