

BEFORE THE SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34797

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

STATEMENT OF RARITAN BAYKEEPER, INC. (d/b/a NY/NJ BAYKEEPER)
AND HACKENSACK RIVERKEEPER, INC. ON JURISDICTIONAL ISSUES

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In this proceeding New England Transrail, LLC (“NET”) is seeking an exemption under 49 U.S.C. § 10502 from the Surface Transportation Board’s (“STB’s”) licensing authority under 49 U.S.C. § 10901. If granted, the Petition will have the effect of authorizing NET to operate as a railroad with the full benefit of preemption under the Interstate Commerce Commission Termination Act, Pub. L. 104-88, 109 Stat. 803 (Dec. 29, 1995) (“ICCTA”), but free of STB’s limited oversight of NET’s operations.

Relationship to Other Proceedings

The STB has framed the threshold issue in this proceeding as whether it has jurisdiction, and specifically whether the construction and demolition debris (“C&D”) and municipal solid waste (“MSW”) handling activities proposed at the NET facility can be considered part of “transportation” within the meaning of ICCTA. See Notice of Oral Argument, STB Finance Dkt. No. 34797 (STB Served March 29, 2007) and Request for Comments, STB Finance Dkt. No. 34797 (STB Served June 12, 2006).

We welcome the opportunity to address the threshold jurisdictional issue. However, we respectfully submit that question is part of, but not the same as, the issue that has preoccupied Congress, the STB, states, municipalities, the railroad industry, the solid waste industry, and environmental groups – the scope of preemption under 49 U.S.C. § 10501(b). That section contains both an exclusive jurisdiction clause in the first sentence and a preemption clause in the second sentence. On preemption issues, the more relevant provision is the second sentence:

Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b) (emphasis added).

The preemption provision therefore contains two important textual limitations upon the scope of the STB’s ability to preempt other laws. First, ICCTA preempts laws only “with respect to regulation of rail transportation,” which is a narrower class of state laws than those “‘with respect to’ rail transportation.” Florida East Coast Railway v. City of West Palm Beach, 266 F.3d 1324, 1331 (11th Cir. 2001). Congress’s intentional use of the former, narrower phrase meant that it intended to preempt laws that “have the effect of ‘manag[ing]’ or ‘govern[ing]’ rail transportation . . . while permitting the continued application of laws having a remote or incidental effect on rail transportation.” Id. Environmental laws fall into the latter, non-preempted category.

Second, Congress specifically limited the STB’s ability to preempt laws to situations where there are other remedies under Part A, Subtitle IV, Title 49, which are the “remedies provided under this part . . .” 49 U.S.C. § 10501(b). The statutory remedies provided to the STB cover rate levels and practices such as economic anti-discrimination (chapter 107, 49 U.S.C. §§ 10701-47), the licensing, abandonment and sale of railroad property (chapter 109, 49

U.S.C. §§ 10901-07), operations, open track rights and common accounting standards (chapter 111, 49 U.S.C. §§ 11101-64), financial matters, including mergers and acquisitions (chapter 113, 49 U.S.C. §§ 11301-28) and taxes (chapter 115, 49 U.S.C. §§ 11501-02). All of these substantive powers relate to economic regulation and circumscribe the enforcement sections in Part A (chapter 117, 49 U.S.C. §§ 11701-07, and chapter 119, 49 U.S.C. §§ 11901-11908). Thus, Section 10501(b) clearly states that only the limited, economically-oriented remedies set out in Part A are within the STB's exclusive bailiwick. The need for courts to locate equivalent STB remedies before displacing other laws is illustrated by a Third Circuit case, Union Railroad Company v. United Steel Workers of America, 242 F.3d 458 (3rd Cir. 2001). There, a union was precluded from bringing claims against a railroad because ICCTA provided an explicit remedy before the STB: "Among the matters which ICA puts within the exclusive jurisdiction of the STB is the relation between the railroad and its employees. . . . More importantly, [49 U.S.C. §] 11326 gives the STB both the statutory authority and the mandate to impose on the rail carrier . . . a 'fair arrangement' that will protect the employees affected by the consolidation." Id. at 466-67. As Congress noted, exclusive Part A remedies do not include generally applicable laws such as "criminal statutes governing antitrust matters not preempted by this Act, and laws defining such criminal offense as bribery and extortion, [which] remain fully applicable unless specifically displaced, because they do not generally collide with the scheme of economic regulation (and deregulation) of rail transportation." H.R. Conf. Rep. No. 104-422, at 167 (1995), reprinted in 1995 U.S.C.C.A.N. 850, 852.

Congress's division makes sense as a matter of economic theory. Congress did not choose to leave the railroad field completely unregulated, but rather made a conscious decision that market forces will result in efficient pricing and levels of service. Competition might create

the right incentives for optimum haulage rates. But by definition competition will also create incentives to escape regulatory requirements that impose compliance costs on the operator in order to protect the public from harmful effects. Environmental and other laws that eliminate such externalities must be left in place in order to create functioning and efficient markets and a level playing field between railroads and non-railroads.

In sum, ICCTA Part A provides no remedies pertaining to generally applicable environmental or pollution laws. The lack of any overlap makes sense because pollution control is altogether beyond the scope of the STB's delegated authority under ICCTA, *i.e.*, economic regulatory control. Given ICCTA's limited reach, the Supreme Court's warnings against the creation of regulatory gaps are particularly appropriate in the circumstances of this case: while an "authoritative federal determination that [an] area is best left unregulated" may preempt state laws in that area, there must be a strong affirmative indication of that intent. Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 384 (1983) (emphasis in original); see generally Bates v. Dow Agrosciences LLC, 544 U.S. 431 (2005) (holding tort claims not preempted because, in part, "it seems unlikely that Congress considered a relatively obscure provision . . . to give pesticide manufacturers virtual immunity from certain forms of tort liability"); Medtronic, Inc. v. Lohr, 518 U.S. 470, 488-89 (1996) (rejecting an interpretation that would result in "wiping out the possibility of [a] remedy for the . . . injuries"); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 263 (1984) (holding tort claims not preempted because "it is inconceivable that Congress intended to leave victims with no remedy at all.").

We point out this difference because courts and the STB in ICCTA preemption cases have hitherto focused exclusively upon the first sentence on the Board's exclusive jurisdiction, which is seemingly very broad. ICCTA states that the Board's "jurisdiction . . . over . . .

transportation . . . and . . . facilities . . . is exclusive.” 49 U.S.C. § 10501(b). The expansive reach of this sentence is seemingly reinforced by Congress’s definition of “transportation,” which includes the physical apparatus of railroad operations (locomotives, cars, rails and terminals and the like that are owned by rail carriers) and services related to the movement of passengers or property by rail. 49 U.S.C. § 10102(9). The broad definition of “transportation,” taken in isolation, would seem to provide the Board with “jurisdiction” over any facilities or equipment owned by railroads without regard to any nexus with rail transportation or common carrier services. 49 U.S.C. § 10501(b). Of course the exclusive jurisdiction sentence also links the term “transportation” with the remedies that are available to the STB. 49 U.S.C. § 10501(b). Accordingly, even if preemption analysis were to begin and to end with the “exclusive jurisdiction” clause, it should still address whether there are equivalent STB remedies. So too in this proceeding should the STB consider the limitations on its remedies in deciding whether the activities at issue are “transportation.”

Despite the text of the statute, ICCTA decisional law has incorrectly relied on analysis of the transportation section alone, and has ignored the remedies qualification or the language of the preemption clause in deciding preemption cases. One oft-quoted dictum from an early judicial decision is that “[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations” than the exclusive jurisdiction sentence of ICCTA. CSX Transp. v. Georgia Pub. Serv. Comm’n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996); see also City of Auburn v. United States, 154 F.3d 1025, 1030 (9th Cir. 1998) (relying on exclusive jurisdictional sentence of Section 10501 of ICCTA to preempt state claims); Wisconsin Cent. Ltd. v. City of Marshfield, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000) (relying on jurisdictional provision to hold that that ICCTA precludes “all state efforts to regulate rail

transportation.”). These cases have largely ignored the preemption section. In solid waste cases, the course that have preempted state environmental laws have done so based solely on the exclusive jurisdiction clause and the seemingly broad scope of “transportation” without any analysis of the remedies qualification or preemption sentence. See New York Susquehanna and Western Ry. Corp. v. Jackson, 2007 WL 57643 (D.N.J. Feb. 21, 2007); Coastal Distribution, LLC v. Town of Babylon, 2006 WL 270252 (E.D.N.Y., Jan. 31, 2006); Canadian National Ry v. City of Rockwood, 2005 WL 1349077 (E.D. Mich. June 1, 2005).

Because the issue today is the important threshold issue of whether NET’s activities will be “transportation” within the meaning of ICCTA, and not the issue of the scope of preemption under that statute, is not 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 Ry. Corp. v. Jackson, 2007 WL 576431 (D.N.J. Feb. 21, 2007), appeal docketed, No. 07-1675 (3d Cir. Mar. 16, 2007). Indeed, a decision from the STB in this matter will inform the courts in the Third Circuit and throughout the country whether solid waste cases can be disposed of on the ground that solid waste handling is not “transportation” or whether it is necessary for courts to proceed to analyze the matter under the terms of the statutory preemption clause.

It is also not premature to issue a preliminary decision given the ongoing response actions at the site under the Comprehensive Environmental Response, Cleanup and Liability Act, 42 U.S.C. § 9601 et seq. (“CERCLA”) and overseen by the U.S. Environmental Protection Agency (“EPA”). The EPA has been careful to phrase its view of the relationship of the matters as limited to issues of environmental review, and to recommend that any review be deferred until after the relevant parts of the remedial investigation and feasibility study are completed, and that any such review be a more rigorous environmental impact statement. EPA Statement, STB

Finance Dkt. No. 34797 (filed April 6, 2007). The scope of “transportation” has nothing to do with those issues.

Applicable Environmental Laws

The STB sought parties’ views on which federal statutes and regulations apply to C&D and MSW handling activities, and the extent to which those laws are delegated to the states. We assume that the Board is interested in environmental laws only, and also that it is interested in laws that apply to new operations and not laws such as CERCLA that apply to hazardous substances left in place by past practices.

The principal federal environmental laws that would apply to such activities are the Clean Water Act, 33 U.S.C. § 1251 et. seq. (“CWA”), the Clean Air Act, 42 U.S.C. § 7401 et seq. (“CAA”), and the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq. (“RCRA”). These statutes have delegated the primary enforcement role to the states, largely by authorizing states to issuance of construction and operating permits, while retaining a backup role for enforcement by the federal government and the public through citizen suits. As noted in prior submissions by the Massachusetts Department of Environmental Protection (“MADEP”), for example, the state will have to issue air permits to NET that address emissions from the heavy machinery proposed for moving C&D and MSW and, separately, to address friable asbestos fibers and other air pollutants that will be emitted from NET’s activities; those state controls are necessary to meet the provisions of the State Implementation Plan and other elements of the CAA program delegated to MADEP. The delegated CWA program works in much the same way; MADEP will presumably have to issue a permit that will address NET’s planned collection of stormwater in sewers and detention basins and discharge to nearby

wetlands. The EPA oversees CWA and CAA permits and ensures that state permitting programs meet the minimum standards of federal law.

The regulation of solid waste operates in a slightly different manner. There, state law has a predominant and independent role. With the exception of a few important federal baselines (discussed below) there is no federal program, and states enforce their own laws rather than a delegated federal laws. Early in the modern era of environmental law, the Federal government was instrumental in setting minimum standards for state programs. In 1965, for example, Congress first recognized the national threat to public health and welfare posed by the problems of solid waste and enacted the Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992 (1965). See 42 U.S.C. § 6901(a)(4) (“[T]he problems of waste disposal . . . have become national in scope and in concern”); H.R. Rep. No. 89-899 (1965), reprinted in 1965 U.S.C.C.A.N. 3608, 3614 (noting problems associated with billions of tons of discharged materials and solid waste management methods that “contribute to air, water, and soil pollution and create breeding places for disease-carrying insects and rodents. Accumulations of [waste] cause fire hazards, contribute to accidents and destroy the beauty of cities and the countryside.”). In 1976 Congress enacted RCRA to manage hazardous and solid wastes. Pub. L. No. 94-580, 90 Stat. 2795 (1976), codified at 42 U.S.C. §§ 6901-91. Subchapter III of RCRA concerns hazardous wastes and Subchapter IV concerns solid wastes.

RCRA established national minimum standards and permits for the handling, transfer, and disposal of solid waste, as well as enforcement of those standards by EPA, state agencies and citizens. See 42 U.S.C. §§ 6907, 6912, 6923, 6926, 6928, 6972. RCRA vested the U.S. Environmental Protection Agency (“EPA”) with the power to regulate practices related to the transfer, storage, handling and disposal of solid and hazardous waste. Id. at §§ 6901(a)(4),

6902(b). Among other things, RCRA's statutory minimum standards for solid wastes requires states to close open dumps and directly prohibits activities that amount to the open dumping of solid waste. Id. at §§ 6944, 6945. RCRA separately authorizes basic federal standards for the siting of waste facilities in order to prevent the contamination of groundwater, wetlands and surface waters from waste leachate and the pollution of wetlands, and these standards include consideration of "regional, geographic, demographic, and climatic factors." 42 U.S.C.

§ 6907(a); see generally 40 C.F.R. Part 257. RCRA created incentives for the creation of state or regional solid waste plans, and provided the EPA with the secondary role of approving state plans as well as issuing guidelines for best solid waste management practices. 42 U.S.C.

§§ 6929, 6941. Other than those minimum standards, however, Congress indicated that "the collection and disposal of solid waste should continue to be primarily the function of State, regional, and local agencies." 42 U.S.C. § 6901(a)(4). As a result, the EPA has not substantially updated its basic regulations dealing with the open dumping of solid waste since 1979. See 40 C.F.R. Part 257.

In contrast, the Federal government has a greater role in hazardous waste management and is obligated to adopt a program to identify and list hazardous wastes and a permitting program for the treatment, storage or disposal of hazardous waste 42 U.S.C. §§ 6921, 6925. State programs are tightly controlled through a formal delegated program under Subchapter III of RCRA. 42 U.S.C. § 6926. In 1984, for example, Congress again strengthened RCRA, particularly the federal oversight and regulation of hazardous waste, by passing the Hazardous and Solid Waste Amendments, Pub. L. 98-616, 98 Stat. 3221 (1984), 42 U.S.C. §§ 6991 to 6991(i).

RCRA also provides the EPA and the public with the ability to sue to prevent or correct conditions that create an imminent and substantial risk of endangerment to public health or the environment. 42 U.S.C. § 6972(a)(1)(B). Such claims are not part of an ongoing, generally applicable regulatory process, but rather are adjudicated on a case-by-case basis whenever waste handling practices have degenerate to the level that they are causing or have caused such harms.

Despite the increasingly interstate market for solid waste, then, the terminal points in that market are not regulated by the federal government but by states. This is logical given the localized nature of pollution problems from solid waste, which makes it different from interstate air pollution and other matters for which the federal government has to play a later role. States' strong regulatory presence reflects their historic management of solid waste to avoid public health problems associated with uncontrolled garbage disposal. And states have extensive statutory and regulatory schemes to control the generation, handling, and disposal of solid waste, particularly the great amounts of waste that are gathered and processed at centralized waste transfer stations.

NET, like many other waste companies and railroads that seek to exploit ICCTA preemption, contends in its Petition that it will comply with those provisions of state solid waste law that it deems to be "substantive." NET has also selectively offered to comply with MADEP CAA regulations, and has ignored provisions related to dust and odors and asbestos. The contention that regulated entities can pick and choose the provisions that they will follow reflects notion that some regulations are superfluous. There are no superfluous provisions. Solid waste regulations reflect agencies' experience in dealing with pollution from solid waste handling, and the regulations are constantly evolving to reflect that experience. For example, states adjusted their regulatory regimes to encompass C&D and other non-MSW solid wastes after discovering

the potentially hazardous characteristics of leachate and dust that may include asbestos insulation and lead paint from older structures, as well as all-weather wood treated with arsenic. See Criteria for Classification of Solid Waste Disposal Facilities and Practices and Criteria for Municipal Solid Waste Landfills: Disposal of Residential Lead-Based Paint Waste, 68 Fed. Reg. 117 (June 18, 2003). State law generally requires dust suppression, fire control, and stormwater collection equipment because of these and other identified risks. For example, MADEP has apparently concluded that NET's proposed canvass structure is inadequate to contain the dust, odor, noise and other air pollutants (including asbestos fibers) from the proposed C&D and MSW handling activities. MADEP Comments, STB Finance Docket No. 34797 (filed August 1, 2006). C&D and MSW will contain small quantity generator hazardous waste, household hazardous waste, commercial and industrial waste that contains hazardous components that can be emitted in dust and leachate, even if the entire load of waste is not classified as hazardous waste for regulatory purposes. MSW, because it is putrescible, also requires additional controls for fire risk, disease vectors, and odor.

These and other limitations are implemented through an interlocking, mutually reinforcing series of bonding, background check, facility design, inspection, monitoring, waste manifest and enforcement requirements in state law, each of which reflects agencies' best judgment about the minimum measures that are necessary to prevent adverse effects to human health and the environment. The permit requirement is the hub of this interlocking network of controls. Many companies in the solid waste business have successfully obtained solid waste permits (as with air and water discharge permits) after investing sufficient time and energy to demonstrate that the facilities meet applicable design requirements and their operational controls are sufficient to comply with applicable requirements. Without a permit requirement, state laws

that are otherwise applicable to everyone on an equal footing are held hostage to endless negotiations by companies that continue to operate facilities and to reap economic benefits from non-compliance.

The centrality of permits to enforcement is well illustrated by the unsuccessful efforts of the New Jersey Department of Environmental Protection (“NJDEP”) to obtain compliance at several waste transfer stations through negotiation with the New York, Susquehanna and Western Railway (“Susquehanna and Western”) under an existing court stipulation. These conditions are also described in our July 12, 2006, submission to the STB in this proceeding, and we incorporate those comments here. Without a permit, Susquehanna & Western unilaterally opened five solid waste handling facilities along its existing tracks in North Bergen, New Jersey. Susquehanna & Western allowed construction and demolition debris to be dumped in open piles that grew to over fifty feet tall. After the debris was sorted to remove recyclable metals and material that could not be disposed of in the receiving landfills, operators used heavy machinery to crush the waste and to push it into piles for loading on railcars. Other solid waste processing activities performed at the sites included grinding tires and wood pallets into chips and separating out recyclable metal, presumably for resale. These activities caused emissions of dust into a nearby bus maintenance depot and other businesses, as well as runoff of contaminated stormwater into nearby wetlands and streams. State waste inspectors found extensive violations of state laws, including operations conducted outside of an enclosed building and the lack of systems to collect waste water or control dust. They took samples from standing pools of water at three of the transfer stations and found elevated levels of mercury, arsenic, and lead in excess of regulatory standards. Fire inspectors observed flammable acetylene bottles and paint, piles of waste tires, hydraulic fluid in puddles on the ground, missing or inoperable fire extinguishers,

improper dispensing of fuel, and the use of equipment close to high-voltage power lines, all of which create an extreme fire danger. At another site, officials found eighty 7,000-pound containers of phosphorus pentasulfide, a flammable chemical that can ignite or explode on contact with water and release toxic fumes; the company routinely left the gates to the facility open and had not reported the chemical to local emergency service personnel, who might have unwittingly attacked any fire with water. The construction and demolition debris waste piles were so high that one crane came in contact with overhead high-voltage wires, short-circuiting the lines and causing a power outage. After one carload of waste caught fire and was extinguished, Susquehanna & Western refused to allow the firefighters to inspect the waste based on the railroad's belief that federal law preempted local fire controls.

Susquehanna and Western's facilities have since been enclosed in buildings that are more substantial than those proposed by NET. Nevertheless, these facilities lack permits and do not meet applicable codes and regulations, as described in filings by the NJDEP. By all accounts, Susquehanna and Western's facilities continue to emit dust into the environment and to pose a fire hazard. In short, preemption of the permit requirements has led to severe public health, safety and environmental issues.

The STB should not be under the illusion that any ruling that encourages unregulated facilities will be limited to C&D or MSW. Given their success in preempting state laws, railroads can be expected to continue their attempts to evade otherwise applicable environmental laws. Some railroads now claim the power to operate hazardous waste facilities and landfills on railroad property free of any meaningful oversight. For example, Susquehanna & Western has claimed in regulatory filings that it can operate hazardous waste facilities and landfills on railroad property on the theory that "preemption applies equally to hazardous waste, medical

waste and recycling facility permits and approvals.” 36 N.J.R. 5098(b), 5101 (Nov. 15, 2004) (Cmt. 16). And railroads recently filed suit to block California regulations concerning locomotive idling times that were adopted to control the Los Angeles Basin’s notorious air pollution. Assoc. of Am. R.R. v. South Coast Air Quality Management Dist., Dkt. No. 06-01416 (C.D. Cal. March 7, 2006), reported in BNA’s Environment Reporter, March 17, 2006, at 550. Indeed, in this proceeding, the Brotherhood of Locomotive Engineers and Trainmen have baldly stated that any preemption ruling ultimately issued here will guide “cross-country rail transportation of spent nuclear fuel and high level radioactive waste.” Brotherhood Comments, STB Finance Docket No. 34797 (dated Nov. 27, 2006), p. 2.

Remedies Available to the Board

The STB has asked the parties to address whether it has the power to mitigate the expected environmental harm from the NET project. As described above, this is an important issue under ICCTA preemption, and should be but is not typically considered relevant to the threshold jurisdictional question of whether NET’s activities fall within ICCTA “transportation.”

We welcome the STB’s focus on the limited scope of its remedies and creative search for answers. Any such inquiry must start with the basic fact that ICCTA denies the STB authority to oversee ongoing operations at facilities of the type proposed by NET, and in most cases any ability to license or approve solid waste facilities constructed by existing railroads (the STB has not, for example, approved any of Susquehanna and Western’s waste yards). The STB’s “jurisdiction” over “transportation by rail carriers” is limited to facilities and activities that are necessary for interstate rail transportation, such as rail line extensions, the construction of new rail lines, and the acquisition of new lines, each of which triggers the need for Board licenses and environmental review. 49 U.S.C. § 10906. ICCTA explicitly removes many railroad activities

from the STB's licensing review and, therefore, from its regulatory reach. Id. ("The Board does not have authority under this chapter over the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching or side tracks."). As the STB has acknowledged,

Many rail construction projects are outside of the Board's regulatory jurisdiction. For example, railroads do not require authority from the Board to build or expand facilities such as truck transfer facilities, weigh stations, or similar facilities ancillary to their railroad operations, or to upgrade an existing line or to construct unregulated spur or industrial team track. In such cases, we can provide advice about how preemption applies, but have no direct involvement in the process.

Borough of Riverdale v. New York Susquehanna & Western Ry. Corp., STB Finance Docket No. 33466, 1999 WL 715272, at *4 (STB Sept. 9, 1999) (emphasis added); see also Flynn v. Burlington N. Santa Fe Corp., 98 F. Supp. 2d 1186 (E.D. Wash. 2000). Without licensing authority over "ancillary" but otherwise major facilities such as waste transfer stations, the STB cannot oversee a significant portion of railroad activities, and cannot regulate discharges from ongoing railroad terminal operations to air, water, or soil.

If this were not enough, the STB also lacks the authority and capability to provide remedies for most environmental harms. Its rules promulgated at 49 C.F.R. Part 1105 provide only for review of the environmental impacts of its regulatory decisions under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4333-4335 ("NEPA"). If any review occurs, it is done before projects are undertaken and does not have anything to do with railroads' ongoing compliance with environmental laws. NEPA does not mandate any particular result, and once the adverse environmental effects of a proposed action have been identified and evaluated, the STB may decide to subvert environmental values to other considerations. Moreover, the STB lacks inspectors and environmental staff in the field necessary to regulate ongoing operations; its

overall staff is limited to no more than 150 employees by appropriation, and only a small number of these employees are responsible for NEPA review.¹ The STB does not and cannot regulate discharges from ongoing railroad terminal operations to air, water, or soil. Other entities must regulate the rail waste station facilities if they are to be regulated at all.

In fact, the STB's powers over safety and other aspects of the railroad industry are quite limited, and it does not have general authority to address safety issues, which are reserved for the Department of Transportation's ("DOT's") Federal Railroad Administration ("FRA") under the Federal Rail Safety Act ("FRSA"). For example, the FRA has just addressed the problem of overloaded cars carrying municipal solid waste. Federal Railroad Administration Safety Advisory 2006-06, 72 Fed. Reg. 842 (Jan. 8, 2007) (safety advisory for railroad cars used to haul municipal solid waste to landfill sites, after at least four incidents involving cracking of the long spine that runs along the underside of a railroad car; the most serious incident occurred in North Bergen, New Jersey on May 18, 2006). ICCTA is certainly not the primary federal rail law governing solid and hazardous waste handled by railroads. Courts have already recognized that the ICCTA must co-exist with other federal laws that directly regulate hazardous materials, including the Hazardous Materials Transportation Act, the Federal Rail Safety Act, and DOT regulations governing hazardous materials transportation by rail. CSX Transp. Inc. v. Williams, 406 F.3d 667 (D.C. Cir. 2005) (applying preemption provisions of other federal acts, not ICCTA, to strike down local rule regarding the movement of hazardous waste by rail). For that reason,

¹ See Testimony of W. Douglas Buttrey, Chairman of the Board, Senate Committee on Commerce, Science, and Transportation, Subcommittee on Surface Transportation and Merchant Marine, Hearing on Economics, Service and Capacity in the Freight Railroad Industry at 2 (June 21, 2006). The Board has even adopted a policy to contract out its minimal pre-construction review activities to third parties paid for by railroad applicants, because it "does not have, and likely will never have, funding available to it to increase its staff sufficiently" and "lacks the broad range of in-house technical experts that third-party contractors can tap." 66 Fed. Reg. 15527, 15530 (Mar. 19, 2001).

recent anti-terrorism concerns led Congress to amend those other statutes, not ICCTA, to provide the DOT with additional authority to address railroad safety and hazardous materials transportation. See Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135, §§ 1710-1711 (2002).

In sum, the Board is unable to provide any “remedies” for the environmental and safety effects of solid waste handling activities that would trigger preemption of environmental laws under ICCTA. The lack of relevant remedies should also remove such activities from ICCTA “transportation.”

Moreover, environmental laws were obviously not passed to regulate railroads qua railroads, as would be necessary to meet the statutory qualification for preemption set forth at 49 U.S.C. §10501(b). For example, EPA can regulate the environmental aspects of rail equipment and operations. . See 42 U.S.C. § 6923(b) (explicitly directing the EPA to coordinate its RCRA regulations applicable to transporters of hazardous waste with DOT regulations applicable to transporters of all hazardous materials, which the EPA has done at 40 C.F.R. § 263.10); see also 40 C.F.R. Part 92 (EPA regulation of air emissions from locomotives); 40 C.F.R. § 122.26 (EPA regulation of stormwater from rail operations); 40 C.F.R. Part 201 (EPA regulation of noise from trains); 40 C.F.R. § 263.20(f) (EPA regulation of hazardous waste transport by rail). Similarly, state environmental laws that are generally applicable do not regulate railroads qua railroads.

These limitations inform our view that the Board cannot fully address the environmental concerns raised by NET’s Petition by conditioning exemption upon periodic inspections by state officials, with the STB having the final say in whether unsatisfactory inspections result in facility closure. (We leave for others to address whether the scope of the STB’s economic regulatory power under ICCTA in general, and the standards for exemption at 49 U.S.C. § 10502 in

particular, would permit the imposition of that condition or would expose the STB to a challenge for arbitrary and capricious agency action). The obvious problem with that very creative solution is that it takes away enforcement power from the states and places it in a federal agency, the STB, that is poorly equipped to carry out that task. Some of the many issues that would have to be resolved before adopting such a scheme would include the exact contours of the due process rights afforded to NET, the standards to be applied by the STB to adjudicate the validity of state agency reports of unsatisfactory inspections, the STB's scientific capability to assess state reports and to conduct independent inspections, and whether such conditions intrude upon the EPA's statutory responsibility to oversee programs delegated to the states and to issue solid waste guidelines.

Whether NET's Proposed Solid Waste Facilities is Part of Rail "Transportation"

The STB has also sought guidance on various aspects of whether NET's proposed solid waste facilities should be considered part of rail "transportation" under ICCTA. In partial response to those questions, we incorporate our comments that were submitted to the STB on July 12, 2006.

If the STB determines that NET's proposed C&D and MSW activities are not part of rail transportation, that will have a limited, minimally disruptive effect. NET would simply have to obtain a permit, as every other waste industry participant has to do. Had NET decided to follow applicable state environmental laws, it might well have its solid waste permit by now. Or NET could decide to handle wastes in a way that would meet relevant exemptions, such as might exist for the movement and shipment of waste that is in sealed containers. Finally, of course, NET could decide to move commodities that are unregulated. The range of choices available to NET and other railroads is that same as for non-railroad businesses, and a level playing field would

more accurately reflect Congress's purposes in enacting ICCTA and freeing railroads to take advantage of their comparable hauling advantage than would the creation of a favored regulatory status for railroads to operate in the waste hauling business. Congress did not intend to create a system in which waste handling and processing stations are regulated when waste is removed by truck, but are entirely free of regulation when waste is removed by rail.

We note that NET has not submitted any evidence that state waste regulations have imposed unreasonable burdens on any railroads, or that such laws are otherwise vulnerable to Dormant Commerce Clause attack. That dual compliance is possible is demonstrated by Susquehanna & Western's belated half-measures to comply with state laws. In fact, existing rail-haul waste operation in California, Massachusetts, New Jersey, New York and other states have obtained waste hauling permits or comply with laws requiring loading and hauling waste in sealed containers.

The impact of a negative decision on the Petition should have no effect on NET's proposal to transload other commodities such as lumber and other construction supplies, which are generally not regulated because states have determined that their handling does not generally cause pollution. (It may be that NET would find it easier to avoid cross-contamination of bulk foodstuffs by foregoing C&D and MSW on the site entirely.)

As to the general standard to distinguish transportation activities regulated by ICCTA from related activities along the continuous chain of distribution from initial production to ultimate use, the STB must adopt a coherent, predictable means for states to understand the contours of their regulatory powers. As the Third Circuit held, "[t]he mere fact that the [railroad] ultimately uses rail cars to transport the [construction and demolition] debris [the waste company] loads does not morph [the waste company's] activities into 'transportation by rail

carrier” because under that reasoning “any nonrail carrier’s operations would come under the exclusive jurisdiction of the Board if, at some point in the chain of distribution it handles products that are eventually shipped by rail” Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295, 309 (3d Cir. 2004). In other words, there must be some logical limit to the exclusivity of the STB’s powers and thus to “transportation.” If “transportation” were to include any activity that facilitates transportation, as some parties have suggested, then there would be essentially no limit to the STB’s powers.

In fact, the statute limits “transportation” to “services related to that movement,” 49 U.S.C. § 10102(9), and no parties dispute the wisdom of the STB’s prior decisions holding that transportation does not include the manufacturing or processing of goods. See Borough of Riverdale Petition for Declaratory Order the New York Susquehanna and Western Railway Corporation, STB Finance Dkt. No. 33466, 1999 WL 715272 , 4 S.T.B. 380 *23 (STB served September 10, 1999) (corn processing plant is not integrally related to providing transportation services if it serves only a manufacturing or production purpose); Town of Milford, MA – Petition. for Decl Order, STB Finance Docket No. 34444 (STB served Aug. 12, 2004) (railroad-operated steel fabrication plants not part of transportation); City of Creede, CO – Petition for Declaratory Order, STB Finance Docket No. 34376 (STB decided May 3, 2005) (restaurants or hotels are not transportation activities or facilities). We note that no processing or other manufacturing type activities were at issue in that ICCTA cases preempting the application of state laws to loading or unloading activities. See Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 640 (2d Cir. 2005) (facility used for unloading and storing bulk goods, but not involving processing or manufacturing activities, was within Board’s exclusive jurisdiction); Norfolk Southern Ry. Co. v. City of Austell, 1997 WL 1113647 (N.D. Ga. Aug. 19, 1997)

(facility used for transfer of containers between trains and tractor-trailer trucks found to be within the Board's exclusive jurisdiction); Joint Petition for Declaratory Order-Boston and Maine Corp. and Town of Ayer, MA, 2001 WL 458685 (STB served May 1, 2001) (facility used for unloading and transferring cars to motor carriers for distribution, but not involving maintenance, fueling or repairs, was within Board's exclusive jurisdiction).

Unlike those activities, waste handling activities are more akin to manufacturing or services than to loading. Operators of waste handling facilities must dump the waste, separate out recyclables, separate out items not accepted by the landfill, sort and consolidate the waste and crush it, and these activities process and enhance the value of waste, much like manufacturing activities do. NET has conceded that it is grinding C&D and baling MSW in order to maximize the amount of waste that can be carried on its trains and, therefore, to increase its value. NET admits that some MSW will come to facility already baled, and it certainly can take already processed C&D waste (in bulk or, preferably, in containers). In addition, NET and other waste processors add value by inspecting, sorting, and reclaiming of reusable materials from the C&D and MSW, and recoup that value either by earning direct revenues from recycling or by ensuring a disposal market. NET and other processors also add value by aggregating small loads to big loads for long distance transportation. Whether or not grinding C&D creates value residuals and fines that can be used for grading and shaping the base part of caps used to close old landfills and for daily cover material at existing landfills, as MADEP argues, or lowers value because of regulatory restrictions on unidentifiable C&D, as the Ohio Environmental Protection Agency argues, depends upon applicable state laws. But certainly grinding changes substance from regulatory and environmental point of view. In many ways, NET's proposed waste

practices – as with any undertaken at any transfer station – facilitate landfill disposal and serve other purposes than pure transportation.

We urge the STB not to lose sight of the fact that C&D and MSW should be considered different from other commodities because of the significant localized impacts of waste handling. Among other things, we note that grinding exposes more surface area and will presumably create more contaminated leachate, and NET's proposal to compress MSW at pressure in the baling process will create leachate directly and will increase the risk of fire. Accordingly, we do believe that the STB's determination of whether an activity is "transportation" or not must depend on the type of commodity involved.

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We eagerly anticipate NET's statement and testimony concerning the background of its principles in the C&D and MSW industries. By NET's admission, waste handling will comprise at least 50% of its business and certainly there are few concrete plans or commitments to handle other goods.

However, the STB should issue its decision with the full understanding that it is a common practice in this burgeoning industry for existing railroads or new entities operating under an exemption to partner with local solid waste firms to conduct all sorting, processing, and loading activities for a fee. Railroad oversight of such operators exists largely on paper, not in reality, and the arrangements reduce to railroads selling ICCTA preemption to firms that would otherwise operate (and in fact already do) in the waste business. Unfortunately, some courts have allowed solid waste firms in such arrangements to take advantage of ICCTA preemption. Since the granting of the Petition will remove the exempt facility from the STB's regulatory power, the STB should assume that NET may enter into such an arrangement. The STB should,

at a minimum, ask if NET already has relationships with existing firms to undertake waste handling activities.

If this trend is not checked, unregulated solid waste stations will proliferate across the country, and will destroy the level playing field with traditional solid waste firms that comply with public safety and health laws. Already, two other short-line railroads have attempted to arrange for unregulated waste facilities in South Jersey, and there are similar arrangements or proposals in California, New York, Massachusetts and Rhode Island. The STB should act promptly and should deny jurisdiction over NET's C&D and MSW activities.

Dated: Newark, New Jersey
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CERTIFICATE OF SERVICE

I hereby certify that 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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