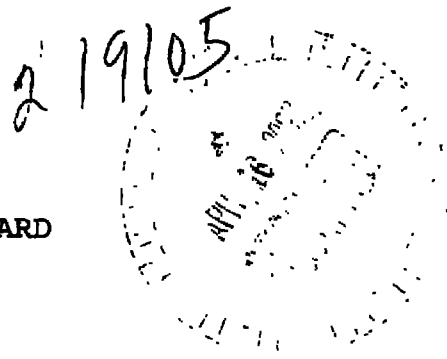


**ORIGINAL**

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

WRITTEN STATEMENT OF POSITION  
ON BEHALF OF JOHN D. FITZGERALD,  
GENERAL CHAIRMAN, UNITED TRANSPORTATION UNION,  
GENERAL COMMITTEE OF ADJUSTMENT (GO-386)

ENTERED  
Office of Proceedings

APR 16 2007

Part of  
Public Record

Gordon P. MacDougall  
Washington, D.C.  
April 19, 2007

Introduction

This written statement of position is on behalf of John D. Fitzgerald, who serves as General Chairman for United Transportation Union (UTU/GO-386), representing certain operating personnel employed by BNSF Railway Company (BNSF). Mr. Fitzgerald has held his elective, full-time, position with UTU/GO-386 since 1993. His offices are in Vancouver, WA. Unfortunately, he is unable to be here today.

UTU/GO-386 is concerned with the encouragement of so-called "non-carrier" notices of exemption under 49 U.S.C. §10901, wherein

individuals and entities, particularly those outside the railroad industry seek to become a "rail carrier" over a short piece of track, so as to engage in the waste business and/or provide "transportation." Although this proceeding takes place in the East, the "rail carrier" impetus appears a potential threat in the western United States, particularly with respect to the substitution of work by a newly-established "rail carrier" for work otherwise performed by established "real" rail carriers, such as BNSF.

The Surface Transportation Board (Board) initially was requested to investigate the "non-carrier" waste business/transportation, on property owned by New York Susquehanna & Western Railway Corporation (NYS&W) in the State of New Jersey, by means of a petition for declaratory order in Finance Docket No. 34776, National Solid Wastes Management Association, et al., - Petition for a Declaratory Order. UTU/GO-386 advised the Board's Secretary, on December 12, 2005, that UTU/GO-386 desired to participate in the event the Board should institute a declaratory order proceeding. However, by decision served March 10, 2006, the Board declined to institute a declaratory order proceeding.

The instant proceeding has its genesis in Finance Docket No. 34391, New England Transrail, LLC, d/b/a Wilmington and Woburn Terminal Railroad Co.--Construction, Acquisition, and Operation Exemption-In Wilmington and Woburn, MA, where the Board on March 2, 2004, conditionally ruled in an unopposed petition for exemption, that the 4,000 feet of industrial trackage was "line of railroad." However, the Board subsequently noted the proposal had

been modified, and accordingly dismissed the petition for exemption, without prejudice, by decision served May 3, 2005.

Thereafter, New England Transrail, LLC, on December 5, 2005, in a new docket, petitioned the Board to acquire in part, to construct in part, and to operate as a rail common carrier, some 7,500 feet of trackage in Wilmington & Woburn, MA. The Board on May 5, 2006 instituted a proceeding, and on June 13, 2006 concluded to first examine the jurisdictional question, inviting all interested parties to participate.

UTU/GO-386 filed its comments on July 13, 2006. The proceeding has drawn widespread interest throughout the United States, with numerous filings in response to the Board's invitation.

#### Statement of Position

1. The Board should find it is without power to authorize or exempt the proposed acquisition, construction, or operation from the provisions of 49 U.S.C. 10901, because industrial and switching tracks come within the exception of 49 U.S.C. 10906:

The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

To be sure, the Board technically has "jurisdiction" over excepted trackage, by virtue of 49 U.S.C. 10501(b)(2), but the Board is without power to accord relief for New England Transrail (NET) under §10901, where excepted industrial or switching trackage is involved. United Transp. Union v. Surface Transp. Bd., 183 F.3d 606, 612-13 (7th Cir. 1999).

2. Trackage, such as that involved herein, traditionally has been constructed, acquired or operated as excepted trackage, free from §10901 and effective agency jurisdiction, whether performed by a line-haul carrier, or by an independent private, contract, or common carrier. The former Interstate Commerce Commission (ICC) promulgated a class exemption from §10901 for the acquisition/operation of rail trackage, but this was limited to "line of railroad" tracks within the scope of §10901, not industrial or switching tracks within the exception of §10906.

3. Following the decision in Brotherhood of Locomotive Engineers v. U.S., 101 F.3d 718 (D.C. Cir. 1996), and construing the court's decision, the Board ruled that a 206-foot excepted "beer track" spur was deemed converted to a "line of railroad," so as to be eligible for prior STB authorization or exemption under §10901 for its acquisition/operation by a newly-created non-carrier. Effingham RR Co.-Pet. for Declaratory Order, 2 S.T.B. 606 (1997) (Effingham). If a non-carrier is the acquiring/operating entity, then all of its trackage, even if entirely "excepted," is deemed "line of railroad" subject to §10901 under the "entire line" ruling of Effingham. Thus a new carrier was born, with preemptive rights, and even eligibility for trackage rights. The Effingham ruling had not been advanced by the parties to that proceeding; rather, the "entire line" concept sprung from agency staff.

4. A number of decisions, mostly (but not all) involving rail carrier employee disputes, have followed Effingham. The parties

here have placed emphasis on the STB's decision in Kaw River,<sup>1/</sup> where the reviewing court, inter alia, was asked to review the STB's interpretation of BLE made in Effingham. The Court noted but declined to reach the issue, asserting lack of Article III standing. Brotherhood of Eng., Trainmen v. Surface Transp., 457 F.3d 24 (D.C. Cir. 2006).

5. The authority of the Board over the proposed construction, acquisition, and operation is a question for decision; it should be answered in the negative. The vacated and unopposed decision of the Board in Finance Docket No. 34391 is neither precedent nor binding.

6. The STB's recent conversion of traditional industrial and switching trackage into a phantom "line of railroad," so contrary to the public interest and railroad employees, is tending toward adverse legislative reactions, similar to undercharge/overcharge manipulations that ended in the 1994 U.S. House vote terminating appropriations for the former Interstate Commerce Commission.

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<sup>1/</sup> Finance Docket No. 34509, Kaw River Railroad, Inc.-Acquisition and Operation Exemption-The Kansas City Southern Railway Company. (May 3, 2005). 2005 WL 1024485. See: Petition, 12/5/05, 17); Reply, 2/21/06, 3).

CERTIFICATE OF SERVICE

I hereby certify I have served a copy of the foregoing  
upon all parties of record by first class mail postage-prepaid..

A handwritten signature in cursive script, reading "Gordon P. MacDougall", written over a horizontal line.

GORDON P. MacDOUGALL

Dated at  
Washington DC  
April 16, 2007