

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB EX PARTE NO. 673

PETITION TO INSTITUTE A RULEMAKING

**REPLY OF THE NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE NEW
JERSEY MEADOWLANDS COMMISSION
TO PETITION**

The New Jersey Department of Environmental Protection ("NJDEP") and the New Jersey Meadowlands Commission ("NJMC"), collectively referred to as "New Jersey" submit these comments to the Surface Transportation Board ("Board") in the above captioned Petition for Rulemaking to express its support for the proposal, filed on June 7, 2007 and recommended by a number of railroads (the "Coalition"),¹ that the requirements set forth in 49 C.F.R. §§1150.33, 1150.34, 1150.43, and 1150.44 should be tightened and increased. As the Coalition explains, New Jersey agrees that the current Class Exemption process is insufficient for the Board and interested third parties to evaluate whether entities filing Notices of Exemptions are bona fide rail carriers engaged in rail transportation as defined by the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 *et seq.* ("ICCTA") or whether the Board's jurisdiction is being invoked for inappropriate purposes. In addition, New Jersey writes separately to emphasize that even if the

¹ The Coalition consists of BNSF Railway Company, Canadian Natural Railway Company, Canadian Pacific Railway Company, CSX Transportation, Inc., Norfolk Southern Railway Company, and Union Pacific Railroad Company.

Coalition's petition is granted, public health and safety problems will remain as long as solid waste facilities located along or in close proximity to railroad tracks continue to misuse ICCTA's preemption provision, 49 U.S.C. § 10501(b), by alleging that ICCTA preempts all regulatory oversight and that solid waste processing activities are integral to moving waste by rail.

New Jersey urges the Board to grant the Coalition's petition, initiate the requested rulemaking, ultimately promulgate additional information requirements for entities seeking to avail themselves of the summary procedures available through the use of the Notice of Exemption procedures in 49 C.F.R. Subparts D and E and overrule the bright line test established in Docket No. 41986, *Effingham Railroad Co. - Petition for Declaratory Order - Construction at Effingham, IL* (served September 18, 1998). New Jersey agrees that tightening the information required is necessary so that the Board, states, localities, and the public have sufficient information to review and evaluate the merits of an exemption request. *See also* STB Ex Parte No. 659, *Public Participation in Class Exemption Proceedings*, Comments of the State of New Jersey (filed May 15, 2006). In addition, NJDEP and NJMC believe that the proposed changes will help to prevent the misuse of Class Exemption procedures to seek to evade state and local regulation. However, while New Jersey strongly supports the Coalition's petition, the petition only partially addresses the problems New Jersey faces in this important area.

Many solid waste operators that align their facilities with a rail carrier or situate their facility on or near railroad tracks or even bona fide rail carriers that file Notices of Exemption claim that the State is preempted from regulating their solid waste processing and transfer activities. These solid waste facilities are similar in claiming ICCTA preemption and operating large waste facilities without basic controls for air and water pollution, fire hazards, or consideration of the public health

and safety. With their broad claims of preemption, some of these facilities even operated as open air solid waste dumps. Unregulated trash stations, however, are unhealthy and dangerous. For example, waste from construction and demolition sites often contains asbestos, lead and hazardous pollutants. Waste facilities also produce significant amounts of air pollution, leachate and wastewater runoff that can drain into surface and ground waters and wetlands. Fire is also a real threat, especially at facilities that operate beyond capacity and keep the waste festering at the facility for days. NJDEP has an obligation to ensure that these threats do not harm the citizens of New Jersey or the critical resources of New Jersey's environment. N.J.S.A. 13:1E-2b(6). *See also* N.J.S.A. 13:1E-2a ("The Legislature finds that the collection, disposal, and utilization of solid waste is a matter of grave concern to all citizens and is an activity thoroughly affected with the public interest; that the health, safety and welfare of the people of this State require efficient and reasonable solid waste collection and disposal service").

There has recently been a surge of filings with the STB by entities seeking to operate in New Jersey and claiming to be "rail carriers" entitled to receive an exemption from the Board. Because of the scant information provided by these entities and New Jersey's experience with such entities seeking to evade legitimate, essential health, safety and environmental regulation, New Jersey has been compelled to respond to each of these filings with, *e.g.*, requests for a stay, to protect the public and environment from prospective waste facilities. For example, the Board recently granted NJDEP's request to stay the Notice of Exemption filed by Ashland Railroad, Inc. ("Ashland"), as the scant information provided by that company appears to indicate that it might not be a bona fide railroad, but in reality appears interested in operating a waste facility in Freehold, New Jersey without regulatory oversight from the State. STB Finance Docket No. 34986, *Ashland Railroad*,

Inc.-Lease and Operation Exemption-Rail Line in Freehold, New Jersey, and Finance Docket 34987, *G. David Crane-Lease and Operation Exemption-Ashland Railroad, Inc.*, (February 26, 2007). When Ashland did not provide an adequate explanation of its proposed activities, on April 30, 2007, the Board granted NJDEP's supplemental stay request. Again, NJDEP was compelled to seek an extension of the stay because of the complete lack of details and information provided by Ashland. Indeed, parties could not even determine from the information provided what type of service was planned for the New Jersey site, the types of commodities that would be handled, whether Ashland was qualified to operate a railroad, or whether Ashland would be a rail carrier in name only. As Ashland's submission of May 30, 2007 shed no further light on these subjects, NJDEP requested the STB to reject the Notice of Exemption in a Reply Submission filed June 29, 2007.

It is New Jersey's experience that many would-be railroads handling solid waste are either not bona fide rail carriers or will not be providing rail transportation, but instead are attempting to evade all environmental review -- including that of the Board -- by use of the summary Notice of Exemption process and ICCTA's preemption provision. By providing little or vague information -- as in the Ashland proceeding as described above -- these entities are often able to pass unnoticed through the system. This is particularly troublesome where solid waste activities are concerned. Indeed, in their attempt to evade legitimate state and local regulation by abusing the Notice of Exemption process, would-be "rail carriers" either fail to disclose their intent to operate waste transfer facilities or substantially downplay their intent to handle and transfer solid waste. Once through the exemption process, the facilities transform into waste transfer stations, handling virtually only, or indeed exclusively, solid waste, but wholly without sufficient environmental controls and

safeguards. The facilities then claim that they are “rail facilities” under ICCTA and therefore, are protected by ICCTA to operate anything from an open air waste dump to an enclosed facility with waste spilling out of the building that fails to control dust or manage wastewater and stormwater runoff that may contain toxic metals and any number of hazardous constituents.

At this point, faced with a “rail carrier” that is a “rail carrier” in name only, other parties have no choice but to seek to revoke an exemption, a process which is cumbersome and expensive. Moreover, the revocation procedure may be inappropriate, since revocation appears to be contingent upon a showing that the Notice contained false or misleading information. In many cases, the problem is that the information submitted to the Board is totally inadequate to discern the validity and merits of the proposed operation, since the existing data requirements are themselves inadequate for this purpose. For these reasons, NJDEP and NJMC support the Coalition’s Petition for Rulemaking. New Jersey believes that it is absolutely critical that the Notice of Exemption process require sufficient information to prohibit sham railroads from abusing these rules. In particular, New Jersey believes that the Board should require that Notices of Exemption to acquire and operate rail lines include at least the following information:

- whether the property in question has ever been operated as a line of railroad or whether it is currently being operated as a railroad;
- whether the property is currently owned or leased by a rail carrier subject to the Board’s jurisdiction;
- whether the property was previously used as private or industrial track;
- whether the property has previously been abandoned pursuant to 49 U.S.C. §§10502 and 10903;

- the nature of the equipment that will be used and the background of employees that would be used to operate the property; and
- whether the party seeking to become a railroad intends to serve or provide facilities for the transportation or transloading of municipal waste, construction debris, or other waste.

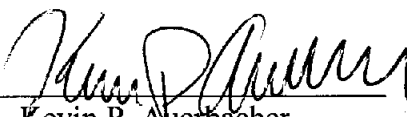
Additionally, the Board should address the problem raised by entities who have learned to use the process by providing scant, vague or simply evasive information, and shift the burden to show that the filing was false or contained misleading information from the parties seeking to revoke the exemption to the exempted party. If actual operations show a divergence from the stated intention of the "rail carrier," or facts show that the rail carrier must have known that it would operate a solid waste facility, *e.g.*, one day after receiving an exemption, the entity begins to accept waste even though it claimed that it did not intend to accept waste, the burden should be on the exempted party to show that it provided a full and truthful disclosure to the Board in its Notice of Exemption filing.

While the above revisions will help ameliorate the current problems related to entities misusing the exemption process, New Jersey continues to emphasize that tightening the rules will not completely cure the problem of unregulated solid waste facilities along or near railroad tracks in this country and the abuse of ICCTA preemption. To the contrary, it has unfortunately become a fact that a number of existing, bona fide railroads have taken the position that no one – not even the STB – has jurisdiction or oversight concerning the construction and operation of solid waste transfer facilities after the railroad has been authorized to operate. New Jersey continues to maintain, as New Jersey and others have asserted in the NET proceeding pending before the Board, that solid waste activities are not integrally related to transportation and have long been overseen by state and local government. Issuing a determination in NET will aid all interested parties in dealing with solid

waste operators filing Notices of Exemption and solid waste operators aligning with established rail carriers to evade legitimate health, safety and environmental regulation.

In sum, NJDEP and NJMC urge that the Board initiate the rulemaking requested by the Coalition and promulgate regulations that provide complete and adequate notice to the public concerning the nature of the proposed activities and the qualifications of the filing entity to actually be a rail carrier.

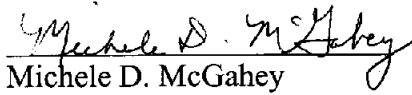
Respectfully submitted,
ANNE MILGRAM
ATTORNEY GENERAL
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Dated: 7/5/07

CERTIFICATE OF SERVICE

I certify that I have this day, July 5, 2007, served copies of the Reply in this proceeding (Ex Parte No. 673) by the New Jersey Department of Environmental Protection upon John M. Scheib, Esq., attorney for Norfolk Southern, et al, via electronic mail at john.scheib@nscorp.com.


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