

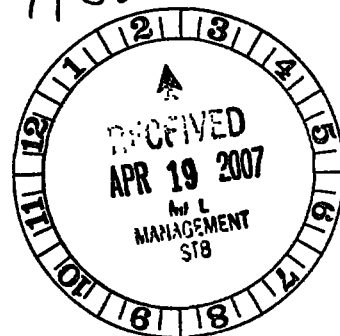
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BEFORE THE
SURFACE TRANSPORTATION BOARD

219132



STB Finance Docket No. 34797

**NEWENGLAND TRANSRAIL, LLC, d/b/a WILMINGTON & WOBURN TERMINAL
RAILWAY – CONSTRUCTION, ACQUISITION AND OPERATION EXEMPTION –
IN WILMINTON AND WOBURN, MA**

COMMENTS OF JAMES RIFFIN AND CNJ RAIL CORPORATION

1. James Riffin and Eric Strohmeier, COO of CNJ Rail Corporation, herewith submit their comments in the above proceeding.¹

2. Fifty years ago, in *Chicago v. Atchison, T.& S.F.R.Co.*, 357 U.S. 77, 87, 78 S.Ct. 1063, 1069, 2 L.E.2d 1174 (1958), the Supreme Court held: “that a city ordinance requiring a license from a municipal authority before a railroad could transfer passengers, an activity also subject to regulation under the ICA, was facially invalid as applied to an interstate carrier. “[I]t would be inconsistent with [federal] policy,” we observed, “if local authorities retained the power to decide” whether the carriers could do what the Act authorized them to do.”

3. In *Chicago & N.W. Transp. v. Kalo Brick & Tile*, 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981), the Supreme Court stated:

“The Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes and has consequently presented recurring pre-emption questions from the time of its enactment. Since the turn of the century, we have frequently invalidated attempts by the States to impose on common carriers obligation that are plainly inconsistent with the plenary authority of the Interstate Commerce Commission or with congressional policy as reflected in the Act.” U.S. at 318; S.Ct. at 1130.

¹ Neither Riffin nor CNJ Rail are parties to this proceeding. However, the outcome of this proceeding may impact all rail carriers. Mr. Strohmeier has articulated principles which the Board may find useful in reaching its decision. These comments are being presented in an effort to provide the Board with as complete a record as possible.

4. In *Missouri Pacific R.Co. v. Stroud*, 267 U.S. 404, 408, 45 S.Ct. 243, 245, 69 L.Ed. 683 (1925), the Court stated: “[T]here can be no divided authority over interstate commerce, and ... the acts of Congress on that subject are supreme and exclusive.”

5. And in *Transit Comm’n v. United States*, 289 U.S. 121, 129, 53 S.Ct. 536, 538, 77 L.Ed. 1075 (1933), the Court stated:

“Among those evils is “[m]ultiple control in respect of matters affecting [interstate railroad] transportation,” because such control, in the judgment of Congress, has proved “detrimental to the public interest.” 289 U.S., at 127, 53 S.Ct., at 538.” *Kalo Brick* at U.S. 321, S.Ct. at 1131.

6. There can be no doubt that the Surface Transportation Board has exclusive regulatory authority over transportation by rail carrier, that the remedies in 49 U.S.C. §§10101 - 11908 are exclusive, and that the Interstate Commerce Act, as amended, completely preempts local and state regulation of transportation by rail carrier.²

7. Norfolk Southern Railway Company, in its April 16, 2007 Supplemental Comments, suggested the Board revisit its practices prior to *Effingham Railroad Co. - Petition for Declaratory Order*, Docket No. 41986, served September 18, 1998. Prior to *Effingham*, the Board’s focus was on the proposed use of the facilities.

8. The Association of American Railroads and the New York, Susquehanna and Western Railway Corporation, have suggested the Board scrutinize non-carrier applications more carefully before granting the non-carrier rail carrier status. While closer scrutiny may provide the Board with more information, doing so would run counter to the policy statement in 49 U.S.C.

² The following courts have ruled the Interstate Commerce Act (“ICA”), codified at 49 U.S.C. 701-727 (general provisions) and 10101-11908 (rail provisions), completely preempts all State and local regulation of rail operations: *Deford v. Soo Line Railroad Company*, 867 F. 2d 1080 (8th Cir. 1989); *Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439 (5th Cir. 2001); *Cedarapids, Inc. v. Chicago, Central & Pacific R.*, 265 F. Supp. 2d 1005 at 1010 (N.D. Iowa 2003); *CSX Transp., Inc. v. Georgia Public Serv. Com’n*, 944 F. Supp. 1573 (N.D. Ga. 1996); *Dakota, Minn. & Eastern R.R. Corp. v. So. Dakota*, 236 F. Supp. 2d 989, 1005 (D.S.D. 2002). In accord: *CSX Transp., Inc. – Petition for Declaratory Order*, STB Docket No. 34662, decided March 14, 2005. See also *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005), which held rail carrier facilities are not subject to local or State regulation, and *Coastal Distribution, LLC, The New York and Atlantic Railway Company, v. Town of Babylon*, 06-0981-CV, February 6, 2007 (2d Cir. 2007).

§10101(7), which states it is the policy of the U.S. Government to reduce regulatory barriers to entry into the industry. More scrutiny of prospective new carriers also **would not** prevent abuse by existing carriers. Proposed or actual activities, whether done by a carrier or non-carrier, that have the potential to endanger the public health, safety or welfare, should be regulated. If local in nature, local regulation is appropriate. If national in scope, regulation should be at the national level. Since Congress has determined that rail carriers should be subject to a uniform set of regulations, the activities of rail carriers should be regulated at the national level.

9. Today, the Board is being asked to draw a line in the sand. Activities on one side of the line would be subject to local and State regulation. Activities on the other side of the line, would be subject to the exclusive jurisdiction of the Board. The comments to date have attempted to sway the Board into moving the line one way or the other. State and local governments have a legitimate interest in regulating activities that are local in nature. The Board has the responsibility of ensuring that rail carriers are subject to a uniform set of regulations, national in scope.

PROPOSED SOLUTION

10. The line in the sand should be drawn between shipper's activities and rail carrier's activities. Legal principles involved: Activities of shippers are subject to concurrent local, State and Federal regulation. Activities of rail carriers are subject to the exclusive jurisdiction of the Board. A common carrier **contracts** with a shipper to transport the **shipper's** goods. A common carrier does not take title to the goods being shipped. A common carrier cannot be both the shipper and the carrier. (A contract must be between two or more parties.) A common carrier must publish its tariff. A shipper must tender a bill of lading to the common carrier, indicating where the carrier is to deliver the goods being tendered. A common carrier may facilitate the loading of a shipper's goods onto the carrier's cars.

11. If goods [Municipal Solid Waste ("MSW"), Construction and Demolition Debris ("C&D"), corn, wheat, petroleum products, etc.] are tendered to a carrier, together with a bill of lading indicating where the goods are to be shipped, the carrier may provide services to facilitate the shipment of those goods (elevation, refrigeration, storage, handling, etc.). What the carrier may not do, is take title to the goods.

12. If MSW and C&D are presented to a carrier for shipment to a destination, the carrier may process those goods in order to facilitate the loading and transportation of those goods. Crushing, shredding, compacting, sorting, elevating, and storing the goods would all be services the carrier could provide, so long as the carrier published a tariff for these various services. What the carrier could **not** do is sort the goods, extract recyclable components, then ship / sell those recyclable goods on its own account. To do this, the carrier would have to take title to the goods. And if the carrier took title to the goods, it would have to do so as a shipper, rather than a carrier.

13. **Bright Line Rule:** Shippers are subject to local and State regulation. Rail carriers are not subject to local or State regulation. If goods are tendered to a rail carrier for shipment to a specific location, and if the rail carrier does not take title to any portion of the goods, then all processing and shipment activities of the rail carrier would be subject to the exclusive jurisdiction of the Board. If at any point in the process the carrier takes title to some or all of the goods, then as to that portion of the goods the carrier takes title to, at the moment the carrier takes title, the status of the carrier changes from that of being a carrier, to that of being a shipper. Furthermore, if the carrier does not have another line of railroad essentially parallel to the line at the processing facility, then the tracks at the processing facility would be considered a line of railroad, rather than tracks located inside an installation which is not part of the general railroad system of transportation. If the tracks inside the processing facility are a part of the general railroad system of transportation, then all activities at that facility would be subject to full FRA regulation, and the individuals employed at that facility would be rail carrier employees, eligible for all rail carrier employee's benefits, including railroad retirement benefits, and would be subject to the Hours of Service regulations.

14. If the Board were to adopt a bright line rule similar to that described above, that would address the bone fides of the entity's desire to be a rail carrier. The labor costs of a rail carrier are much greater than the labor costs of a non-carrier. If an entire facility were subject to full FRA regulatory authority, the cost of complying with the FRA regulations may be much greater than the cost of complying with State and local waste processing regulations. In addition, if the processor cannot benefit financially from disposing of recyclable items, this may take away the perceived economic benefit of being a rail carrier.

SAFETY / REGULATORY ISSUES

15. 49 U.S.C. §10101 (8) states:

“In regulating the railroad industry, it is the policy of the United States Government –

(8) to operate transportation facilities and equipment without detriment to the public health and safety;”

16. The Board has the authority to regulate transportation facilities and equipment so that the operation of those facilities will not be detrimental to the public health and safety. Presently, the Board does not have any specific regulations indicating with some precision what minimum safety procedures must be followed when handling materials that, if not handled properly, could poise a danger to the public health, safety or welfare.

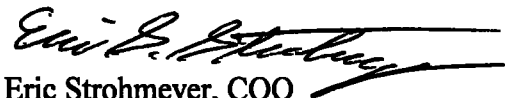
17. Presently, if an individual or local governmental entity felt a carrier’s operation of its facilities or equipment presented a detriment to the public health, safety, or welfare, that individual or governmental entity could file a complaint with the Board under 49 U.S.C. §11704(b), and the Board could order the Carrier to compensate that person or governmental entity, for any damages resulting from the carrier’s activities, and could order the carrier to operate in a manner consistent with the public health, safety and welfare.

18. Since all rail carriers should be subject to the same set of uniform standards, the Board may wish to solicit comments, then promulgate new regulations which address the specific safety issues raised by the opponents of New England Transrail’s proposed activities.



James Riffin
Frostburg Southern Railroad

Respectfully,



Eric Strohmeyer, COO
CNJ Rail Corporation

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