



SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
202 736 8000
202 736 8711 FAX

phemmersbaugh@sidley.com
(202) 736-8538

BEIJING	GENEVA	SAN FRANCISCO
BRUSSELS	HONG KONG	SHANGHAI
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April 16, 2007

ELECTRONIC FILING

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

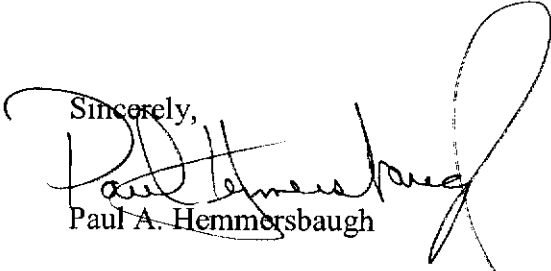
Re: New England Transrail, LLC, STB Fin. Dkt. No. 34797

Dear Secretary Williams:

Enclosed, for filing in the above-referenced proceeding, is an electronic copy of the Statement of Position of the New York, Susquehanna, and Western Railway Corporation regarding issues to be discussed at oral argument scheduled for April 19, 2007 in the above-referenced proceeding.

Thank you for your assistance in this matter. If you have any questions regarding this filing, please contact the undersigned.

Sincerely,


Paul A. Hemmingsbaugh

Counsel to NYS&W Railway Corp.

**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 NEW YORK,
SUSQUEHANNA AND WESTERN RAILWAY CORPORATION**

Nathan R. Fenno
The New York, Susquehanna, and Western
Railway Corporation
1 Railroad Avenue
Cooperstown, New York 13326
(607) 547-2555

G. Paul Moates
Paul A. Hemmersbaugh
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (Fax)

Counsel to the New York, Susquehanna and Western Railway Corporation

Dated: April 16, 2007

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SURFACE TRANSPORTATION BOARD**

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SUSQUEHANNA AND WESTERN RAILWAY CORPORATION**

Pursuant to the Board's March 29, 2007 Notice in the above-captioned proceeding, The New York, Susquehanna and Western Railway Corporation ("NYS&W") respectfully submits this Statement of Position concerning the issues to be discussed at the April 19 oral argument in this matter.

INTRODUCTION AND SUMMARY OF POSITION

By its nature, the question of whether a particular facility or operation is "transportation by [a] rail carrier" is very fact- and circumstance-specific, and it must be evaluated and determined on a case-by-case basis. Because of the wide variety of circumstances and conditions under which rail carriers provide services to their customers, it would be inadvisable, difficult, and perhaps impossible to develop general, "bright line" rules that could be used to determine conclusively whether a given operation or activity constitutes rail transportation subject to the Board's exclusive jurisdiction. A rule that might be appropriate in some circumstances may be entirely inappropriate, unworkable, and inconsistent with rail

transportation law and policy in others. The Board's long-established practice of considering what is and is not "transportation by [a] rail carrier" on a case-by-case basis recognizes that such an inherently circumstance-specific inquiry requires detailed and specific consideration of each unique situation. Accordingly, NYS&W urges the Board to adhere to its sound practice of case-by-case adjudication of these matters, and to confine its consideration and decision in this proceeding to the specific issues and questions directly and necessarily raised by New England Transrail's petition and comments thereon.

Bright-line rules for simplistic determinations of what transloading activities constitute rail transportation would be ill-advised even if confined to a single commodity or narrow category of commodities. The Board should therefore reject requests for restrictive bright-line rules regarding activities related to transloading C&D or other solid waste. Broad application of such inflexible rules to cover most or all transloading operations and activities could cause even more significant harm to rail carriers and their customers, and significantly impede rail transportation and interstate commerce throughout the United States. Therefore, if the Board were to use this proceeding to issue new rules to govern the determination of whether certain transloading activities are within its jurisdiction, it should narrowly confine any such rules to apply solely to situations like those presented by the NET petition, namely the transloading of certain solid wastes at a facility operated by a non-carrier entity that seeks to enter the rail carrier business.

Any rule or pronouncement with respect to the relationship of transloading to rail transportation that sweeps more broadly would risk significant adverse effects on a host of activities in which railroads have engaged on their customers' behalf for many decades. The Board is familiar with a variety of rail facilities that have been constructed to transload

commodities as diverse as coal, chemicals, grain, and lumber on one hand, and intermodal containers, trailers, and set-up automobiles on the other. The efficiencies and value that such facilities bring to the ever-more-sophisticated logistics chains in which railroads and their customers operate are very significant, and the market demands more innovation and creativity in finding ways to further enhance those processes, not restrictive rules and definitions that would subject such important rail facilities to state, regional, and local regulation that would impose excessive burdens and costs on interstate commerce.

NYS&W believes that many of the concerns expressed by commenters would be better addressed through closer scrutiny of exemption notices, petitions, and applications by non-carrier entities that seek to obtain rail carrier status. Many commenters in this proceeding expressed concern that “rogue” operators who are not *bona fide* rail carriers seek this status in order to avoid otherwise applicable state and local laws. In particular, some commenters allege that an increasing number of non-carrier entities involved in the solid waste business seek to become “sham” railroads and thereby avoid state regulation.

NYS&W shares the view that rail carrier status should be limited to entities that are engaged (or will engage) in *bona fide* provision of common carrier rail transportation service. And, NYS&W encourages the Board to more carefully scrutinize exemption notices, petitions, and applications to ensure they do not seek to create sham rail carriers or otherwise abuse the rail carrier status they seek.¹ In some instances, the Board may be required to obtain additional information from the petitioner or applicant, or to seek public input and comment, in order to

¹ NYS&W emphasizes that it takes no position on NET’s petition and application, or its proposed facility and operations. The fact that NYS&W advocates a more rigorous review of non-carrier petitions to obtain authorization to operate as rail carriers should not be interpreted as a comment on the merits of NET’s petition or as a suggestion regarding whether NET should be granted rail carrier status.

conduct an appropriately rigorous analysis. The investment of such additional time and expense should pay valuable and important dividends by reducing the number of, and potential for, sham railroads that abuse the process and protections afforded *bona fide* rail common carriers. Such a threshold screening out of rogue operators -- by keeping them from obtaining rail carrier status in the first place -- should greatly reduce the need for determinations of whether questionable or irresponsible operations and activities constitute rail transportation activity, or simply claim that status as a shield against state regulation.

Below, NYS&W responds to a number of the specific issues and questions raised in the Board's hearing notice. *See* Notice of Oral Argument at 2-3 (March 29, 2007) ("Notice").

I. IS IT PREMATURE FOR THE BOARD TO ISSUE A PRELIMINARY DECISION GIVEN THE PENDING APPEAL OF THE DISTRICT COURT PREEMPTION RULING REGARDING NYS&W'S TRANSLOADING FACILITIES?

NYS&W reiterates that the Board should confine any decision in this proceeding to NET's petition and application, and not attempt to issue a broader "one-size-fits-all" rule of general applicability for all C&D transloading facilities. *See, e.g.*, NYS&W Reply Comments at 3-8 (Aug. 2, 2006). As explained below, any decision or rule having application beyond the specific petition at issue here would be premature given the pending appeal of a federal court decision that held that the Act preempts New Jersey's regulation of certain NYS&W rail transloading facilities and operations.

A. The Board Should Not Issue a Decision with Any Application Beyond the NET Petition While the Appeal is Pending in *NYS&W v. Jackson*.

It would be premature for the Board to issue a decision or rules of general applicability concerning all rail carrier operations and facilities that handle Construction and Demolition material ("C&D") or other solid waste. Following eighteen months of litigation between NYS&W and New Jersey state agencies, the federal District Court for the District of New Jersey

recently issued a thorough and well-considered decision holding that pervasive New Jersey regulations purporting to regulate rail carrier transloading activities were preempted by the Interstate Commerce Act, and could not be applied to certain NYS&W transloading facilities.² See Opinion and Order, *NYS&W v. Jackson* (D.N.J. Feb. 21, 2007).³ The State of New Jersey appealed the decision, and requested that the Third Circuit Court of Appeals stay the District Court decision pending that appeal. The Court of Appeals denied New Jersey's motion for stay, but agreed to consider the appeal on an expedited basis. See Order, *NYS&W v. Jackson et al*, No. 07-1675 (3rd Cir. April 2, 2007).

The pending appeal will directly address the question of a State's power to regulate C&D transloading facilities owned and operated by rail carriers. The preemption issues presented in that appeal are essentially the same as a central issue presented in this proceeding: whether and to what extent state or local governments may regulate C&D transloading facilities and operations conducted by a *bona fide* rail common carrier.

² See Opinion and Order, *New York, Susquehanna and Western Railway Corp. v. Jackson, New Jersey Meadowlands Comm'n et al*, No. 05-4010 (D.N.J. Feb. 20, 2007) (copy lodged in this proceeding Feb. 21, 2007). In response to NJ DEP's supplemental comments mischaracterizing the federal court decision, NYS&W submitted comments that briefly summarized the decision, and corrected and clarified the record regarding that decision. See Response of the NYS&W to Supplemental Comments of the New Jersey Department of Environmental Protection (Mar. 13, 2007).

³ Five NYS&W rail transloading facilities were at issue in the New Jersey federal case. Four of those facilities transload construction and demolition material (generally, concrete, lumber, drywall and similar building material generated by the demolition of buildings), delivered by over-the-road trucks, into rail freight cars for line-haul movement to landfills in other states. The fifth facility transloads a different commodity – contaminated soils from environmental cleanups – for movement to landfills approved for the disposal of such material. For convenience, NYS&W will refer to the five facilities and operations collectively as “C&D” transloading facilities and operations. Although the fifth facility handles contaminated soils rather than C&D, that distinction is not important for purposes of NYS&W's comments in this proceeding.

If the Board were to issue a ruling of general application on that question (as opposed to a narrow ruling confined to the specific facts and circumstances of the NET petition), it would risk creating a precedent or rule(s) that would be inconsistent with a federal court of appeals decision concerning the same issue. Early in the federal court litigation, NYS&W suggested that the court might consider referral of the preemption question to the Board for its views, but NJ DEP and NJMC opposed such a reference. See NYS&W Reply at 2-3 (Nov. 14, 2005) STB Fin Dkt. No. 34776, *National Solid Wastes Management Ass'n et al – Petition for Declaratory Order*. Subsequently, some of the same parties participating this present proceeding filed a separate proceeding requesting that the Board issue a declaration that one of the NYS&W C&D transloading facilities was not engaged in “transportation by rail carrier.” *National Solid Wastes Management Ass'n*, STB Dkt. No. 34886. As NYS&W explained to the Board at that time, because the State of New Jersey had indicated its preference to proceed in the federal court instead of before the Board, the parties had developed a substantial factual record in the federal court litigation and a decision by the Board during the pendency of the federal litigation would be inappropriate and inefficient:

NYS&W contends [in the District Court case] that certain regulations promulgated by the New Jersey Department of Environmental Protection (“NJDEP”) governing the design, construction and operation of truck-rail transload facilities . . . are preempted by 49 U.S.C. § 10501(b). A substantial record has been developed in that [district court] proceeding, and the parties are currently engaged in further discovery with respect to the very same issues as those raised in the NSWMA Petition (i.e. whether the transload facilities operated by NYS&W are, in fact, “rail facilities” at which “rail transportation” takes place, within the meaning of ICCTA. . . A suggestion [by NYS&W counsel] that the issues before the Court be referred to the STB for resolution was opposed by counsel for NJ DEP and was not accepted by the Court. . . . In these circumstances, issuance of the declaratory order requested by NSWMA [regarding one of the C&D transloading facilities at issue in the district court case] would usurp the

jurisdiction of the District Court and could lead to inconsistent determinations with respect to identical issues of law and fact.

Reply of NYS&W at 2, STB Fin. Dkt. No. 34776 (Nov. 14, 2005). The Board wisely dismissed that declaratory petition, and the federal court subsequently found – based on a well-developed factual record – that the facility in question was engaged in transportation by rail carrier and that the Act preempted New Jersey’s extensive regulations that sought to regulate that activity. *See National Solid Wastes Management Ass’n et al – Petition for Declaratory Order*, STB Dkt. No. 34776 (served March 10, 2006); *Jackson*, Opinion (Feb. 21, 2007).

Conflicting authority from the Board and the federal courts would generate substantial and disruptive uncertainty and confusion among carriers, their customers, and state and local governments regarding governing law and rules. Deference to the judicial process, and the interest of clear, consistent rules governing interstate transportation and commerce weigh in favor of deferring a decision regarding transloading of C&D until after final court action in *NYS&W v. Jackson*.

B. Any Preliminary Decision in this Case Should be Confined to the NET Petition.

The District Court’s *Jackson* ruling was based upon an extensive factual record, multiple hearings, expert testimony, and extensive briefing regarding the specific NYS&W facilities and operations at issue. In contrast, the Board has no factual record before it in this proceeding regarding the NYS&W transloading facilities, or for any facility or operation other than those proposed by NET. Because determinations of whether an activity is rail transportation under the Act are necessarily fact-dependent, the lack of such a record for non-NET facilities and operations makes it unwise and unsound for the Board to issue a decision that would apply to all C&D transloading facilities or activities. In the specific case of the NYS&W’s C&D transloading facilities and activities, any rule or decision the Board might issue would both lack

the factual foundation necessary for a sound decision, and disregard the factual record developed in the District Court and its analysis and conclusions based upon that record.

If the Board decides to issue any preliminary decision in this proceeding, that decision should be expressly confined to the authority and approval sought in the NET petition.⁴ NYS&W takes no position as to whether the Board should issue a partial, preliminary, or conditional decision in light of the pending EPA remedial investigation of the site (or the environmental impact statement EPA recommends the Board conduct) at which NET proposes to operate. NYS&W notes, however, that the controversy regarding the proposed location of the NET facility on a Superfund site further highlights the wisdom and importance of the Board's longstanding policy of considering the specific facts and circumstances of each situation individually. *See, e.g., Tri-State Brick And Stone of NY – Petition for Declaratory Order*, STB Dkt. No. 34824 (Aug. 9, 2006); *City of Creede, CO—Pet. for Decl. Order*, STB Fin. Docket No. 34376, Decision at *8 (May 3, 2005); *Town of Milford, MA—Pet. for Decl. Order*, STB Fin. Docket No. 34444, Decision at *2 (Aug. 11, 2004). *Hi Tech Trans, LLC – Petition for Declaratory Order – Newark, NJ*, Decision at 5, STB Dkt. 34192 (Sub-No. 1) (served Aug. 14, 2003). A ruling based upon the nature of one particular site and accompanying issues or concerns should not be used as the basis for a rule of general applicability that would apply to a range of different facilities, operations, and circumstances.

Because the facts and circumstances relating to NET's petition and proposal are unusual, if not unique, this proceeding is particularly ill-suited for the development of new rules to govern

⁴ The first topic the Notice asked the parties to discuss was "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?" Notice of Oral Argument at 2, *New England Transrail*, STB Dkt. No. 34797 (March 29, 2007).

determinations of what solid waste transloading facilities or operations constitute “transportation by rail carrier” under the Act.⁵

C. The Board Should Heighten its Scrutiny of Petitions and Applications From Entities Seeking Rail Carrier Status.

In NYS&W’s view, the legitimate general concern expressed by a number of commenters in this proceeding and elsewhere is the abuse of rail common carrier status by entities that are not actually engaged in providing common carrier rail transportation service, but claim “rail carrier” status in order to avoid regulation. For example, several commenters have expressed concern that the Board’s exemption processes allow entities that are not *bona fide* rail carriers to nonetheless acquire “rail carrier” status under 49 U.S.C. §10901. *See, e.g.*, Reply of The Commonwealth of Massachusetts at 3-5, 12 (Jan. 27, 2007); Reply of NSWMA et al at 14 (Jan. 27, 2006); Reply of Town of Wilmington at 4, 14-15 (Jan. 26, 2006); New Jersey DEP Supplemental Comments at 3 (suggesting the Board revise its exemption procedures to ensure that entities seeking rail carrier status through exemption petitions will be bona fide rail common carriers, and not “a sham intended to take advantage of the preemption provision in 49 U.S.C. § 10501(b)”).

NYS&W agrees that it is important that the Board’s processes ensure that entities upon which it confers rail carrier status are legitimate, *bona fide* rail carriers. The preemption provisions of the Act are intended to facilitate interstate rail transportation, *not* as a device for entities that are not engaged in common carrier rail transportation to shield their activities from state and local regulation. Ensuring that only bona fide rail common carriers are granted “rail carrier” status at the outset is far more direct, effective, and efficient way to guard against sham

⁵ As NYS&W noted in its earlier comments, there is no basis for the Board to consider in this proceeding new rules or criteria for determining whether rail transloading of material other than solid waste (which, for this purpose, includes C&D) constitutes “transportation by rail carrier” within the meaning of the Act. *See, e.g.*, NYS&W Reply Comments at 2-5.

railroad operations than attempting to make bright line distinctions between which of a virtually endless variety of activities are “transportation” and which are not, when conducted by a bona fide rail carrier.

The Board could address concerns regarding such “rogue” operations and “sham” railroads by more rigorous and demanding scrutiny of exemption requests by non-carriers seeking to become or to create rail carriers. Toward that end, exemption processes should be modified to ensure that the Board and the public have adequate information regarding a proposed new rail operation before an exemption is granted or allowed to take effect.⁶ If the Board requires parties seeking exemption under Section 10901 to provide more information about their proposed operations and activities, the Board, interested parties, and the public will be able to make informed evaluations of such proposals.⁷ Based upon that information and any comments of interested parties, the Board could limit abuse of the exemption process, and ensure that only *bona fide* rail common carriers receive the benefits and protections of the Act.

II. FEDERAL STATUTES APPLICABLE TO RAIL TRANSLOAD FACILITIES THAT HANDLE C & D?

The Hearing Notice asks what federal statutes and regulations are applicable to C&D and MSW facilities, and whether their administration is delegated to the states. NYS&W cautions at the outset that the answer to the question of what laws or regulations apply to an entity, activity,

⁶ See, e.g., Comments of the AAR, *Public Participation in Class Exemption Proceedings*, STB Ex Parte 659 (May 15, 2006); Comments of Norfolk Southern Railway Company, *Ashland Railroad, Inc. – Lease and Operation Exemption – Rail Line in Monmouth County, NJ*, STB Dkt. No. 34986 (March 5, 2007). The Board improved opportunities for public access to and participation in exemption proceedings in STB Ex Parte 659 (Oct. 19, 2006). The Board may wish to explore the possibility of further strengthening its review and enhancing opportunities for public participation in exemption proceedings that seek to create a new rail carrier.

⁷ The Board might also establish a more rigorous standard for approval of exemptions, perhaps by requiring that entities seeking to create a new line of railroad demonstrate that their proposed operations and activities would constitute rail common carrier service as part of the national rail transportation network.

or circumstances cannot be determined in the abstract, but only in the context of clear, concrete, and specific facts and circumstances. Thus, any listing of potentially applicable federal statutes, without specific facts and circumstances, is necessarily a hypothetical exercise. NYS&W has not undertaken a survey of all federal laws that are potentially applicable to C&D transloading facilities or activities that might be conducted at such facilities, and it has not considered what statutes might apply to MSW activities, because NYS&W does not handle MSW. An incomplete list of examples of federal statutes that might, in some circumstances, apply to rail facilities and operations handling C&D includes the Federal Rail Safety Act (49 U.S.C. § 20101 et seq.), the Hazardous Materials Transportation Act (49 U.S.C. § 5101 et seq.), the Railway Labor Act (45 U.S.C. § 151), the Federal Employers' Liability Act (45 U.S.C. § 51 et seq.), the National Environmental Policy Act (42 U.S.C. § 4321), federal criminal statutes, and, in some instances, certain provisions of other federal environmental statutes such as CERCLA, the Clean Air Act, RCRA, and the Federal Water Pollution Control Act.⁸ In some cases, the provisions and requirements of potentially applicable federal statutes must be harmonized with provisions of the Interstate Commerce Act in order to ensure that compliance with those other statutes does not unduly impede or interfere with the objectives and requirements of the Act.

III. THE BOARD SHOULD NOT DELEGATE ITS REGULATORY AUTHORITY TO STATES.

As a general matter, NYS&W believes it would not be consistent with the exclusive jurisdiction and preemption provisions of the Act for the Board to condition authorization of rail carrier activity on ongoing state or local regulatory oversight. *See* Notice at 2. The Board's proposal would effectively delegate exclusive federal regulatory authority – including the power

⁸ Administration of some provisions of federal environmental statutes is delegated to states. It is beyond the scope of this Statement to attempt to enumerate what specific federal environmental regulation is delegated to which states and under what circumstances. Most of the other federal statutes listed above are administered by federal agencies.

to revoke the Board's authorization – to state officials. Such delegation of exclusive federal responsibility and jurisdiction would be flatly inconsistent with the clear language of the Act. *See* 49 U.S.C. § 10501.⁹ Moreover, giving state or local officials an effective veto power over a carrier's operations and activities (by providing for revocation of the Board's authorization upon the "recommendation" of such officials) is directly contrary to the intent and purpose of the Act's preemption provisions.

The Board has a non-delegable responsibility and power to grant and revoke exemptions. Once granted, an exemption should be revoked only through a full exemption revocation proceeding conducted by the Board, and upon satisfaction of the statutory standard for such revocation. *See* 49 U.S.C. § 10502(d). Of course, state agencies or officials may request revocation, and may provide comments and other input in a revocation proceeding. However, the Board may not – directly or indirectly – cede its exclusive regulatory jurisdiction, authority, and responsibility to state or local officials.

IV. THE IMPACT OF A BOARD DECISION HOLDING THAT C&D TRANSLOADING ACTIVITIES ARE NOT RAIL TRANSPORTATION

The impact of a general decision by the Board that C&D transloading activities are not "transportation by rail carrier" would be significant. The severity of that effect would depend upon the scope, breadth, and basis of the decision. As NYS&W has noted, the best way to address concerns expressed in this proceeding while avoiding undue restriction of legitimate rail transportation activity or other unintended consequences is for the Board to more carefully screen requests for authority to operate as a rail carrier; and to consider each case on its specific

⁹ The Board has, on occasion, conditioned its grant of authority (e.g. a construction exemption) upon consultation with state or local officials or compliance with certain specific state or local regulatory requirements. NYS&W does not take a position in this proceeding as to whether any condition imposed in a prior proceeding was appropriate or lawful. To NYS&W's knowledge, however, the Board has never imposed a condition that requires ongoing state or local regulatory oversight and indirectly gives state and local authorities the power to revoke Board authorization.

facts and circumstances and issue decisions that are narrowly tailored to such facts and circumstances, and avoid broad or rigid rules.¹⁰

If the Board made a case-specific finding that, under the facts presented in the NET petition, a limited number of specific proposed activities are insufficiently related to rail transportation to fall within the Board's jurisdiction, and expressly limited that finding to the NET petition, the impact of the decision might be confined to NET's proposed activities. Parties to future proceedings might use the Board's NET-specific finding to support their arguments, but as long as the Board remained committed to a fact- and circumstance-specific inquiry and determination in each case, the impact of the decision could be confined to the specific activities conducted by NET that the Board found did not constitute "rail transportation."

If the Board ruled more broadly that all C&D transloading activity (or all solid waste transloading activity) is *per se* outside the Board's jurisdiction, the effect would be broader and more negative.¹¹ Such a bright line rule would subject a significant volume of rail carrier business to local regulation, which history has demonstrated is frequently onerous, discriminatory, and arbitrary. NYS&W's experience in New Jersey shows that, given the power, state officials will develop regulations and requirements that are so pervasive, restrictive, and arbitrarily applied, that a rail carrier engaged in transloading C&D or other solid waste will face

¹⁰ In one of the Hi Tech decisions, for example, the Board considered the specific facts and circumstances of the case and found that movement of C&D by trucks over roads to a transload facility operated by Hi Tech did not constitute "transportation by rail carrier." Therefore, the Board lacked jurisdiction over the truck movement, and state and local regulations of that movement were not preempted. *See Hi Tech Trans, LLC – Petition for Declaratory Order – Hudson County, NJ*, STB Fin. Dkt. No. 34192, slip op. at 3-5 (STB served Nov. 20, 2002).

¹¹ Such a ruling would also flatly contradict the decision of the New Jersey District Court, which found that C&D transloading activity conducted by NYS&W was rail transportation, and that the State of New Jersey could not regulate that activity. *See NYS&W v. Jackson et al*, Opinion. The potential for such conflict with the federal court ruling shows that the Board should not issue any general rule or decision regarding C&D transloading until after the completion of the appeals process and issuance of a final decision in *NYS&W v. Jackson*. *See supra* at I.

a dilemma of either shutting down those operations or facing huge, ruinous monetary fines and penalties. Because transportation of C&D – including transloading – is a large and growing segment of NYS&W’s business, the inability to transport such freight without undue burden would have a severe financial effect on the railroad, and could threaten its overall viability.

If the Board were to issue a decision having even broader application, such as a general bright-line rule attempting to delineate for all cases what is and is not rail transportation activity, the effect on rail transportation could be enormous. NYS&W does not believe the Board intends to issue such a broad rule, and the record in this proceeding does not contain sufficient evidence and information to support any such rule, but the potential negative effects and repercussions of such a hypothetical rule would be profound. For example, if all activities that were deemed “ancillary” or “incidental” to transportation were automatically deemed to be outside the Board’s jurisdiction, then many rail operations and activities -- including activities the Act expressly defines as “transportation,” which are therefore indisputably *within* the Board’s jurisdiction, such as vessels, warehouses, docks, property, “equipment of any kind,” receipt, delivery, elevation, *transfer in transit*, refrigeration, icing, ventilation, storage, and handling, *see* 49 U.S.C. § 10102(9)¹² – potentially could be deemed to be outside the Board’s jurisdiction and be subject to burdensome and inconsistent state and local regulation. Because virtually all rail carriers engage in such activities in large segments of their business (including the burgeoning intermodal business), such a sweeping rule could severely damage the rail transportation industry.

¹² The statutory definition of “transportation” is introduced by the term “includes,” which indicates that the provision only gives a partial, illustrative list of services related to rail transportation. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 188-89 (1941). “Transportation,” therefore, includes all “services related to [rail] movement[s],” including many that are not expressly enumerated in § 10102(9).

V. RAIL TRANSPORTATION FACILITIES NEED NOT ENGAGE IN ACTIVITIES LABELED “SOLELY TRANSPORTATION” IN ORDER TO FALL WITHIN THE BOARD’S JURISDICTION.

The Notice asks if “[i]n determining whether a facility is a rail transloading facility, must the activities that take place there be solely transportation activities?” The answer is no. The term “solely transportation activities” is an ambiguous label that would not be useful for determining which of a wide variety of potential activities at a facility may be within the Board’s jurisdiction. Most activities of any sort could be accurately characterized as accomplishing more than one purpose or falling into more than one descriptive category. To take but one example, the removal of non-compliant material at a transloading facility makes the remaining freight suitable for loading and thus is “transportation,” but that removal also serves the purpose of addressing the disposal needs and requirements of the shipper and the destination landfill. Thus, that activity could not be labeled solely transportation. Indeed, it is difficult to envision what rail transportation activities (other than perhaps line-haul movement of freight) could be described as “solely” or exclusively transportation activity.

It is also difficult to imagine criteria that could be used to determine whether a multipurpose or multiple use activity should be deemed solely transportation. No such criterion has been proposed in this proceeding, and it would be nearly impossible to find a workable standard that could make meaningful, non-arbitrary differentiations between activities that are solely transportation and those that are transportation and something else.

VI. A PROPOSED ACTIVITY NEED NOT BE “ESSENTIAL TO TRANSPORTATION” TO BE WITHIN THE BOARD’S EXCLUSIVE JURISDICTION.

Like “solely transportation,” the term “essential to transportation” would be very difficult to define and even more difficult to administer in practice. Such a standard would have little utility, and would require fine and tenuous distinctions between, for example, activities that are

deemed “essential” to transportation and those that merely assist or facilitate transportation in specific circumstances. Moreover, such a criterion would place the Board in the position of determining how certain freight “should” be transloaded or transported. Should the method for transporting C&D involve loading bulk material into rail cars, or should the material be baled or containerized and loaded into rail cars in that form, or should some other transloading method be used? And, which of those transloading activities would be deemed “essential” to transportation of C&D?

The means and methods by which C&D is transported should be determined by the circumstances, including the needs and requirements of rail shippers and carriers, not by a government agency. Any method or activity that the Board deems non-essential to transportation would be subject to burdensome state and local regulation, and thus likely would be rejected in favor of a method the Board has deemed “essential” to transportation. Such Board interventions in marketplace interactions, and the resulting distortion of business and economic decisions, would be unwise and unnecessary.

Although nearly any bright-line test would be unworkable and undesirable, a guideline that considered whether a particular activity “facilitates” transportation could be useful as part of the Board’s consideration all of the facts and circumstances in each specific case. *See* Notice at 2. If an activity facilitates transportation by rail, it likely should be deemed a rail transportation activity within the Board’s jurisdiction. Nonetheless, defining and applying the term “facilitates transportation” in a reasonable and appropriate manner would be challenging¹³, and it is

¹³ Some limit on what activities “facilitate[] transportation” would obviously be necessary. In some sense, the mining and extraction of ore is both “essential to” and “facilitates” transportation of that ore, because if the ore remained buried in the ground, it could not be transported. Presumably, no rail carrier would argue that the mining of such ore is subject to the Board’s exclusive jurisdiction. The need for reasoned limits on any rule or guideline further

important that no single criterion be treated as determinative or the *sine qua non* for the Board's jurisdiction. Rather, the Board should continue to conduct a flexible analysis in each case to allow adequate room for consideration of specific facts and circumstances in determining whether a given facility or activity constitutes rail transportation.

VII. THE COMMODITY TRANSPORTED IS IRRELEVANT TO WHETHER AN ACTIVITY IS RAIL TRANSPORTATION.

The determination of whether a rail carrier's activity is within the Board's jurisdiction under the Act does not – and may not – depend upon the commodity involved. The jurisdictional provisions of the statute make no distinctions based upon the commodity transported. *See* 49 U.S.C. § 10501. If an activity is within the Board's jurisdiction when the transported commodity is coal, grain, or chemicals, that same activity is within its jurisdiction when the commodity transported is C&D, lumber or orange juice. The Act does not allow exceptions to the Board's exclusive jurisdiction for transportation activity involving C&D or other solid waste.

Even if the Board were to consider creating exceptions to its statutorily-prescribed jurisdiction based upon commodity, no commenter has proposed a standard or criterion to be used to determine which commodities would be inside the Board's jurisdiction and which would be outside. Thus, even if commodity-based distinctions were consistent with the statute (they are not), the record contains no proposal that would allow the Board to make principled, non-arbitrary distinctions between commodities for purposes of determining its jurisdiction.

VIII. SOLID WASTE SHOULD BE TREATED LIKE ANY OTHER BULK COMMODITY FOR PURPOSES OF DETERMINING THE BOARD'S JURISDICTION.

NYS&W wishes to clarify that the "solid waste" material transloaded at its facilities is not municipal solid waste ("MSW"). None of NYS&W's transloading facilities handles MSW

demonstrates the impracticality of a broad bright-line rule and the importance of a more sophisticated analysis that considers the totality of the circumstances in each case.

or any putrescible waste or liquid. Rather, the facilities at issue in the *Jackson* litigation handle C&D, which is essentially debris from construction and demolition of buildings.¹⁴ This solid bulk material generally includes used lumber and drywall, bricks, concrete, steel reinforcing rods, and other building materials. Generally, these materials do not have a strong odor and transloading them in enclosed buildings with concrete floors such as those employed by NYS&W does not pose the environmental risks and hazards associated with MSW and putrescible waste.

There is no sufficient basis for treating MSW differently from other commodities for purposes of the Board's jurisdiction. As discussed above, the Act does not make such commodity-based distinctions. Absent a very powerful compelling countervailing argument – and no such argument has been proffered in this proceeding – the Board should not carve out an exception to Section 10501(b) for transportation of solid waste.

IX. MISCELLANEOUS ISSUES.

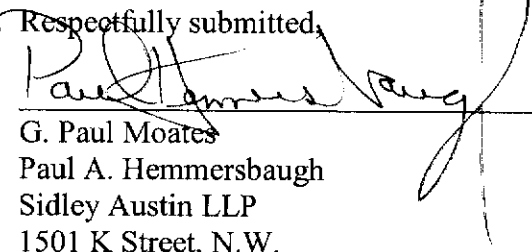
NYS&W briefly addresses two other potential bright-line tests mentioned in this proceeding. First, whether a particular activity generates revenue for a carrier should not determine whether that activity is considered a rail transportation activity within the Board's jurisdiction. *See* Notice at 3. In the *Jackson* litigation, the State of New Jersey argued that NYS&W's transloading activities should not be considered rail transportation because they generated little-to-no additional net revenue to NYS&W over and above the revenues collected for the line-haul movement of C&D. NYS&W presented expert testimony in that case demonstrating that rail carriers often provide certain component transportation services at cost, or even at a loss, in order to generate positive net revenue for the entire movement. In ruling that

¹⁴ As NYS&W previously noted, one of the facilities at issue in *Jackson* transloads contaminated soils.

the transloading services in question constituted “transportation by rail carrier,” the Court necessarily rejected New Jersey’s argument and accepted the principle that whether a particular service is part of rail transportation does not depend on the amount of revenue it generates.

Second, the Decision seeking comments in this proceeding might be read to suggest that whether an activity is within the Board’s jurisdiction depends on whether it “would occur even absent rail transportation.” This cannot be the test for whether an activity constitutes rail transportation.¹⁵ Many activities or functions may take place both as part of rail transportation and as part of something else. For example, non-transportation facilities that manufacture and store corn syrup may heat it to maintain the syrup’s viscosity, and rail transloading facilities may also heat corn syrup to maintain its viscosity during the loading process. *See Borough of Riverdale – Petition for Declaratory Order – NYS&W*, STB Dkt. No. 33466, Decision at 9 (served Sept. 10, 1999) (local government erroneously claimed corn syrup transloading activity was a “corn processing plant.”). The fact that the same activity occurs “absent rail transportation” does not diminish the fact that when it is conducted as part of rail transloading, it is rail transportation within the Board’s jurisdiction.

Nathan R. Fenno
The New York, Susquehanna, and Western
Railway Corporation
1 Railroad Avenue
Cooperstown, New York 13326
(607) 547-2555

Respectfully submitted,

G. Paul Moates
Paul A. Hemmersbaugh
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for The New York, Susquehanna and Western Railway Corporation

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¹⁵ In addition, such an ambiguous standard would be unworkable because, in many instances, it may not be readily ascertainable whether an activity would take place absent rail transportation.