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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35020

**NORTHERN AND BERGEN RAILROAD, L.L.C.
—ACQUISITION EXEMPTION—
A LINE OF RAILROAD OWNED BY NEW YORK & GREENWOOD LAKE RAILWAY**

**REPLY OF NORTHERN AND BERGEN RAILROAD LLC
TO ADDITIONAL COMMENTS BY NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION**

In accordance with the Board's May 25, 2007 Decision in this proceeding ("Decision"), Northern and Bergen Railroad, L.L.C. ("NBRR") hereby files this Reply to the "Additional Comments by New Jersey Department of Environmental Protection," ("NJDEP") filed on May 31, 2007 ("NJDEP Comments") and to the letter comments filed by New Jersey Transit Corporation ("NJT") on the same date ("NJT Letter"). Neither set of comments has met the standards that the Board reminded NJDEP and NJT that they must satisfy in order to justify the extraordinary relief of a stay Decision at 2.

Although ostensibly separate state agencies with very different interests, it is quite obvious that NJDEP and NJT are engaged in a concerted effort to devise any reason to stay this transaction, regardless whether that reason comports with their individual interests. On the very same day that NJT filed its comments, NJDEP filed comments that piggy-back almost entirely on NJT's issues. This is not a case of NJDEP merely referring to previously filed comments of another interested party. Rather, because NJDEP knows that it cannot satisfy the relevant

standards for a stay on the arguments that it has made, NJDEP has conspired to use NJT's issues in the hope that it may be more successful. But that strategy also must fail.

NJDEP attempts to demonstrate likely success on the merits entirely by relying upon the issues raised in the NJT Letter. The only independent arguments raised by NJDEP concern the irreparable harm and public interest standards, which are merely a rehash of the very *same* public interest and environmental arguments that the Board rejected as insufficient in the Decision at 2. Furthermore, because NJDEP's alleged irreparable harm arises from concerns with the *existing* operations of the New York and Greenwood Lake Railroad ("NYGLR"), a stay will not prevent that alleged harm.

NJT's concerns do not salvage NJDEP's request for stay. NJT hints that it may be unwilling, for reasons not clearly stated, to continue the lease of the track by which NYGLR currently interchanges with Norfolk Southern. For example, NJT alludes to unidentified "substantive changes in the operations of NJ TRANSIT and NY&GL since NJ TRANSIT entered into the original lease with NY&GL in 1996" that "requires additional information about the intended NBR operations." NJT Letter at 2. NJT does not state what those operational changes are and when they occurred, nor why it has not raised those issues with NYGLR even though the lease expired five years ago. Since NBRR does not intend to change NYGLR's current interchange operations over this track, it is unclear what additional information NJT could possibly need from NBRR.

NJT's allegations appear to be deliberately vague. NBRR cannot conceive of any operating issue that would justify refusal of a lease agreement by NJT, and NJT has not given one. So long as NBRR is willing to comply with industry standard insurance and indemnity requirements, similar to those in NJT's lease with NYGLR, there is no reason for NJT to refuse

NBRR a lease, except as a means to shut down the solid waste rail transfer station NJT certainly must recognize that such an overt threat would impinge upon this Board's exclusive jurisdiction, which would account for NJT's vagueness

To the extent that NJT is suggesting that it can arbitrarily refuse to lease the interchange track to either NYGLR or NBRR, the Board should disabuse NJT of that notion. Although NJT owns the track, Norfolk Southern still possesses the common carrier obligation associated with the Bergen County line. Under *State of Maine, Dept of Transportation—Acquisition and Operation Exemption—Maine Central R R Co*, 8 I C C 2d 835 (1991) and subsequent cases, the common carrier obligation is not effectively transferred, however, if the owner of the underlying real estate and/or track can prevent or unreasonably interfere with the performance of that obligation NJT seems to believe it can engage in precisely that level of interference and control when it states "Until NJ TRANSIT determines whether it will lease the siding to NBR, enabling the NBR to access to [sic] the Bergen County rail line, NBR will not be able to provide rail transportation service." NJT Letter at 2 See also NJDEP Comments at 1 If NJT unilaterally can deny NBR the right to interchange with NS, then NJT must be a common carrier subject to the Board's jurisdiction under 49 U S C § 11103 to order NJT to establish a reasonable switch connection.¹ But in order to be a common carrier, NJT would have to have obtained Board authority to acquire the Bergen County Line, which it did not do ²

The State of New Jersey, through NJDEP and NJT, is attempting to use this exemption proceeding to make a larger point regarding when a solid waste transfer station is, or is not, a rail

¹ Both NJT and NJDEP incorrectly assert that NBRR cannot be a rail carrier if NJT refuses to lease the interchange track to NBRR But, NBRR can be a rail carrier even if it has no other rail connections, so long as it holds itself out as a common carrier over its rail line While the attractiveness to a shipper of a 1 2 mile rail line without any connections is questionable, the railroad's status as a common carrier is not

² It is NBRR's understanding that NJT's charter in fact prohibits it from becoming a common carrier

facility. This is NJDEP's issue, however, not NJT's. Moreover, that issue already is under consideration by both the Board and the Courts in several other cases. If NJDEP desires to challenge the status of NYGLR's *existing* solid waste transfer station, then it can and should do so in an appropriate proceeding against whoever owns the facility at the time. An exemption proceeding, however, is not the proper proceeding to litigate this issue Decision at 2 ("NJDEP's apparent request for a ruling at this stage of this proceeding about what activities NBR may conduct if it acquires the rail facilities is not the proper subject of a stay request") There is no serious question as to the fact that NYGLR does provide common carrier rail transportation service even beyond the transportation of solid waste and that NBRR would continue to do so. Thus, there is no justification to continue the stay of this exemption³

WHEREFORE, for the foregoing reasons, the Northern and Bergen Railroad LLC respectfully requests that the Board deny NJDEP's Request for Stay

Respectfully submitted,



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³ In the Decision, the Board noted that a 30-day stay would enable a further exchange of information that could prove useful. NJDEP and NBRR did confer via teleconference on June 6, 2007. Because NJDEP believes that the solid waste transfer station is not a rail facility and therefore must be permitted, no agreement could be reached, despite NBRR's willingness to comply with New Jersey's health and safety regulations for rail carrier solid waste facilities. N J A C 7 26-2D 1. Nevertheless, NBRR remains open to the possibility of reaching some form of accommodation that would address NJDEP's concerns.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June 2007, copies of the foregoing "Reply of Northern and Bergen Railroad LLC to the Additional Comments of New Jersey Department of Environmental Protection " were served via electronic mail upon Ruth E Carter, Deputy Attorney General of New Jersey, at Ruth.Carter@dol.lps.state.nj.us, D C. Agrawal, Assistant Executive Director of New Jersey Transit, at dcagrawal@njtransit.com and Kevin P Auerbacher, Deputy Attorney General of New Jersey, at Kevin.auerbacher@dol.lps.state.nj.us.



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