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April 16, 2007

VIA HAND DELIVERY

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
395 E. Street, S.W.
Washington, D.C. 20423-0001

ENTERED
Office of Proceedings
APR 16 2007
Part of
Public Record

Re: *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, Finance Docket No. 34797*

Dear Secretary Williams:

Enclosed for filing is the above referenced docket are an original and ten copies of a statement of position for the oral argument on this matter scheduled for April 19, 2007.

Kindly acknowledge receipt of this material by date stamping the enclosed copy of this letter and returning it to our messenger.

Sincerely yours,

Stephen M. Richmond

SMR:mjg
Attachment

cc: Service List for STB Finance Docket No. 34797 (by mail with attachment)

**NEW ENGLAND TRANSRAIL, LLC, D/B/A WILMINGTON AND 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**

Statement of Position

**Stephen M. Richmond, Esq.
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And

**Michael Camara, President
New Bedford Waste Services, LLC**

For

**NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION
SOLID WASTE ASSOCIATION OF NORTH AMERICA
SOLID WASTE ASSOCIATION OF NORTH AMERICA – MASSACHUSETTS
CHAPTER
MASSACHUSETTS MUNICIPAL ASSOCIATION
CONSTRUCTION MATERIALS RECYCLING ASSOCIATION
INTEGRATED WASTE SERVICES ASSOCIATION
NEW BEDFORD WASTE SERVICES, LLC**

Before the

Surface Transportation Board

Oral Argument Scheduled For

April 19, 2007

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**NEW ENGLAND TRANSRAIL, LLC, D/B/A WILMINGTON AND 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**

Statement of Position

Introduction

Thank you for the opportunity to submit this statement and contribute to this very important debate. The rail industry has great importance in America, and that value is recognized by the businesses and communities for whom we speak.

We do not seek to create barriers for transloading operations or to cause problems for the rail industry. Instead, we simply wish to ensure that the business of solid waste management is recognized as a distinct and separate business from rail transportation, and that the business continues to be subject to state and local law. We think you can make this determination consistent with your past decisions on the reach of the Board's exclusive jurisdiction under the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. §10101 *et seq.*

From the government perspective, solid waste is potentially dangerous and must be regulated to protect public health, safety and the environment. States and local governments all regulate solid waste facilities because improperly run facilities can cause serious problems: rats, insects, air and water pollution issues, odor and other nuisance conditions. When waste is poorly managed, it creates enormous problems, threatens public health, and endangers the environment. Ensuring its safe and reliable management is a classic government function, and municipalities are the first line of defense. Federal environmental law does not substantively regulate solid

waste activities; that responsibility has been left to state and local government. Simply put, if you strip local government of its jurisdiction over the management of solid waste, you put the American public at risk.

From the private sector perspective, solid waste management is a business. Before waste is disposed, waste management involves very distinct activities that transform the value of the materials for either regulatory or economic reasons. Solid waste management companies use heavily regulated facilities to conduct these activities, subject to many state and local laws and permits. These activities are completely separate from the business of transporting wastes.

From both the government and industry viewpoints, the New England Transrail (NET) petition creates the same glaring problem: NET is attempting to blur the lines of distinction between the highly regulated waste management business with the deregulated rail business. NET seeks to vertically integrate solid waste management and solid waste transloading. Why? To avoid the important and costly safeguards imposed by state and local law. This undermines public health, safety and environmental protections in every community with a rail line, and it threatens the many billions of dollars of investments that legitimate industry members have made in creating a protective waste infrastructure.

The Limits to Transportation

Our argument in this case is with NET's proposal to process a significant quantity of waste, using methods that will change the value and composition of the incoming waste stream.¹ In our view, these waste management activities are processing or manufacturing operations, as

¹ *Statement of Robert Jones, November 30, 2005 at ¶4.*

performed by solid waste facilities every day, and they therefore do not fall within the statutory definition of transportation at 49 U.S.C. §10102(9).

ICCTA provides that the Board has exclusive jurisdiction over “transportation by rail carriers.” 49 U.S.C. §10510(b). ICCTA defines transportation to include rail facilities and services related to the movement of goods by rail. 49 U.S.C. §10102(9). This Board and a number of federal courts have determined repeatedly that the exclusive jurisdiction conferred by ICCTA extends to facilities and activities only to the extent that they are integrally related to the provision of rail service. *See Borough of Riverdale - Petition for Declaratory Order*, STB Finance Docket 33466 (STB served Sept.9, 1999); *Hi Tech Trans, LLC - Petition for Declaratory Order*, STB Finance Docket 34192 (STB served Nov. 19, 2002); *Green Mountain RR v. State of Vermont*, 404 F.3d 638 (1st Cir 2005); *CFNR Operating Co. v. City of American Canyon*, 282 Fed. Supp. 2d 1114 (N.D. Cal. 2003); *Flynn v. BNSF*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000).

We think the Board would agree that ICCTA was not intended to deregulate the solid waste industry. The industry deals with a wide range of materials that are potentially hazardous if mishandled and that could pose a serious threat to public safety if not subject to careful governmental scrutiny. Poorly managed waste attracts pests and vermin, creates odors and particulate emissions, and causes environmental degradation. Poorly sited waste management facilities exacerbate these issues. The problem in this case is simply that NET seeks to blur the distinction between two separate businesses and stretch the definition of transportation under ICCTA to include a solid waste enterprise. To resolve that problem we are asking you to draw a clear line of demarcation between activities integrally related to rail transportation and activities that constitute solid waste management.

This case is no different than several others the Board has dealt with addressing non-transportation activities. For instance, in *Borough of Riverdale – Petition for Declaratory Order*, STB Finance Docket 33466 (STB served Sept. 9, 1999), the Board indicated that a corn processing plant would not be integrally related to the provision of rail transportation, and in *Town of Milford – Petition for Declaratory Order*, STB Finance Docket 34444 (STB served Aug. 11, 2004), the Board found that while the off-loading of steel by a rail carrier in a building constructed across a track would constitute transportation, cutting and welding activities performed on the steel before transport from the facility would not constitute transportation.²

The Business of Waste Management

NET has described several activities it intends to perform that we know to be waste processing activities, and not transportation activities.³ NET intends to receive construction and demolition wastes, dump these wastes on a floor, remove metals and woods, and then shred the remaining material. NET intends to use conveyor belts, which provides access for removal of debris. NET intends to sort incoming mixed waste streams, segregate different commodities and wastes, and shred the remainder. These processes create marketable wood fuels, they extract valuable metals for recycling, and they deliberately, by design, create specific segregated streams of waste materials that have a different marketplace value than the mixed stream that arrived at the facility. These activities do not fall within the statutory definition of transportation.

Waste management facilities employ these same basic processes to separate incoming mixed wastes into different streams. The purpose of this separation is to take a mixed waste stream and divide it into segregated parts that have either lower disposal costs or market value.

² The Board determined that “(e)ven under the broadest construction of the term, (the) proposed steel fabrication activities fall outside the definition of railroad transportation.”

³ See *Jones Statement*, at ¶13, 17, 18; *Statement of John Ryan*, November 15, 2005, at ¶5-7.

For example, waste management facilities remove large pieces of wood from a waste load and shred the wood to create chips that are then marketable as a fuel. Shredded wood currently has a positive market value; by separating the wood out of the waste stream, you avoid up to a \$70 - \$90 per ton disposal cost in New England that needs to be paid to dispose of the rest of the waste. This activity is not performed for a rail transportation purpose, it is performed for an economic purpose.

Another much more lucrative example is metal. Construction and demolition debris can have a high metals content. When buildings are demolished, appliances, siding, pipes, wires, fixtures and other metal components are contained in the mixed debris. When the mixed debris arrives at a waste management site, it represents a liability reflecting the disposal cost. But after processing to remove the metals, the separated materials can have significant value. This is a business model that exists throughout the country and is driven by hard economics, not by the dictates of rail car owners or to protect loading equipment, as NET has suggested.⁴ In stark conflict with NET's insistence that metals need to be removed to facilitate rail shipments, the Institute of Scrap Recycling Industries (ISRI) recently testified to the Board that its members prepare more than 145 million tons of scrap materials for reuse each year. "Rail service is crucially important to the scrap metal industry. Half or more of ferrous scrap travels by rail."⁵

The value of metals has increased precipitously in the last few years. The price of nickel is now approximately \$50,000 per ton; the price of tin is around \$15,000 per ton; and copper is nearly \$8,000 per ton. When you separate pieces of metal out of a waste stream, you literally create money out of trash: incoming material is burdened with a future disposal cost of as much

⁴ See Jones Statement, at ¶13; Ryan Statement, at ¶6-8.

⁵ See Written Testimony of the Institute of Scrap Recycling Industries, Ex Parte No. 671, April 2007, pages 1- 2.

as \$70 - \$90 per ton, but after processing some of the outgoing material has a market value of as much as \$50,000 per ton. This is manufacturing: you take a feedstock that has a procurement cost, and you transform it into a product that has value.

Unanswered Questions for NET

NET has stated that it will remove metal and wood from its incoming waste streams to protect rail cars, and will ship these materials to “appropriate facilities.”⁶ If ISRI has reported to the Board that tremendous quantities of scrap metal are moving by rail throughout this country, why would NET need to remove metal to protect its rail cars? Given this inconsistency, the astounding value of scrap metal, and the economics of waste processing, we suggest that the Board consider with significant skepticism NET’s statement about its motivation in removing these materials from the incoming waste stream.

We ask the Board to consider several questions that have not yet been answered:

1. Is NET proposing to extract metals and wood on its own initiative, or at the direction of a shipper?
2. If extraction will occur under a shipper’s direction, what financial incentive will NET be provided for the extraction?
3. If extraction will occur under NET’s direction, what contractual right will NET have to extract these materials from incoming shipments?
4. Who will be identified as the shipper of the extracted metals and wood products when they leave the NET facility? If not NET, will any affiliate or principal of NET, or any company in which an NET principal has an ownership interest (an Affiliate)?
5. What contracts will be used for the sale of extracted materials? Will those contracts differ from the shipping papers used for the incoming wastes? If there will be separate contracts, either written or oral, will NET or an Affiliate be a party to those contracts?
6. Who will choose the facilities that will receive the extracted materials? Will NET or any Affiliate have any direct contractual relationship with those facilities?

⁶ See Jones Statement, at ¶13.

7. Will NET or any Affiliate have any ownership interest in any facility receiving materials from the facility?
8. Will NET or any Affiliate profit from the extraction process? If not, who will receive the value of the extracted metals, the wood fuel, and the reduced waste disposal costs?
9. Who will own the extracted commodities at the facility once they are separated from the incoming waste stream?

We think the answers to these questions will help to illustrate our point - that the value creation process intended to be employed by NET does not constitute transportation by rail carrier.

Request for Clear Decision

We are asking the Board to issue guidance to clarify when a facility that handles solid waste is conducting activities that are integrally related to rail transport, and when those activities are not integrally related. This issue cries out for clarity and that is why we asked the Board last July to issue a bright line rule. We seek a decision that the direct transfer of waste to or from a rail car, or the temporary storage of waste while awaiting such transfer, are activities which are integrally related to rail transportation, but that the other management activities described by NET, and specifically the extraction, segregation and shredding activities, are a separate business and do not constitute transportation under 49 U.S.C. §10102(9).

If a company decides to vertically integrate two separate businesses, solid waste management with transloading, then it seems a simple proposition that the transloading activity would constitute rail transportation, while the solid waste management activities would not.

Discussion of Board Issues

The following is our discussion of several of the issues raised by the Board in its March 29, 2007 notice of oral argument. We have listed the issues in numerical sequence, and have only addressed those on which our coalition has a particularly strong viewpoint.

Issue 1: Is it premature to issue a preliminary decision given the pending appeal in the United States Court of Appeals for the Third Circuit in the New York, Susquehanna and Western case and the ongoing Environmental Protection Agency remedial investigation and feasibility study under the Superfund laws on the property on which NET proposes to operate the business at issue in this matter?

There are several compelling reasons why the Board should not delay a decision.

First, the Board has already considered and rejected a delay due to the U.S. Environmental Protection Agency (EPA) remedial investigation. In the June 12, 2006 notice commencing this jurisdictional inquiry, the Board said it would address EPA's request for a delay after the Board made a decision on jurisdiction. The jurisdictional issue is of critical importance and Board should speak to this issue now.

Second, the NET proceeding would not be directly affected by a Third Circuit Court of Appeals decision in the New York Susquehanna case. The issues presented by NET are national in scope, and only the Board can speak with a national voice and impact at this point in time.

Third, the federal courts have expressed a strong interest in obtaining the Board's interpretation of ICCTA preemption. Several courts have indicated that this Board is "uniquely qualified to determine whether state law should be preempted". *CSX Transportation v. Georgia Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1584 (N.D. Ga. 1996); *cited in Grafton & Upton Railroad v. Town of Milford*, 337 F. Supp. 2d 233, 240 (D. Mass 2004).

Fourth, deferring a decision will only prolong existing ambiguity. There is great uncertainty, and significant resources have been allocated to this issue. Continued ambiguity places an enormous burden on all parties. The Board can provide clarity by acting on the record in front of it today.

We urge the Board to not just act, but to issue a final decision on the jurisdictional issue. It serves all interests to have a binding interpretation, and if there is going to be an appeal - from any of the many parties to this matter - it should not be delayed by a preliminary decision.

Issue 2: What federal statutes and regulations are applicable to facilities where C&D and MSW are handled and to what extent is their administration delegated to the states?

There are few meaningful federal environmental statutes or regulations addressing the solid waste processing activities that are the subject of this petition. The federal Solid Waste Disposal Act has never been used to regulate solid processing in any substantive way. The EPA solid waste program only adopts general and non-enforceable guidelines, primarily for landfills and collection activities.⁷ All siting and permitting of solid waste facilities is left to the states and municipalities under their own statutory authorities.

The only substantive environmental requirements that would apply to the NET facility are not specific to solid waste. These include stormwater permitting, hazardous waste management, and emergency planning. These general requirements, which apply to locations as diverse as office buildings, factories, and solid waste facilities, do not impose significant controls for the types of risks that exist from unregulated solid waste facilities. The significant controls are imposed under state and local law.

⁷ See 40 C.F.R. Parts 243, 246, 257, 258.

Issue 3: Could the Board address the state environmental concerns associated with NET's proposal by conditioning any Board authorization of NET's proposal on NET permitting state officials to periodically inspect the facility? If so, could the Board provide for the suspension or revocation of NET's authorization on the recommendation of state officials based on an unsatisfactory inspection, provided that NET has some due process recourse to the Board?

We do not believe such a regulatory framework is practical or could be effective. The Board is not equipped to address the myriad state and local concerns arising from the siting, construction, operation and closure of solid waste facilities.

Issue 4: If the C&D and MSW activities proposed by NET are determined not to be part of rail transportation, what impact would such a decision have on this proposal and on the transloading of other commodities by railroads?

Issue 8: Should C&D and MSW be considered differently from all other commodities and, if so, on what basis?

The Board need not treat wastes differently from other commodities, and therefore a determination that NET's waste activities are not part of rail transportation would not have an impact on other transload operations. In each case presented to the Board, activities should be subjected to the "integral relationship" test that the Board has adopted.

Where activities by a rail carrier are necessary for rail operations, they constitute transportation under ICCTA and the Board's exclusive jurisdiction applies. If, for example, coal is staged, sampled and weighed as part of rail shipping, or if a product is quality tested during transloading for purposes of facilitating a rail shipment, these activities are likely transportation as defined under ICCTA.

Issue 5: In determining whether a facility is a rail transloading facility, must the activities that take place there be solely transportation activities?

Issue 7: May a determination be based on the type of commodity involved? To what extent, if any, does it matter that the proposed facility would handle multiple commodities?

The labeling of a facility should not determine its status. It is the activities and who conducts them that is critical. The Board has previously determined that different conclusions can be reached about separate activities at a single facility. In *Town of Milford*, the Board found that a rail carrier was conducting transportation when it delivered rail cars into a facility that was built across a track, but the company that unloaded the rail cars and then fabricated steel structures in the same facility was not conducting transportation.

A facility can therefore be subject to different statutory obligations depending upon the different activities occurring there and the participants in those activities. Activities at a facility that constitute transportation and are performed by a rail carrier are entitled to ICCTA preemption; activities at the same facility that do not constitute transportation, or that are not conducted by a rail carrier, are not so entitled.

A concrete example of this would be if NET becomes a rail carrier and builds a facility that it uses to load sealed containers of waste, or frozen chicken parts for that matter. Such a facility would fall under this Board's exclusive jurisdiction. But if NET wanted to use the same facility to process waste to change its value, or to slaughter chickens and package them, then that use of the same facility would not be subject to the Board's exclusive jurisdiction. ICCTA does not confer exclusive jurisdiction over manufacturing or processing activities, even if performed by a rail carrier.

The Board should avoid any attempt to allow solid waste management to slip under the exclusive jurisdictional tent with an argument that the activity is only a portion of the business to

be performed at a site. Whatever the extent of an activity, if it is not transportation, or is not performed by a rail carrier, it is not subject to ICCTA's preemption provision.

Issue 6: In determining whether NET's proposed activities would be part of rail transportation, would it be enough that an activity facilitates transportation, or must that activity be essential to the transportation?

This Board has repeatedly used the integral relationship test to determine whether an activity constitutes transportation, and that test should not change. The test appears in numerous Board decisions, and has been adopted by many federal courts. *See Borough of Riverdale - Petition for Declaratory Order*, STB Finance Docket 33466 (STB served Sept.9, 1999); *Hi Tech Trans, LLC - Petition for Declaratory Order*, STB Finance Docket 34192 (STB served Nov. 19, 2002); *Green Mountain RR v. State of Vermont*, 404 F.3d 638 (1st Cir 2005); *CFNR Operating Co. v. City of American Canyon*, 282 Fed. Supp. 2d 1114 (N.D. Cal. 2003); *Flynn v. BNSF*, 98 F. Supp. 2d 1186 (E.D. Wash. 2000).

This case should be analyzed under existing precedent. The inquiry to be conducted through a factual inquiry is whether the proposed activities are integrally related to rail transport. "To come within the preemptive scope of 49 U.S.C. 10501(b), ... activities must be integrally related to the railroad's ability to provide rail transportation services." *Hi Tech Trans* at 3.

It is therefore not enough that an activity merely facilitates transportation. Many manufacturing activities could be said to facilitate transportation but would not be integrally related to providing rail service. As examples, consider saw mills, slaughterhouses, sand and gravel operations, and other businesses that produce products which are easier to ship than the raw feedstocks they first receive. To be integrally related, an activity must be integrally related to a railroad's ability to provide its transportation services. In this case, NET's waste processing is

not integrally related to its transport services. The extraction of metals and wood, the shredding of wastes, is economically motivated and would be performed for a separate business reason. Even if some incidental benefit for rail transport is conferred, these activities simply do not pass the integral relationship test.

Issue 10: Would NET's proposed activities at the transload facility with respect to C&D and MSW add value to the materials, facilitate the disposal of the material in a landfill or otherwise, or serve any purpose other than facilitating rail transport? If so, should that have an impact on our determination here?

Issue 11: To what extent would NET's proposed handling of C&D and MSW be directed towards ensuring that the material would meet the requirements of the landfill, or other receiver, to which it would be transported?

NET's processing activities are going to change the economic value of the waste materials received, and this will allow wastes to go to receivers that would not have otherwise accepted the materials, or would only have accepted them at substantially higher disposal prices.

As examples, NET will receive mixed loads of C&D waste, containing high wood content. NET will separate the wood and shred it to create a chipped material that can be sold as fuel, used as a feedstock at composters, or sent to landfills for a reduced price for use as alternative daily cover. Each of these uses dramatically reduces the costs of disposal.

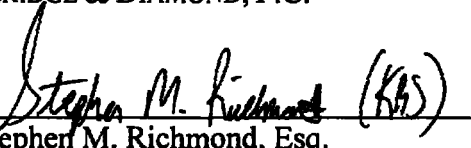
NET argues that it will use a shredder to pack more material into rail cars and to reduce the danger of derailments. We know that rail cars can be packed very tightly by mechanical means without resorting to shredders, which have a high operating cost, and require high maintenance. We have also searched the web site of the Federal Railroad Administration and have located no safety advisories or bulletins or orders even discussing potential hazards associated with the weight distribution of waste shipments.

Shredding is not customarily performed in the waste industry for transportation purposes. It is performed for value creation. For example, a trash to energy facility in Massachusetts owned by Covanta has rail access for waste shipments and receives 3,000 tons per day of solid waste by rail and truck from many of the communities on Cape Cod. At the plant, after receipt of the waste, Covanta runs its material through a shredder to prepare the waste for use as a fuel. This is clearly not a transportation related function, since it occurs after transportation is completed.

It is also worthwhile noting that operating a shredder can be hazardous. Even at a company like Covanta, which has an excellent operational and safety record, there was an explosion in a shredder earlier this month that appears to have been caused by a propane cylinder hidden in the incoming waste. It took 150 firefighters to put out that fire and the entire trash to energy plant has been out of operation all month. Is the risk of this type of incident worth taking at facilities that are not subject to any meaningful regulation or any siting criteria?

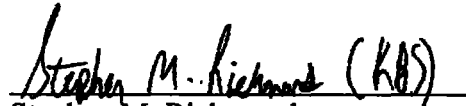
Conclusion

Thank you for the opportunity to present this statement in advance of the oral argument scheduled for April 19. We look forward to the opportunity to continue the dialogue with the Board at that hearing.

DATED: Wellesley, Massachusetts April 16, 2007	Respectfully submitted, NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, and SOLID WASTE ASSOCIATION OF NORTH AMERICA, and SOLID WASTE ASSOCIATION OF NORTH AMERICA - MASSACHUSETTS CHAPTER, and MASSACHUSETTS MUNICIPAL ASSOCIATION, and CONSTRUCTION MATERIALS RECYCLING ASSOCIATION, and INTEGRATED WASTE SERVICES ASSOCIATION, and NEW BEDFORD WASTE SERVICES, LLC By their attorneys, BEVERIDGE & DIAMOND, P.C. By:  (KRS) Stephen M. Richmond, Esq. 45 William Street, Suite 120 Wellesley, Massachusetts 02481-4004 And by Michael Camara, President, NEW BEDFORD WASTE SERVICES, LLC 1245 Shawmut Avenue New Bedford MA 02746-1328
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2007, I served the foregoing Statement by causing a copy to be delivered by first class mail, postage prepaid, to the parties listed below.


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