



ASSOCIATION OF AMERICAN RAILROADS

Law Department

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April 16, 2007

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

Re: 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:

Pursuant to the order served by the Board on March 29, 2007, in the above proceeding, the Association of American Railroads and its Member Railroads hereby submits its Statement of Position.

Respectfully submitted,

Louis P. Warchot

**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 THE ASSOCIATION OF AMERICAN RAILROADS

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RAILWAY—CONSTRUCTION, ACQUISITION AND OPERATION EXEMPTION—IN
WILMINGTON AND WOBURN, MA**

STATEMENT OF POSITION OF THE ASSOCIATION OF AMERICAN RAILROADS

In response to the Board's March 29, 2007 Notice of Oral Argument in the above-captioned proceeding, The Association of American Railroads ("AAR") respectfully submits this Statement of Position. AAR does not seek to comment on the specific issues directly presented by the NET exemption petition, but only to reiterate its position on broader policy questions raised in this proceeding.¹

**I. WHETHER AN ACTIVITY IS "TRANSPORTATION BY RAIL CARRIER" IS A
FACT-SPECIFIC INQUIRY THAT CANNOT BE CONDUCTED PROPERLY
THROUGH THE APPLICATION OF BRIGHT-LINE RULES.**

Activities and operations are "within the Board's jurisdiction" and "qualify for preemption under 49 U.S.C. § 10501(b)" if they constitute "transportation by [a] rail carrier." *See* Decision at 2, *New England Transrail*, STB Fin. Dkt. No. 34797 (served June 13, 2006) ("Decision") (requesting comments on whether NET's proposed activities are qualified for preemption); 49 U.S.C. § 10501. As the Board has explained on numerous occasions, the

¹ AAR incorporates to this Statement the comments it previously filed in this proceeding. *See* Initial Comments of Association of American Railroads, STB Dkt. No. 34797 (filed July 13, 2006).

determination of whether a particular activity or facility constitutes “transportation by a rail carrier” within the meaning of the Interstate Commerce Act is necessarily a fact- and circumstance-specific inquiry. *See, e.g.*, Decision at 3, *Tri-State Brick And Stone of NY – Petition for Declaratory Order*, STB Dkt. No. 34824 (Aug. 9, 2006); Decision at 5, *High Tech Trans, LLC – Petition for Declaratory Order – Newark, NJ*, STB Dkt. 34192 (Sub-No. 1) (served Aug. 14, 2003). Broad, generally applicable bright-line rules simply cannot adequately account for the myriad different situations and circumstances in which *bona fide* rail carriers provide transloading services. Any such rule risks creating unintended negative consequences for rail carriers and their customers.

AAR asks the Board not to use this contentious and unusual exemption proceeding to issue any broad ruling, decision, or statement about the scope of preemption for transloading facilities, operations or activities.² Transloading is an important rail transportation activity and a central part of modern rail transportation and integrated transportation logistics and supply chains. Any broad ruling that would apply to other rail carriers, commodities, practices or activities could have serious unintended consequences for rail transportation and interstate commerce. AAR strongly encourages the Board to avoid any such sweeping ruling, and to adhere to its established practice of evaluating each specific preemption case that may come before it on the specific facts and circumstances presented – just as it should do here with respect to the NET petition.

² AAR understands the Board’s request for comments in this proceeding to be confined to transloading of C&D or other solid waste. *See* Decision. Although NET apparently proposes to transload other commodities as well, that activity has not been the focus of this proceeding and there is no evidence in the record that would be sufficient to support the issuance of any general rule regarding transloading of material other than solid waste.

A. The Board Could Eliminate Sham Operations and Abuses by Ensuring that New Entrants Obtain Rail Carrier Status Only if They are *Bona Fide* Rail Common Carriers Engaged in the Provision of Rail Transportation Service.

The Board could eliminate the inappropriate use of ICA preemption by ensuring that “rail carrier” status is granted only to those entities that are created for the purpose of providing common carrier rail transportation service. By ensuring that only *bona fide* rail common carriers are authorized to act as “rail carriers,” the Board can avoid attempts by non-railroads and “sham” operations to avoid state regulation by claiming preemption under the Act. If an entity is not a “rail carrier” within the meaning of the Act, then by definition it cannot be engaged in “transportation by rail carrier” and has no claim to ICA preemption.

One possibility for better ensuring that only *bona fide* rail common carriers obtain “rail carrier” status would be to strengthen the Board’s review of exemption notices and petitions for exemption by parties seeking exemption from the requirements of Section 10901. The Board recently made some initial improvements in that process aimed at increasing the opportunity for public input and participation in exemption proceedings. *See* Decision, *Public Participation in Class Exemption Proceedings*, STB Ex Parte 659 (served Oct. 19, 2006). In that proceeding, AAR advocated additional changes to the Board’s class exemption processes for parties seeking exemption from the requirements of Sections 10901 and 10902. *See* Comments of the Association of American Railroads, STB Ex Parte 659 (May 15, 2006). The Board did not adopt those suggestions in its Decision in Ex Parte 659, because those suggestions would result in substantive, rather than procedural, changes in the regulations. AAR renews those suggestions here. The relatively modest changes AAR has suggested – primarily requiring persons seeking exemption to provide additional information about their proposed operations – would substantially enhance the Board’s ability to ensure that only *bona fide* railroads engaged in providing rail transportation service become “rail carriers” within the meaning of the Act.

B. The Wide Variety of Rail Carrier Transloading Activities Related to Transportation Makes it Impractical and Unwise to Attempt to Issue A Bright Line Rule Differentiating Between Activities that Are “Transportation” and Those That Are Not.

As AAR explained in its Comments, railroads today have myriad different transloading operations on their systems, involving coal, chemicals, automobiles, grain, lumber, and other products. Transloading between modes of transportation has been an integral part of railroad operations since the early days of railroading, and it is becoming increasingly important in today’s integrated transportation and logistics systems. In order to best serve the transportation needs of customers and the public, rail carriers engage in a wide variety of activities at transloading facilities. *See* AAR Comments at 4-6. What those diverse activities have in common is that they are all conducted as part of the rail transportation process by carriers who provide rail transportation service, not by a non-carrier engaged in some other business that claims “rail carrier” status for the purpose of avoiding regulation.

No bright-line rule could hope to capture or address the many different facts, circumstances, and conditions in which rail carriers engage in various activities related to transportation. Any attempt at such delineation would run a very substantial risk of excluding appropriate and legitimate rail transportation activities, particularly given today’s rapid evolution of integrated transportation, logistics, and supply chain operations. Any rail transloading activity – or any other rail transportation activity -- that is excluded from the Board’s jurisdiction will be subject to local regulation and control. The result would be the imposition of a multitude of overlapping and potentially inconsistent regulatory burdens on rail transportation in interstate commerce, and enabling local governments to prohibit certain rail transportation activity entirely, both of which would directly contravene the intent of the Act and its broad grant of exclusive jurisdiction to the Board.

II. **BROAD RULES SUGGESTED IN THIS PROCEEDING ARE MISGUIDED AND UNWORKABLE.**

Three general criteria have been suggested in this proceeding for determining whether an activity is “transportation by rail carrier.” None is appropriate or workable. First, it has been suggested that activities that would “occur even absent rail transportation” may not be rail transportation. *See, e.g.*, Decision at 2. The fact that certain activities or operations may also occur elsewhere or in other contexts is not relevant to the question of whether, when such an activity is conducted at a rail transloading facility, it constitutes “rail transportation.” Thus, a determination of whether an activity might also take place “absent rail transportation” does not advance the inquiry regarding whether that activity is properly deemed part of rail transportation under the Act.

Second, some parties have suggested that any “processing” activity is outside the Board’s jurisdiction. As evidenced by the comments in this proceeding, the general term “processing,” is subject to different interpretations and applications, some of which are fully consistent with activities performed as part of rail transportation. For example, rail transloading facilities sometimes mix different types of coal during loading, in response to a customer’s direction. At times, a rail transloading facility is equipped to heat the transported product – be it coal, corn syrup, or another commodity – in order to facilitate the transloading process. Such “processing” is a reasonable and necessary part of rail transportation, and plainly should be within the Board’s jurisdiction.

Third, some commenters have suggested that activity involving C&D or other solid waste should be deemed to be outside the Board’s jurisdiction. Given the current controversy regarding sham operations seeking to avoid regulation of solid waste activity by claiming rail carrier status and concern about the potential for increases in such abuse, the desire

to address this problem is understandable. As discussed above, the way to address that problem is to ensure that sham operations are denied rail carrier status, not by delegating jurisdiction over transportation of certain commodities to local government.

Testimony in the Board's recent hearing on capacity and infrastructure³ highlighted the fact that limitations on preemption will affect adversely capacity and infrastructure expansion and enhancement, may impede the development of necessary public-private partnerships, and could eliminate third-party investment in rail systems. The Board must not take action in this limited proceeding that would broadly affect important means of developing necessary railroad capacity.

CONCLUSION

The Board should confine its decision to the NET-specific issues presented in this proceeding, and should not issue any bright-line rules or other broad rules of general applicability to govern the determination of whether an activity or facility constitutes "transportation by rail carrier." More demanding and rigorous review of new entrants seeking rail carrier status should eliminate most abuse of the regulatory protections and benefits the Act affords to *bona fide* rail carriers.

Respectfully Submitted,


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³ Public hearing held April 11, 2007 pursuant to STB Ex Parte No.671, *Rail Capacity and Infrastructure Requirements* (served March 6, 2007).