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July 12, 2006

BY FEDERAL EXPRESS

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington D.C. 20006



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:

Enclosed for filing please find an original and 10 copies of the Comments of the City of
Woburn in response to the Surface Transportation Board's June 12, 2006 decision in the above
referenced proceeding.

Thank you for your attention to this matter.

Very truly yours,

Mark R. Reich

MRR/KDL/jmb

Enc.

cc: Mayor

Service List for STB Finance Docket No. 34797

287196/WBRN/0039

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 34797



**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**

**COMMENTS OF THE CITY OF WOBURN, MASSACHUSETTS
ON THE JURISDICTIONAL QUESTION OF
THE PREEMPTION OF
NEW ENGLAND TRANSRAIL’S PROPOSED ACTIVITIES**

INTRODUCTION

New England Transrail, LLC, (“NET”) has filed a petition with the Surface Transportation Board (the “Board”) seeking 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 (the “Facility”). See Petition for an Exemption from 49 U.S.C. §10901, STB Finance Docket 34797 (“Petition”). The City of Woburn (the “City”) provides these comments in response to the June 12, 2006 Decision of the Board, which provides that the Board will first examine the issue of whether the activities proposed to be conducted by NET come within the Board’s exclusive jurisdiction.

Based on the information provided in the Petition, NET is not operating as a rail carrier and its solid waste processing operations do not constitute transportation by rail as defined by the statute. Thus, the Board lacks jurisdiction to regulate these particular services.

COMMENTS

49 U.S.C. §10501(b) vests the Board with exclusive jurisdiction over “transportation by rail carriers” and explicitly preempts state and federal law with respect to regulation of rail transportation. To come within the preemptive scope of 49 U.S.C. §10501(b), NET’s activities must be both (1) transportation, and (2) performed under the auspices of a rail carrier. Transportation is expansively defined by 40 U.S.C. §10102(9) to include “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,” as well as “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) defines a rail carrier as “a person providing common carrier railroad transportation for compensation.” The Board is given the authority to determine on a case-by-case basis whether a particular activity constitutes transportation by rail carrier under §10501(b). Each determination requires a fact-specific inquiry. Hi Tech Trans, LLC – Petition for Declaratory Order – Newark, NJ, STB Finance Docket 34192 (Aug. 14, 2003) Slip Op. at 5.

NET’s Petition indicates that it intends to engage in waste processing activities prior to the loading of municipal solid waste (“MSW”) or construction and demolition debris (“C&D”) into rail cars for transportation out of state. More specifically, NET intends to receive truck shipments of loose C&D and MSW, which will be dumped onto a concrete floor at its Facility. The C&D will first go through a recycling process where the waste will be sorted to remove wood, metal, and other materials, which will be

segregated and shipped to “appropriate receiving facilities.” The remaining C&D will be shredded on site, and eventually loaded into railcars by conveyor belt. The bulk MSW will be sorted and baled on site prior to being loaded onto rail cars for shipment to receiving facilities. Although NET proposes to conduct a substantial amount of waste processing prior to loading MSW and C&D into railcars, NET claims that these activities are within the scope of a traditional railroad transloading facility that moves materials on or off railcars.

1. The Board Lacks Jurisdiction Over NET’s Petition Because NET Does Not Qualify As A Rail Carrier.

NET is not entitled to avoid regulation through preemption because it has failed to demonstrate that it is operating as a rail carrier. To be a common carrier, NET must hold itself out to the public as an entity engaged in the business of transportation. See Black’s Law Dictionary, 188 (6th ed. 1991). NET’s primary business undertaking is that of solid waste processing, not transportation. The fact that NET proposes to establish its solid waste processing activities at a facility situated on railroad tracks, and ultimately tender the waste for rail transport, does not automatically qualify NET for rail carrier status.

In Grafton and Upton Railroad Co. v. Town of Milford, 417 F.Supp.2d 171, 177 (D. Mass. 2006) the Court affirmed a decision of the Board which held that the Boston Railway Terminal Corporation (“BRT”), which operates a railroad over a short, fixed distance for such purposes as moving freight within an industrial complex, was not a rail carrier as defined by 49 U.S.C. §10102(5). The Court found that a plan by the Grafton and Upton Railroad Company (“Grafton”) to develop its Milford Rail Yard by establishing a jointly operated transloading facility with BRT did not “bring BRT’s operations under the auspices of a rail carrier.” Id. at 176. Thus, regardless of the fact

that the Board found Grafton to be an established rail carrier, the Board could not preempt state and municipal law as it applied to BRT's activities at Grafton's rail yard.

Id.

Similarly, the 11th Circuit Court of Appeals has held that the Interstate Commerce Commission Termination Act, 49 U.S.C. §10101 et seq., ("ICCTA") does not preempt the City's application of zoning ordinances to a non-rail carrier's unloading and distribution activities, which are located on railway property. See Florida East Coast Railway Co. v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001).

On the basis of its submissions, NET's assertion that it will function as a "rail carrier" is highly suspect. NET was formed as a corporate entity solely for the purpose of undertaking this project. See NET Petition, STB Finance Docket 34797, p. 5. None of NET's owners have control of any other common carrier. Id. NET's proposed operation is similar to that of BRT in Grafton and Upton Railroad Co. 417 F.Supp.2d at 171, where the Board determined that BRT's transloading activities at a Terminal facility in which BRT operated a railroad over a short, fixed distance did not qualify BRT for rail carrier status. Id. at 172-173. Like BRT, NET intends to limit its rail operations to its own parcel and restrict rail transportation to shifting cars in and out of the facility and placing them on an interchange for outbound movement. See NET Petition, STB Finance Docket 34391, p. 7. Despite NET's assertions that it is entitled to rail carrier status, NET has yet to negotiate or establish any interchange agreements or connecting switches with either Boston & Maine Railroad ("B&M") or the Massachusetts Bay Transportation Authority ("MBTA"), the owners of railway track adjacent to NET's Facility. Id. at 7-8. Moreover, NET has not specified whether it intends to take an ownership interest in any

railway equipment, such as railway cars or locomotives. Id. at 8. Thus, NET's status as a "rail carrier," with its consequent assertion of preemption for its solid waste Facility, is based entirely on the "operation" of 7,500 feet of track, which primarily consists of railroad siding.

The Board has clearly stated that it "will not approve rail carrier authority that is a sham or intended solely to avoid local regulations." Hi Tech Trans, LLC – Petition for Declaratory Order – Newark, NJ, STB Finance Docket 34192 (Aug. 14, 2003) Slip Op. at 6, n.12. NET is not a rail carrier and local regulation of its solid waste services may not be preempted by the Board.

2. The Board Lacks Jurisdiction Because NET's Proposed Waste Processing Activities Are Not Integrally Related To Rail Transportation.

Even if, arguendo, the Board were to determine that NET is a rail carrier, there is no legal support for preemption of local regulation of NET's core business enterprise: the operation of a solid waste processing facility.

Not all business facilities located adjacent to rail lines or otherwise on railroad property are elements of "rail transportation," as defined by 49 U.S.C. §10501(b). Both the Board and federal courts have rejected attempts to allow non-rail related activities conducted on railway property to fall under the Board's exclusive jurisdiction. See e.g., Hi Tech Trans, LLC, 382 F.3d at 308; Florida East Coast Ry. Co., 266 F.3d at 1324; Grafton and Upton Railroad Co., 417 F.Supp.2d. at 171. Rather than allowing any enterprise so located to shelter itself from generally applicable state and local regulations, the Board has declared: "To come within the preemptive scope of 49 U.S.C. §10501(b) ... these activities must be integrally related to the railroad's ability to provide rail transportation services." Hi Tech Trans., LLC – Petition for Declaratory Order – Hudson

County NJ, STB Finance Docket No. 34192 (Nov. 20, 2002) Slip Op. at 3 (emphasis added). The Third Circuit Court of Appeals applied similar logic in analyzing the Hi Tech case. In Hi Tech Trans, LLC v. State of New Jersey, Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295, 308 (3rd Cir. 2004), the Court determined that the mere fact that C&D debris was transported in rail cars, which were loaded by Hi Tech, does not “morph Hi Tech’s activities into ‘transportation by rail carrier.’” To accept such reasoning would place any party’s operation under the Board’s jurisdiction “if at some point in a chain of distribution, [the operator] handles products that are eventually shipped by rail by a rail carrier.” Id. Congress did not intend for the Board’s jurisdiction to sweep that broadly.

The Board has held that processing and manufacturing activities located on railroad property but not “integrally related to the provision of interstate rail service” or “part of a railroad’s ability to provide transportation services” are not under the Board’s jurisdiction, but are instead subject to local and state regulation to the same extent as if they were located on non-railway property. Borough of Riverdale – Petition for Declaratory Order – The N.Y. Susquehanna and Western Ry. Corp., STB Finance Docket No. 33466 (Sept. 10, 1999), Slip Op. at 9. The 11th Circuit Court of Appeals has held that a distribution center located on property leased from a railroad was not shielded from local zoning by the ICCTA because the distribution activities “serve no public function and provide no valuable service to the [railroad].” See Florida East Coast Ry. Co., 266 F.3d at 1336. Although the distribution center was located on railroad property and involved the unloading of railcars, the distribution activities were sufficiently attenuated from rail transportation so as to fall outside the scope of the Board’s jurisdiction.

The solid waste processing operations proposed by NET are not integrally related to rail transportation services. While it is established that certain transloading activities, such as tipping and loading and intermodal transfer of goods, are within the Board's jurisdiction, the acts of sorting, segregating, recycling, shredding and bailing solid waste are extensive processing activities that have more in common with the manufacturing, production, and distribution activities the Board has held as not within its jurisdiction. See Florida East Coast Ry. Co., 266 F.3d at 1324; Compare Green Mountain Railroad Corporation – Petition for Declaratory Order, STB Finance Docket No. 34052 (May 28, 2002) (transloading bulk salt and cement); Boston and Maine Corporation and Town of Ayre, MA – Joint Petition for Declaratory Order, STB Finance Docket No. 33971 (May 1, 2001) (transporting automobiles).

Although NET posits that shredding and baling of waste will increase the utilization of rail equipment and protect rail equipment from damage, such analysis does not conclusively prove that these operations are integral to rail transportation. Solid waste transfer stations that provide waste processing services, like those proposed by NET, are typically unaffiliated with railways. Furthermore, waste that is processed at state-regulated solid waste transfer stations may also be received by rail carriers for transportation out of state. It is difficult to ascertain how solid waste processing would be integral to rail transportation when other waste service facilities successfully process and transport waste to rail carriers without being located directly on railway-owned property.

Even if NET was determined to be a rail carrier, the Board should not accept jurisdiction over NET's waste processing activities, simply because the same corporate entity proposes to both process the waste and oversee the shipment by rail carrier.

Preemption should not depend on whether the separate functions of waste handling and transport are managed by one corporate entity or by two. The objectives of Federal transportation policy expressed in 49 U.S.C. §10101, especially the assurance of effective competition between and among rail carriers and other modes, are not advanced by allowing a solid waste facility operator's eligibility for preemption to hinge on such an artificial distinction. If NET contracted with a third-party to conduct the waste processing activities at its Facility, the Board would not have jurisdiction over the activities of the third-party. Grafton and Upton Railroad Co., 417 F.Supp.2d. at 171. It is incongruous to suggest that the very same activities, conducted by NET itself, would somehow overcome the jurisdictional hurdle.

For these reasons, it is apparent that NET's operations are not integrally related to rail transportation services and are therefore not subject to the Board's jurisdiction.

3. The Board May Not Preempt State and Local Regulations Protecting Public Health and Safety.

The Board should decline to exercise jurisdiction over NET's proposed waste processing activities because solid waste services are subject to a system of state oversight, which is essential to the protection of public health and safety. The ICCTA does not preempt state regulations which come within the state's traditional police powers and which are directed at the protection of public health and safety. The Board has noted that "ICCTA does not usurp the right of state and local entities to impose appropriate public health and safety regulations on interstate railroads." King County, WA – Petition for Declaratory Order – Burlington Northern Railway Company, STB Finance Docket No. 33095 (Sept. 25, 1996) Slip Op. at 4. "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 ‘manag[ing]’ or ‘govern[ing]’ rail transportation, . . . while permitting the continued application of laws having a more remote or incidental effect on rail transportation.” Florida East Coast Ry. Co., 266 F.3d at 1331.

The regulation of solid waste management is an area that remains within the state’s traditional police powers due to the compelling interest of the state in regulating hazards posed by unmanaged disposal of solid waste. See e.g. 42 U.S.C. §6901(b)(2) (“disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment”); see also Old Bridge Chems., Inc. v. Department of Environmental Protection, 965 F.2d 1287, 1292 (3d. Cir. 1992) (stating that “the collection and disposal of solid wastes should continue to be primarily the function of the State.”). State regulation of these concerns is necessary to provide sufficient oversight and maintain consistent application of regulations across the state. Massachusetts has a comprehensive system for the regulation of solid waste handling and processing activities. See Solid Waste Management Act, G.L. c. 111 §150A and Massachusetts Department of Environment Protection Regulations, 310 CMR 16.00 et seq. and 19.00 et seq.

The waste processing activities proposed by NET pose a significant threat of harm to the public if not managed correctly. To find that 49 U.S.C. 10501(b) requires the preemption of all state regulation of solid waste management would create an unnecessary and potentially harmful regulatory gap, and would place an unreasonable burden on the Board to serve as the regulating authority of these activities.

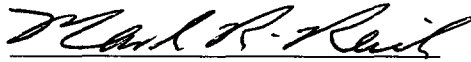
Therefore, NET's operations should be subject to local health regulation and are clearly not entitled to preemption from those regulations.

CONCLUSION

NET's Petition is clearly an attempt to circumvent state solid waste regulations by seeking rail carrier status and designating its solid waste processing services, carried out on railway property, as "integral" to rail transportation. For the reasons stated herein, the City of Woburn urges the Board to deny NET rail carrier status and decline to accept jurisdiction over NET's solid waste processing activities, which are not integrally related to rail transportation.

RESPECTFULLY SUBMITTED,
CITY OF WOBURN,

By its attorney,



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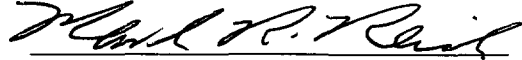
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CERTIFICATE OF SERVICE

I, Mark R. Reich, hereby certify that on the below date, I served a copy of the foregoing Comments of the City of Woburn, by first class mail, postage prepaid, to the parties of record in this proceeding, as provided on the attached Service List.

Dated: July 12, 2006


Mark R. Reich

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**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

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