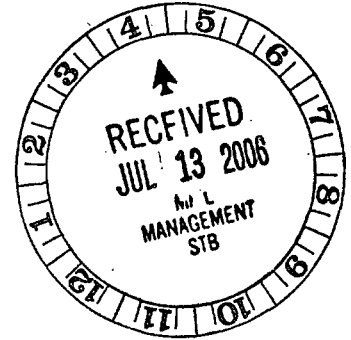


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ORIGINAL

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

COMMENTS

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GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

July 13, 2006

Attorney for John D. Fitzgerald

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SURFACE TRANSPORTATION BOARD

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COMMENTS

John D. Fitzgerald,^{1/} for and on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), submits these comments in response to the Board's invitation, by decision served June 13, 2006, to all interested parties to comment on the Board's jurisdiction in this proceeding.^{2/}

1. UTU/GO-386 is concerned with the Board's apparent encouragement of so-called "non-carrier" notices^{and petitions} of exemption under 49 U.S.C. 10901, wherein individuals outside the railroad industry seek to establish a "rail carrier" on a short piece of track, so as to engage in the waste business and/or transportation. UTU/GO-386 represents railroad operating personnel employed by Burlington Northern Railway Company (BNSF). UTU/GO-386 is concerned by this development, which appears also intended for the western United

^{1/} General Chairman for United Transportation Union on lines of BNSF Railway Company, with offices at 400 E. Evergreen Blvd., Vancouver WA 98660.

^{2/} Although the Board gave the requisite 30 days notice period, the Board's notice was not published in the Federal Register.

States, particularly with respect to the substitution of work by a newly-established "rail carrier" for work otherwise performed by the established "real" rail carriers, such as BNSF.

2. UTU/GO-386 generally understood the lead docket in this subject would be Finance Docket No. 34776, National Solid Wastes Management Association, et al.-Petition for a Declaratory Order.^{3/} However, the Board by decision served March 10, 2006, declined to institute a declaratory order proceeding.

3. The Board should find that although it may have exclusive jurisdiction over the construction, acquisition or operation of spur, industrial, team, switching, or side tracks, the Board lacks authority to permit or to allow such construction, acquisition, or operation. 49 U.S.C. 10501(b)(2); 10906. Cf. United Transp. Union v. Surface Transp. Bd., 183 F.3d 606, 612-13 (7th Cir. 1999). In short, spur or industrial tracks are "excepted" from STB authorization, such trackage not being "line of railroad," over which the STB otherwise might have authority under 49 U.S.C. 10901.

4. The instant proposed construction and/or acquisition/operation of a small footage of industrial trackage appears to be "excepted" trackage under 49 U.S.C. 10901.^{4/}

3/ UTU/GO-386 advised the Board's Secretary, by letter dated December 13, 2005, that UTU/GO-386 desired to participate in the event the Board should institute a declaratory order proceeding.

4/ The Board's decision in Finance Docket No. 34391, New England Transrail, LLC, d/b/a Wilmington and Woburn Terminal Railroad Co.--Construction, Acquisition, and Operation Exemption--in Wilmington and Woburn, MA (served March 2, 2004), conditionally ruled in an unopposed petition for exemption, that the 4,000 feet of industrial trackage was "line of railroad." However, the Board subsequently dismissed the petition for exemption without prejudice, by decision served May 3, 2005, and noted the proposal had been modified. Thus, the matter of the Board's jurisdiction and authority under 49 U.S.C. 10901, 10906, is open and undecided.

5. UTU/GO-386 notes that considerable arguments have already been submitted in this proceeding on jurisdictional matters. The petitioner appears to place principal reliance upon the Board's May 3, 2005 decision in Finance Docket No. 34509, Kaw River Railroad, Inc.-Acquisition and Operation Exemption-The Kansas City Southern Railway Company (Kaw River).^{5/}

However, Kaw River is undergoing judicial review,^{6/} and Kaw River never sought STB authority to become a common carrier.^{7/}

6. The STB's recent conversion of traditional industrial trackage into a phantom "line of railroad," so contrary to the public interest, is tending toward adverse legislative reactions, similar to the undercharge/overcharge manipulation that ended in the 1994 U.S. House vote terminating appropriations for the Interstate Commerce Commission.

Respectfully submitted



GORDON P. MacDOUGALL
1025 Connecticut Ave., N.W.
Washington DC 20036

July 13, 2006

Attorney for John D. Fitzgerald

^{5/} See: Petition, 12/5/05, 17; Reply, 2/21/06, 3; Kaw River and New England Transrail (F.D. No. 34391), were both decided May 3, 2005.

^{6/} Brotherhood of Locomotive Engineers and Trainmen v. STB (No. 05-1233). The "entire line" theory, whereby industrial and spur tracks are converted into "line of railroad," appears to stem from the STB's interpretation of the Court's rulings in Brotherhood of Locomotive Engineers v. U.S., 101 F.3d 718 (D.C. Cir. 1996), as determined by the STB in Effingham RR Co.-Pet. for Declaratory Order, 2 S.T.B. 606, 609-10 (1997).

^{7/} The petitioner in judicial review of Kaw River termed it a STB fabrication, among other language.

Certificate of Service

I hereby certify I have served a copy of the foregoing upon
all parties of record by first class mail postage-prepaid.

Washington DC


Gordon P. MacDougall