



ASSOCIATION OF
AMERICAN RAILROADS

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July 13, 2006

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

Re: Finance Docket No. 34797, New England Transrail, LLC, d/b/a Wilmington
& Woburn Terminal Railway – Construction, Acquisition and Operation
Exemption – In Wilmington and Woburn, MA

Dear Secretary Williams:

Pursuant to the order served by the Board on June 13, 2006, in the above
proceeding, the Association of American Railroads and its Member Railroads hereby
submits its Initial Comments.

Respectfully submitted,

Louis P. Warchot

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34797

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

INITIAL COMMENTS
OF ASSOCIATION OF AMERICAN RAILROADS

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July 13, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34797

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

**INITIAL COMMENTS
OF ASSOCIATION OF AMERICAN RAILROADS**

Introduction and Background

The Association of American Railroads files these comments on behalf of itself and each of its individual members (collectively "AAR").

This proceeding concerns the petition, filed on December 5, 2005, of New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway ("NET") for authority to acquire in part, construct in part, and operate as a rail common carrier a total of approximately 7,500 feet of trackage located in Wilmington and Woburn, MA.

Although the nature of the facility to be operated by NET purportedly is to be a transload facility for sand and gravel, plastic resins and liquids, municipal solid waste ("MSW") and construction and demolition debris ("C&D"), most of the comments and concerns raised by parties seemed to concentrate on the transload of MSW and C&D.¹

On June 13, 2006, the Surface Transportation Board ("STB" or "Board") served a decision stating that it will examine and issue a decision on "the extent to which

¹ The transload of MSW and C&D, and the application of the Interstate Commerce Commission Termination Act Preemption (encapsulated in 49 U.S.C. § 10501(b)) to the acquisition, construction and operation of facilities that transload MSW and C&D, have been the subject of several proceedings before the Surface Transportation Board over the past few years.

the activities proposed to be conducted by NET comes within the Board's jurisdiction." STB Finance Docket No. 34797, New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway – Construction, Acquisition and Operation Exemption – In Wilmington and Woburn, MA, served June 13, 2006) ("NET June 13 Decision"), slip op. at 2. Although the Board seeks a discussion of "what activities would normally be associated with MSW and C&D processing and would occur even absent rail transportation," it also seeks comments on the broader issue of "what activities would normally be associated with transloading and thus would be part of rail transportation." Id.

Initial Comments

According to the Board's June 13 Decision, "NET proposes to subject all of the C&D and some of the MSW it receives to sorting, grinding, crushing, aggregating, segregating, and/or bailing before being loaded into rail cars or containers for rail shipment." Id., slip op. at 1. The Board seeks comments with regard to which of these activities "would normally be associated with MSW and C&D processing and would occur even absent rail transportation."

AAR respectfully submits that the question of which processes "would occur even absent rail transportation" is not the relevant inquiry, particularly when fashioning a rule that may have application outside of the specific context of MSW and C&D transloading. Indeed, that question may not be readily answerable. The proper question is whether the activity is "transportation" by a "rail carrier" as those terms are defined in the Interstate Commerce Act, which is a fact-specific inquiry. The key issue in making that determination is whether the entity is created for a railroad transportation purpose or for other "sham" purposes.

AAR members have numerous railroad- and customer-operated transload facilities on their lines devoted to the transloading of various types of materials. In fact, most if not all of the railroads operating under the Board's jurisdiction have facilities

located on their systems that transload coal, chemicals, intermodal containers and trailers, automobiles, grain, lumber and other products between rail and other transportation modes. Transloading between a rail car, on the one hand, and trucks, barges or ships, conveyor belt or another rail car² has been an integral part of railroad operations since railroading began.³ ICCTA preemption is vital for the construction and operation of a railroad-operated transload facility – be it a facility that is open to all comers or one that is designed, constructed or contractually devoted for the benefit a single customer.⁴

Often there are processes taking place at rail transload facilities that occur at other facilities that: (1) load products onto a non-rail transportation mode or transload products between two non-rail transportation modes; and (2) that would occur even absent rail transportation. For example, at intermodal facilities, truck chassis must be inspected, and occasional spot repairs conducted, prior to release – processes that may not seem immediately to be “rail transportation” but which are absolutely necessary to the rail transload function because the chassis should not leave the intermodal facility in an unsafe condition.⁵ At railroad docks on Lake Erie owned by NS and CSX (Ashtabula, Sandusky, and Toledo) coal is transloaded off of the rails and onto Lake vessels (and, in the case of Sandusky, into trucks) – coal that often must be staged on the ground, sampled and weighed before being transloaded.⁶ At NS’ Lamberts Point Docks in Norfolk, where coal is transloaded between rail cars and ocean-going vessels, coals from various sources are mixed via the loading process in accordance with a customer’s request. At a potato

² At times the top layer of a double stack intermodal train will have to be removed and transloaded to a second set of cars when the train reaches a point in its journey that is not cleared for the double stack configuration. In this situation, in which the train has to be converted from a double stack configuration to a single stack configuration, the container transload is literally from rail car to rail car.

³ In fact, the derivation of the term “team track” goes back to the time when railroads operated tracks able to be accessed by its customers’ horse-team pulled wagons and the shipments would be transloaded between a rail car and the wagon.

⁴ Construction of a facility appropriate to a location or market can result in the construction of a facility capable of serving only a single customer.

⁵ These same processes are as necessary to a ship-to-truck or truck-to-ship transload as it is to a truck-to-rail or rail-to-truck transload.

⁶ These same processes take place at conveyor-to-truck coal transload facilities.

flake transload facility on BNSF, product is transferred to and from sample containers via pneumatic tube, where the product is tested for quality and moisture content during the process of transloading to truck. At petroleum coke transload locations, petroleum-coke is tested and blended on-site for a particular sulphur content during the transload operations. At automotive transload facilities throughout the interstate rail system, vehicles are inspected both before entering the rail car and upon leaving the rail car. These are but a few examples of processes associated with the transload that are reasonable or necessary to the rail transload that also would occur in a non-rail transload environment.

Any bright line demarcation that would identify a specific process as one that is or is not rail transportation, without reference to the specific circumstances, runs the risk of forcing these processes to occur either: (1) immediately outside of the gates of the rail-operated facility, in an environment that is not subject to the Board's jurisdiction; or (2) within the gates of the rail-operated facility, but subject to local regulatory oversight and control. Either situation would subject legitimate facilities that are integrally related to "transportation" activities to the whims of local regulation and control. As long as the local community has the ability to control or prohibit processes reasonable or necessary to the performance of the rail transload, the local community will have the ability to control or prohibit the rail transload itself.

AAR urges the Board, in reviewing the initial and subsequent rounds of comments in this proceeding, to recognize that the controversies surrounding the transload of MSW and C&D are of relatively recent vintage in the rail transload history. Often these controversies result from abuses of the Board's processes and in circumstances that do not involve the transload of other products such as coal, chemicals, intermodal containers and trailers, automobiles, grain, lumber and other products.⁷ Indeed, the Board properly is examining and could address many of the controversies that

⁷ Abuse of the Board's processes is not confined to the construction and operation of MSW and C&D transload facilities. See, e.g., *See AAR Opening Comments, Ex Parte 659* at 9 (May 15, 2006). (discussing Comrail situation and the development of a "railroad police force" in the absence of a railroad).

arise from such abuses in Ex Parte 659.

This proceeding, concerning an admittedly contentious facility and involving several very difficult issues concerning the specific authority sought, should not result in a sweeping ruling about the scope of preemption for transloading facilities that overlooks the historic and significant role that transload facilities play in logistics chains that are becoming ever more sophisticated and integrated. At the very least, the question of jurisdiction must involve a broader inquiry than simply whether a specific process would occur even absent rail transportation.

CONCLUSION

AAR strongly urges the Board to focus on the essential role that transload facilities have historically played in railroad operations to recognize that such facilities are located throughout the rail network to handle a wide variety of commodities. AAR urges the Board to ensure that any decision in this proceeding does not intentionally or unintentionally harm the railroads' ability to provide, free from State or local regulatory interference, important transload processes that railroads have provided and continue to provide to the shipping public.

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Respectfully submitted,



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July 13, 2006

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2006, I have caused to be served a true and correct copy of the forgoing to the persons on the attached list by first-class mail, postage prepaid, or by more expeditious means.

Robert P. Wauchope

Dated: July 13, 2006

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