

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

**SUPPLEMENTAL COMMENTS
OF NORFOLK SOUTHERN RAILWAY COMPANY**

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Norfolk Southern Railway Company (“Norfolk Southern”) hereby submits its Supplemental Comments¹ in accordance with the Notice of Oral Argument served March 29, 2007 in the above-referenced proceeding. Norfolk Southern notes that the issues and concerns raised in this proceeding, which are focused on the transloading of municipal solid waste (“MSW”) and construction and demolition debris (“C&D”) to and from rail cars, are relatively new. Rail transloading more generally, however, has a long history.

Norfolk Southern believes that the Surface Transportation Board (“STB” or the “Board”) has four avenues available to it to address the issues and concerns that are raised by this proceeding. Each of these avenues would be generally available for use in other proceedings involving MSW or C&D transloading.

First, the Board could reconsider the bright line test in Effingham Railroad Co. – Petition for Declaratory Order – Construction at Effingham, IL.²

¹ On July 13, 2006, Norfolk Southern filed Initial Comments together with CSX Transportation, Inc. (“CSXT”). Norfolk Southern endorsed the Initial Comments of the Association of American Railroads and its Member Railroads (“AAR”), and Norfolk Southern continues to endorse those comments. Further, Norfolk Southern endorses the Supplemental comments AAR files today.

² Docket No. 41986, Effingham Railroad Co. – Petition for Declaratory Order –

Second, the Board can strengthen the legal framework it already has in place by requiring the submission of information sufficient for the Board and the public to determine whether an entity filing under the Board's notice of exemption procedures is, in fact, a railroad providing transportation.

Third, the Board could provide guidance to future parties that is limited in scope and application to MSW and C&D. Such guidance should recognize the unique status of the collection, transloading, and disposal of MSW or C&D, which take place in a highly regulated state and local environment. In the development and operation of other railroad transload facilities, the Board and rail carriers have achieved a balance in working with State and local officials regarding otherwise applicable State and local regulations that unreasonably interfere with interstate commerce. If given, any guidance the Board provides in this proceeding should strive to achieve the same balance.

Fourth, the Board could adopt a policy of conditioning a grant of authority to a new railroad engaging in MSW or C&D transloading on consultation with state and local officials regarding otherwise applicable State and local regulations that would unreasonably interfere with interstate commerce.

In all events, however, the Board should avoid action that could have an adverse effect on other traditional railroad transloading operations.

Background

This proceeding arises out of NET's petition, filed on December 5, 2005, for authority to acquire in part, construct in part, and operate as a rail common carrier a total of approximately 7,500 feet of trackage located in Wilmington and Woburn, MA. NET claims that it intends to operate transload facilities on the location for sand and gravel, plastic resins and liquids, but most of the comments and concerns raised by parties relate to the desire by NET to

Construction at Effingham, IL, served September 18, 1998 ("Effingham").

transload MSW and C&D. In essence, the comments and concerns are aimed at one issue: will all or some of the NET proposed MSW and C&D transload facility and the operations fall within the rubric of 49 U.S.C. 10501(b), commonly referred to as “ICCTA Preemption,” or instead be subject to Massachusetts State and local regulation.

On June 13, 2006, the STB served a decision stating that it would examine and issue a decision on “the extent to which the activities proposed to be conducted by NET come within the Board’s jurisdiction.”³ At that time, the Board received several responsive comments on “what activities would normally be associated with MSW and C&D processing and would occur even absent rail transportation...” Among the comments the Board received were the comments of the Association of American Railroads (“AAR”), which includes Norfolk Southern as a member. Among the points made by the AAR were the following: (1) the proper question is whether the activity is “transportation” by a “rail carrier” as those terms are defined in the Interstate Commerce Act, which is a fact-specific inquiry; (2) transloading between a rail car and trucks, barges, ships, conveyor belt, or another rail car has been an integral part of railroad operations since railroading began; and (3) ICCTA Preemption is vital for the construction and operation of a railroad-operated transload facility. Norfolk Southern, along with CSXT, also filed separate comments adopting the AAR’s position and entering their individual appearances in this proceeding.

On March 29, 2007, the STB served a subsequent decision noticing oral argument to be held on April 19, 2007, and inviting this written statement of position.

Statement of Interest

Norfolk Southern does not have any railroad-operated C&D or MSW transload facilities on its lines.⁴ The Norfolk Southern rail system, however, currently has several railroad-

³ Finance Docket No. 34797, New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway – Construction, Acquisition and Operation Exemption – In Wilmington and Woburn, MA, served June 13, 2006, slip op. at 2.

⁴ The Roanoke County Resource Authority owns and operates an origin MSW transload

and customer-operated transload facilities on its lines devoted to the transloading of other materials – facilities for the transloading of coal, chemicals, intermodal containers and trailers, automobiles, grain, lumber and numerous other commodities. Each of these facilities is unique and is necessarily responsive to the commodity being transloaded, the particular requirements of the location, and the needs of the customers. Taking place at these facilities is a myriad of associated and ancillary processes that, when examined in isolation, may appear not to be transportation but that are reasonable or necessary when examined in the entirety of the transloading and transportation effort.⁵

Comments

Early in the history of railroading, railroads developed team tracks for the transloading of products for the vast majority of their customers who, for economic, operational or other reasons, did not have direct rail access. Over time, railroads have adapted and developed a wide variety of other facilities for the transloading of their customers' products. Many of these facilities were introduced by long-haul railroads amid significant controversy and amid State and local efforts either to regulate or to eliminate them. With the guidance of first the Interstate Commerce Commission and then the Surface Transportation Board, long-haul railroads largely have developed the ability to work cooperatively with State and local officials to resolve issues related to these now more traditional railroad transload facilities.

On the other hand, the issues and controversies involved in State and local

facility (Roanoke, VA) and destination MSW transload facility (Ironton, VA) on Norfolk Southern lines. Further, Norfolk Southern serves several landfills in Ohio and Pennsylvania that are often the destination for MSW or C&D generated in the Northeast United States.

⁵ For example, at intermodal facilities, truck chassis must be inspected, and occasional spot repairs conducted, prior to release – processes that may not seem immediately to be “rail transportation” but which are absolutely necessary to the rail transload function because the chassis should not leave the intermodal facility in an unsafe condition. These same processes are as necessary to a ship-to-truck or truck-to-ship transload as it is to a truck-to-rail or rail-to-truck transload.

regulation of truck to rail transloading of C&D and MSW are of relatively recent origin.⁶ Often, but not always, these cases involve entities trying to qualify as railroads in order to claim that they are not covered by State and local regulation because of ICCTA preemption.

Norfolk Southern takes no position with regard to the legitimacy of NET's proposal, or whether the proposed acquisition and operation covered by NET's proposal constitutes "transportation by or on behalf of a rail carrier" entitling it to the protections and responsibilities of ICCTA preemption. Norfolk Southern, however, does acknowledge that proceedings involving the creation of new rail carriers, many of which are intended to facilitate the transloading of C&D or MSW, are becoming more common. These cases almost always engender significant controversy, whether they are initiated by a notice of exemption or petition for exemption.

Norfolk Southern asserts that the Board's review of these cases has been, and should continue to be, conducted on a case-by-case basis using the analysis developed in the 2002 and 2003 Hi Tech line of cases.⁷ The Hi Tech line of cases generally provides for a review

⁶ The issue of whether an entity is a rail carrier for the purpose of evaluating application of preemption has not been restricted to C&D and MSW transloading cases. See, e.g., Finance Docket No. 34291, Comrail International Railroad, Inc. – Operation Exemption – Chicago Heights Railcar, Inc., served February 26, 2003 (permitting the voluntary revocation of Comrail's exemption and noting "certain questions ... raised ... particularly with respect to the establishment of a railroad police force"). See, also, "Verified Notice of Exemption Pursuant to 49 C.F.R. 1150.31," Finance Docket No. 34451, Atlantic & Pacific Railroad and Transportation Co. – Lease and Operation Exemption – Line of Kansas & Oklahoma Railroad, submitted June 28, 2004 (supplying no information on proposed operations) and "Petition for Exemption Pursuant to 49 C.F.R. 10502" [sic], Finance Docket No. AB-992X, Atlantic & Pacific Railroad and Transportation Co. – Discontinuance of Service Exemption – In Rice County, KS, submitted March 2, 2006, at 1 (seeking discontinuance because "no shipper has requested rail service from A&P and A&P has not performed any rail operations over the Subject Line"). Information on what led to the discontinuance is sketchy. See, "Reply Comments of Watco Companies, Inc.," Ex Parte No. 659, Public Participation in Class Exemption Proceedings, submitted June 14, 2006 at 8 n.3 (A&P lease terminated by Kansas & Oklahoma Railroad upon discovery of A&P misrepresentation).

⁷ See, Finance Docket No. 34192, Hi Tech Trans, LLC – Petition for Declaratory Order – Hudson County, NJ, served November 20, 2002 ("Hi Tech I"), and Finance Docket No. 34192 (Sub-No. 1), Hi Tech Trans, LLC – Petition for Declaratory Order – Newark, NJ, served August 14, 2003 ("Hi Tech II").

of all of the facts to determine whether the statutory criteria for ICCT preemption are met.

Specifically, the Hi-Tech inquiry is whether there is “*transportation performed by or on behalf of a rail carrier.*”⁸

The first prong of the Hi Tech test focuses on whether the entity before the Board is a “rail carrier” as that term is defined in the statute,⁹ which status many claim through the Board’s notice of exemption procedures. The Board recently has heard many calls for action arising out of these procedures. There are calls for stays and for additional information to be submitted in individual notice and petition proceedings¹⁰ and that an individual case is potentially a “sham” transaction.¹¹ More generally, there are calls, including from Norfolk Southern, for the Board to modify its regulations governing Exempt Transactions under 49

⁸ 49 U.S.C. Section 10501(b) (“The jurisdiction of the Board over – (1) transportation by rail carriers ... is exclusive.”). The Board recognized in its formulation of the Hi Tech test that rail carriers often act through contractors.

⁹ See Hi Tech II.

¹⁰ “Request for Continuation of Stay by the New Jersey Department of Environmental Protection,” Finance Docket No. 34986, Ashland Railroad Co. – Finance and Operating Exemption (“Ashland”), submitted April 4, 2007, at 2 (additional information “is necessary to determine whether Ashland would indeed be a bona fide ‘rail carrier’”); “Comments of Norfolk Southern Railway Company,” Ashland, submitted March 5, 2007 (“NSR Ashland Comments”), at 3 (the Board was correct to issue a stay “so that the Board, other interested parties, and the public may evaluate Ashland’s proposal and Ashland’s status under the Interstate Commerce Act”). The NET proceeding that the subject of the upcoming oral argument is another example.

¹¹ See, e.g., Finance Docket No. 34392, New Jersey Rail Carrier LLC – Acquisition and Operation Exemption – Former Columbia Terminals, Kearny, NJ, served August 13, 2003 (“NJ Rail I”) (granting the Petition of New Jersey Department of Environmental Protection (“NJDEP”) for a stay in order to give New Jersey Rail Carrier (“NJ Rail”) “an opportunity to provide information that would indicate whether NJ Rail would be conducting operations as a bona fide rail carrier”). After a proceeding lasting several months, NJDEP informed the Board that NJ Rail intended to be “a legitimate rail carrier”, and the Board permitted the notice of exemption filed by NJ Rail to become effective. Finance Docket No. 34392, New Jersey Rail Carrier LLC – Acquisition and Operation Exemption – Former Columbia Terminals, Kearny, NJ, served January 20, 2004, slip op. at 2-3. See also, Finance Docket No. 34501, James Riffin d/b/a The Northern Central Railroad – Acquisition and Operation Exemption – In York County, PA, served February 23, 2005, slip op. at 2-3 (discussing allegations that the applicant sought authority to initiate a dinner train and to use authority to operate in one state in order to frustrate state and local laws in another).

U.S.C. 10901 (49 C.F.R. Section 1150.31, et seq.).¹² And there are calls for Federal legislation.

Norfolk Southern believes all the current calls for Board action harkens back to the period before Effingham. The STB's decision in Effingham provides the legal underpinning for the vast preponderance of the claims of "rail carrier" status by an acquirer of track. In that case, the STB commented that, because the 206 feet of track constituted Effingham Railroad's entire operation, that track by definition became a jurisdictional line of railroad notwithstanding other characteristics that made it a spur or siding while operated by Conrail. Before Effingham and its entire operation test, the Board more closely reviewed the proposed operations and more closely scrutinized whether the rail entity was a "rail carrier" as that term is defined by statute. In essence, there was greater emphasis on what is now the first part of the Hi Tech test – whether the entity involved was a rail carrier, including a case-by-case examination of the character of the facilities of the entity seeking to be declared a rail carrier and whether the proposed use of those facilities comported with the historic definition of a rail carrier. After Effingham, there has been a de-emphasis on this inquiry. The de-emphasis on what is now the first part of the Hi-Tech test has skewed the Board's inquiry in preemption cases.¹³ Therefore, the Board should reconsider

¹² "Comments of the Association of American Railroad," Ex Parte No. 659, Public Participation in Class Exemption Proceedings, submitted May 15, 2006, at 9-13; NSR Ashland Comments, at 5 (supporting the AAR Ex Parte No. 659 proposal); "Response of the New York, Susquehanna and Western Railway Corporation to the Supplemental Comments of the New Jersey Department of Environmental Protection et al.," 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, submitted March 13, 2007, at 5 (same).

¹³ Many of the cases before the STB that have involved the transloading of C&D or MSW have arisen out of the acquisition of short stretches of track previously operated as an industrial spur, a siding, a customer-owned industrial track or industrial park track, which prior to Effingham might have resulted in a determination that the entity did not qualify as a railroad. The analysis would not have reached a review of whether the entity was providing transportation. Occasionally the pre-Effingham analysis continues to be applied. See, e.g., Finance Docket No. 33950, Jefferson Terminal Railroad Co. – Acquisition and Operation Exemption – Crown Enterprises, Inc., served March 15, 2001, slip op. at 4 (the Board's "class exemption procedures ... were not intended to apply to cases in which a noncarrier seeks to convert what could be non-rail property into a rail line").

the bright-line test in Effingham.

The Board should also require a party to file sufficient information with the Board so that the Board and the public can understand and evaluate whether the proposal involves a rail carrier providing transportation. Recently, the Board provided additional time after the filing of a notice of exemption for the Board or the public to examine the facts and circumstances concerning the acquisition of rail property by a non-carrier and to decide whether further inquiry may be necessary.¹⁴ But the Board's regulations still require an entity to provide only a minimum amount of information with its notice of exemption, and often the information provided simply is not enough to even understand the proposal. Thus, Norfolk Southern suggests that the Board should initiate a rule making proceeding to adopt the AAR's proposal submitted in Ex Parte 659 to require additional information and data be submitted in exemption proceedings.

The Board already has taken the step of requesting supplemental information in an increasing number of individual cases.¹⁵ An increasing number of parties believe the Board should require the submission of supplemental information in notice of exemption proceedings.¹⁶ Now is the time for the Board to act.

Even if the Board chooses to address the current controversies under the second prong of the Hi Tech test – whether the entity seeking authority is providing transportation – the Board would benefit from the additional information submitted in exemption proceedings. The

¹⁴ In order “to ensure that the public is given notice of a proposed transaction before the exemption becomes effective,” the Board provided for a thirty (30) day period between filing and the effectiveness of a notice of exemption. Ex Parte No. 659, Public Participation in Class Exemption Proceedings, served October 19, 2006.

¹⁵ See, e.g., Finance Docket No. 34986, Ashland Railroad, Inc. – Lease and Operation Exemption – Rail Line in Monmouth County, NJ, served February 27, 2007; NJ Rail I. Cf., Finance Docket No. 34484, James Riffin d/b/a The Northern Central Railroad – Acquisition and Operation Exemption – In York County, PA and Baltimore, MD, served April 20, 2004, slip op. at 3 (revoking the exemption and instructing the applicant to submit “more detailed information” if the applicant chooses to refile pursuant to a petition for exemption or application); Finance Docket No. 34501, James Riffin d/b/a The Northern Central Railroad – Acquisition and Operation Exemption – In York County, PA, served February 23, 2005 (same).

¹⁶ See submissions cited in note 13, supra.

entity seeking authority would have to provide the Board with a clear definition of the facilities sought to be operated, the services to be provided, and a description of how each facility and service relates to the rail transportation that the railroad would provide to its customers. This information would permit the Board to inquire whether the activities and facilities of an entity seeking authority will meet the broad statutory definition of “transportation,” which definition includes equipment, property and facilities “of any kind that relate to the transportation of ... property ... by rail” and “services related to that movement.”¹⁷

Turning more directly to the second-prong of the Hi-Tech test, Norfolk Southern does not believe that there are any bright lines to be drawn given the expansive statutory definition of “transportation,”¹⁸ but instead believes that the statutory definition of transportation itself requires a case-by-case analysis.¹⁹

Railroads transload many commodities, and generally applicable guidance could cripple railroads’ ability to transport these commodities to the detriment of rail customers and the economy. Rail transloading has occurred since at least the days of team tracks and stockyards.

¹⁷ “In this part – (9) ‘transportation’ 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 passenger 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.

¹⁸ In fact, Norfolk Southern believes that to establish a bright line delineation between what is, and what is not, transportation in the context of C&D or MSW transloading would be to ignore the dictates of 49 U.S.C. 10102(9). Cf., Finance Docket No. 33466, Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna and Western Railway Corp., served September 10, 1999 (“Riverdale I”), slip op. at 9 (“we [the Board] see no simple, clear line of demarcation that has or could be drawn” regarding enforcement of local building codes at railroad facilities). Further, traditional railroad transload facilities often are adapted for the unique requirements of a particular customer. A bright-line delineation could result in the elimination of the rail transload option for some customer for reasons potentially unassociated with the concerns raised by commenters in this and other proceedings.

¹⁹ See, e.g., Finance Docket No. 33455, Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna and Western Railway Corp., served February 27, 2001 (“Riverdale II”), slip op. at 2 (“Thus, individual situations need to be reviewed individually to determine the impact of the contemplated action on interstate commerce.”).

Over time, a careful balance has been achieved. Railroads work with state and local officials regarding state and local regulations regarding accommodation of regulations that would otherwise unreasonably interfere with interstate commerce. But the interests of national uniformity and the free flow of interstate commerce do dictate that railroads not be unreasonably burdened by state and local regulations.

As the Board has done in the past,²⁰ the Board can provide guidance regarding what is transportation, but that guidance should be specific to consideration of facilities performing transloading of C&D or MSW. Although the gathering, transportation, delivery and disposal of MSW, and more recently of C&D, have been the subject of pervasive state and local regulation for some time, only recently has the exhaustion of landfills in the Northeast United States resulted in the significant increase in the distances MSW and C&D must be shipped in order to be disposed. That increased distance would be traversed in one of two ways – by placing it in trucks for movement over an already overburdened highway system or by placing it in rail cars for movement in interstate commerce. Although the rail option for this new transportation dilemma is the focus of this proceeding, the guidance the Board should provide is not new. Part of the regulatory solution (coupled, of course, with the reforms discussed above) is a balance of having railroads comply with legitimate regulations that do not unreasonably interfere with interstate commerce and working with State and local officials in accommodating those regulations that do unreasonably interfere with interstate commerce.

Therefore, any guidance the Board provides should focus on cooperation and information exchange with State and local officials in the construction and operation of the C&D or MSW transload facility and substantial compliance with State and local laws that do not unreasonably interfere with interstate commerce. Such guidance would be consistent with the Board's objectives in other contexts involving ICCTA Preemption.²¹ The guidance that the

²⁰ See generally, Finance Docket 34364, Vermont Railway, Inc. – Petition for Declaratory Order, served January 4, 2005 (declining to institute a declaratory order proceeding, but providing guidance), and cases cited therein; Riverdale I, Riverdale II.

²¹ Riverdale II, slip op. at 2 (discussed in footnote 20, supra).

Board provides regarding C&D and MSW transload facilities will lead railroads with these facilities to seek and reach the same proper balance with State and local officials as railroads have sought and reached in the construction and operation of intermodal, coal, auto, chemical, plastics, ethanol and other product transload facilities.²²

Finally, in individual cases, the Board could implement this guidance by imposing conditions on approval. Those conditions could require entities seeking authority to work with state and local officials to achieve a balance regarding otherwise applicable State and local regulations that unreasonably interfere with interstate commerce. If such an effort is not successful, the Board would always be available to mediate, and if necessary, to tailor more narrowly its imposed condition.

In all events, the Board must ensure that its actions here continue to protect legitimate and historical rail transportation against regulations that unreasonably burden interstate commerce.

In addition to being careful not to disrupt traditional railroad transload activities, the Board should take care in examining the scope of preemption. The STB's recent hearing²³ highlighted the need for rail capacity and infrastructure. Limiting the preemption of state and local regulations that impede commerce and the expansion of railroad capacity would be counter-productive at any time, but especially so now. The Board must be careful that it does not erect another barrier or disincentive to investment in rail infrastructure and transportation facilities.

²² A dramatic example is the C&D transload facilities operated by the New York, Susquehanna and Western Railroad ("NYS&W"), which were the subject of proceedings before this Board and Federal court. Of the five open air facilities that existed a few years ago, three have been closed. The two remaining facilities, together with others more recently opened by NYS&W, appear to be in substantial compliance with New Jersey regulations, notwithstanding the fact that those regulations have been declared to be preempted.

²³ Public Hearing held April 11, 2007 pursuant to Ex Parte No. 671, Rail Capacity and Infrastructure Requirements, served March 6, 2007.

CONCLUSION

Norfolk Southern urges the Board to ensure that any decision in this proceeding does not intentionally or unintentionally adversely affect the ability of the railroads to provide important transload processes that railroads historically have provided to the shipping public.

The Board can strengthen the legal framework it already has in place by requiring sufficient information to make informed decisions, based upon pre-Effingham analysis, about whether an entity filing under the Board's notice of exemption procedures is, in fact, a railroad providing transportation. Specific guidance should be applicable only to that MSW or C&D transloading environment on how rail carriers operating MSW or C&D transload facilities should communicate with State and local officials in order to construct and operate such facilities in substantial compliance with otherwise applicable State and local regulations that do not unduly interfere with interstate commerce.

Respectfully submitted,



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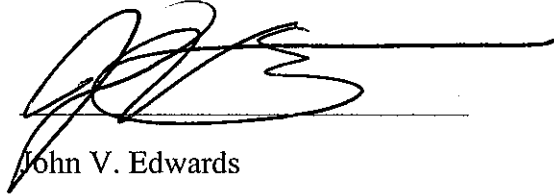
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2007, I have caused to be served a true and correct copy of the forgoing to the persons on the attached list by first-class mail, postage prepaid, or by more expeditious means.



John V. Edwards

Dated: 4-16-07