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

Re: NEW ENGLAND TRANSRAIL, LLC D/B/A THE WILMINGTON &
WOBURN TERMINAL RAILWAY & WOBURN TERMINAL RAILWAY-
PETITION FOR EXEMPTION-TO ACQUIRE, CONSTRUCT AND OPERATE
AS A RAIL CARRIER ON TRACKS AND LAND IN WILMINGTON AND
WOBURN, MA,
STB Finance Docket No. 34797

Dear Secretary Williams:

Enclosed for filing in the above captioned matter are the original and ten copies of a Reply of New England Transrail, LLC to Jurisdictional Comments.

Please file these documents in STB Finance Docket No. 34797, file-stamp the additional copy and return it to our messenger for service and for our files. If you have any questions regarding this filing, please do not hesitate to contact us.

Thank you in advance for your careful consideration of this filing.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jeffrey M. Bauer'. The signature is stylized with a large, sweeping 'J' and 'B'.

Jeffrey M. Bauer

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 34797

**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**

**Petitioner's Reply to Jurisdictional Comments
(Includes Color Exhibits)**

New England Transrail, LLC ("NET") hereby submits its reply to the comments filed in response to the Board's June 13, 2006 order in this proceeding. In that order, the Board instituted a preliminary inquiry to determine whether it has exclusive jurisdiction over certain activities proposed to be undertaken by NET at a transload facility that NET intends to construct and operate in Wilmington, Massachusetts ("NET Facility").

At the outset, it is important to note what this jurisdictional inquiry is not about. Not a single commenter has asserted that NET's transloading of plastic pellets or sand or gravel or wood chips (or any number of other commodities) falls outside the definition of "transportation" that is subject to the Board's exclusive jurisdiction under the Interstate Commerce Commission Termination Act ("ICCTA"). This is significant. For despite all the controversy associated with NET's proposal to transload construction and demolition debris ("C&D") and municipal solid waste ("MSW"), it cannot be disputed that NET's

Facility is designed to handle a variety of commodities. NET attached to its Petition the verified statement (“V.S.”) of one of its principals, Robert Jones, who swore to that effect. And no one has submitted any verified statement to the contrary.

Furthermore, even the National Solid Wastes Management Association and its affiliated entities (hereinafter “NSWMA”) concedes that NET should be allowed to transport C&D and MSW if all it would be engaged in doing is “merely moving its cargo from one mode of transportation to another.” NSWMA Comments at 7. However, NSWMA objects to the manner in which the C&D and MSW will be “moved” by NET. The reason for NSWMA’s opposition seems clear – its members do not want to be exposed to any competition. They want to force shippers to send waste materials to one of their processing sites in a truck, where it will be sorted and then loaded into another truck for transportation to yet another site, be it a rail yard, disposal facility or recycling facility. The economic inefficiency involved in such an operation is staggering, not to mention the adverse environmental impacts.

The Massachusetts Department of Environmental Protection (“MADEP”) argues that NET’s handling of C&D and MSW constitutes “solid waste processing” that is subject to the state’s regulatory permitting requirements. MADEP Comments at 7-10. What should be kept in mind is that MADEP has previously argued that the NET Facility would be subject to the full panoply of the state’s environmental permitting requirements even if it handled no waste materials at all. This is because MADEP argued in its Reply to NET’s Petition that the Board has no authority to preempt any facility from the state’s

“site assignment” permitting program.¹ There is also an economic motive underlying MADEP’s opposition to NET’s project. MADEP does not want any waste materials to escape regulation under its so-called “waste bans,” which require certain materials to be recycled. The stated purposes of the mandatory recycling are to prevent use of the limited landfill capacity in Massachusetts and to create an economic incentive for the recycling industry in the Commonwealth.² As NET explained in its Consolidated Reply, however, there is no basis for MADEP to enforce its waste bans with respect to materials that are being transported out of state.³

Essentially NET’s opponents are attacking the way in which NET plans to unload waste materials from trucks and load them onto rail cars. They argue that NET’s loading and unloading of these materials is not “integral to their transportation.” This is not a new legal argument. It was fully briefed by NET’s opponents in their replies to NET’s Petition and it was fully rebutted by NET in NET’s Consolidated Reply. Consolidated Reply at 4-11. Accordingly, NET does not intend to repeat in this submission every factual and legal point contained in its Petition and Consolidated Reply. Instead, NET will summarize the key points and demonstrate why applicable legal precedent requires

¹ MADEP Reply at 2, 12-13 (January 27, 2006). Other states that have filed comments have made similar arguments about their own regulatory programs. See generally, Comments of Colorado Department of Health and Environment, Idaho Department of Environmental Quality, Illinois Environmental Protection Agency, New Jersey Department of Environmental Protection, and Ohio Environmental Protection Agency.

² Commonwealth of Massachusetts Department of Environmental Protection, Frequently Asked Questions About The Massachusetts Waste Bans, Feb. 14, 2006, available at www.mass.gov/dep/recycle/wbgidy2k.pdf.

³ Consolidated Reply at 11-13, Feb. 21, 2006 (attached hereto as Exhibit A). Of course, if NET were to voluntarily comply with the “waste bans,” it probably would be attacked by NSWMA (and perhaps even by MADEP itself) for engaging in non-transportation activities.

the Board to decide that NET's proposed activities are subject to the Board's exclusive jurisdiction.

NET agrees with the statement made by the Association of American Railroads ("AAR") that the relevant inquiry for the Board is not whether certain processes "would occur absent rail transportation." Instead, the question is whether the activities proposed to be undertaken by NET constitute "transportation" by a "rail carrier." AAR Comments at 3. See also Comments of CSX and Norfolk Southern (adopting the AAR Comments). As discussed below, the Board's jurisdictional inquiry does not present a case of first impression. As noted by the AAR, the shipment of waste by rail is of "relatively recent vintage." AAR Comments at 5. However, the practice of preparing materials for transloading onto rail cars has been conducted as part of railroad operations for over a century. As a result, there is ample and longstanding judicial and Board authority directly relevant to the following two questions that must be answered by the Board. First, is NET a rail carrier? Second, does NET's proposed unloading and loading of C&D and MSW materials constitute "transportation"? For the reasons set forth below, both questions should be answered in the affirmative.

1. NET Qualifies to Be a Rail Carrier.

NET's Petition specifically requests that it be granted the "authority to operate as a common carrier by rail." Petition at 5. In support of its request, NET described the legal standard for such status and described how it will meet that standard once its Petition is granted. Id. NET attached to its Petition the verified statements of its technical consultants and one of its principals, Robert Jones, in which the ownership of

NET and the technicalities of its proposed operations are described in detail. None of the commenters has filed any verified statement rebutting NET's verified statements regarding NET's ownership and its plans for conducting operations at the NET Facility.

Further, none of NET's opponents has cited any legal authority to support the Board's denial of NET's status as a rail carrier. Instead, some of NET's opponents merely asserted, as they did in their original replies to NET's Petition, that because NET is not currently a common carrier, its petition should be denied. See, e.g., Reply of NSWMA at 14-15; Reply of MADEP at 12. In its Consolidated Reply, NET discussed in some detail the precedent of the Board that allows a request for carrier status to be made in the same petition in which a request for an exemption is made. Consolidated Reply at 2-3.

It is well-established that the Board has granted rail carrier status to entities proposing to perform services that are similar to those proposed to be performed by NET. See, e.g., Kaw River R.R. Inc. – Acquisition and Operation Exemption – The Kansas City Southern Ry. Co., STB Finance Docket No. 34509 (STB served May 3, 2005) (citing cases); Pennsylvania Southwestern R.R. Inc., – Lease and Operation Exemption – J.L. Special Steel, LLC, STB Finance Docket No. 34328 (STB served April 24, 2003); Penn Jersey Rail Line, Inc. – Acquisition and Operation Exemption – WMI Prop., Inc., STB Finance Docket No. 33414 (STB served June 24, 1997). In those cases, the Board granted rail carrier status and asserted jurisdiction over the newly-created carrier's operations because each was proposing to create a new railroad to compete with other carriers in the territory and because each was providing access to the national railway system. See Kaw River R.R. Inc. at 4, n.2. The same factors are present here.

As explained in NET's Petition and accompanying verified statements, NET was created specifically to operate as a full-service common carrier by rail. Petition at 16; Jones V.S. at ¶¶ 2; 19. As a common carrier, NET will acquire and operate the necessary railroad equipment and will hire the appropriate railroad personnel. NET will also execute the appropriate agreements with the B&M and the MBTA to connect its operations to the national railway system. Petition at 6; Jones V.S. at ¶ 3.

There is nothing speculative about NET's plans, and none of the commenters has filed any verified statement challenging the accuracy of the statements contained in NET's Petition and accompanying verified statements regarding those plans. The argument that NET is not currently a rail carrier ignores the obvious point that NET cannot implement key aspects of its business plan, such as the purchase of a locomotive, until after the Board grants it authorization to operate as a common carrier. In summary, the unrebutted evidence in the record demonstrates that NET will operate as a rail carrier and thereby provide access to the national railway system. Therefore, under applicable Board precedent, NET qualifies as a rail carrier.

2. NET's Proposed Unloading and Loading Operations Constitute "Transportation" Subject to the Board's Exclusive Jurisdiction.

As a common carrier, NET has proposed to perform a variety of services integral to "transportation" as defined under applicable law. Congress specifically defined "transportation" broadly to include, within the preemptive jurisdiction of the Board, all facilities and services related to the movement of goods by rail. 49 U.S.C. § 10102(9). Specifically, the statute includes "any yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property . . . by rail." Id.

The intent of Congress was to broaden the federal jurisdiction over railroads and their activities and to free railroads, even smaller intrastate operations, from inconsistent, expansive, and expensive state regulation. See S. Rep. 104-176, *5-6, 104th Congress 1st Session, 1995 WL 701522.

As articulated in NET's Petition and NET's Consolidated Reply, the courts that have interpreted the scope of the Board's jurisdiction under the ICCTA, and indeed the Board itself, have uniformly held that the types of intermodal transloading operations proposed by NET constitute "transportation" under the statute when conducted by rail carriers. Petition at 19-20; See, e.g., Green Mt. R.R. Corp. v. Vermont, 404 F.3d 638, 644 (2d Cir. 2005) ("[T]he proposed transloading and storage facilities are integral to the railroad's operation and are easily encompassed within the [Board's] exclusive jurisdiction over 'rail transportation.'"); Coastal Distribution LLC v. Town of Babylon, No. 05-CV-2032, slip op., 2006 WL 270252 (E.D.N.Y. January 31, 2006) (holding that C&D storage and transloading facility was part of rail transportation) ; Canadian National Railway, et al. v. City of Rockford, et al., 2005 WL 1349077 (E.D. Mich. June 2, 2005) (activities occurring at the C&D transload facility "appear to meet the definition of 'transportation by rail carrier,' which would cause [city's] regulations to be preempted."); Grafton & Upton R.R. Co. v. Town of Milford, 337 F. Supp. 2d 233, 239 (D. Mass 2004); Norfolk Southern Ry. Co. v. City of Austell, 1997 WL 1113647, *6 (N.D. Ga. 1997) ("[T]he instant intermodal facility comes within the ICCTA's definition of 'transportation by rail carrier' over which the STB is given exclusive jurisdiction."); Green Mountain Railroad Corporation – Petition for Declaratory Order, STB Finance Docket No. 34052 (STB served May 28, 2002); Joint Petition for Declaratory Order–

Boston and Maine Corporation and the Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001); cf. Hi Tech Trans, LLC – Petition for Declaratory Order – Newark, NJ, STB Finance Docket No. 34192, at *5-6 (STB Served August 14, 2003) (“There is no dispute that Hi Tech’s transloading activities are within the broad definition of transportation.”).

As explained in NET’s Petition and accompanying verified statements, NET proposes to transport a broad array of commodities. Petition at 10; Jones V.S. at ¶¶ 2, 4, 9, 11, 12, 13. As AAR noted in its comments, “most if not all of the railroads operating under the Board’s jurisdiction have facilities located on their systems that transload” some of the same types of commodities that NET has proposed to handle at its facility. See AAR Comments at 4. Because NET will operate as a common carrier, the demand for NET’s transportation services will necessarily be driven by the free market. To date, however, NET has engaged in discussions with a number of shippers about transporting those commodities that are listed in the Petition. That list is based on the verified statement of one of NET’s principals, Robert Jones. Petition at 10; Jones V.S. at ¶ 4. As a result of those discussions, NET has designed the construction and operation of its facility so that it will be able to accommodate that broad array of commodities. Indeed, the precise location for the transloading of various commodities is specifically listed in the Petition. Petition at 10-12. Attached as Exhibit B is an artist’s rendering of the NET Facility showing what these different commodity loading areas will look like. NET’s transloading of C&D and MSW, along with other commodities that need protection from the elements, will occur in an enclosed structure located in the center of its facility. A artist’s rendering showing a cut-away of this structure is attached as Exhibit C.

As noted above, NSWMA has repeatedly conceded that NET's transportation of C&D and MSW is subject to the Board's jurisdiction if NET were "merely moving these materials from one mode of transportation to another." NSWMA Comments at 7; see also Reply of NSWMA at 2 (January 27, 2006).⁴ The question is whether the handling techniques that NET proposes to use to unload waste materials from trucks and load them onto rail cars somehow transforms NET's activities into solid waste processing or recycling activities. The evidence demonstrates that NET's unloading and loading of C&D and MSW will be performed solely for the purpose of maximizing transportation efficiency, protecting rail cars, and promoting safer transportation.

As stated in NET's Petition and accompanying verified statements, because of the relatively small size of NET's Property, NET must maximize the efficiency of its transportation of C&D and MSW in order to accommodate the transloading of other commodities. Petition at 20-21; Ryan V.S. at ¶ 7; Egan V.S. at ¶4. All of the handling techniques proposed by NET are for the purpose of facilitating transportation. First, by shredding C&D before loading it onto rail cars, NET will greatly reduce (if not completely eliminate) the significant rail car damage that is now commonly experienced in C&D transportation by rail. Egan V.S. at ¶ 6. Both NET, which will own some of the rail cars, and the lessors of the other leased cars share the same interest in having the C&D shredded before it is loaded. Jones V.S. at ¶ 13; Egan V.S. at ¶ 8. Second, by

⁴ In a recent article in Railway Age magazine authored by Keith Borman, Vice President and General Counsel of the American Short Line and Regional Railroad Association, Mr. Borman described the enormous benefits to the environment, the economy, and shippers of allowing short line and regional railroads to transload and transport waste. In the article, Mr. Borman discusses solid waste transloading as a continuation of the traditional role that short line and terminal railroads play in obtaining capital and developing transloading interfaces between the national railway system and shippers. A copy of the article is attached as Exhibit D.

minimizing void spaces in the cars caused by the bridging or tenting of large pieces of C&D materials, the shredding of C&D allows operators to load cars to their full rated capacity. Egan V.S. at ¶¶ 5-7. Third, the shredding of C&D minimizes the safety risks associated with unevenly loaded cars, which are more likely to derail than evenly loaded cars. Egan V.S. at ¶ 8.

With respect to MSW, baling the material eliminates the need to pack it into rail cars or containers forcibly, which again minimizes damage to the cars and containers. Ryan V.S. at ¶ 10. Second, baling MSW maximizes the amount of material that can be transported in a single car. *Id.* Third, baling maximizes the types of rail cars that can be used to transport the MSW. *Id.* For example, both gondola cars and box cars can be used to transport baled materials. All three of these results relate directly to rail transportation. In addition, baling results in the environmental benefit of reducing fugitive odor and litter. Ryan V.S. at ¶ 11; Egan V.S. at ¶ 11.

All of the handling techniques to be employed at the NET Facility represent the “best management practices” in rail transportation of C&D and MSW. Ryan V.S. at ¶ 2, 6, 10; Egan V.S. at ¶ 6-9. They will require the purchase and use of state-of-the-art equipment to accomplish a legitimate transportation purpose. NET’s proposed operations represent a marked improvement over current transloading practices. Presently, many rail carriers that operate transload facilities for handling waste end up crushing the C&D by running excavating equipment over it and forcing the C&D materials into rail cars using grappling hooks or front-end loaders. Ryan V.S. at ¶ 6; Egan V.S. at ¶ 5. In addition, many truckloads of C&D materials are dumped directly from the trucks into the

rail cars, potentially creating an unsafe loading condition that could lead to a rail car derailment.

An analysis of data contained in a Federal Railroad Administration trend report of rail-related accidents occurring in 2003 through the first half of 2006 shows that seventy (70) accidents, including sixty-six (66) derailments, were a direct result of an improperly loaded car, placing that among the leading causes of railroad accidents not caused by human factors or track/mechanical failure. In addition, forty-three (43) more accidents, including thirty-four (34) derailments, were a direct result of a load that shifted during transportation.⁵

In contrast, NET's shredding of C&D and baling of MSW will maximize efficiency and create a safer and less damaging form of rail transportation. Indeed, NET submits that its proposed practices should be encouraged – if not required – by the Board. At the very least, NET should not be penalized for seeking to engage in the best management practices for handling these materials. Nevertheless, if the Board determines that NET's proposed practices for unloading and loading C&D and MSW are not part of rail transportation, NET reserves the right to operate its facility in an antiquated manner by crushing C&D under excavators and by forcibly packing the C&D into rail cars and by forcibly packing MSW into rail containers.

Some of the commenters reiterate their earlier argument that because NET will be performing some of the same activities that NSWMA's members perform at their solid waste transfer and recycling facilities, it follows that NET's facility must also be a "solid

⁵ See <http://safetydata.fra.dot.gov/OfficeofSafety/Query/Default.asp?page=inctally1.asp>

waste processing facility.” See, e.g., Comments of NSWMA at 7-8, 10-14; Comments of MADEP at 4-9. And, the argument continues, if the NET Facility constitutes such a “solid waste processing facility,” then NET cannot be viewed as engaged in transportation.

This assertion is both legally and factually incorrect. First, the argument ignores longstanding precedent. A similar argument was addressed in United States v. Union Stockyard, 226 U.S. 286 (1912), where a railroad sought to avoid responsibility for feeding and caring for cattle it was transporting. The Court held that such ancillary activities were part of rail transportation and therefore subject to the exclusive jurisdiction of the Board’s predecessor, the ICC. It was not disputed that similar, if not identical, feeding activities were being performed by nearby stockyards. However, the fact that stockyards were engaged in the same activities did not mean that those activities could be excluded from the definition of “rail transportation.” The same analysis applies here.

The Court’s reasoning in Union Stockyard is supported in transportation practices that are occurring every day throughout the country. In its comments, AAR confirmed that “[o]ften 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.” AAR Comments at 4. The AAR comments cited numerous examples and described how, when performed in the context of a rail transload operation, these processes are absolutely necessary to rail transportation. Id. The facts related in AAR’s comments are undisputed in the record.

Second, the unsupported assertion that NET is engaging in activities similar to those that take place at solid waste processing facilities is contrary to undisputed facts in the record. Attached as Exhibit E is a chart showing the differences between the operation of C&D transfer facilities and MSW material recovery facilities and the operation at the NET Facility. As the chart demonstrates, there are a number of significant differences. For example, typical solid waste processing facilities create increasingly finer types of aggregate from their grinding and screening of concrete materials, with some pieces being as small as a grain of rice. This grinding and screening practice is utilized for the sole purpose of creating and then selling these aggregate materials as commercial products. In contrast, NET intends to shred concrete and other materials into much larger pieces, typically averaging two feet in length. NET's sole purpose in shredding these materials is facilitating their loading onto rail cars for transportation. Unlike solid waste processing facilities, NET will not be creating stockpiles of different types of commercial materials for the purpose of resale. Instead, NET will derive all of its revenue from its transloading and transportation activities.

Perhaps in recognition of the obvious differences between the NET Facility and typical solid waste processing facilities, NET's opponents next assert that NET will be "adding value" to the materials that pass through its facility. See Comments of NSWMA at 6. This assertion too is contrary to established case law and the un rebutted facts in the record.

Since the passage of the Hepburn Act in 1906, the definition of transportation has included "services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange."

Act of June 29, 1906, ch. 3591, 34 Stat. 584. Many of these services “added value” to the ultimate transportation of the affected commodity. “Thus, Congress clearly recognized that services such as [grain elevators that processed, cleaned, mixed, and transloaded grain ancillary to the rail service] were services in transportation,” although they were conducted by private grain companies. See ICC v. Diffenbaugh, 222 U.S. 42, 44 (1911); accord Cleveland, Cincinnati, Chicago, & St. Louis Ry. Co. v. Dettlebach, 239 U.S. 588, 594 (1916) (“[F]rom this and other provisions of the Hepburn Act it is evident that Congress recognized that the duty of carriers to the public included a variety of services that, according to the theory of the common law, were separable from the carrier’s service as carrier.”) To the extent that NET’s proposed handling of C&D and MSW “adds value” to NET’s transportation services, that is entirely appropriate. It should be emphasized, however, that any economic benefit that NET may derive from its shredding of C&D or its baling of MSW is directly related to NET’s transportation of those materials. For example, NET may gain an economic benefit by increasing the utilization of its rail cars and minimizing damage to them. That is not the type of economic benefit that a solid waste or recycling facility obtains when it processes, stockpiles, and ultimately resells recycled materials directly in the marketplace.

In summary, NET’s proposed shredding and baling activities are clearly part of the loading and unloading that have long been determined to be integral to transportation. See Railroad Retirement Board v. Duquesne Warehouse Co., 326 U.S. 446 (1946) (loading, storing, and unloading services at a warehouse considered “transportation”).⁶

⁶ A number of commenters have cited the recent injunction order issued in *New Jersey v. J.P. Rail, Inc.*, Atlantic Superior Court Docket No. C-41-06 (Chancery Div. June 22,

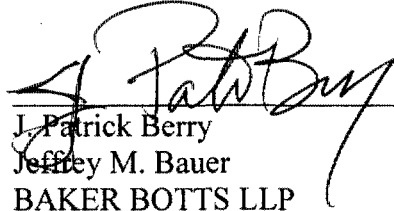
Conclusion

The commenters opposing NET's transloading facility have failed to articulate any real factual or legal basis for the Board to deny jurisdiction over the handling activities proposed for the unloading and loading of C&D and MSW in NET's facility. They have presented no evidence to rebut sworn statements submitted by NET in this proceeding. NET's opponents of the facility are asking the Board to depart from established law and create a new legal standard disclaiming jurisdiction over all transloading of C&D and MSW, unless that transloading is conducted using unsafe and antiquated methods. The Board should not do so. The basic facts in this case are established by the verified statements submitted by NET and by the materials submitted in support of NET's Petition. Those facts are unrebutted. The application of existing precedent to those facts demonstrates the proposed facility is well within the Board's traditional jurisdiction. The C&D and MSW handling activities proposed by NET clearly

2006). However, that case is clearly distinguishable both contextually and factually from the issue currently before the Board. First, central to the court's underlying decision was the fact that, unlike NET's Facility, the rail carrier in *J.P. Rail* was not conducting the operations at the transload facility, nor were the operations being conducted on behalf of the rail carrier. In short, the railroad had no role in the delivery, sorting, or loading of materials at the facility. Second, in *J.P. Rail*, the rail carrier, by written agreement with New Jersey Transit, was not permitted to contract for or construct any freight facilities until after it had received permission from New Jersey Transit. However, New Jersey Transit had withheld the necessary approvals for the construction of a rail spur to service the proposed facility because the railroad refused to provide basic safety information requested several times by New Jersey transit. Third, the rail carrier's corporate status had been revoked by the State of New Jersey, and the carrier was not authorized to conduct any business in the state. Thus, the court concluded, no waste could be transported from the facility by rail. Fourth, *J.P. Rail* was not decided in the context of the Board's preemptive jurisdiction over intrusive state and local regulations. Instead, the case involved a situation where the U. S. Department of the Interior had exclusive jurisdiction over development in the area where the facility was to be constructed.

constitute "transportation" by a "rail carrier," and NET's Petition for Exemption should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Patrick Berry", is written over a horizontal line.

J. Patrick Berry
Jeffrey M. Bauer

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Attorneys for New England
Transrail, LLC
Date: August 2, 2006

EXHIBIT

A

215838

BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34797

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

Petitioner's Consolidated Reply To Comments

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On December 5, 2005, New England Transrail, LLC ("NET") filed its Petition for an Exemption from the application requirements of 49 U.S.C. § 10901 ("Petition"). A number of comments have been submitted by interested parties in response to the Petition. Most of those comments focus on a few common issues. To address the main issues raised by the commenters, NET hereby files this Consolidated Reply to the comments filed by the Massachusetts Department of Environmental Protection ("MADEP"), the National Solid Wastes Management Association, et al. ("NSWMA"), the Town of Wilmington ("Wilmington"), and the New Jersey Department of Environmental Protection et al. ("NJDEP").¹ NET believes this Consolidated Reply will aid the Board by providing a "road map" to the various issues raised by the commenters and NET's responses.

¹ NET recognizes that the Board's rules do not permit replies to replies filed by other parties as a matter of course. Accordingly, in a separate letter filed today with the Secretary, NET has requested leave to file this reply.

As explained in detail in its Petition, NET has made a substantial effort to address all of the questions raised by the Board in its May 3 order dismissing NET's original Petition without prejudice. New England Transrail, LLC, STB Finance Docket No. 34391 (STB served May 3, 2005). NET retained technical consultants to assist in that effort, and their verified statements are attached to the Petition. In addition, NET met with representatives of MADEP in September to explain the details of the project in person, and offered, in writing, to enter into a voluntary agreement pursuant to which MADEP could exercise inspection and enforcement authority at the NET Facility. Thus far, MADEP has declined to consider NET's offer to reach a voluntary arrangement with MADEP. Nevertheless, NET remains willing to work with MADEP, and with all other interested parties in the Wilmington and Woburn communities, to address any concerns they may have with respect to the proposed project.

The major issues raised by the commenters can be broken into four separate categories. Those issues are addressed below.

1. NET Will Meet the Standards To Be A Rail Carrier.

MADEP, NSWMA and the NJDEP all argue that NET's Petition for an exemption from § 10901 should be denied because NET is not, at this moment, a rail carrier. MADEP at 12; NSWMA at 14; NJDEP at 8-9. That argument ignores the fact that NET's Petition specifically requests, as part of this proceeding, that it be granted the "authority to operate as a common carrier by rail." Petition at 5. In support of its request, NET described the legal standard for such status and described how it will meet those tests if its Petition is granted. Id.

The commenters cite no authority in the Board's regulations or decisions that precludes NET from making a "common carrier" request in the same pleading in which NET requests authorization to acquire, construct, and operate the trackage and intermodal transload facility at issue. To the contrary, there is ample Board precedent for allowing a noncarrier to seek carrier status in the same proceeding in which it seeks to acquire a rail line. See, e.g., Kaw River R.R., Inc. - Acquisition and Operation Exemption - the Kansas City Southern Ry. Co., 2005 WL 1024485 (S.T.B.), Finance Docket No. 34509 (S.T.B. served May 3, 2005) (citing cases). It is certainly more efficient for the Board to consider both requests simultaneously because it will help the Board to know the details of NET's proposed operations before ruling upon its common carrier request.

MADEP and NSWMA also argue that NET has not provided sufficient information for the Board to grant NET's request to operate as a common carrier. NSWMA asserts that "NET concedes" that its proposed connections with the MBTA and B&M lines are "purely speculative," and MADEP asserts that "NET provides no information on the likelihood of striking a deal with either B&M or the MBTA or on a timetable for putting such agreements in place." NSWMA at 8. MADEP at 14. MADEP also questions whether NET has shown that it can hire the appropriate personnel and acquire and operate the appropriate equipment. MADEP at 14. Similar arguments regarding personnel and equipment are raised by the NJDEP. NJDEP at 8.

Those assertions simply ignore the facts that NET set forth in the Petition and the sworn statements attached thereto. There is nothing "speculative" about NET's plans to execute agreements with the B&M and MBTA and to acquire and operate the necessary equipment and to hire the appropriate personnel. Attached to NET's Petition is the

Verified Statement (“V.S.”) of Robert Jones, III, who certified that the necessary agreements would be executed with B&M and MBTA. See Petition at 6; Jones V.S. at ¶ 3. There is nothing speculative about those plans, because the law requires B&M and MBTA to execute such agreements.² Mr. Jones also certified that, if authorization is granted, NET itself, as a rail carrier, would acquire the railroad equipment and construct and operate the facility, rather than entering into a contract arrangement with an existing rail carrier to provide those services. Jones V.S. at ¶ 7. Obviously, however, NET cannot finalize its plans before the Board grants it authorization to do so. None of the commenters has offered any evidence, beyond mere conclusory assertions, to rebut Mr. Jones’ statements.

Because NET’s Petition specifically requests authority to become a railroad, and because NET meets the requirements for common carrier status as described in the Petition, the commenters’ opposition to the Petition based on NET’s existing status as a noncarrier is without basis.

2. NET Will Be Engaged In “Transportation” Activities, Not “Solid Waste Processing” Or “Recycling” Activities.

Almost all of the commenters argue strenuously that NET’s proposed facility is nothing more than a “solid waste processing facility.” However, those arguments ignore the facts. The record shows that NET proposes to construct an intermodal transload facility that will facilitate the shipment of a broad array of commodities in one continuous intermodal rail movement. The types of activities in which NET proposes to engage at

² See, e.g., 49 U.S.C. § 10742; 49 U.S.C. § 11103; Cleveland, C., C. & St. L. Ry. Co. v. U.S., 275 U.S. 404 (1928); SMS Rail Service Inc.—Petition for Declaratory Order, STB Finance Docket No. 34483-0 (STB served January 24, 2005).

the facility are analogous to those that Congress, the courts, and the Board itself have determined to be “transportation” under applicable law. There is longstanding precedent evidencing a broad interpretation of the Board’s preemptive and exclusive jurisdiction over facilities and services, ancillary to rail carriage, that facilitate the movement of goods by rail.

Since the passage of the Hepburn Act in 1906, the definition of transportation has included “services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange.” Act of June 29, 1906, ch. 3591, 34 Stat. 584. The Hepburn Act brought other businesses that transport goods for a fee, such as terminals, storage facilities, pipelines, ferries and others, under the jurisdiction of the Interstate Commerce Commission (“ICC”). “Thus, Congress clearly recognized that services such as [grain elevators that processed, cleaned, mixed, and transloaded grain ancillary to the rail service] were services in transportation,” although they were conducted by private grain companies. See ICC v. Duffenbaugh, 222 U.S. 42, 44 (1911); see also Cleveland, Cincinnati, Chicago, & St. Louis Ry. Co. v. Dettlebach, 239 U.S. 588, 594 (1916) (“[F]rom this and other provisions of the Hepburn Act it is evident that Congress recognized that the duty of carriers to the public included a variety of services that, according to the theory of the common law, were separable from the carrier’s service as carrier.”)

In adopting the Interstate Commerce Commission Termination Act (“ICCTA”) in 1995, when it abolished the ICC and replaced it with the Board, the Congress retained the broad definition of “transportation” that included all facilities and services related to the movement of goods by rail. 49 U.S.C. § 10102(9). Since that time, in addition to

“services related to the movement” of goods, “transportation” has also included “any yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property . . . by rail.” Id. Contrary to the commenters’ assertions in this proceeding, the intent of the Congress in passing the ICCTA was to broaden the federal jurisdiction over railroads and their activities. Their object was to free railroads, even smaller intrastate operations, from inconsistent, expansive, and expensive state regulation. See S. Rep. 104-176, *5-6, 104th Congress 1st Session, 1995 WL 701522.

As demonstrated in the Petition, the courts that have interpreted the scope of the Board’s jurisdiction under the ICCTA, and indeed the Board itself, have uniformly held that, when conducted by rail carriers, the types of intermodal transloading operations to be conducted at NET’s proposed facility constitute “transportation” under the statute. Petition at 19-20; Green Mt. R.R. Corp. v. Vermont, 404 F.3d 638, 644 (2d Cir. 2005) (“[T]he proposed transloading and storage facilities are integral to the railroad’s operation and are easily encompassed within the [Board’s] exclusive jurisdiction over ‘rail transportation.’”); Coastal Distribution LLC v. Town of Babylon, No. 05-CV-2032, slip op., 2006 WL 270252 (E.D.N.Y. January 31, 2006) (holding that C&D storage and transloading facility was part of rail transportation) ; Canadian National Railway, et al. v. City of Rockford, et al., 2005 WL 1349077 (E.D. Mich. June 2, 2005) (activities occurring at the C&D transload facility “appear to meet the definition of ‘transportation by rail carrier,’ which would cause [city’s] regulations to be preempted.”); Grafton & Upton R.R. Co. v. Town of Milford, 337 F. Supp. 2d 233, 239 (D. Mass 2004); Norfolk Southern Ry. Co. v. City of Austell, 1997 WL 1113647, *6 (N.D. Ga. 1997) (“[T]he

instant intermodal facility comes within the ICCTA's definition of 'transportation by rail carrier' over which the STB is given exclusive jurisdiction."); Green Mountain Railroad Corporation -- Petition for Declaratory Order, STB Finance Docket No. 34052 (STB served May 28, 2002); Joint Petition for Declaratory Order--Boston and Maine Corporation and the Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001); cf. Hi Tech Trans, LLC -- Petition for Declaratory Order -- Newark, NJ, STB Finance Docket No. 34192, at *5-6 (STB Served August 14, 2003) ("There is no dispute that Hi Tech's transloading activities are within the broad definition of transportation.").

Instead of responding to the legal analysis set forth in NET's Petition, the commenters fall back on name calling. NSWMA calls the NET facility a "solid waste processing facility" at least 16 times in its comments. See, e.g., NSWMA at 9, 10, 13, 14, and 20. NJDEP characterizes NET's facility as a "transfer station" and "recycling" center. NJDEP at 10 and 12. Indeed the commenters devoted a large proportion of their analysis to addressing the regulatory requirements applicable to solid waste processing and transfer facilities. Because the facts in the record show that NET is proposing to construct and operate an intermodal transload facility that is integral to transportation of commodities by rail, the requirements cited by the commenters have no application. Merely calling NET's facility a "solid waste processing facility" does not turn it into one.

Because NET will operate as a common carrier, the demand for NET's transportation services will ultimately be driven by the free market. In its Petition, NET explained that waste is only one of several commodities that the transloading facility is intended to handle. Petition at 10-11. Contrary to NSWMA's assertion that NET never

explained what percentage of the total commodities would be waste, the Verified Statement of Robert Jones, attached to the Petition, states that approximately 50% of the total commodities would be materials other than waste.³ None of the commenters has tendered a single witness to rebut the testimony of Mr. Jones that NET has engaged in discussions with a number of shippers to transport the variety of commodities that are listed in the Petition and in his Verified Statement. Petition at 10; Jones V.S. at ¶ 4. NET's business plan is based on handling commodities other than waste, as the description of the project makes clear. Petition at 10-11; Jones V.S. at ¶¶ 2, 4, 9, 11, 12.

NSWMA repeatedly asserts that NET's proposed facility will be performing some of the same activities that NSWMA's members perform at their solid waste transfer and recycling facilities. NSWMA at 16-20. Because NSWMA's members operate "solid waste processing facilities," NSWMA therefore concludes that NET's facility must be a "solid waste processing facility." NSWMA at 16-20. That argument ignores longstanding precedent. A similar argument was addressed in United States v. Union Stockyard, 226 U.S. 286 (1912), where a railroad sought to avoid responsibility for feeding and caring for cattle it was transporting. The Court held that such ancillary activities were part of rail transportation and therefore subject to the exclusive jurisdiction of the Board's predecessor, the ICC. It was not disputed that similar, if not identical, feeding activities were being performed by nearby stockyards. Just because stockyards were engaged in the behavior, however, did not remove those activities from

³ Jones V.S. at ¶ 4. NSWMA ignores that fact, even though Mr. Jones said exactly the same thing in his March 2005 verified statement which NSWMA quotes at 13, 16.

the definition of “rail transportation,” as interpreted by the Court. The same analysis applies here.

Unlike solid waste processing facilities or recyclers, NET will never take title to any of the materials passing through its facility, and will not be in the business of “processing” them for resale into the local market. Petition at 12; Jones V.S. at ¶¶ 16, 19. To the contrary, the shredding and baling of materials will be done solely to (1) facilitate their transfer into railcars and their subsequent carriage to the end users in one continuous intermodal rail movement; (2) minimize damage to railcars; and (3) maximize the utilization and safety of railcars. Petition at 11-12; Jones V.S. at ¶¶ 13, 15; Ryan V.S. at ¶¶ 5-12. Consequently, the shredding and baling activities are clearly part of the loading and unloading that have long been determined to be integral to transportation. See Railroad Retirement Board v. Duquesne Warehouse Co., 326 U.S. 446 (1946) (loading, storing, and unloading services at a warehouse considered “transportation”).

None of the commenters cites a single decision by the Board or any court in which the Board denied jurisdiction when a rail carrier sought to construct and operate an intermodal transload facility, such as the one proposed by NET. Instead, the commenters rely upon a handful of cases that were decided under facts easily distinguishable from those in the record of this case.

For example, the commenters rely heavily on three cases holding that bulk distribution centers operated by third parties on land leased from the railroad were not subject to the Board’s jurisdiction or federal preemption. See Florida East Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324, 1329 (11th Cir. 2001); CFNR Operating Co. v. City of American Canyon, 282 F. Supp. 2d 1114, 1118 (N.D. Cal. 2003); Growers

Marketing Co. v. Pere Marquette Ry., 248 I.C.C. 215, 226-27 (1941). However, those cases all are distinguishable because, unlike NET, the businesses operating the facilities were not themselves common carriers, but customers of the railroads who wished to locate their distribution centers as close to the point of delivery as possible. See Canadian National Ry. Co. v. City of Rockwood, Docket No. COV/04-40323, 2005 WL 1349077 (E.D. Mich. June 1, 2005).

Another case on which the commenters rely heavily, Hi-Tech Trans, LLC v. New Jersey, 382 F.3d 295 (3d Cir. 2004), is also distinguishable, for two reasons. First, central to the court's decision in that case was the fact that Hi-Tech, the operator of the facility, was not a railroad and had previously withdrawn its application for carrier status. Hi-Tech, 382 F.3d at 305. The court conceded that the activities undertaken at the transload facility could be considered transportation.⁴ Id. at 308. However, the facts demonstrated that Hi-Tech was essentially a waste processing and hauling company that contracted for the shipment of construction and demolition waste ("C&D") to its facility by trucks, processed it, and loaded it onto railcars owned by the Canadian Pacific Railroad ("CPR"). Hi-Tech was only permitted to operate its facility under a license agreement with the railroad. Id. at 299, 308. Under this agreement, Hi-Tech, the non-railroad third party, was responsible for the construction and maintenance of the facility and subject to liability for the operations at the facility. Id. at 308. Thus, according to the Third Circuit, CPR, the railroad, had no involvement in or control over the operation of the facility. Id.

⁴ It should be noted that, in the Board's decision, Hi-Tech Trans, LLC -- Petition for Declaratory Order -- Newark, NJ, STB Finance Docket No. 34192, at *5-6 (STB served August 14, 2003), the Board declared that "[t]here is no dispute that Hi-Tech's transloading activities are within the broad definition of transportation.").

Second, the license agreement expressly limited Hi-Tech to using “the Premises only for the transfer of Waste Products from truck to railcars operated by CPR.” *Id.* at 299. Waste was the only commodity moved by Hi-Tech, from its own trucks to CPR’s railcars. Thus, by the terms of the license agreement, the facility at issue was a solid waste transfer station, rather than the type of multi-commodity intermodal transload facility proposed by NET.

The commenters also rely on Borough of Riverdale -- Petition for a Declaratory Order -- The New York and Susquehanna and Western Railway Corporation, STB Finance Docket No. 33466-0 (STB Served September 10, 1999), but the Board’s analysis in that case is actually consistent with NET’s position. In Riverdale, the Board was presented with the factual issue of whether a truck terminal, weigh station, and corn processing plant constructed and operated by the railroad in a residential zone constituted “transportation” subjecting it to the Board’s jurisdiction. Contrary to the assertion of the commenters in this case, the Board did not deny jurisdiction but rather stated that it could “not determine from the current record whether [the corn processing facility] [was] actually a corn processing plant or some sort of transloading operation (for the transfer of corn syrup, for example) that [was] related to transportation services.” *Id.* at *6-7. Thus, if the Board had been able to determine that the facility was utilized to facilitate the transfer of the commodity [corn syrup] to rail cars, like the proposed NET facility, then the Board would have held it to be “related to transportation services.”

3. **NET Will Comply With All Environmental Health And Safety Requirements.**

NET expressly stated in its Petition that it intends to fully comply with all substantive health and safety regulations of the Commonwealth of Massachusetts.

Petition at 15. NET listed examples of these regulations in its Petition and made it clear that this listing was not exclusive.⁵ NET provided for only two exceptions: the Massachusetts regulations regarding “Site Assignment” and the regulations commonly referred to as the “Waste Ban” regulations.

MADEP does not criticize NET for not agreeing to comply with the Massachusetts Site Assignment and Waste Ban regulations. Instead, MADEP argues that because “NET has not agreed to comply with all the necessary elements of the Massachusetts State Implementation Plan, NET’s proposal would be in violation of the federal Clean Air Act.” MADEP at 17. This conclusion simply ignores NET’s unequivocal commitment to comply with “all applicable substantive health and safety regulations.” Petition at 15. Jones V.S. at ¶ 16. In addition, MADEP’s comment fails to mention that NET offered, in writing, to work out an agreement that would allow MADEP to enforce NET’s commitment.⁶ Such a voluntary agreement would eliminate any need for the Board to involve itself in the inspection and enforcement activities that NSWMA says would be necessary. NSWMA at 11.

Unlike MADEP, NSWMA does challenge NET’s positions on the Site Assignment and Waste Ban regulations. NSWMA argues that NET’s non-compliance with the Site Assignment regulations would relieve it of the necessity to comply with “extensive permitting and approval processes.” NSWMA at 12. However, that is

⁵ “Other substantive state health and safety regulations pertaining to NET’s operations with which NET expects to comply include the following . . .” Petition at 15.

⁶ See Letter from Jeffrey Porter, Counsel to NET, to Susan Ruch, MADEP (October 14, 2005), attached as an exhibit to NET’s December 16, 2005 response to MADEP’s and NSWMA’s requests for an extension of time to file their replies.

exactly the reason the Board has preempted “preclearance” requirements like the Site Assignment regulations -- to prevent a community from imposing so many permitting requirements on a project that it is never built. Petition at 19 & n.25; see also City of Creede, CO - Petition for Declaratory Order, 2005 WL 1024483 (STB), *4, STB Finance Docket No. 34376, (STB served May 3, 2005) (“[S]tate or local permitting or preclearance requirements of any kind that would affect rail operations (including building permits, zoning ordinances, and environmental and land use requirements) are categorically preempted.”).

NSWMA also challenges NET’s refusal to comply with the Waste Ban regulations, arguing that the Waste Ban regulations “conserve scarce landfill space.” NSWMA at 12. However, because all of the waste materials NET intends to transport will be sent to landfills outside Massachusetts, NSWMA’s argument regarding the conservation of landfill space inside Massachusetts does not apply to the facts of this case.⁷

The Board has made it clear that the ICCTA does not preempt substantive health and safety laws, including federal environmental laws, such as the Clean Air Act. Joint Petition for Declaratory Order--Boston and Maine Corporation and the Town of Ayer, MA, STB Finance Docket No. 33971, at *9 (STB served May 1, 2001). NET has already expressly committed that it will comply with those requirements. Petition at 15. Jones V.S. at ¶ 16. In addition, to ensure NET’s commitment, the Board can make NET’s

⁷ It is remarkable how NSWMA claims that there are “many facilities” in Massachusetts that ship waste by rail. NSWMA at 13. However, a careful reading of the Verified Statement of Steven G. Changaris indicates that there are only two rail facilities in the Boston area that ship waste by rail. Changaris V.S. at ¶ 10.

compliance with all applicable substantive health and safety laws a condition of its exemption.⁸

4. **The NET Facility Can Be Safely Constructed And Operated On The Olin Property Even If The Olin Site Is Listed On The NPL.**

The Verified Statement of Margret Hanley, attached to NET's Petition, addresses the potential inclusion of the Olin Site on the National Priority List ("NPL") under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"). Hanley V.S. at ¶¶30-31. CERCLA does not prohibit the redevelopment of contaminated properties that are listed on the NPL. To the contrary, the federal Environmental Protection Agency ("EPA") has developed policies and criteria that protect parties such as NET, who seek to redevelop contaminated properties in a manner that protects the public health, from certain liabilities under federal law. The criteria for the redevelopment of contaminated properties, including NPL Sites, by "Bona Fide Prospective Purchasers," are described in Title II of H.R. 2869, entitled the "Brownfields Revitalization and Environmental Restoration Act of 2001" (the "Brownfields Act"), and are substantially the same as those criteria imposed on developers and operators of contaminated properties under the MADEP Construction Policy. 42 U.S.C. §§ 9601(40) and 9607(r)(1). Specifically, the Brownfields Act requires that in order to limit liability under CERCLA, the prospective purchaser of such property must demonstrate that it has taken, or will take, steps to stop any continuing release, to prevent any future release, and to prevent or limit human, environmental, or natural resource exposure to any hazardous substance previously released. *Id.* In addition, the prospective purchaser must

⁸ See, e.g., Mitigation Condition #38 in the Post-Environmental Assessment prepared by SEA in the prior NET proceeding.

demonstrate that it has complied with institutional controls and has granted access to parties conducting response actions. *Id.* Thus, to limit its potential liability under CERCLA, NET has a significant incentive to comply with these criteria.

More importantly, however, the Board has the ability to require that NET conduct all construction and operation activities in compliance with any conditions that are imposed by the federal EPA. This is what SEA proposed in the prior proceeding with respect to NET's compliance with MADEP's Construction Policy.⁹ The same condition could be required in this case with respect to all conditions that might be imposed by EPA in the event that the Olin Site is listed on the NPL.¹⁰

⁹ See Mitigation Condition #35 in the Post-Environmental Assessment.

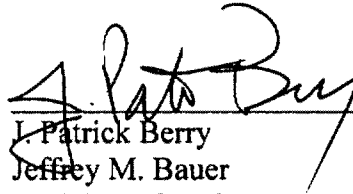
¹⁰ Wilmington attached to its comments a report prepared by its environmental consultant. It should be noted that the report is in the form of a letter instead of a Verified Statement. The report does not raise any issues that are not addressed by NET in the report entitled "Response to the Town of Wilmington Comments Construction Related RAM," dated February 2005, which was incorporated by reference in the Petition. Petition at 4, n.5.

In its Reply, Wilmington attempts to associate the well documented, historical migration of DAPL to the west of the Olin Property, which occurred over thirty years ago, with the risks posed by the future operations of the NET Facility. Although certain contamination that exists in the Maple Meadow Brook Aquifer ("MMBA") is due to historical releases of wastewater at the Olin Property, the existing conditions at the portion of the Property to be developed by NET are not now affecting the conditions in the MMBA or the Wilmington wells, nor will they do so under any future use that has been proposed by NET. See Verified Statement of Margret Hanley at ¶¶ 28-32.

Conclusion

For the reasons set forth in the Petition, and for the additional reasons set forth above, NET requests that its Petition for an Exemption be granted.

Respectfully submitted,

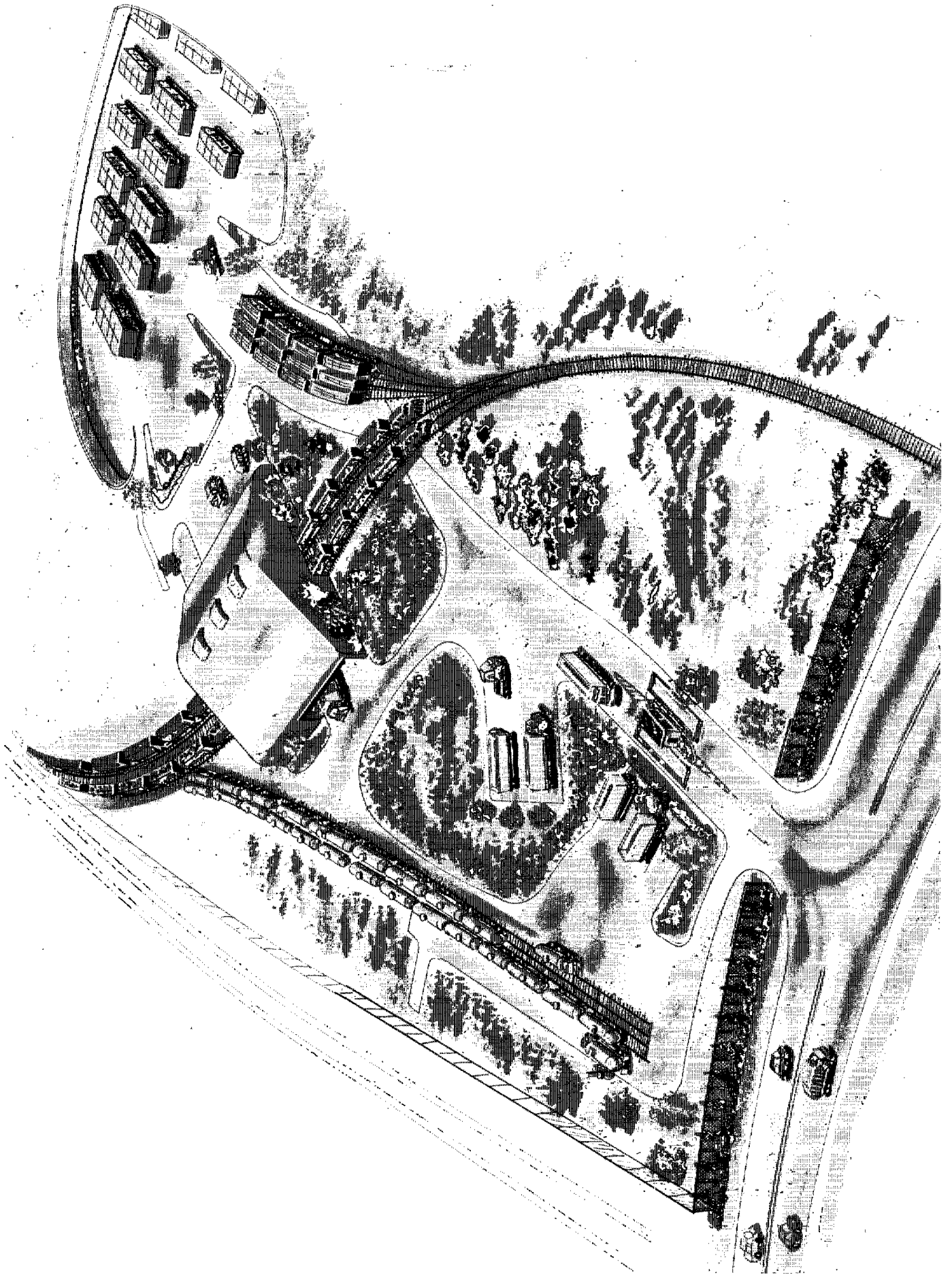
A handwritten signature in black ink, appearing to read "Jeffrey M. Bauer", is written over a horizontal line.

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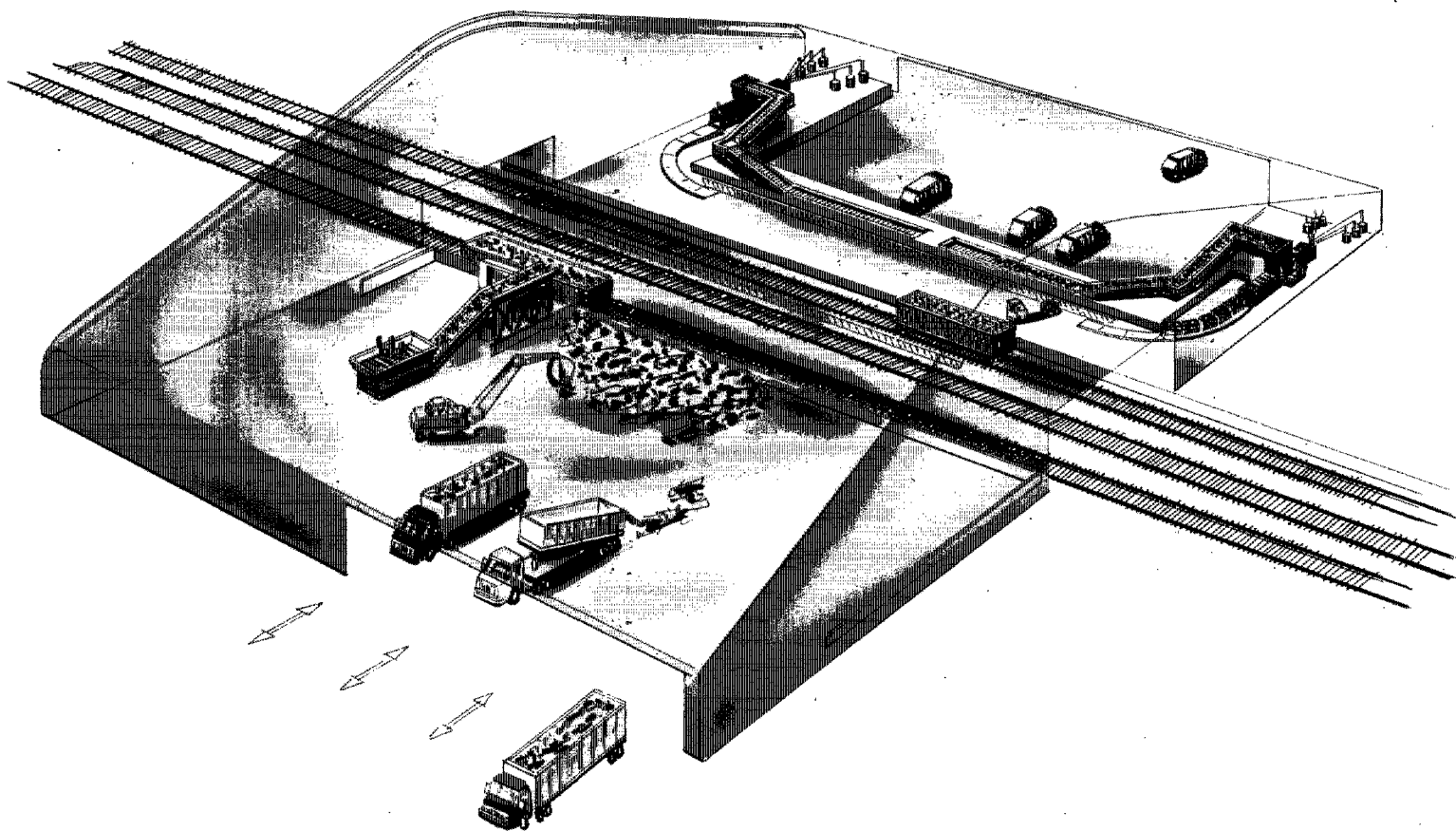
EXHIBIT

B



EXHIBIT

C



EXHIBIT

D



A story that everyone should love, but doesn't.(short line/regional perspective)

RailwayAge *Railway Age; 2/1/2006; Borman, Keith T.*

The modern short line and regional railroad industry was created to thrive in a rough and tumble world of competition and opportunity. First, the Staggers Act in 1980 broke the bonds of suffocating federal regulation and encouraged alternatives to abandoning light density rail lines. Then the ICC Termination Act of 1995 declared that the sole jurisdiction to regulate the operation of rail carriers lay in the hands of the Surface Transportation Board, and when it comes to rail operation, state laws are preempted by federal law.

As Congress and the public expected they would, short line railroads adapted nimbly to the competitive climate into which they were born. They moved quickly to fill the nooks and crannies of the interstate transportation system with quick, responsive customer service, often in underserved rural and light density markets where only the most entrepreneurial and quick witted operators could survive. They also looked for new markets that were either overlooked or rejected by the big Class I's, and sought creative solutions to the opportunities they uncovered.

In recent years, many short lines have found such market opportunities and creative transportation solutions in the operation of solid-waste transfer facilities. To short lines, these terminals perform the same function for trash that Class I intermodal facilities do for containers. They provide a truck-to-rail platform where the materials come in by truck, are sorted and reloaded into railcars, and sent on to their final destinations on the interstate rail network. All in all, the service rendered at these facilities is a classic short line story of a market largely ignored by the big railroads and requiring small-scale but deftly conducted operations in tucked-away but convenient locations. By undertaking the sorting and removal of solid-waste material through the interstate rail network, the short lines also are providing the kind of service to their local communities that Congress expected them to perform. Placing the handling and transportation of trash onto the rails keeps it away from busy streets and highways, with obvious environmental and aesthetic benefits to local communities.

This is a story, that everyone should love, but many local jurisdictions and state governments hate it. In fact, they are doing everything they can to put these operations out of business. They claim that short lines use the federal preemption of state laws to construct and operate the transfer facilities without complying with lengthy, complex, and expensive local permitting and environmental regulations. But in most cases, short lines have complied voluntarily with local environmental and building codes, and in all cases, remain subject to federal environmental rules. What they have not done is submit to the slow moving and sometimes politically charged local permitting processes, which by their very nature can doom these projects altogether.

Local and state governments claim that avoiding the local procedures gives the railroads an unfair competitive advantage. But unfair to whom? Unfair to the local governments themselves, as it turns out. Not only is a multi-year slog through red tape a lucrative revenue source for local governments, but often its length, costs, and onerous requirements are an effective method for keeping local government-sanctioned solid-waste transfer monopolies in business, unfettered by competitors. Through licensing and other fees, local governments keep their revenues and consumer costs high by effectively preventing lower-cost competition. Short lines spoil this monopoly by providing a lower cost and efficient alternative. Lower costs and efficiency were two goals Congress had in mind when it passed the ICC Termination Act.

For years, local jurisdictions have been fighting--and losing--their war against short line-operated solid-waste transfer facilities in the courts. Recently, they have joined with their licensees to challenge the railroad operations at the STB. The National Solid Wastes Management Association has petitioned the STB to declare that railroad waste transfer facilities are not railroad-related operations, subject to the exclusive jurisdiction of the Board. It would follow then that local ordinances are not federally preempted. This campaign also has spilled over into the legislative arena with at least one congressman introducing a bill to chip away at the concept of federal preemption by carving out an exception for solid-waste transfer facilities.

Some veteran railroad facilities' operators think the issue is non-railroads trying to pose as common carriers to skirt the cost of local regulation with no intent or ability to act as true railroads. There is always the possibility that unscrupulous wolves-in-sheep's-clothing may try to disguise themselves in a common-carrier cloak. If so, no court or agency is in a better position to determine who is or is not a railroad than the STB. Don't Balkanize interstate transportation regulation by ceding authority over railroad solid-waste transfer sites to local governments. Keep the regulation of railroad operations at the STB, and let legitimate short lines continue to operate solid-waste transfer facilities.

Keith T. Borman is Vice President and General Counsel of the American Short Line and Regional Railroad Association.

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EXHIBIT

E

Comparison of C&D Transfer Facilities with NET Facility

<u>Truck Based C&D Transfer Station</u>	<u>NET Facility</u>
Material arrives by truck	Material arrives by truck
Large pieces of wood are separated from rest of material and <u>placed in stockpiles</u> or loaded into outbound trailers.	Large pieces of wood are separated from rest of material and placed (with best effort to achieve minimal drop and with proper orientation to avoid sidewall deformation and puncture) in outbound rail cars. No stockpiling occurs.
Large pieces of metals removed and placed in stockpiles or loaded into outbound trailers.	Large pieces of metals removed and placed (with best effort to achieve minimal drop and with proper orientation to avoid sidewall deformation and puncture) in outbound rail cars.
Large pieces of brick separated from rest of material.	NONE
Large pieces of concrete separated from rest of material.	NONE
Concrete chunks are broken down into aggregate pieces.	NONE
Remaining material runs through a sequential series of trammel screens with different size screening holes. Trammel screens separate materials by sizes. The largest portion of transfer station operations involves trammel screen equipment and operations.	NONE
Trammel process also pulverizes materials further into Coarse and Fine materials, which are new end products in and of themselves.	Material shredded into sizes approximately two feet in length and conveyed directly into rail cars.
Manual picking stations remove wood and recyclables and piles of different material are stockpiled into mounds for: Brick (End Product) Concrete aggregate (New End Product) Wood chips (End Product) Course Fill Material (New End Product) Fine Fill Material (New End Product).	NONE
Stockpiled material stored outdoors.	NONE
Stockpiled material is held for long duration as inventory.	NONE
Stockpiled materials are transformed into separate finished product lines. This inventory is sold to local customers (retail and wholesale).	NONE
Stockpiled material leaves the facility by truck (delivered by operator or picked up by customer).	NONE
Non-processed C&D material leaves facility by truck.	All C&D material leaves facility by rail.

Comparison of MSW Material Recovery Facilities with NET Facility

Material Recovery Facilities	NET Facility
Truck dumps MSW material on a tipping floor.	Truck discharges MSW material into the recessed transload equipment area.
Material placed onto conveyor belts.	Material moved by conveyor, which is housed in the transload equipment area, into baling machine.
Manual pick lines remove: Plastics Metals Paper Other items.	NONE
Plastics, paper and metals are baled and transported out of facility.	NONE
Non-processed MSW material compacted on tipping floor using excavator rollover or through compactors or conveyed through balers.	All MSW material baled into a rectangular package.
MSW in containers or bales is placed on trucks for outbound transport.	MSW package is placed on rail cars for outbound transport.

CERTIFICATE OF SERVICE

I do hereby certify that on this 2nd day of August, 2006, I served a copy of Petitioner's Reply to Jurisdictional Comments, by causing a copy to be delivered by first class mail, postage prepaid, to:

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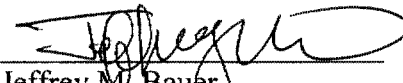
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