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August 2, 2006

HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001



217194

Re: STB FD 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:

Enclosed for filing in the above-referenced proceeding are an original and twenty copies of the Reply Comments of The New York, Susquehanna and Western Railway Corporation. A diskette containing an electronic version of the Comments is also enclosed.

Please acknowledge receipt of the enclosed Comments for filing by date-stamping the enclosed extra copies and returning them via our messenger. If you have any questions, please contact the undersigned counsel.

Sincerely,

G. Paul Moates

Counsel for The New York,
Susquehanna and Western
Railway Corporation

Enclosures

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217 194

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



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**

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**REPLY COMMENTS OF THE NEW YORK, SUSQUEHANNA AND
WESTERN RAILWAY CORPORATION**

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Dated: August 2, 2006

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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**

**REPLY COMMENTS OF THE NEW YORK, SUSQUEHANNA AND
WESTERN RAILWAY CORPORATION**

Pursuant to the Board's Decision served in the above-captioned proceeding on June 12, 2006 (the "June 12 Order"), The New York, Susquehanna, and Western Railway Corporation ("NYS&W") submits these reply comments. In its June 12 Order, the Board requested comments from interested parties "on what activities would normally be associated with transloading and thus would be part of rail transportation" for purposes of preemption under 49 U.S.C. § 10501(b) ("ICCTA preemption"). June 12 Order at 2. In response, several commenters have proposed tests that are completely at odds with both the statutory definition of "transportation" and with the operational realities of rail transportation. Others ask the Board to abandon its settled case-by-case approach to ICCTA preemption questions in favor of a one-size-fits-all rule. The Board should reject both suggestions and recognize both that Congress' broad definition of "transportation" encompasses a wide range of transloading activities and that the question of whether a particular activity is related to rail transportation requires a careful assessment of the surrounding facts and circumstances.

SCOPE OF THE PROCEEDING

The ultimate question in this proceeding is a narrow one: whether or not the Board should grant the petition filed by New England Transrail, LLC for authority to acquire in part, construct in part and to operate certain rail facilities in Wilmington and Woburn, Massachusetts. The preliminary federal-state jurisdictional question on which the Board requested comments is similarly narrow. Because New England Transrail's petition concerns in part its proposed transloading of solid waste, NYS&W understands the Board's June 12 Order to call for comments regarding the transloading of solid waste. As such, there is no record on which the Board can consider or rule on the applicability of ICCTA preemption to the transloading of other commodities.

REPLY COMMENTS

I. ICCTA'S BROAD DEFINITION OF "TRANSPORTATION" APPLIES TO A WIDE RANGE OF ACTIVITIES RELATED TO RAIL TRANSPORTATION.

The starting point for any analysis of what activities constitute rail transportation for ICCTA preemption purposes is 49 U.S.C. § 10102(9), which broadly defines the "transportation" over which this Board has exclusive jurisdiction. 49 U.S.C. § 10102(9); *see* 49 U.S.C. § 10501(b) (granting Board exclusive jurisdiction over "transportation by rail carriers"). Section 10102(9) provides that:

[T]ransportation includes—

(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(9) (emphases added). By the plain terms of the statute, therefore, “transportation” applies both to the actual movement of cargo and to a long list of services that are “related to” that movement.¹ *Id.* A rail carrier’s “receipt” of freight is covered by the statute, as are any “transfer[s] in transit” or “interchanges[s]” of that freight. *Id.* “[H]andling” and “storage” related to rail transportation are similarly covered. *Id.* Indeed, both the Board and the federal courts have repeatedly held that “transportation” encompasses related activities that go far beyond the actual movement of cargo.²

The test for determining whether an activity is “transportation,” therefore, is whether it can fairly be considered to be “related to” a rail carrier’s movement of passengers or freight.³

¹ Indeed, this long list is not exclusive. Section 10102(9)(B) uses the term “including,” which indicates that the provision only gives a partial, illustrative list of services related to rail transportation. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 188-89 (1941). “Transportation,” therefore, includes all “services related to [rail] movement[s],” even those that are not enumerated in § 10102(9)(B).

² *See, e.g., Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 640 (2d Cir. 2005) (construction of storage sheds); *Canadian Nat’l Ry. Co. v. City of Rockwood*, No. COV/ 04-40323, 2005 WL 1349077, at *4 (E.D. Mich. 2005) (construction of transload facility for construction and demolition debris); *Soo Line R.R. Co. v. City of Minneapolis*, 38 F. Supp. 2d 1096, 1101 (D. Minn. 1998) (demolition of buildings and “construction, development, and operation” of bulk transfer facility); *CSX Transp., Inc. v. Georgia Pub. Serv. Comm’n*, 944 F. Supp. 1573, 1582 (N.D. Ga. 1996) (maintenance of railroad business offices); STB Fin. Docket No. 33971, *Joint Pet. for Decl. Order—Boston & Maine Corp. & Town of Ayer, MA*, slip. op. at 2 (Apr. 3, 2001) (facility where automobiles were loaded, transferred, and temporarily stored).

³ The Commonwealth of Massachusetts suggests that any activity at a rail facility that might also occur at a non-rail facility is, by definition, not related to rail transportation. *See* Comments of Massachusetts at 4 (July 13, 2006). This is not—and could not be—correct. Activities such as “refrigeration,” “ventilation,” and “storage” all may constitute “transportation” under § 10102(9)(B) where they are undertaken in connection with a rail carrier’s transportation of cargo. The fact that such goods might be refrigerated or stored even if they were not transported by rail does not alter the conclusion that, when conducted in connection with rail transportation, such activities are covered by § 10102(9). Similarly, the fact that certain actions might be taken when a commodity is transported by truck or by rail does not make those actions any less “related to” rail transportation. *See* Comments of Ohio Env’tl Prot. Agency at 2 (suggesting that preemption only applies to actions that are “unique to rail transportation”). For example, while a building obviously could be constructed to support truck transportation or for a

See STB Finance Docket No. 33466, *Borough of Riverdale--Pet. for Decl. Order--The New York Susquehanna and Western Ry. Corp.*, slip op. at 9 (Sept. 9, 1999) (Board has jurisdiction over activities “integrally related to the provision of interstate rail service”). This is necessarily a fact-bound question that depends upon the surrounding context and the nature and purpose of the rail carrier’s service.

Some general guidelines are clear from the statute, however. For example, a railroad’s “receipt” of freight at a transload facility is plainly covered by the statute, and its loading process is similarly “related to” the movement of that property. § 10102(9)(B). In addition, the “storage” of cargo while it awaits loading before shipment or customer pickup after shipment is a necessary element of transportation. *Id.* Similarly, a railroad’s “handling” of freight to facilitate safe and efficient rail movement is subject to the Board’s exclusive jurisdiction. *Id.* For example, as part of providing rail transportation service, a railroad may inspect freight tendered to it, and it may remove nonconforming materials from such freight. The Association of American Railroad’s filing illustrates but a few examples of the many forms of “handling” performed at transload facilities that are integrally related to rail transportation. See Comments of American Association of Railroads at 4-5.

To be sure, “transportation” has limits, and it does not include the manufacturing or processing of goods that is not related to the transportation of those goods. In many cases, however, differentiating between non-transportation-related “processing” and transportation-related “handling” requires a careful individualized assessment of the operations at issue. For this reason the Board has long recognized that “individual situations need to be reviewed

non-transportation purpose, the construction of a building that is related to rail transportation is unquestionably covered by ICCTA. See *Green Mountain R.R. Corp.*, 404 F.3d at 640. The proper question is whether the activity takes place in a context related to rail transportation, not whether it is possible for the activity to take place somewhere else.

individually” to determine whether ICCTA preemption applies. *E.g.*, STB Fin. Docket No. 33466, *Borough of Riverdale—Pet. for Decl. Order—The New York Susquehanna and Western Ry. Corp.*, slip op. at 2 (Feb. 23, 2001).

Several commenters complain about the Board’s practice of considering specific cases individually and argue that the Board should use this proceeding to draw a “bright-line” rule designating which kinds of activity constitute transportation and which do not. *See, e.g.*, Comments of Raritan Baykeeper, Inc. and Hackensack Riverkeeper, Inc. at 2-3 (July 12, 2006); Comments of NSWMA *et. al.* at 19 (July 13, 2006). Such an inflexible “one-size-fits-all” approach is not workable or appropriate for a case-specific inquiry that must consider a wide variety of different facts and circumstances. New England Transrail’s proposed facility is simply not representative of the thousands of transload facilities throughout the country. For example, it differs in significant respects from NYS&W’s own transload facilities, some of which handle construction and demolition debris and one of which handles contaminated soils. The Board simply does not have an adequate factual record in this proceeding to define the bounds of preemption for all transload facilities that may handle solid waste.⁴

⁴ The need for the Board to have a full and accurate factual record upon which to base the determination of whether an activity constitutes transportation is illustrated by the repeated mischaracterizations in this proceeding about transload facilities operated by NYS&W. NYS&W operates several facilities in North Bergen, New Jersey that transload construction and demolition debris and one where contaminated soils are transloaded. The State of New Jersey has attempted to impose state and local regulations on those transloading facilities; however, a federal court has enjoined enforcement of those regulations against NYS&W since August 2005. NYS&W voluntarily chose to end all its open-air transloading of construction and demolition debris, and since January 1, 2006 all of NYS&W’s transloading of such materials has been conducted in enclosed buildings that suppress dust emissions and accommodate wastewater and stormwater runoff.

Despite these undisputable, public facts, several parties to this proceeding have continued to claim erroneously that NYS&W is operating open-air facilities that threaten to pollute the environment. *See, e.g.*, Comments of NJDEP at 2, 5; Comments of Raritan Baykeeper, Inc. and

II. OTHER COMMENTERS' ATTEMPTS TO NARROW ICCTA'S BROAD SCOPE SHOULD BE REJECTED.

Even if a bright-line approach were appropriate, some of the rules proposed by commenters are baseless and contrary to the broad terms of ICCTA. For example, Raritan Baykeeper, Inc. and Hackensack Riverkeeper, Inc. ("Baykeeper/Riverkeeper") assert that railroads transporting solid waste should be deemed to be engaged in "transportation" for ICCTA preemption purposes only when that freight is in "sealed containers." Comments of Raritan Baykeeper, Inc. and Hackensack Riverkeeper, Inc. at 1 (July 12, 2006). There is absolutely no basis in the statute for this cramped definition; § 10102(9)'s definition of "transportation" does not turn upon whether or not property is tendered in sealed containers. Moreover, Baykeeper/Riverkeeper's proposal to read such a limitation into the statute disregards the realities of the rail industry. It is standard industry practice for rail carriers to transport materials that are not in "sealed containers." Coal, automobiles, lumber, certain agricultural commodities, and scrap metal are but a few of the materials that are carried in open cars. Requiring bulk freight like construction and demolition debris to be "sealed" prior to rail transportation would be economically impractical; would burden interstate commerce with potentially conflicting requirements of various states and local governments; and would place rail carriers at a serious competitive disadvantage against motor carriers that are not required to transport such materials in sealed containers.

Hackensack Riverkeeper, Inc. at 3 (July 12, 2006). Similarly, NJDEP's suggestion that NYS&W has been operating sham facilities that are fronts for supposed "solid waste disposal companies" is false and belied by the extensive documentation that NYS&W has provided to NJDEP. NJDEP Comments at 5. These misrepresentations demonstrate how important it is for the Board to limit its ruling in this proceeding to New England Transrail's proposed activity and the factual record before the Board, without considering unsupported allegations about activities at other transload facilities.

Some commenters accept that non-containerized waste is subject to ICCTA preemption but claim that the transloading of such material constitutes “transportation” under § 10102(9) only if the materials are loaded directly from trucks into rail cars. *See* City of Middletown Comments at 5 (July 11, 2006) (“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.”); NSWMA Comments at 19-20. According to these commenters, the only transloading that is covered by ICCTA preemption is direct truck-to-rail loading; using a tipping floor to deposit material from trucks prior to loading into rail cars is not “transportation.” This test is flatly contradicted by the express terms of § 10102(9), which expressly includes a railroad’s “receipt” and its “storage” of materials among the services that are “related to” rail transportation. Using the tipping floor of a transloading facility to “recei[ve]” bulk materials and “stor[e]” it briefly until it can be loaded is thus plainly “transportation” within the terms of the Interstate Commerce Act. So too is “handling” incident to transportation, such as inspection of cargo and the removal of nonconforming materials.⁵

Other commenters seem to argue that ICCTA preemption should not apply where they believe local environmental oversight would be good public policy. *See* NJDEP Comments at 3. But Congress has made the relevant policy judgment here by enacting ICCTA’s “clear and broad” preemption clause that precludes “all state efforts to regulate rail transportation.” *Wisconsin Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000); *see* *CSX Transp., Inc. v. Georgia Pub. Serv. Comm’n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996) (“It is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory

⁵ NYS&W takes no position on whether the baling, chopping, and processing of solid waste is a necessary incident of rail transportation. NYS&W does not bale, chop, or otherwise process construction and demolition debris at any of its transload facilities in North Bergen, New Jersey.

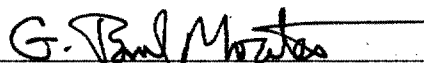
authority over railroad operations.”). Indeed, it was precisely to avoid the sort of regulatory balkanization of commerce inherent in these proposals that Congress enacted the broad preemption provisions of ICCTA. *See City of Auburn v. United States*, 154 F.3d 1025, 1031 (9th Cir. 1998). Neither local governments nor the Board may disregard Congress’s policy judgment simply because state and local governments would prefer to regulate activities that Congress defined as rail transportation.

These policy claims appear to be based on the erroneous impression that ICCTA preemption gives railroads “virtual immunity from any meaningful environmental or health and safety regulation.” NJDEP Comments at 9. To be sure, ICCTA preempts certain state regulations that NJDEP has attempted to apply to NYS&W’s facilities (and which have been restrained by the New Jersey federal district court). But the fact that ICCTA preemption applies to certain state laws does not mean that rail carriers are not subject to any environmental regulation. The Board exercises environmental regulation and review of rail carrier activity. Moreover, federal environmental statutes such as the Clean Air Act or Clean Water Act are also relevant to rail carriers. As the Board has explained, “where section 10501(b) and a Federal environmental statute are both involved, the Federal statutes need to be harmonized” by weighing “[t]he severity of the likely environmental impacts” against “the severity of the transportation impacts of compliance.” STB Fin. Docket No. 33971, *Joint Pet. for Decl. Order—Boston & Maine Corp. & Town of Ayer, MA*, slip. op. at 3-4 (Oct. 3, 2001). Indeed, the Board has indicated that state and local jurisdiction over certain matters of public health and safety is not preempted, so long as that regulation is non-discriminatory and does not unduly interfere with rail transportation, and NYS&W has in fact substantially complied with such standards.

CONCLUSION

In conclusion, NYS&W takes no position on whether the petition filed by New England Transrail, LLC for authority to acquire in part, construct in part and to operate certain rail facilities in Wilmington and Woburn, Massachusetts should be granted. NYS&W urges the Board to rule only on that specific petition, however, and continue to adhere to the Board's own well-settled policy of deciding specific preemption issues on a case-by-case basis.

Respectfully submitted,



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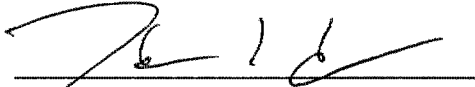
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Dated: August 2, 2006

CERTIFICATE OF SERVICE

I hereby certify this 2nd day of August 2006 that I have served all parties of record in this proceeding by first class mail, postage prepaid.


Matthew J. Warren