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April 16, 2007

Honorable Vernon A. Williams, Secretary
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423

**Re: STB Finance Docket No. 34797
New England Transrail, LLC, d/b/a Wilmington & Woburn
Terminal Railway – Construction, Acquisition and Operation
Exemption – In Wilmington and Woburn, MA**

Dear Secretary Williams:

Attached for electronic filing today with the Surface Transportation Board is the Statement of Position of CSX Transportation, Inc. in the above referenced matter.

Very truly yours,

A handwritten signature in black ink that reads "Paul R. Hitchcock". The signature is written in a cursive, flowing style.

Paul R. Hitchcock

PRH/pkw

Attachment

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 34797

**NEW ENGLAND TRANSRAIL, LLC, d/b/a WILMINGTON & WOBURN TERMINAL
RAILWAY—CONSTRUCTION, ACQUISITION AND OPERATION EXEMPTION—IN
WILMINGTON AND WOBURN, MA**

STATEMENT OF POSITION OF CSX TRANSPORTATION, INC.

CSX Transportation, Inc. (“CSXT”), a party to this proceeding, appreciates the opportunity to submit a Statement of Position concerning issues that may be discussed at the April 19, 2007 oral argument in this matter. CSXT submits this short Statement primarily to urge the Board to limit its decision in this matter to the narrow specific issues presented, and to avoid a broader ruling that could have significant negative consequences for railroads and their customers.

Opportunistic abuses of the Board’s regulatory processes have created a problem. It is important that the Board, in grappling with this problem, strike the right policy balance between facilitating commencement of operations by *bona fide* start-up short-lines and preventing sham operations and activities by entities seeking to evade regulation by erroneously characterizing their activities as railroad operations. Recent abuses present a danger that the important and valuable policy of federal preemption of state and local regulation of rail transportation activity could be compromised in order to curtail abuses by entities that are not real railroads.

I. TRANSLOADING AND RELATED ACTIVITIES ARE AN IMPORTANT PART OF RAIL TRANSPORTATION, AND ANY GENERAL RULE THAT LIMITS THE BOARD’S JURISDICTION OVER SUCH ACTIVITY COULD HAVE SIGNIFICANT ADVERSE CONSEQUENCES FOR RAIL TRANSPORTATION.

As the Board knows, transloading between railroads and other modes of transportation has been a central part of rail transportation in the United States for at least a century. For example, the term “team track” originated as a term to describe rail facilities used to transload freight to or from horse-team drawn wagons into rail cars for shipment by rail. This practice provided access to the rail system to shippers who lacked direct access to that system. Today, transloading facilities and activities continue to provide access to the rail network for the many customers who do not have direct access to a rail line or facility. Facilities and activities that link truck and rail transportation are absolutely essential to intermodal transportation (here used to describe containers on flat cars and trailers on flat cars) and to bimodal transportation (involving bulk freight transferred between trucks and rail cars), fast-growing segments of the transportation industry whose benefits and effectiveness are well established. As railroads and over-the-road trucks face capacity constraints while transportation demand continues to grow, it is critical to the continued vitality of interstate commerce and the American economy that transloading facilities and activities not be unduly burdened or constrained by new state and local government regulations.

CSXT does not read the Board’s decisions and notice in this proceeding as intending to address broad questions of the Board’s jurisdiction or the scope of federal preemption with respect to the wide variety of transloading facilities and activities conducted by rail carriers throughout the country today. To the contrary, the proceeding appears to be focused primarily on the single specific exemption petition filed by New England Transrail, LLC (“NET”). Such a focused inquiry is appropriate and consistent with the Board’s established case-by-case approach

to determining whether a given entity or activity is within the Board's jurisdiction. Because some comments and some of the Board's questions in its Notice might be read to suggest the possibility of a broader rule of more general application, however, CSXT is submitting this Statement to urge the Board not to issue a decision or rule that could have broad, unintended negative consequences for large portions of the rail industry and intermodal transportation.

CSXT encourages the Board to consider a different approach of re-examining its notice of exemption procedures to ensure that they are not abused and that they promote sound transportation policies. In Ex Parte 659 the Board took an important first step in that effort by extending the time period for certain notices of exemption to thirty days. CSX respectfully suggests that a logical next step may be the adoption of additional information requirements designed to enable the Board to assess whether a proposed start-up entity's operations would indeed be those of a rail carrier.

A. The Board Must Not Issue a Broad New Rule Limiting its Jurisdiction Over Activity by Rail Carriers.

A decision that states a broad new rule or principle limiting activities within the Board's exclusive jurisdiction under 49 U.S.C. §10501 could have dramatic negative effects on existing and future rail transportation operations. Even if the Board issued a rule intended to apply only to certain solid waste transloading operations, such a rule might be applied to other transloading activities or otherwise used as a precedent to limit the Board's jurisdiction over railroad facilities, operations, and activities. Regardless, such a new rule of general application could generate extensive litigation directed at resolving resulting confusion, conflicts, and uncertainty.

If, for example, the Board determined that only activities that are "solely transportation" or "essential to transportation" are within its jurisdiction, many rail carrier activities could be in jeopardy of being deemed outside the Board's jurisdiction and thus subject to burdensome state

and local regulation.¹ At automobile unloading facilities, vehicles are inspected and prepped; certain equipment (e.g. tires or batteries) may be installed or replaced; and minor repairs may be conducted. At intermodal facilities (sometimes called “intermodal ramps”), containers, trailers, and chassis are cleaned and receive routine maintenance and repairs. Such activities might not be deemed absolutely “essential” to transportation (in the sense that it would be possible, though much less efficient, for them to take place elsewhere), but they are important parts of modern integrated transportation and logistics chains. The great variety of transportation-related services that rail carriers conduct today means that any broad rule or policy pronouncement that seeks to impose across-the-board limits or restrictions on what constitutes “transportation by rail carrier,” would create a substantial risk of unintentionally excluding functions and activities that, viewed on a case-by-case basis, would be found within the scope of the Board’s jurisdiction.

Performance of such activities at rail transloading facilities efficiently serves the needs and requirements of CSXT’s customers and transportation partners, and we urge the Board to avoid a decision or rule that could inadvertently disrupt supply chains.

Because of the importance of transloading activities to the rail transportation industry, the Board should very carefully consider any proposed new rules of broad or general application and their potential effects on rail transportation and interstate commerce before promulgating any such rules. This proceeding simply has not provided the evidence and information the Board would need to conduct a meaningful evaluation of broad and far-reaching changes to the Board’s

¹ CSXT believes a rule delineating between activities that are “solely” or “essential to” transportation and those that are not would be so vague and ambiguous that it would be unworkable in practice and generate much confusion, disputes and litigation. Thus, the rules the Board and commenters have suggested for discussion would be arbitrary and unsound. CSXT’s larger point in these comments, however, is that the Board should avoid *any* broad new rule or pronouncement regarding what rail carrier activities are and are not within its jurisdiction.

jurisdiction, or the effect of such changes on the many operations and practices that rail carriers and their customers have developed in reliance on existing law, regulations, and policies.

CSXT believes there is no present need for broad changes in the Board's practices and policies regarding the determination of its jurisdiction. Certainly, no such need has been demonstrated in this proceeding, and there is no evidentiary basis for adoption of new rules or principles of general application regarding what activities constitute "transportation by rail carrier" within the Board's jurisdiction. Therefore, the Board's decision in this proceeding should be as narrow as possible, and should take care to avoid broad rulings or pronouncements having effect beyond the narrow scope of the proceeding.

B. THE BOARD'S DECISION SHOULD ADDRESS THE SPECIFIC FACTS OF THE NET PETITION AND SHOULD NOT RULE ON ALL SOLID WASTE TRANSLOADING OPERATIONS.

CSXT opposes the request by several commenters that the Board establish a new inflexible rule to govern the determination of regulatory jurisdiction over all rail carrier activities involving the transportation of some form of solid waste. In the first instance, Section 10501 of the Interstate Commerce Act does not authorize any differentiation between freight commodities for purposes of determining the Board's jurisdiction. The broad jurisdiction provisions of the Act treat all commodities the same. *See* 49 U.S.C. §10501; *cf.* Notice at 3 (March 29, 2007).² Moreover, the wide variety of potential activities in which a rail carrier might engage in connection with transportation of one or more types of solid waste – including potential new activities that may be initiated in the future -- make an inflexible rule both unwise and impractical.

² Creating a commodity-based exception to the Board's jurisdiction would set a bad precedent and open the door for requests for local regulation of rail transportation of other commodities. Such a commodity-by-commodity approach would be inconsistent with the broad terms and purpose of the Act, and could lead to the sort of regulatory patchwork and interference with rail transportation that Section 10501 is designed to avoid.

The difficulty of fashioning a lawful, workable rule to apply to all situations involving the transloading of solid waste illustrates the wisdom of the Board's practice of considering the facts and circumstances of each case individually in order to determine whether the specific activity in question is "transportation by a rail carrier." CSXT therefore suggests that the decision in this proceeding be confined to the specific facts and circumstances of the NET petition and *not* be extended to all solid waste transportation facilities and activities.

II. THE BOARD COULD ADDRESS ABUSE OF PREEMPTION BY LIMITING NEW RAIL CARRIER AUTHORIZATIONS TO ENTITIES THAT DEMONSTRATE THEY WILL BE BONA FIDE RAIL COMMON CARRIERS.

The Board could greatly reduce the potential for abuse its jurisdiction by imposing more rigorous requirements on parties seeking authority to act as rail common carrier. In particular, the Board should consider imposing greater information requirements on entities seeking to invoke class exemptions under 49 U.S.C. §§ 10901 & 10902. In recent years, a limited but growing number of parties who are not engaged in the provision of common carrier rail transportation service have sought to use those class exemptions to circumvent state and local regulation of their activities. Such sham rail operations are an abuse of the exemption process, and the Board should take action to eliminate them. Additional information regarding the purpose and intended operations of an entity seeking rail carrier status would enable the Board to better evaluate exemption requests and determine if the proposed operator would be a *bona fide* rail carrier engaged in the provision of rail transportation service.³ If the Board is not satisfied

³ For example, the Board could require that a notice of exemption include information including, but not limited to: (1) what customers will be served and how those customers will be served; (2) what locomotives, cars, and crews will be used to provide that service; (3) whether the entity seeking carrier status will establish a police force; (4) whether any property at issue is currently being operated as a line of railroad subject to the STB's jurisdiction; (5) whether such property is currently owned or leased by a rail carrier subject to the Board's jurisdiction; and (6) what arrangements the entity has made with connecting carriers.

that a petitioner has demonstrated it would be a rail carrier engaged in providing rail transportation service, it should deny the exemption or other authorization sought.

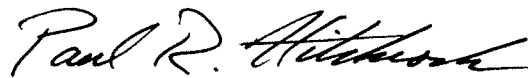
CSXT wishes to emphasize that, as a general matter, it strongly supports exemptions and the exemption notice and petition processes implemented by the Board over the last two decades. Class exemptions have been important policy innovations that have successfully reduced unnecessary regulatory delays and costs. It is only in a few narrow instances, primarily involving the creation of a new carrier or a new line of rail, that the exemption process has been subject to some unfortunate abuse. The requirement that non-carrier entities seeking exemptions provide a modest amount of additional relevant information, in combination with recently enacted regulations expanding the opportunity for public participation in exemption proceedings (*see* Decision, Ex parte No. 659 (served Oct. 19, 2006), should greatly reduce abuse of class exemptions by sham operators.⁴

To aid in distinguishing between *bona fide* rail carrier start-ups and sham operations, the Board might adopt different rules for transfer of operating authority for existing “lines of railroad” on one hand and for new operations that are not currently “lines of railroad” on the other hand. The term “line of railroad” has been well developed through years of decisions under the Interstate Commerce Act, and in many instances could serve as a useful line of demarcation between *bona fide* rail carrier operations, and an entity using a sidetrack or similar facility to masquerade as a rail common carrier.

⁴ The AAR proposed additional modest changes to procedures and requirements for exemptions in its comments in Ex Parte 659. *See* Comments of the Association of American Railroads, *Public Participation in Class Exemption Proceedings*, STB Ex Parte 659 (May 15, 2006). The Board declined to adopt those substantive suggestions in Ex Parte 659, because that proceeding was intended to consider only procedural changes. *See* Decision, Ex Parte 659, slip op at 3 (Oct. 19, 2006). CSXT supports the changes proposed by the AAR in Ex Parte 659 and suggests that the Board consider adopting some of those changes in this substantive proceeding.

In sum, modest changes to the Board's exemption procedures and review could go a long way toward addressing concerns about inappropriate evasion of state regulatory requirements by solid waste processors and others without causing undue delay of exemption proceedings. If the Board implements procedures designed to ensure that only *bona fide* rail common carriers are subject to the rail carrier provisions of the Act, the emerging problem of entities obtaining rail carrier status solely for the purpose of evading state and local regulation could be dramatically curtailed, if not eliminated entirely. Accordingly, CSXT encourages the Board to ensure that its regulatory processes (including exemption proceedings) effectively limit rail carrier status to *bona fide* rail common carriers engaged in providing rail transportation service.

Respectfully submitted,



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