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November 29, 2007

VIA ELECTRONIC FILING

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
395 E. Street, S.W.
Washington, D.C. 20423-0001

Re: *JP Rail, Inc. – Lease and Operation Exemption – NAT Industries, Inc.*
STB Finance Docket No. 35090

Dear Secretary Williams:

Enclosed for electronic filing is the Pennsylvania Waste Industries Association's Petition to Revoke Exemption or in the Alternative to Stay Effectiveness of Exemption.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Stephen M. Richmond".

Stephen M. Richmond

SMR:mjg
Attachment

cc: Service List for STB Finance Docket No. 35090 (by mail with attachment)

Beveridge & Diamond, P.C.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35090

JP RAIL, INC. – LEASE AND OPERATION EXEMPTION – NAT INDUSTRIES, INC.

**PENNSYLVANIA WASTE INDUSTRIES ASSOCIATION'S
PETITION TO REVOKE EXEMPTION
OR IN THE ALTERNATIVE TO STAY EFFECTIVENESS OF EXEMPTION**

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November 29, 2007

Pursuant to 49 CFR § 1150.45 and the October 25, 2007 decision of the Surface Transportation Board (the “Board”) concerning the Notice of Exemption and supplemental verified statement filed by JP Rail, Inc. (“JP Rail”) (the “Notice”), the Pennsylvania Waste Industries Association (“PWIA”) petitions the Board to revoke the exemption scheduled to become effective on December 6, 2007, or in the alternative to stay its effectiveness. The Notice contains false or misleading information, which renders it void *ab initio*. In addition, the Notice provides sufficient information to require full environmental impact review, but also omits critical information about both the proposed operation and the potential environmental impacts of the operation, thereby depriving the Board of the ability to make fully educated decisions about the filing.

I. STATEMENT OF INTEREST.

The PWIA is a statewide association of private-sector waste haulers, recyclers, and landfill operators in the Commonwealth of Pennsylvania, many of which currently ship solid waste by rail and have an interest in ensuring a continuing competitive rail industry. PWIA’s mission is to promote the efficient and environmentally safe management of solid waste, advocate sound public policy affecting the management of solid waste, and communicate the benefits the waste industry provides to the people of Pennsylvania. PWIA is an affiliate of the National Solid Wastes Management Association.

The Notice proposes the operation of a construction and demolition (“C&D”) waste transfer facility that will be exempt from most of the laws that PWIA members must comply with to protect the environment and the citizens of Pennsylvania. Adverse impacts on the environment or public health as well as adverse public responses from the operation proposed in the Notice will have serious detrimental impacts on the solid waste industry, PWIA, and its

members. PWIA therefore has a strong interest in the outcome of this matter.

II. JP RAIL'S NOTICE OF EXEMPTION IS VOID *AB INITIO*.

Pursuant to 49 CFR § 1150.45(f), a notice of exemption is void *ab initio* if it contains false or misleading information. As detailed below, JP Rail's Notice contains false or misleading statements, or both, that render it void *ab initio*.

A. The Notice is Misleading as to the Names of JP Rail's Intended Customers.

In the Notice, JP Rail states: "[t]he customers to be served are those originating traffic from JP Rail's Pleasantville, New Jersey facility including Salem Logistics, LLC, a subsidiary company of JP Rail, Inc." See Notice at 5. The Pleasantville facility is identified as the *sole* source for all shipments destined for the proposed transload facility in Pennsylvania (the "Proposed Facility"). *Id.*

In making this statement, JP Rail continues what is now a pattern of failing to identify its primary C&D waste customer in Pleasantville. The one alleged customer it does name, Salem Logistics, LLC, is described on that company's web site as a logistics services company, not as a waste generator or waste management company. See Internet web site of Salem Logistics, Inc. (<http://www.salemlogistics.com/>) (an excerpt is attached as Exhibit A).¹ Court documents in other cases involving JP Rail suggest that the railroad has in the past attempted to hide the

¹ Notwithstanding JP Rail's claim that Salem Logistics is its subsidiary, a brief search locates no corporate connection between Salem Logistics and JP Rail. However, in other litigation, JP Rail has identified a company with a similar name, SRNJ Logistics, as both a subsidiary and an "agent" of the railroad, and a court described the company as "an entity with only one or two employee which handles administrative matters related to the rail operation for the railroad." See Opinion at 3 (August 14, 2007), *State of New Jersey v. J.P. Rail*, Superior Court of New Jersey, Chancery Division, Civil Action Docket No. ATL-C-41-06 (attached as Exhibit B); Brief on Behalf of Defendants J.P. Rail, Inc. d/b/a/ Southern Railroad Company and SRNJ Logistics in Opposition to Request for Injunctive Relief at 7 (April 12, 2006), *State of New Jersey v. J.P. Rail*, U.S. District Court for the District of New Jersey, Civil Action No. 06-CV-1603 (excerpts attached as Exhibit C); Deposition of David M. DeClement at 105 (May 30, 2007), *New Jersey v. J.P. Rail, Inc., et al.*, Superior Court of New Jersey Law Division – Atlantic County, Docket No. ATL-C-41-06 (excerpts attached as Exhibit D). SRNJ Logistics therefore does not appear to be a generator of wastes for shipment by rail. To the extent JP Rail has misidentified its alleged customer, this also constitutes a false or misleading statement and is grounds for voiding the Notice.

identity of its true customer at the Pleasantville facility. Beginning several years ago, Magic Disposal, Inc. ("Magic"), a solid waste company in New Jersey, approached JP Rail to find a site in or near Atlantic City, New Jersey, from which Magic could ship waste materials, predominantly C&D waste. *See* Deposition Transcript of Thomas A. Collard, vice president of JP Rail at 37-38, 47, 59 (September 14, 2005), *J.P. Rail Inc. v. New Jersey Pinelands Commission*, U.S. District Court for the District of New Jersey, CV-05-2755 (excerpts attached as Exhibit E) ("Collard Deposition").

JP Rail and Magic agreed to develop the Pleasantville facility for the shipment of Magic's C&D waste. The development of the site was conducted jointly by both companies, although some contact with municipal officials about the development was actually made exclusively by Magic. *See* Opinion at 30 (August 14, 2007), *State of New Jersey v. J.P. Rail*, Superior Court of New Jersey, Chancery Division, Civil Action Docket No. ATL-C-41-06 ("State Court Opinion") (attached as Exhibit B). The building at the site was constructed by Magic's employees, Magic's employees performed the waste transloading operation, and until the facility was closed by order of a state court, Magic was the only entity that brought solid waste to the facility. *Id.* at 30-36.

JP Rail has gone to some lengths in other proceedings to hide Magic's involvement in the Pleasantville facility. The railroad represented to a federal District Court that "the only relationship that SRNJ [JP Rail] has with Magic Disposal, Inc. is that Magic ... may utilize the [Pleasantville] facility as SRNJ's customer." *See* Brief on Behalf of Defendants J.P. Rail, Inc. d/b/a/ Southern Railroad Company and SRNJ Logistics in Opposition to Request for Injunctive Relief at 4 (April 12, 2006), *State of New Jersey v. J.P. Rail*, U.S. District Court for the District of New Jersey, Civil Action No. 06-CV-1603 (attached as Exhibit C). Similarly, a state court

judge found that JP Rail's attorneys had represented to the New Jersey Department of Environmental Protection ("NJDEP") that "[n]either Steve Waszen [a principal in Magic] nor his related companies are involved in this site in any way." State Court Opinion at 37-38. However, notwithstanding these representations, the New Jersey court determined with respect to the Pleasantville facility in an August 2007 decision that "from the court's perspective, it would be entirely appropriate to conclude that this facility was the result of a type of joint venture entered into by J.P. Rail and Magic." *Id.* at 38.

The reasons for JP Rail's reluctance to disclose the identity of Magic as its primary, and perhaps exclusive, C&D waste customer in Pleasantville are not clear. However, the Board should be aware of two facts. First, David M. DeClement, the individual who signed the Notice as an officer of JP Rail, appears to be the same David M. DeClement who was the attorney of record for Magic and its principal Steve Waszen in the recent case of *J.P. Rail v. New Jersey Pinelands Comm'n*, 404 F. Supp. 2d 636 (D.N.J. 2005). Second, according to the State of New Jersey, Magic has been the subject of repeated environmental and solid waste handling enforcement cases, resulting in criminal court sanctions and civil penalties. *See* Answer and Counterclaim/Third Party Complaint at ¶¶ 19, 28 (June 8, 2005), *J.P. Rail Inc. v. New Jersey Pinelands Commission*, U.S. District Court for the District of New Jersey, CV-05-2755(JBS) (attached as Exhibit F). NJDEP issued three Administrative Orders and Notices of Civil Administrative Penalty Assessments as recently as 2005 against Magic. *Id.* at ¶ 28. In addition to assessing fines of \$770,000, NJDEP revoked Magic's permit for a solid waste transfer station, which, according to NJDEP, Magic continued to operate even after revocation.

JP Rail's failure to specifically identify its primary customer for the Proposed Facility is both false and misleading as to the entities that will be served and is grounds for revoking the

Notice. The quality and type of customers – and their track record and dedication to complying with environmental rules and regulations – is a material consideration for the Board and the public and has a direct impact on whether the use of the exemption procedure is appropriate.

B. JP Rail Did Not Disclose Violations at its Pleasantville Facility That Could Materially Impact its Operations.

JP Rail has failed to disclose ongoing enforcement actions by the State of New Jersey regarding the Pleasantville facility that threaten the facility's very existence. As noted above, JP Rail has represented that its Pleasantville facility will be the exclusive origination point for C&D waste destined for the Proposed Facility. Following an inspection of the Pleasantville facility on September 17, 2007 by the Office of Regulatory Affairs of the New Jersey Department of Community Affairs, the agency issued a Notice of Unsafe Structure concerning the building at the site and further issued an order to vacate the structure by November 20, 2007. *See* Order Compliance Number OR-031-07 (attached as Exhibit G). The Notice recites numerous violations of the New Jersey Uniform Construction Code. JP Rail's inability to use this structure may have a significant impact on ongoing facility operations and, at a minimum, JP Rail should disclose this material consideration to the Board. To the extent the enforcement actions result in the discontinuation of operations at the Pleasantville facility, the Notice of Exemption will be moot and should be terminated, as JP Rail has stated in its verified Notice that this one facility is the source of all shipments to the Proposed Facility.

C. The Map Obscures the Potential Impact of the Proposed Facility.

The Notice fails to accurately and completely identify the location of the Proposed Facility and the areas to be impacted. Pursuant to 49 CFR § 1150.43(f), JP Rail is required to submit a "map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and states." The map included by JP Rail marks the spot of the proposed

operation with a handwritten “X” and a rough label of “rail site,” but fails to identify origins, termini, or stations, as required. It is therefore not possible to identify what roads will service the Proposed Facility, or where rail traffic will terminate. The map is therefore both incomplete and misleading on substantive requirements for a Notice of Exemption and impedes the ability of the Board and the public to evaluate the scope and the likely impacts of the Proposed Facility. The deficiencies in the map are sufficient grounds for revoking the Notice.

D. The Notice Misleads as to NEPA Review.

Pursuant to the National Environmental Policy Act (“NEPA”), the Board is required to “take a hard look at the environmental consequences” of a project. *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 97 (1983). JP Rail stated in the Notice without support that the project was exempt from environmental review under 49 CFR § 1105.6(c)(2)(i). The Board indicated in its preliminary decision dated October 25, 2007, that JP Rail had not made a facially sufficient showing under NEPA, stating that JP Rail “fails to support its contention that such operations would not exceed the environmental thresholds at 49 CFR § 1105.7(e)(4) and (5)” and fails to explain “why this proposal would not otherwise warrant the preparation of environmental documentation” pursuant to 49 CFR § 1105.6(d). *See* STB Decision, p. 1. In its supplement, JP Rail neither identifies the standards that apply nor provides any meaningful response to the Board’s inquiry.

Specifically, JP Rail has failed to demonstrate that it does not exceed the energy and air impact thresholds. In fact, the information JP Rail does provide indicates NEPA review is actually required if this project is to proceed. For example:

1. **Impact on Recyclable Commodities.** The Proposed Facility must undergo environmental review to evaluate the impacts that the project will have on the recycling of the C&D waste cargo pursuant to 49 CFR § 1105.7(e)(4)(ii). The proposed rail service will

transport C&D waste to a landfill for disposal. The Board has heard abundant testimony recently on the market value of the recyclable materials contained in C&D wastes. *See, e.g., Oral Argument* (April 19, 2007), *New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway – Construction, Acquisition and Operation*, STB Finance Docket No. 34797. Given that the Proposed Facility will serve only to ship these materials to a landfill for disposal, there is a direct impact on recyclable commodities. Solid waste management companies operating in Pennsylvania actively support and promote the recycling of C&D waste in concert with state laws that encourage such recycling. While the Notice states that inbound traffic would exclude recyclable commodities, there is no support offered for this statement and it is either false or misleading, or both: the very purpose of the proposed activity is to ship C&D waste for disposal. Under 49 CFR § 1105.7(e)(4)(ii), an analysis of the effect of the proposed action on recyclable commodities is required.

2. **Impact on Nonattainment Area Under Clean Air Act.** JP Rail also states that the proposed action does not meet the air thresholds of 49 CFR § 1105.7(e)(5). However, JP Rail fails to disclose, and does not appear to consider, that Washington County, Pennsylvania, the location of the Proposed Facility, is designated a nonattainment area under the Clean Air Act for certain pollutants. *See* 40 CFR § 81.339. Therefore, pursuant to 49 CFR § 1105.7(e)(5)(ii), the reduced nonattainment area thresholds apply to this project.

a) **Carloads Per Week.** JP Rail's estimate of 10 carloads per week (Verified Statement of David M. DeClement ("DeClement Statement") at ¶ 9) is widely variant from JP Rail's projection of its waste shipments just two years ago. In a sworn deposition in September 2005, Thomas Collard, a vice president of JP Rail, testified that the railroad and Magic estimated a waste facility supplied by Magic would generate about five railcars per day initially. *See*

Collard Deposition at 108-111. That would comprise 25 car loads per week, rather than the 10 stated by Mr. DeClement. For revenue assumptions, JP Rail and Magic previously estimated the volume of material would grow to 10 -15 railcars per day. *Id.* While it is possible that these waste projections were not accurate, there was no reason for Mr. Collard to inflate those projections in a deposition. Indeed, it is equally plausible that the projections for the Proposed Facility are understated here to avoid NEPA review. Throughput records at the Pleasantville facility for the duration of its operations would prove which set of projections is accurate.

In addition, JP Rail stated in its verified Notice that “[t]he trackage is currently in service.” *See* Notice at 3. Therefore, JP Rail must provide the volume of current rail traffic (before it commences operations) in order that the Board can evaluate the percentage increase created by the appropriate number of projected carloads per day and compare it to the 50 percent increase threshold that applies pursuant to 49 CFR § 1105.7(e)(5)(ii)(A). *See Lee’s Summit, Missouri and Raytown, Missouri v. Surface Transp. Bd.*, 231 F.3d 39, 42 (D.C. Cir. 2000) (environmental assessment could be required where rail traffic increases from one train per day to two trains per day). In the absence of this data, it is misleading for JP Rail to conclude that the threshold has not been exceeded.

b) **Increase in Rail Yard Activity.** The Proposed Facility may serve as a rail yard for JP Rail, as there is no other JP Rail facility in the Commonwealth of Pennsylvania. *See* Notice at 6. If the facility is a rail yard, JP Rail has failed to provide the current carload activity and the contemplated carload activity so that the Board can evaluate whether the impact exceeds the 20 percent threshold pursuant to 49 CFR § 1105.7(e)(5)(ii)(B). In the absence of this data, it is misleading for JP Rail to conclude that the threshold has not been exceeded.

c) **Increase in Truck Traffic.** JP Rail states that there will be an increase in the

average number of outbound truckloads but no increase in the number of inbound truckloads. *See* DeClement Statement, ¶ 12. It is not clear how this is possible. Further, JP Rail has provided no data on the average daily traffic on all (or any) road segments to be used by trucks servicing the facility so that they can be compared to the 10 percent increased traffic threshold in 49 CFR § 1105.7(e)(5)(ii)(C). It is believed that the absence of a rail crossing at the Proposed Facility will dictate that substantial truck traffic be diverted onto local roads, but there is no information provided by JP Rail to evaluate this impact. In the absence of meaningful traffic data for all road segments to and from the destination landfill, it is misleading for JP Rail to conclude that the threshold has not been exceeded.

d) **Transportation of Ozone Depleting Materials.** JP Rail states that inbound traffic would exclude ozone depleting materials, but provides no support for this conclusion. *See* DeClement Statement, ¶ 7. In fact, C&D wastes can include major appliances, such as air conditioners, dehumidifiers, and refrigerators, which often have reservoirs that contain ozone depleting materials. *See* CHARACTERIZATION OF BUILDING-RELATED CONSTRUCTION AND DEMOLITION DEBRIS IN THE UNITED STATES, EPA 530-R-98-010; June 1998, (<http://www.epa.gov/epaoswer/hazwaste/sqg/c&d-rpt.pdf>). Reflecting this content, the definition of Construction and Demolition Debris in many state solid waste statutes and regulations specifically includes appliances. *See, e.g.,* 6 NYCRR 360-1.2(b)(38) (New York); K.S.A. § 65-3402(u) (Kansas). Solid waste companies operating in Pennsylvania remove these materials from their waste streams prior to disposal. While the Notice states that inbound traffic would exclude ozone depleting materials, there is no support offered for this statement and it is therefore misleading for JP Rail to conclude that no ozone depleting materials would be transported. Under 49 CFR § 1105.7(e)(5)(iii), an analysis of the effect of the proposed action

on the transport of ozone depleting materials is required.

The Board should reject the Notice on the basis of false or misleading information as discussed above. In the alternative, the Board should stay the exemption for further inquiry and require further environmental review pursuant to 49 CFR § 1105.6(d), as discussed below.

III. The Board Should Invoke Environmental Review if it is Unpersuaded to Void the Petition.

The Board has the authority on an individual basis to determine that a particular action has the potential for significant environmental impact and that environmental review is therefore required even if no review is otherwise required. *See* 49 CFR § 1105.6(d). The facts of this case suggest that even if the Board is unpersuaded by the NEPA or other deficiencies noted above, the Board should require full environmental review of this project.

The Board's docket contains ample evidence of attempts to capitalize on the benefits of ICCTA preemption in order to avoid state and local law, particularly in the oversight of the solid waste industry. *See, e.g., New England Transrail – Construction, Acquisition and Operation Exemption*, STB Finance Docket No. 34797 (STB served July 10, 2007); *Hi Tech Trans, LLC – Petition for Declaratory Order*, STB Finance Docket No. 34192 (STB served November 20, 2002); *Suffolk & Southern Rail Road LLC – Lease and Operation Exemption*, STB Finance Docket No. 35036 (STB served August 13, 2007). One common thread in these cases is attempts to cloak or minimize solid waste activities in order to avoid rigorous review.

JP Rail's Notice follows this pattern. In its October 25, 2007 decision, the Board directed JP Rail to file supplemental information to allow for a fuller analysis of the project. Despite that admonition and opportunity, JP Rail's supplemental two-page statement fails to remedy these deficiencies.

JP Rail provides the Board with very little detail about the proposed operation. The

“Description of Service” merely states that C&D waste will be “unloaded by JP Rail” and that the “materials will not be handled except to unload rail cars and directly load waiting trucks for transport into the Westmoreland Waste facility.” There is no information about proposed structures, where transloading will occur at the site, or whether the area will even be paved. The Proposed Facility is located adjacent to the Monongahela River and a large park. *See* map printed from Google Maps (attached as Exhibit H). JP Rail fails to mention these features or provide any analysis of impacts on these receptors.

Despite its claims that C&D waste will never be placed on the ground and that the facility will be a “rail to truck direct movement,” *see* Notice at 7, JP Rail provides no information on the waste transfer process, the equipment it intends to use, safety provisions, how and where wastes will be stored, and whether trucks will comply with state idling restrictions. The Notice does not even provide sufficient information to determine whether waste transfer will occur in the outdoors. It is therefore not credible for JP Rail to assert in the Notice that “[a]t no time will materials be placed on the ground”. Spillage, wind blow litter, and dust deposition are to be expected where there is uncontrolled mechanical unloading of C&D waste in the open air.

The paucity of information in the Notice deprives the Board of an understanding of the activities expected at the site and of a basis on which to make a determination of the extent of the anticipated environmental impacts. There is no information provided about stormwater controls, chemical release protections, fire suppression capability, wind blown litter prevention, air pollution controls for particulate emissions, or worker or third party safety precautions. The outstanding questions about the project dictate that the Board exercise its discretion under NEPA pursuant to 49 CFR § 1105.6(d) to require environmental impact review if the project is to proceed. Given the litany of environmental concerns presented and JP Rail’s failure to supply

necessary information, the Board should direct JP Rail to undergo full environmental review.

IV. CONCLUSION

The Board should revoke the Notice of Exemption on the basis that the Notice contains material information that is either false or misleading or both, and therefore is void *ab initio*. If the Board disagrees with this analysis and does not void the exemption, the Board should stay the exemption and require full environmental review under NEPA to ensure that appropriate environmental impact analysis occurs.

DATED:
Wellesley, Massachusetts
November 29, 2007

Respectfully submitted,

PENNSYLVANIA WASTE INDUSTRIES ASSOCIATION

By their attorneys,

BEVERIDGE & DIAMOND, P.C.

By: 

Stephen M. Richmond, Esq.

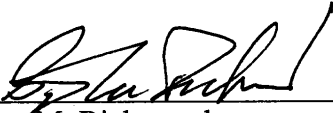
Marc J. Goldstein, Esq.

45 William Street. Suite 120

Wellesley, Massachusetts 02481-4004

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 2007, I served the foregoing Petition by causing a copy to be delivered by first class mail, postage prepaid, to the parties on the service list for the JP Rail proceeding, FD 35090, as of the current date.



Stephen M. Richmond

Beveridge & Diamond, P.C.

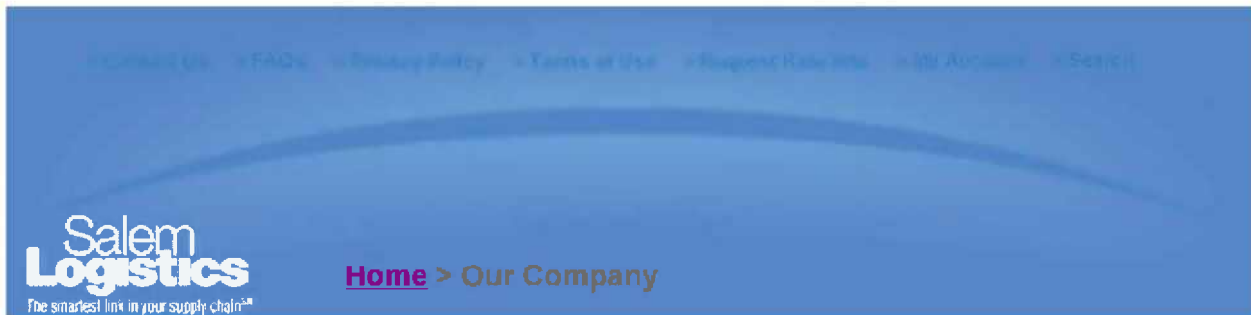
**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35090

JP RAIL, INC. – LEASE AND OPERATION EXEMPTION – NAT INDUSTRIES, INC.

**PENNSYLVANIA WASTE INDUSTRIES ASSOCIATION'S
PETITION TO REVOKE EXEMPTION
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EXHIBIT A



- [Our Company](#)
- [Traffic Services](#)
- [Transport Services](#)
- [Distribution Services](#)
- [Tools of the Trade](#)
- [Fun with Logistics](#)

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Beveridge & Diamond, P.C.

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PETITION TO REVOKE EXEMPTION
OR IN THE ALTERNATIVE TO STAY EFFECTIVENESS OF EXEMPTION**

EXHIBIT B

STATE OF NEW JERSEY, DEPT. OF ENVTL. PROT.,	:	SUPERIOR COURT OF NEW JERSEY
	:	CHANCERY DIVISION
	:	
PLAINTIFF,	:	CIVIL ACTION
V.	:	DOCKET NO. ATL-C-41-06
	:	
J.P. RAIL, INC., D/B/A	:	
S.R.R. CO. OF NEW JERSEY, SRNJ	:	OPINION
LOGISTICS AND MAGIC DISPOSAL	:	
INC.	:	
DEFENDANTS	:	
	:	

Decided: August 14, 2007

Appearances:

Jon C. Martin, D.A.G., for plaintiff, the State of New Jersey, Dept. of
Environmental Protection
John K. Fiorilla, Esq., for defendants, J.P. Rail, Inc., d/b/a Southern Railroad Co.
of New Jersey, and SRNJ Logistics (Capehardt & Scatchard, attorneys)
Frank G. Olivo, Esq., Attorney for Magic Disposal, Inc.

William C. Todd, P.J.Ch.

The processing of solid waste is an activity typically regulated by the states. Railroads are generally regulated by the federal government, which has preempted state regulation of rail carriers. Railroads have now become involved in transporting solid waste. In some circumstances, that will require the processing of the materials in question before those materials are placed on a railcar for transportation. That processing may occur at a facility owned, controlled or operated by a railroad. It may also involve individuals or entities other than a railroad. The primary issue presented in this case is whether and how the federal statute providing for preemption bars or limits state

regulation of the processing waste in such circumstances. That issue has been considered in a variety of forums. This opinion is intended to outline this court's conclusions as to the proposed regulation of one such facility located in Pleasantville, N.J. In resolving the matter, it is necessary to address just how that facility was operated and the extent of federal preemption. Those matters were addressed in a number of preliminary proceedings, and at a trial conducted in July 2007. For the reasons noted below, this court has concluded that the railroad does have the right to resume transloading operations at the facility in question, subject to the plaintiff's right to regulate that facility pursuant to certain regulations which are a part of the New Jersey Administrative Code.

General Background and Procedural History

The complaint in this matter was filed by the New Jersey Department of Environmental Protection (hereinafter, "NJDEP") in May 2006. NJDEP asserted claims against three separate entities that were involved in some capacity in the construction and operation of the facility at issue (hereinafter, "the Facility"). NJDEP's complaint sought the issuance of a permanent injunction prohibiting the construction and operation of the facility, based on a number of different state regulatory programs. At issue was the proposed and actual use of the property as a transloading facility, involving the processing of solid waste as it was being transferred from trucks to railroad cars. Defendant J.P. Rail, Inc. (hereinafter "J.P. Rail") is the owner of the property in question which has been serviced by rail lines for a substantial period of time. It is also the rail carrier which would ultimately receive and then transport the materials in question from the Facility. Defendant Magic Disposal (hereinafter "Magic") is an entity that has been involved in the processing of solid waste in the Atlantic County area for years, which had

previously been involved in the development and operation of solid waste transfer stations which were subject to the regulation of NJDEP. Magic did in fact bring solid waste to the Facility once it was operational. As will be noted below, it was also involved in the construction on this property and in the transloading that occurred there.

Defendant SRNJ Logistics (hereinafter "Logistics") is an entity with only one or two employees which handles administrative matters related to the rail operation for the railroad. It was involved in those activities before the parties became involved in the Facility, and was involved in administrative matters related to the operation of the Facility. David DeClement is an individual who has been involved in the affairs of all the defendants. He is not a party, but does have an ownership interest in both J.P. Rail and Logistics. Mr. DeClement is an attorney. In the past he has represented Magic and/or Mr. Waszen, a principal in Magic, in a variety of matters. He also holds the position of Director of Freight Operations for J.P. Rail.

NJDEP contends that the facility in question is subject to regulation pursuant to the Solid Waste Management Act (hereinafter "SWMA"), N.J.S.A. 13:1E-1 to -202, the Coastal Zone Management Act, 33 U.S.C. §§ 1451-1466, and the Coastal Area Facility Review Act (hereinafter "CAFRA"), N.J.S.A. 13:19-1 to -33. Also at issue are regulations enacted pursuant to the Solid Waste Management Act, commonly referred to as the 2D Regulations. See N.J.A.C. 7:26-2D.1. In essence, NJDEP has asked the court to prohibit the operation of the Facility based on the defendants' failure to comply with those regulatory schemes, including the permitting requirements of SWMA, specifically applicable to solid waste transfer stations. Defendants, on the other hand, contend that those state regulatory schemes have been preempted by the federal government through

the Interstate Commerce Commission Termination Act (hereinafter "ICCTA"), 49 U.S.C. §§ 10101-11908, which places exclusive jurisdiction over rail transportation with the Surface Transportation Board (hereinafter "STB"). Alternatively, defendants contend they have complied with whatever state regulation is permitted. Defendants' counterclaim requests a determination that J.P. Rail has complied with the 2D regulations enacted pursuant to SWMA.

The complaint in this matter was filed May 8, 2006. The complaint contained three counts. The first count asserted a right to relief under CAFRA, requesting the issuance of an injunction against the construction and operation of the facility in question based on the failure to obtain an appropriate permit under that statute, and failure to comply with SWMA and the 2D regulations. The second count asserted a right to the same type of injunctive relief under SWMA, referring to the statutory obligation to register and obtain approval from NJDEP before operating a solid waste facility. The third count alleged violations of the 2D regulations, and sought the issuance of an injunction against continued construction and operation on that basis. J.P. Rail and Logistics filed a joint answer and counterclaim February 1, 2007. That counterclaim asserted that defendant J.P. Rail had complied with the 2D regulations, and that the actions that had been taken by NJDEP constituted selective enforcement of the regulations and SWMA, entitling defendants to injunctive relief. Magic did eventually submit a separate answer but did not assert any affirmative claims.

NJDEP's application for a preliminary injunction was considered June 16, 2006. In an oral decision issued that day, this court concluded that ICCTA's preemption provisions did not preempt state regulation of the processing of solid waste, and did issue

an order enjoining the defendants from the processing of solid waste at the Facility. The order in question, issued June 22, 2006 prohibited all defendants from the processing of solid waste at the Pleasantville facility, referring specifically to disposal, sorting, processing, grinding, crushing, aggregating, segregating or baling solid waste prior to loading into rail cars or containers for rail shipment. J.P. Rail and SRNJ did file a motion for leave to appeal from the court's June 16, 2006 order. That motion was denied by the Appellate Division August 4, 2006. In November 2006, in response to a motion for enforcement of litigant's rights, this court modified the prior restraint to prohibit defendants from bringing any solid waste to the facility except in sealed containers which would be placed directly on the railway without processing. Some discovery was conducted. Motions for summary judgment were then considered in April 2007. As a result of those motions, defendant's claims of selective enforcement were limited. In all other respects, the motions for summary judgment were denied. The matter proceeded to trial in July 2007. The preliminary injunction issued in June 2006, as modified in November, has remained in effect to date.

Federal preemption, as it may apply to the processing of solid waste, has been the subject of a number of proceedings both in the courts and before the STB. Prior decisions dealing with that issue will be reviewed below. The court will then address the factual disputes presented in this matter, its own legal analysis and its conclusion. That analysis will focus on the state's ability to regulate the processing of solid waste under SWMA. Additional comments will be made with respect to the potential for regulation under CAFRA.

Federal Preemption – Potential Fact Issues

The most fundamental question presented in this matter is whether the preemption provisions of ICCTA bar state regulation of the processing of solid waste, when the process involves the delivery of solid waste to a rail carrier. Preemption is generally an issue of congressional intent, and often involves issues of statutory interpretation. The case law suggests a number of general principles that apply to any analysis of whether there has been preemption, in any given area.

Our courts have recognized three types of preemption—(1) express preemption, arising out of a specific statutory command that state law be displaced, (2) field preemption, which arises when federal law so thoroughly occupies a legislative field, supporting the inference Congress left no room for the States to supplement its action, and (3) conflict preemption which arises when a state law makes it impossible to comply with both state and federal law, or when the state law stands as an obstacle to the accomplishment of Congress' objectives. See St. Thomas-St. John Hotel and Tourism Assoc. v. Virgin Islands, 218 F.3d 232, 237-8 (3d Cir. 2000). It has also been recognized that any preemption analysis should be “tempered by the conviction that the proper approach is to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted.” Merrill Lynch v. Ware, 414 U.S. 117, 127; 38 L.Ed. 2d 348, 359; 94 S.Ct. 383, 389-90 (1973). In a case dealing with the regulation of railroads and the federal statute at issue here, the New Jersey Supreme Court noted a similar concern in the following passage:

Consistent with the nature of federalism, “[w]e begin by noting that preemption is not to be lightly presumed and that the historic police powers of the States are not to be superseded by federal law unless that was the clear and manifest purpose of Congress.”

Ridgefield Park v. NY, Susquehanna & W. Ry., 163 N.J. 446, 453 (2000)

(quoting Franklin Tower One v. N.M., 157 N.J. 602, 615, 725 A.2d 1104 (1999)).

ICCTA was enacted in 1996. That statute created the Surface Transportation Board. It clearly contemplated that some state regulation would be preempted. ICCTA deals with the issue of preemption as follows:

The jurisdiction of the [STB] over –

- (1) *transportation by rail carriers*, and the remedies provided in this part [49 U.S.C. § 10101 et seq.] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, *and facilities of such carriers*; and
- (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. 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 supplied).

ICCTA also defines “transportation” in broad terms, as follows.

- (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and
- (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.

49 U.S.C. § 10102(9).

There has been a substantial amount of litigation dealing with the issue of preemption under ICCTA. The issue can arise in a variety of contexts, involving

different types of properties, different activities and different state regulatory schemes.

Ridgefield Park, for example, involved an attempt to regulate a maintenance facility constructed within the municipality in question, where issues were raised as to the potential preemption of basic health, safety, zoning and land use laws.

Many of the reported cases deal with the process of transloading, or moving materials to or from railcars. The cases dealing with transloading can also involve a variety of different circumstances. It may be of some moment whether the activity that might be subject to state regulation involves the placement of materials on a railcar, or the movement of materials from a railcar to some other location. The materials at issue may be different. The type of proposed regulation may also vary. Green Mountain R.R. Corp. v. Vt., 404 F.3d 638 (2d Cir. 2005), for example, dealt with the application of Vermont's environmental land use statute to a proposed transloading facility which would unload bulk salt, bulk cement, and non-bulk goods such as steel pipe. In that case, the Second Circuit did find that the proposed environmental regulation, through permitting, was preempted.

A number of courts have suggested specific factual inquiries are necessary to address preemption claims involving the transloading process, particularly when the matter involves the processing of solid waste. That inquiry generally focuses on the specific language of 49 U.S.C. § 10501(b) and the question of whether the activity at issue involves "transportation by rail" or "transportation to rail." That inquiry, in turn, may require an analysis of just what entities are involved in the activity at issue, and how they are involved. That analysis has been adopted by a number of courts.

That type of analysis was adopted by the Third Circuit in Hi Tech Trans., LLC v. N.J., 382 F.3d 295 (3d Cir. 2004), a case that involved the transloading of solid waste. That case involved a solid waste disposal facility in Newark, N.J. The Canadian Pacific Railroad (CPR) owned trackage rights into the Oak Island Rail Yard (OIRY). The railroad and Hi Tech entered into a License Agreement under which Hi Tech agreed to develop and operate a construction and demolition debris bulk waste loading facility at OIRY. The License Agreement indicated that Hi Tech could only use the premises in question to transfer waste products from trucks to railcars operated by CPR. Hi Tech filed suit against the NJDEP, the plaintiff in this action, seeking a determination that its attempt to regulate the facility in question under the SWMA was preempted and therefore subject to the exclusive jurisdiction of the Surface Transportation Board under ICCTA. After an extensive factual and legal analysis, the Third Circuit affirmed the District Court's action, concluding that the proposed regulation under SWMA was not preempted by ICCTA. As part of its analysis, the Third Circuit adopted the distinction between "transportation by rail" and "transportation to rail." The following passage appears in its opinion:

Even if we assume arguendo that Hi Tech's facility falls within the statutory definition of "transportation" and/or "railroad," the facility still satisfies only a part of the equation. The STB has exclusive jurisdiction over "transportation by rail carrier." 49 U.S.C. § 10501(a), (b) (emphasis added). However, the most cursory analysis of Hi Tech's operations reveals that its facility does not involve "transportation by rail carrier." The most it involves is transportation "to rail carrier." Trucks bring C&D debris from construction sites to Hi Tech's facility where the debris is dumped into Hi Tech's hoppers. Hi Tech then "transloads," the C&D debris from its hoppers into rail cars owned and operated by CPR, the railroad. It is CPR that then transports the C&D debris "by rail" to out of state disposal facilities. As we noted above, Hi Tech operates its facility under a License Agreement with CPR. Pursuant to the terms of that

license agreement, Hi Tech is permitted to use a portion of CPR's OIRY for transloading. Hi Tech is responsible for constructing and maintaining the facility and CPR disclaims any liability for Hi Tech's operations. License Agreement, PP 4(d), 7. Thus, the License Agreement essentially eliminates CPR's involvement in, and responsibility for, the operation of Hi Tech's facility. Hi Tech does not claim that there is any agency or employment relationship between it and CPR or that CPR sets or charges a fee to those who bring C&D debris to Hi Tech's transloading facility.

Accordingly, it is clear that Hi Tech simply uses CPR's property to load C&D debris into/onto CPR's railcars. The mere fact that the CPR ultimately uses rail cars to transport the C&D debris Hi Tech loads does not morph Hi Tech's activities into "transportation by rail carrier." Indeed, if Hi Tech's reasoning is accepted, any nonrail carrier's operations would come under the exclusive jurisdiction of the STB if, at some point in a chain of distribution, it handles products that are eventually shipped by rail by a railcarrier. The district court could not accept the argument that Congress intended the exclusive jurisdiction of the STB to sweep that broadly, and neither can we.

Hi Tech, 382 F.3d at 308-209 (footnote omitted).

Approximately one year later, Judge Simandle applied a similar analysis in his opinion in J.P. Rail, Inc. v. N.J. Pinelands Comm'n, 404 F.Supp. 2d 636 (D. N.J. 2005.) That case arose out of an effort by J.P. Rail and Magic, two of the defendants in this matter, to locate a waste transfer station at a property in Mullica Township, N.J.¹ Steven Waszen, Sr., a principal in Magic, had acquired the property in Mullica Township. While the property was not served by a rail line, it was apparently contemplated that a rail spur could be constructed, which would connect the property to a rail line. That process would have required approvals from New Jersey Transit. In any event, the property was then transferred to Mr. Waszen's son, who then entered into a ground lease with J.P. Rail. Mr. Waszen Jr., as Landlord, agreed to construct facilities at the property, apparently for the processing of solid waste. Eventually, J.P. Rail notified Mullica Township of its

¹ Ultimately defendants abandoned that effort. That in turn led to the construction of the Facility at issue in this manner.

intention to construct a waste disposal facility at the site, proposing that it would use that facility to transload containers of solid waste to rail cars bound for destinations in interstate commerce. During the same period of time, Elwood Transload, Inc. and Elwood Brokerage, Inc. were incorporated, for the purpose of operating the proposed facility. The Waszen's apparently controlled each of those entities. Both Elwood Transload, Inc. and Elwood Brokerage, Inc. entered into agreements with J.P. Rail dealing with the proposed operation of the facility in question. Sometime later, control of the Elwood entities was transferred to Mr. DeClement, who had previously represented either Magic or the Waszen's.

The Mullica Township property was located in the Pinelands National Preserve, and was generally subject to regulation by the Pinelands Commission. See N.J.S.A. 13:18A-1 to -58. J.P. Rail filed suit in federal district court against the Pinelands Commission requesting an injunction pursuant to ICCTA which would bar the Pinelands Commission from preventing or interfering with the construction proposed at that property. The Pinelands Commission filed a third party complaint against Magic, the Waszens and the Elwood entities, asserting a right to regulate the facility in question. Judge Simandle addressed the matter on cross-applications for preliminary injunctive relief. J.P. Rail's request for a preliminary injunction was denied. The Pinelands Commission's request for a preliminary injunction was granted. In resolving those applications Judge Simandle relied on the prior analysis in Hi Tech Trans., LLC, focusing on the question of just what functions were to be performed at the proposed facility by the various entities involved. His analysis is outlined in the following passages:

The facts here are similar to those in Hi Tech. In that case the loader was permitted to use a portion of the railroad's property for transloading; here, the loader is using land leased by the railroad to conduct the proposed waste transfer activities. In Hi Tech, the facility operator financed the construction and maintenance of the facility; here the Elwood Entities appear to be almost exclusively responsible for funding the facility's development and operational costs, including all state Class II railroad taxes, engineering fees, (Martin Decl. Ex. 17, Collard Dep. Tr. 127:18-24,) and the \$ 257,225 deposit to New Jersey Transit. (Id. at 177.) Finally, in Hi Tech the licensing agreement between Hi Tech and the railroad disclaimed any liability by the railroad for Hi Tech's operations; here, the agreements between SRNJ and the Elwood Entities essentially eliminate the railroad's liability for damage caused by the operation of the facility. In short, Third-Party Defendants will "simply use[] [the railroad's] property to load . . . debris into/onto [the railroad's] railcars. The mere fact that the [railroad] ultimately uses rail cars to transport the . . . debris [Third-Party Defendants] load[] does not morph [Third-Party Defendants] activities into 'transportation by rail carrier.'" Hi Tech, 382 F.3d at 309.

SRNJ argues that the proposed facility here is more akin to the one at issue in Canadian Nat'l Railway Co. v. City of Rockwood, 2005 U.S. Dist. LEXIS 40131, Docket No. 04-40323 (E.D. Mich., June 1, 2005). (Pl. Ex. C.) There, Canadian National Railroad had contracted with a third-party to perform the actual operation of the equipment at its transloading facility. The court held that despite the agreement with a third-party contractor, Canadian National was the party providing the transloading services and, thus, that the activities occurring at the transload facility were subject exclusively to the STB's jurisdiction. See also 36 N.J. Reg. 5105 (Nov. 15, 2004) (recognizing regulation of transload and transfer operations federally preempted even though conducted by third parties "as long as those activities [are] being conducted on behalf of the rail carrier as part of its rail transportation services"). Here, however, for the reasons just explained, Elwood's activities are not being conducted on behalf of SRNJ. Canadian Nat'l is, thus, distinguishable from this case and, in any event, Hi Tech, being a decision of the Third Circuit, is binding precedent upon this Court.

J.P. Rail, Inc., 404 F.Supp.2d at 650-651 (footnotes omitted).

On that basis, Judge Simandle concluded that the activities at issue in that matter were "transportation to rail" rather than "transportation by rail" and that the plaintiff had not established a probability of success which would justify the issuance of a preliminary injunction prohibiting regulation by the Pinelands Commission based on preemption

under ICCTA. As already noted, it is this court's understanding that J.P. Rail ultimately abandoned its efforts to open a transloading facility at the Mullica Township property.

Approximately one year later, in February 2007, these issues were addressed again in Judge Hayden's opinion in N.Y., Susquehanna and W. Ry. Corp. v. Jackson, 2007 U.S. Dist. LEXIS 11907 (D. N.J. 2007). That case involved ongoing activities at five different sites in the Township of North Bergen, N.J. where construction and demolition waste and contaminated soil was loaded onto rail cars for shipment out of state. The railroad (hereinafter "NYS&W") had declined to comply with NJDEP's 2D regulations, after their enactment in 2004, claiming those regulations were preempted. NJDEP assessed a multimillion dollar fine against NYS&W. NYS&W brought suit against Ms. Jackson, as the Commissioner of NJDEP, challenging the 2D Regulations on the grounds of federal preemption under ICCTA, the Commerce Clause and the federal Hazardous Materials Transportation Act, 48 U.S.C. § 5125(a). The matter was addressed in a detailed written opinion. This court has been advised that decision is the subject of an appeal now pending before the Third Circuit.

NYS&W owned four of the five facilities at issue, and leased the fifth. Apparently all the processing of waste at those facilities was done by others, and not by the railroad. NYS&W's customers were known as shippers. The various shippers involved would have their own customers, who had a need to dispose of solid waste. The shippers' customers would have the right to dump the waste at the facility. The shipper then takes title to the waste and is able to dispose of it pursuant to its contract with the railroad. In addition, NYS&W had contracts with loading agents which would be responsible for processing the waste in question. The shipper pays a loading fee to NYS&W which in

turn pays the loading agent. NYS&W does not profit from the transaction with the loading agent. Income is derived from the fees charged to shippers to transport the materials in question on its rail line. At most of the facilities the processing of waste involves it being dumped and sorted, with some materials being extracted. At one facility, materials were dumped directly into a rail car from a truck, with no sorting, extraction or inspection.

Judge Hayden ultimately concluded that the 2D regulations were preempted by ICCTA and enjoined the NJDEP from implementing or enforcing those regulations at the five facilities at issue. In reaching that decision she concluded that NYS&W was a rail carrier, and that the North Bergen facilities or the activities at those facilities constituted “transportation.” She also concluded that the activities at issue constituted “transportation by rail” rather than “transportation to rail,” distinguishing the circumstances presented in North Bergen from the circumstances at issue in the Third Circuit’s opinion in Hi Tech Trans., LLC and from the circumstances at issue in Judge Simandle’s opinion in J.P. Rail, Inc. She addressed those cases in the following passage.

In Hi Tech, the Third Circuit held that a nonrail carrier’s operation of a transload facility on a rail carrier’s property involves, at most, “transportation to rail carrier,” and does not qualify as “transportation by rail carrier” pursuant to ICCTA. 382 F.3d at 308. The facts behind that holding are that: (1) Hi Tech, a nonrail carrier, was responsible for constructing and maintaining the facility; (2) the rail carrier disclaimed all liability for Hi Tech’s operation of the facility; (3) Hi Tech did not claim that there was any agency or employment relationship between it and the rail carrier; and (4) Hi Tech, not the rail carrier, set and charged a fee to those who brought C&D debris to the transloading facility. Id. at 308.

In J.P. Rail, Judge Simandle had similar facts, and relied on the same factors applied by the Third Circuit in Hi Tech in finding that the proposed waste transfer facility did not involve “transportation by rail carrier.” 404 F.Supp. 2d at 638.

The State claims that the decisions in Hi Tech and J.P. Rail compel the Court to conclude that the five facilities at issue in this litigation also involve “transportation to rail carrier” as opposed to “transportation by rail carrier.” The Court disagrees. “Whether a particular activity constitutes transportation by rail carrier under [ICCTA] is a case-by-case and fact-specific determination.” Hi Tech Trans., LLC Petition for Declaratory Order, No. 34192, 2003 STB LEXIS 475, 2003 WL 21952136, at *3 (STB Aug. 14, 2003). Making a case-by-case and fact-specific determination quickly reveals factual distinctions. First, a rail carrier was not a party to the litigation in either Hi Tech or J.P. Rail, whereas here, a railroad licensed by the STB is claiming the exemption from State regulation. Additionally, it is hard to ignore that NYS&W is the record owner or lessor of the property the facilities are located on, has paid the costs for erecting buildings at the facilities, is paid a loading fee by the shippers at each facility, and does not disclaim liability for the loading onto its rail cars by its loading agents. Where a “rail carrier builds and owns a truck-to-rail transloading facility, and holds it out to the public as its own facility, but chooses to have it run by a contract operator,” the STB would find preemption according to its discussion in Hi Tech Trans., LLC Petition for Declaratory Order, 2003 STB LEXIS 475, 2003 WL 21952136, at *4 n.13. Such is the situation here.

The Third Circuit and STB decisions in Hi Tech soundly reject the metamorphosis of an entity from a non-rail carrier to a rail carrier. Likewise, it seems unlikely that Congress or the STB would accept an analysis that carves portions that are seamlessly part of the rail carrier’s operations out of the exclusive jurisdiction of the STB. Until Congress passes legislation that does just this, decisional law in this Circuit goes directly against the State’s position.

Based on the facts established in this record, and the analysis in the relevant cases and the text of the relevant statute, the Court holds that the activity at the North Bergen facilities does constitute transportation by rail carrier.

N.Y., Susquehanna & Wyo. R.R., 2007 U.S. Dist. LEXIS 11907, at *59-62.

The opinions in Hi Tech Trans., LLC, J.P. Rail, Inc., and N.Y., Susquehanna all suggest it is necessary to engage in a fact sensitive analysis, on a case by case basis, in resolving preemption issues in this area. The precise inquiry required, however, is less than clear. Presumably the ultimate question may be whether the facility or activity which

is potentially subject to regulation involves “transportation by rail” or “transportation to rail.” That question, however, could suggest a number of factual issues. Does the issue turn on the specific activity at issue? Is it important whether the rail carrier in question owns the land on which the activity is to occur, or the improvements constructed on the land to permit the activity in question? Is the identity of the individual or entity that is involved in the activity dispositive, or does the matter turn on whether or not the rail carrier is somehow “in control” of the activity in question? Does the rail carrier derive some financial benefit from the processing of the materials in question, or is that processing simply incidental to transportation by rail? By definition these types of disputes will involve, in one way or another, the movement or processing of solid waste, on its way to a rail carrier. Under the cases cited, it is difficult to see any clear line that defines just when state regulation of that activity is preempted under ICCTA.

In some of the proceedings in this matter, it has been suggested that the issue of preemption may turn on whether the railroad or some other entity controls either the facility in question or the activity which might be subject to regulation. In the context of this case, that issue is framed by NJDEP’s claim that the Pleasantville operation is nothing more than Magic’s attempt to avoid state regulation of its activities in processing solid wastes, by involving a rail carrier. While it is simple enough to present the issue in terms of “control,” it is difficult to develop any clear standards that would govern the resolution of that issue in every circumstance. The opinions in Hi Tech Trans., LLC, J.P. Rail, Inc., and N.Y., Susquehanna illustrate that problem.

In High Tech Trans., LLC, the rail carrier apparently owned the land in question, but had given control of the facility to High Tech, which used it for transloading. While

High Tech and the rail carrier had entered into a Licensing Agreement, there was no indication of any agency or employment relationship between them, and no indication the rail carrier set or charged fees to those who would bring materials to the facility. The Third Circuit was apparently satisfied there was a clear differentiation between the operation of the railroad and the processing of the waste materials in question and found state regulation of the latter was not preempted. One could suggest it was clear, from all the circumstances, that the rail carrier had no control over the processing of the materials at issue in that matter. In J.P. Rail, Inc. the rail carrier did not own the land, but had entered into a long term ground lease with the owner. It appeared that other entities would ultimately control the facilities to be constructed on the property and the processing of materials. Judge Simandle also found the activity involved “transportation to rail” rather than “transportation by rail” and concluded there was no preemption. Again, one could suggest the rail carrier had no control over the processing of the materials at issue.

In N.Y., Susquehanna, however, Judge Hayden found there was preemption of NJDEP’s attempted regulation of five separate facilities. NYS&W owned four of the five facilities. As in Hi Tech Trans., LLC and in J.P. Rail Inc. the processing of the waste materials was not done by the railroad, but by loaders. While NYS&W did have contracts with the loaders, and was involved in the processing of payments to them, those payments could be traced directly to the shippers, who apparently paid separately for the processing or loading the materials, and for their shipment. It is difficult to distinguish the role played by the loaders in N.Y., Susquehanna from the proposed roles of the Elwood entities in J.P. Rail Inc., or of Hi Tech Trans, as related to the processing of the materials

in question. In other words, it is not clear there are material differences in those cases as to the amount of control exercised by the rail carriers in question over the actual processing of solid wastes. In distinguishing the circumstances presented in N.Y., Susquehanna from those presented in Hi Tech Trans., LLC and J.P. Rail, Inc., Judge Hayden noted that NYS&W owned the properties in question, had paid for the construction the buildings in question, was paid a loading fee, and had not disclaimed liability of the activities of the loaders. While those distinctions may well be material, they do not appear to go to the day to day control of the activities involved in the processing of solid waste.

The STB addressed this same problem very recently, and has offered what appears to be a different perspective on the issue of preemption. Its opinion in New England Transrail, LLC—Construction, Acquisition and Operation Exemption—in Wilmington and Woburn Ma., 2007 STB LEXIS 391, was issued June 29, 2007, a short time before the trial of this matter. That opinion arose out of a request presented by New England Transrail (hereinafter NET) for authorization to become a rail carrier, subject to STB's jurisdiction. NET had sought authority to acquire some existing track, to construct new track and to operate as a rail carrier on that track and an adjacent property owned by Olin Corporation (hereinafter OLIN). NET planned to construct a facility at the OLIN property which would process solid waste, including materials classified as municipal solid waste (MSW) and construction and demolition debris(C&D) to be loaded on rail cars for shipment out of state.² The opinion just issued addresses the preliminary issue of

² MSW and C&D are different types of solid waste, and the specific definitions of those terms may differ from jurisdiction to jurisdiction. Definitions applicable in New Jersey can be found at N.J.A.C. 7:26-1.4. Those definitions provide that MSW "means residential, commercial and institutional solid waste generated within a community," and C&D "means waste building material and rubble resulting from construction,

the extent to which NET's planned activities involving the processing of solid waste come within the scope of the STB's jurisdiction. In essence, NET asked the STB to address the preemption issue prior to the construction and operation of the facility at issue, in conjunction with its request for permission to become a rail carrier. Given the extensive interest in the preemption issue, a number of entities not directly involved in NET's proposal were permitted to participate in those proceedings. NJDEP was one of those entities.

As already noted, the courts which have dealt with this issue have often focused on the issue of just who is involved in the processing of solid waste. The STB, through its opinion in New England Transrail, LLC, appears to have approached the issue from a different perspective. That opinion focuses not on the identity of the individuals or entities involved but on the type of processing which is proposed. The STB did conclude that NET would be considered a rail carrier. It reviewed the manner in which the facility in question would be operated in some detail. It then focused on the question of whether the particular type of processing at issue was integrally related to rail transportation, distinguishing between activities which were subject to preemption and activities that were not. The STB concluded that unloading material onto the floor of the transloading facility, storing the material there temporarily, loading the material into containers and rail cars, the baling or wrapping of MSW, and the extraction of refrigerators were all a part of rail transportation and therefore preempted. It also concluded, however, that the shredding of C&D, at least as proposed by NET, was not preempted. The STB appears to have concluded that if a rail carrier were to engage in the shredding of solid waste it

remodeling, repair, and demolition operations on houses, commercial buildings, pavements and other structures." The distinction between these two types of solid waste is not material to the analysis in this matter.

would subject itself to regulation by the state, including permitting. The STB discussed that distinction in the following passage.

NET has failed to persuade us, however, that the shredding it proposes to undertake to reduce the C&D into 2-foot lengths would be integrally related to rail transportation. NET asserts that the purpose of this shredding would be so that it could move the C&D on a conveyer belt for loading onto rail cars. We find that difficult to believe in light of the presentation at oral argument by NBW and others. As the president of NBW explained, his waste processing facility can only justify the cost and other problems associated with shredding equipment because the shredding (to 2-foot lengths) and use of a conveyer belt enables his company to separate from the C&D debris by hand any metal, wood and other valuable materials, which it then resells. The metal and wood that is removed has significant value.

Given the fact that C&D contains material with considerable value, we find it difficult to believe that NET would do nothing to retrieve that value. In response to questioning at the oral hearing as to why it would not recycle any C&D components, NET replied that it would have no space for that; that recycling was not part of its business plan; and that NET would already be making enough money due to its lower transportation costs. In other words, it claims that it would design a facility with easy access to waste streams and then not capitalize on the opportunity to recycle metal with a value of up to \$ 50,000 per ton pass by, destined for a landfill. But businesses rarely forgo significant economic opportunities.

NET did not adequately demonstrate that the shredding activity they propose would be integrally related to rail transportation. As noted at the oral argument, a shredder is not required to pack into rail cars material that has arrived at its facility packed into trucks. Additionally, the record indicates that shredding is a common practice in the landfill and waste management businesses and often facilitates recycling. Nor are we persuaded that the size of the facility would be so large that NET would need to use a conveyer belt just to move waste within the facility for transfer.

For all of these reasons, we find that NET has not met its burden of demonstrating that its proposed shredding activities at the Olin site would be part of rail transportation. Therefore, those activities would not be subject to the Board's jurisdiction or covered by the section 10501(b) preemption. *If NET chooses to conduct the shredding activities, they would be subject to the full panoply of state and local regulation.*

New England Transrail LLC, 2007 STB LEXIS 391 at *33-36 (footnotes omitted).

Notably, the STB's decision in New England Transrail LLC was not unanimous. There were three members of the STB who participated in that decision—the Chairman, the Vice Chairman and one Commissioner. Commissioner Mulvey issued a written dissent, specifically noting that he did not agree with the STB's determination that the unloading of MSW onto the floor and the temporary storage, baling and loading of those materials were activities which were subject to preemption. He outlined his concerns in the following passage:

There is a critical reason that the power to regulate the handling of MSW has been delegated to the states—and that is because states and localities are in the best position to protect the health and safety of their citizens and to understand the impacts of handling MSW. While the Board typically harmonizes its interpretation and implementation of the Act with other federal laws, there is no federal law to be harmonized here precisely because states have the authority and responsibility to regulate in the area of MSW handling.

I am troubled by the recent up-tick in assertions by new entrants into the MSW industry that they are rail carriers subject to the Board's jurisdiction. What concerns me is these firms' attempts to blend the nature of their operations to offer both rail carrier service as well as waste processing, and to use their putative status as rail carriers to shield their waste processing operations from the reach of state and local environmental laws. This tactic is manipulative and abusive of the Board's jurisdiction and powers, and it highlights a method of evading the law that I cannot support. If the Board's existing interpretation of the Act cannot stop this practice, then it is time for Congress to do so.

2007 STB LEXIS 391 at *46-47.

As noted earlier, this court did address the preemption issue in ruling on NJDEP's request for a preliminary injunction in June 2006, concluding in general terms that ICCTA's preemption provisions did not extend to preempt state regulation of the processing of solid waste. Commissioner Mulvey's analysis in the dissent in New

England Transrail LLC appears to be consistent with this court's analysis of the matter in dealing with that application for a preliminary injunction.

The various decisions discussed above suggest a variety of factual determinations may be necessary to resolve the question of whether a particular facility involved in the processing of solid waste is subject to preemption under ICCTA or, alternatively, is subject to regulation by the state. Issues of ownership and control may be important, as indicated in Hi Tech Trans., LLC. Under the STB's decision on New England Transrail LLC it may be necessary to focus on the particular type of processing at issue.

Partial Preemption—Ridgefield Park

It may be difficult to resolve the question of whether a particular facility is subject to preemption. At the very least, the various decisions discussed above indicate the issue must be addressed on a case by case basis and is subject to very specific factual determinations. There is, however, one other potential complication presented by our case law. It is clear that preemption, when it applies, may not be absolute.

The New Jersey Supreme Court addressed that matter in Ridgefield Park v. NY, Susquehanna and W. Ry., supra. That case involved attempts at regulating a train maintenance facility being constructed by the railroad at a property apparently owned by the railroad and located within the Village of Ridgefield Park. The railroad began construction of the facility without applying for zoning or construction permits and without otherwise informing the Village of its plans, relying on the preemption provisions of ICCTA. The Village filed suit claiming the right to enjoin a nuisance, and the right regulate the facility pursuant to health, safety, zoning and land use laws. In a

published opinion, the Appellate Division concluded the Village was required to present its request for injunctive relief to the STB, based on the doctrine of federal preemption and primary jurisdiction and affirmed the trial court's action in dismissing the matter.

Ridgefield Park v. N.Y., Susquehanna and W. Ry., 318 N.J.Super. 385 (App.Div.1999).

The STB subsequently addressed the preemption issue in its decision in Borough of Riverdale Petition of Declaratory Order, N.Y., Susquehanna and W. Ry. Corp., 1999 W.L. 715272 (STB September 9, 1999), concluding that zoning regulations and the use of traditional permitting programs were preempted, but that state and local governments did retain certain police powers which might be applied in a non-discriminatory way to protect public health and safety, without permitting. Based on the STB's decision in Riverdale, the New Jersey Supreme Court remanded Ridgefield Park to the trial court. It provided guidance as to how efforts to regulate the facility at issue there should proceed, in language that would appear applicable in other situations.

Consistent with the STB's opinion in Riverdale, we hold that the Railroad may not deny the Village access for reasonable inspection of its maintenance facility. We further hold that although the Village may not require permits of the Railroad, the Railroad must notify the Village when it is undertaking an activity for which another entity would require a permit. The Village may enforce its local fire, health, plumbing, safety and construction regulations to the extent they are applicable to the existing maintenance facility. Because the "maintenance facilities" consist essentially of two diesel tank cars with pumping equipment, three boxcars containing administrative offices, shops and bathroom facilities, and a hand-pumped septic system, a certain degree of pragmatism on the part of the Village will be necessary in attempting to apply its relevant ordinances and regulations to the Railroad's facilities. Because of the nature of those facilities, literal compliance with all of the requirements of the Village's ordinances and regulations may be impractical, and may not be necessary to protect the public interest.

We envision that it will be the rare situation when fairly enforced fire, health, plumbing, safety, or construction regulations interfere with a

railroad's operations. In the event that conflicts arise over the Village's attempted enforcement of those regulations, either party is free to apply to the Law Division for such relief consistent with this opinion as may be appropriate.

....

Obviously, the nature of the Railroad's facilities does not make it feasible to subject them to the usual scope of review contemplated by municipal site plan ordinances. See N.J.S.A. 40:55D-41 (authorizing site plan ordinances requiring review of location of structures, vehicle and pedestrian circulation, preservation of natural resources, parking, lighting, screening and landscaping). Nevertheless, the record informs us that in 1992 the Railroad submitted for review by the Village engineer a site plan depicting its facilities, and subsequently forwarded supplemental information requested by the engineer. The Village apparently ceased, at least temporarily, its review of the Railroad's site plan. Because the parties voluntarily commenced the site plan review process before the litigation commenced, we anticipate that to now require the Railroad to submit again to site plan review, tempered by the pragmatic considerations that should guide the Village's review-process, will not foreclose or restrict the Railroad's ability to conduct its operations. Consistent with the STB's disposition in Riverdale, 1999 STB LEXIS 531, the Village's authority to review the Railroad's site plan does not include the power to require approval of the site plan as a condition of the Railroad's continued use of its maintenance facility.

Because zoning regulations imposed by the Village "clearly could be used to defeat [the Railroad's] maintenance and upgrading activities, thus interfering with the efficiency of railroad operations that are part of interstate commerce," *ibid.* 1999 STB LEXIS 531, [WL] at *7, the Village may not dictate the location on its right-of-way of the Railroad's maintenance facility. In the event the Village remains of the view that the Railroad's siting decision is arbitrary, unreasonable and contrary to the interests of its citizens, the Village is free to seek relief on that issue from the STB.

Ridgefield Park, 163 N.J. at 460-462.

The facility at issue in Ridgefield Park did not involve the processing of solid waste. The New Jersey Supreme Court's decision in that case did not address the type of distinctions that have now been suggested both by the courts and the STB in dealing with facilities involved in that type of activity. The extent to which state regulation of these

types of facilities is permissible is still subject to substantial debate. The STB's decision in New England Transrail LLC indicates that engaging in a particular type of processing (i.e.—shredding) would expose the facility to “the full panoply of state and local regulation,” presumably allowing the type of permitting which was severely limited, if not barred, under Riverdale and Ridgefield Park. The dissent in New England Transrail LLC suggests a more expansive role for the state when rail roads become involved in the processing of solid waste. Cases like Hi Tech Trans., LLC, J.P. Rail Inc. and N.Y., Susquehanna suggest a different type of inquiry, focusing on the issue of control. It is in that context that the facts presented here must be reviewed.

New Jersey's Regulatory Scheme—The 2D Regulations

New Jersey has regulated the processing of solid waste for a substantial period of time. The SWMA was enacted in 1970, to address issues arising out of the collection, disposal and utilization of solid waste. See N.J.S.A.13:1E-2. That statute authorized NJDEP to promulgate rules and regulations governing solid waste collection and disposal. See N.J.S.A. 13:1E-6(a)(2). Over the years NJDEP has promulgated rules dealing with a variety of subjects, now appearing as Title 7 of the Administrative Code. The rules dealing with solid waste are collected in Chapter 26 of that Title. See N.J.A.C. 7:26-1.1 to -17.26.

Prior to 2003, the rules promulgated by NJDEP apparently required rail carriers who operate solid waste transfer facilities to obtain a permit and approval from NJDEP before operating. The New Jersey Supreme Court issued its decision in Ridgefield Park in 2000 determining that the Village in that case could not require the issuance of permits

prior to the construction and operation of a maintenance facility, but would be permitted, in some way, to enforce its local fire, health, plumbing, safety and health regulations, recognizing such enforcement might present some practical difficulties. Approximately three years later, NJDEP proposed and then enacted a number of amendments to the rules dealing with the activities of rail carriers involved in the processing of solid waste. Those amendments were based on obvious concerns over preemption under ICCTA, and may have been a specific reaction to the opinion in Ridgefield Park. One amendment, effective November 15, 2004, does exempt rail carriers from permitting under SWMA, subject to their obligation to comply with the 2D Regulations which were enacted at the same time. That exemption from permitting appears in a part of N.J.A.C. 7:26-2.1(c).

(c) This subsection sets forth the specific criteria for exempting rail carriers:

1. This subchapter does not apply to a rail carrier that transfers containerized or noncontainerized solid waste to or from rail cars. For the purpose of this subchapter, the term "rail carrier" shall mean a person as defined in 49 U.S.C. § 10102(5) that provides common carrier railroad transportation and has been approved pursuant to 49 U.S.C. §§ 10901 or 10902, by the United States Surface Transportation Board (or its predecessor agency) or otherwise has been recognized as a rail carrier by such agency, and holds out to the general public that the operations at the facility for which the exemption under this subchapter is applicable are being conducted by it or on its behalf as part of its rail transportation services. However, a rail carrier that transfers containerized or noncontainerized solid waste to or from rail cars is not exempt from regulation pursuant to the Solid Waste Management Act, and shall be subject to the provisions of N.J.A.C. 7:26-2D.

2. Rail carriers engaged in the business of solid waste disposal or transportation by rail, but that do not engage in the business of solid waste collection (as defined by N.J.S.A. 13:13E-3) by other means of transportation within the State of New Jersey, are exempted from the requirement to submit a disclosure statement pursuant to N.J.A.C. 7:26-16.3.

N.J.A.C. 7:26-2.1(c).

The provision cited above is a part of Subchapter 2 of Chapter 26 of Title 7 of the Administrative Code. The permitting provisions of Chapter 26 are a part of Subchapter 2. See N.J.A.C. 7:26-2.3. Rail carriers transferring solid waste to and from railcars are exempted from that permitting process.

The Summary issued by NJDEP with the proposed amendments suggests NJDEP may have concluded its ability to require permitting had been preempted by ICCTA. See Solid Waste Transporter Registration and Related Fees for Rail Carriers, 36 N.J.R. 5055(Proposal No PRN 2004-432, November 15, 2004). In any event, the exemption from permitting noted above and the 2D Regulations were enacted in 2004. Those regulations impose fairly specific obligations on rail carriers involved in the transportation of solid waste. Separate regulations apply to rail carriers that transport waste exclusively in sealed containers and to those that engage in solid waste tipping or processing. See N.J.A.C. 7:26-2D.1(c) and N.J.A.C. 7:26-2D.1(d) respectively. All rail carriers are required to provide NJDEP with certain information prior to commencing operations. See N.J.A.C. 7:26-2D.1(b).

This court has been asked to resolve a variety of disputes related to the potential application of the 2D Regulations to this Facility. NJDEP has asserted the right to regulate the Facility under the 2D Regulations, irrespective of Magic's involvement. It asserts there were a variety of violations of the 2D Regulations while the Facility was operating, justifying its action in requesting the closure of the Facility by court order, pending full and complete compliance. J.P. Rail argues that the state's attempt to regulate this Facility pursuant to those regulations has been preempted, consistent with Judge Hayden's opinion in N.Y., Susquehanna. Alternatively, J.P. Rail has asked the

court to confirm that it has complied with the 2D Regulations. Those issues will be addressed further below.

Factual Determinations — Construction and Operation of the Pleasantville Facility

The factual disputes presented in this matter were somewhat limited. Those disputes were addressed at trial through the testimony of eight witnesses and the submission of a variety of documents. The materials submitted into evidence include surveys, plans and photographs which depict both the Facility itself and the activity that occurred at the property in question during construction and operation. The following factual determinations have been made, based on the evidence presented at trial.

Some circumstances relevant to this dispute occurred well before the parties became involved in the Pleasantville facility, and involve conflict between Magic, NJDEP and other governmental agencies dating back several years. Magic has been involved in the processing and handling of solid waste in the Atlantic County area for years, in two distinct capacities. Magic has been and is authorized to transport solid waste by truck over the highways. In addition, Magic did previously operate a solid waste transfer station located on Ridge Avenue in Egg Harbor Township. That facility involved truck to truck transfers, and not any rail operations. The operation of that facility was subject to permitting through NJDEP pursuant to SWMA. The Ridge Avenue facility was also the subject of substantial regulatory action by Atlantic County, which resulted in litigation over a number of years. In June 2005, this court entered an order in a separate action that had been filed by Atlantic County several years earlier, which essentially prohibited the continued operation of that solid waste transfer station. (See Exhibit P48 in evidence.) In many ways this litigation reflects NJDEP's concern that Magic has

responded to the regulatory problems it encountered at the Ridge Avenue facility by attempting to establish a new solid waste transfer station in one or another location, without complying with the permitting provisions of SWMA, and only involved the railroad to avoid appropriate state regulation.

The order closing the Ridge Avenue facility was entered in June 2005. Sometime prior to that, Magic became involved in the property located in Mullica Township which was ultimately the subject of Judge Simandle's opinion in J. P. Rail Inc. Mr. Waszen had acquired that property in 2003. During 2003, Atlantic County instituted municipal court proceeding against Mr. Waszen and others alleging that illegal dumping had occurred at the Mullica Township property. Those proceedings resulted in the entry of a number of municipal court orders which required Mr. Waszen to remove materials that he or Magic had dumped at the site and to clean up other conditions traceable to a prior owner. Such orders were entered in December 2003, in June and August 2004, and in February and April 2005. (See Exhibits P46 and 47 in evidence.) In the interim, a ground lease was entered into with J.P. Rail, apparently contemplating that the property would be used as a transloading facility, subject to federal preemption of state and local regulation under ICCTA. It was in that context that J.P. Rail instituted the action that resulted in Judge Simandle's opinion in J.P. Rail Inc. That opinion was issued in December 2005. J.P. Rail's request for a preliminary injunction prohibiting the Pinelands Commission from interfering with the property was denied. J.P. Rail, Magic and related individuals and entities were restrained from continuing with construction at the property. Ultimately, J.P. Rail elected not to proceed at the Mullica Township property.

J.P. Rail has been the owner of the Pleasantville property, and has conducted rail operations, including the transloading of various types of materials which were brought to or from the property by rail for an extended period of time. While it is not clear just when the defendants first considered using the Pleasantville facility for the transloading of solid waste, it does appear that occurred during the time the litigation as to the Mullica Township property was pending before Judge Simandle. It is reasonable to conclude the defendants considered the Pleasantville property as an alternative to the project proposed in Mullica Township.

While it is not clear just when J.P. Rail and Magic first considered using the Pleasantville property for the transloading of solid waste, there was some contact with municipal officials in Pleasantville about such a project by late 2005. Interestingly, one initial contact was made by Mr. Waszen and one of his employees, and not by anyone employed directly by J.P. Rail. In January 2006, J.P. Rail forwarded written notice to the Pleasantville City Clerk of the fact that it was "in the process of constructing and operating a new railroad transloading facility" at the property at issue here. That letter indicated the Facility would only accept C&D. It specifically cited the New Jersey Supreme Court's opinion in Ridgefield Park as authority for the railroad's right to proceed without applying for permits.³ That letter was eventually forwarded to NJDEP, and there was a subsequent exchange of correspondence between J.P. Rail's attorneys and NJDEP dealing with the Facility.

A building or enclosure was constructed on the property to be used for the proposed transloading of solid waste. That building was constructed by Magic's employees. While it is not clear just when construction began, it is clear construction was

³ See Exhibit P50 in evidence, Mr. Fiorilla's letter of January 3, 2006.

completed within a relatively short period of time. By March 2006, solid waste was being brought to the property, processed and loaded onto rail cars for shipment. By that same time, representatives from NJDEP had begun visiting the property on a regular basis. A series of photographs taken by one of NJDEP's representatives from March 2006 through October 2006 were admitted in evidence.⁴ Those photographs do depict the building just noted and portions of the transloading operation. NJDEP filed this action in May 2006, after the Facility had been operating for several months. This court's preliminary injunction was issued in June 2006 and the Facility has not been used for the transloading of solid waste for a substantial period of time.

A number of disputes have been presented as to the manner in which the Facility was constructed and operated. At issue were the identity and/or control of the individuals involved in those processes, and the specific activities involved in the transloading of waste. Preliminarily, it bears noting that both the construction of the building and the actual processing of solid waste, through the time it was placed on railcars, was done by individuals who were employees of Magic. Those circumstances could support the conclusion urged by NJDEP—that the Facility was essentially a solid waste transfer station, being operated by Magic and therefore subject to state regulation. Defendants' response is simple. Defendants contend that while the construction and operation was actually performed by Magic's employees, that was done pursuant to agreements with J.P. Rail, which remained in control of the Facility. Defendants argue Magic was essentially acting on behalf of the railroad, in both constructing and operating the Facility. The conclusion suggested by defendants is that the Facility is nothing more than a transloading operation, being conducted by the railroad, through the use of an

⁴ See exhibits P1-P37 in evidence.

independent contractor. In support of that argument, defendants have also offered proofs establishing that rail carriers regularly elect to conduct substantial portions of their operations through the use of contractors, thereby limiting the number of railroad employees. That practice is apparently based, at least in part, on concerns as to the types of benefits which must be maintained for those individuals who are employed directly by a railroad. There are apparently substantial savings which may be available to railroads through the use of independent contractors. In that context, disputes as to just what occurred may be less important than how one characterizes the relationship between J.P. Rail and Magic.

As noted above, J.P. Rail has owned this property for a substantial period of time. The property itself is relatively open. An existing track runs through the property. The building or enclosure at issue here was constructed over that track and an adjacent open area. The area where the track enters and leaves the building is open at each end, to permit railcars to be moved through the Facility. The building is covered by a roof and has walls or partial walls on three sides. The remaining side of the property is gated, but the gate does not extend to the full height of the building, or over the tracks. An interior partition runs between the track and an open area within the building where solid waste is deposited on the floor. The area above that partition is open, to permit waste to be transferred from the floor to rail cars which would be located on the other side of the partition.

During the period when this Facility was operating, Magic was the only entity which brought solid waste to the Facility. J.P. Rail has continually represented that there

are other waste haulers which would use this Facility if it is permitted to reopen on a permanent basis. This court sees no reason to question that representation.

This Facility was operated for three to six months, prior to the issuance of this court's preliminary injunction. During that time, Magic would pick up C&D from its customers. It would bring that solid waste to the facility by truck. The trucks would be weighed at a scale controlled by another customer of the railroad, apparently off the railroad property. After being weighed, Magic's trucks would travel to the building and deposit the waste on the open floor within the building. Some materials were then removed or segregated from the materials which are on the floor, either by hand or with the use of some machines. An excavator with a type of bucket was then used to lift the remaining waste from the floor, over the partition, and to deposit it in a rail car. Once the rail car was loaded it would be covered by a screen, which in turn was weighed down with tires.⁵ The waste was then transported to its ultimate destination on that rail car. Waste processed through this Facility would be transported to landfills located in other states.

A number of issues are presented as to just how and why materials are segregated or extracted as a part of the process noted above and who may benefit from that process. While this Facility was operating a variety of materials were extracted from the C&D before materials were loaded onto railcars. The materials removed included metals, wooden pallets, cardboard, tires, full cans of paint, and some newspapers. There were a number of different reasons why materials were segregated. Metals were removed because their shipment might result in damage to the railcars. Wooden pallets were

⁵ An alternative practice is to cover the railcar with a tarp rather than a screen, in which case tires are not used. That alternative practice was not used at this facility.

removed because the problems they would present during shipping, because of their limited weight. Other materials would be removed because they would not be accepted by the landfills which would be the ultimate recipient of the remaining solid waste.

At least some of the materials that were extracted could be sold to generate income for the individual or entity which received those materials, and that apparently occurred on a limited basis while the Facility was operating. The testimony offered with respect to the disposition of extracted metal illustrates some of the fine distinctions presented in addressing the disputes presented regarding the issue of preemption, if one focuses on the question of just who is "in control" of the transloading process. There is a market for scrap metal, which may have some substantial value. Mr. Waszen testified as to the disposition of the scrap metal which was extracted at the Facility, indicating that much of that scrap metal was stolen, after it had been extracted from the C&D. In the end, however, it was clear that at least some of the scrap metal was sold by Magic, generating some limited income. That is apparently consistent with what would have occurred had the materials in question been processed at Magic's solid waste transfer station when it was operating. Magic's access to the extracted scrap metal could support the conclusion that it remained in control of the materials in question and the transloading process itself. Mr. DeClement responded to that issue in his testimony, indicating that the railroad had simply elected "to return" the scrap metal to Magic as it was extracted, suggesting that the railroad had possession and control of the materials in question once they were delivered to the Facility, and was in control of the transloading process.

Additional issues were presented as to one specific activity involved in the transloading process at the Facility. Testimony as to that issue was apparently offered to

respond to the STB's analysis in New England Transrail LLC, which had concluded that the shredding proposed at the facility at issue in that matter would expose the facility to state and local regulation. As already noted, the Pleasantville operation did involve the segregation and extraction of certain materials. It did not involve any baling or wrapping, or the type of shredding at issue in New England Transrail LLC. NJDEP did, however, present the testimony of John A. Castner, a Director of NJDEP, who had concluded that the transloading activity that had occurred at the Pleasantville facility involved the "crushing" of the materials being placed in the railcar. In essence, Mr. Castner indicated that the excavator being used to lift waste off the floor and deposit it into the railcar was also used to compact the materials within the railcar itself. While it is likely some compaction occurred as the excavator was being operated, it is not clear that was an essential part of the transloading process.

In addition, proofs were presented as to the identity of the individuals involved both in the construction of the building and the transloading process, and the financial relationship between J.P. Rail and Magic with respect to those activities. NJDEP has questioned defendants' claims with respect to those issues, noting there was limited documentation available to corroborate defendants' version of the events. This court sees no reason to reject the testimony offered through defendants' representatives on those issues, describing various credits made available to Magic for its assistance in the construction and operation of the Facility. Magic's operations begin when it picks up waste from its customers, typically charging them by the ton, with some additional hauling fee. Magic is then required to dispose of those materials. If Magic was required to dispose of solid waste at other types of facilities, it would ordinarily be charged a fee,

based on the weight of the materials in question. Those fees could range from \$20 to \$50 per ton charged by various landfills. The fees charged by a county facility in Atlantic County are in the area of \$80 per ton. At the Pleasantville Facility, however, Magic was charged not by the ton, but by the railcar. While the Facility was operating, the railroad allowed Magic a number of credits against those charges.

Magic supplied the materials used to construct the building and its employees completed the actual construction. That was done based on an agreement between Magic and J.P. Rail, which was not reduced to writing. J.P. Rail was charged \$100,000 for the building. That \$100,000 obligation was satisfied by credits given to Magic by J.P. Rail against the monies that would otherwise be charged to Magic for the shipment of solid waste once the Facility was operating. Those credits were in the amount of \$1000 per railcar. The \$100,000 obligation had essentially been satisfied through those credits by the time the Facility was closed.

Similarly, Magic's employees handled the actual transloading of materials all during the time the Facility was operating. Materials were brought to the Facility in Magic's trucks and were presumably dumped on the floor by Magic's drivers. Magic's employees extracted materials from the waste that had been dumped on the floor. The equipment used in the transloading process was owned by Magic. Magic's employees operated all of that equipment, including the excavator which was used to move waste from the floor into railcars. Magic's employees, however, were not involved in the movement of railcars into or out of the Facility. That activity was handled by other individuals, apparently employed directly by the railroad.

Defendants acknowledged that the actual transloading of waste was handled entirely by Magic's employees, but indicated that was done under the direction and control of the railroad, through Mr. DeClement. Defendants all indicated that railroad would ordinarily have charged Magic fees for the transloading of the materials onto its railcars. In essence defendants indicated those fees were waived in exchange for the equipment and services provided by Magic. This court accepts defendants' description of that financial arrangement.⁶ By the same token, it is apparent some different arrangement would be necessary if other waste haulers were to use the Pleasantville Facility, as suggested by defendants, at least with respect to waste brought by those other waste haulers.

NJDEP has questioned defendants' description of just what occurred at the Pleasantville Facility. It is entirely understandable that NJDEP was skeptical of the version of events presented by defendants, suggesting Magic had a very limited role in the development and operation of the Facility. A number of circumstances indicated that Magic played a substantial part in the decision to proceed in Pleasantville. J.P. Rail and Magic had worked together in Mullica Township, in an attempt to develop what would be a solid waste transfer station on property owned by Mr. Waszen and leased to the railroad. An initial contact with Pleasantville was made by Mr. Waszen and one of his employees. In addition, there clearly have been some inconsistencies in the positions taken by defendants over time. Correspondence forwarded to NJDEP by the railroad's attorneys in January 2006 represented that "[n]either Steve Waszen nor his related

⁶ The practice of charging a loading fee is apparently recognized in the industry. See Judge Hayden's description of the role of shippers and loading agents at the various facilities at issue in N.Y., Susquehanna. At those facilities, transloading was handled by loading agents. The shippers paid loading fees to the railroad, which in turn paid the loading agent.

companies are involved in this site in any way.”⁷ Mr. DeClement executed a certification to be filed in this matter in April 2007, describing Logistics as the loading agent for the Facility and indicating that “[t]he loading agent (Logistics) uses its own employees.”⁸ Defendants’ election not to document their agreement as to the construction of the building was also suspicious. From the court’s perspective, it would be entirely appropriate to conclude that this Facility was the result of a type of joint venture entered into by J.P. Rail and Magic, at least during the period of construction and initial operation. By way of example, it is not at all clear that the railroad would have elected to proceed with the project, but for Magic’s willingness to arrange for the construction of the building, and to provide both equipment and personnel to handle the transloading of waste during the initial stages of operation.

This court is satisfied, however, that J.P. Rail has retained control over the Facility itself and any activities that occur at the Facility. Magic did have the right to be reimbursed for the construction of the building, but that has apparently occurred. On a day to day basis, Magic was permitted to handle the actual transloading process, in lieu of being charged a separate loading fee. There is no indication, however, that the railroad would be prohibited from altering that arrangement at anytime. Assuming operations resume, the railroad could presumably elect to acquire its own equipment and to hire its own employees to handle the transloading process at anytime, charging Magic and any other waste haulers who use the Facility a loading fee. Alternatively, the railroad might elect to contract with a third party to perform those functions.

⁷ See Exhibit P 53 in evidence.

⁸ See Mr. DeClement’s certification of April 17, 2007.

Alleged Violations of the 2D Regulations

NJDEP claims there were a variety of violations of the 2D Regulations during the time the Facility was operating, justifying the closure of the facility until defendants have established their willingness and ability to comply, irrespective of Magic's involvement in the operation. NJDEP's complaint alleged violations of nine separate sections of the 2D Regulations.⁹ Those claims were also framed by correspondence forwarded to J.P. Rail by NJDEP prior to the filing of suit.¹⁰ The proofs at trial were primarily presented through Ms. McPeak, an NJDEP employee who visited the Facility frequently, particularly when it was operating.

There are separate provisions of the regulations which apply to railroads which transport waste exclusively in sealed containers and those whose operations involve solid waste tipping. This Facility was constructed for solid waste tipping and would therefore be subject to the latter provisions, appearing at N.J.A.C. 7:26-2D-1(d). There are twenty seven separate subsections to that portion of the regulations. NJDEP presented proofs as to a limited number of those subsections. Those proofs will be reviewed, with reference to the particular subsections at issue. There are a variety of issues presented as to the proper interpretation of the regulations and as to just what occurred at this Facility.

N.J.A.C. 7:26-2D.1(d)(1) requires that all processing of materials, including storage, occur within the confines of an enclosed building that complies with the provisions of the Uniform Commercial Code (hereinafter "UCC"). That section of the regulations raises several discrete issues. Plaintiff has suggested that the building constructed by Magic does not comply with the UCC, but did not offer any convincing

⁹ See paragraph 38 of the complaint.

¹⁰ See Mr. Skacel's letter of February 10, 2006, Exhibit P57 in evidence.

proofs on that issue. (Defendants' witnesses relied on the fact that the plans for the building had been approved by an architect.) One could argue that the building, as constructed, is not fully enclosed. As already noted, it is open where the tracks enter and leave the building. The gate at one side of the building does not extend to the roof, leaving a substantial opening even when the gate is closed. This court is not convinced, however, that the building is not adequately "enclosed" to comply with the regulation in question. It is clear, however, that some sorting and storage of materials did occur outside the building itself, in violation of the regulation. (See, for example, photographs P21, P22 and P32 in evidence, depicting either metals or cardboard being moved out of the area of the building. Materials that were extracted were regularly placed in containers outside the building, at least for some limited time.)

N.J.A.C. 7:26-2D.1(d)(2) and (3) require all facilities to insure the proper containment, collection and disposal of waste water, in part by having "concrete or equivalent" tipping floors and ramps. Ms. McPeak questioned the adequacy of the defendants' system dealing with waste water, noting that a number of drains had been removed, at least for some period of time. As a general matter, this court saw no reason to question Ms. McPeak's testimony as to her observations at the Facility, or her own perspective on the dispute as to defendants' compliance. By the same token, the regulation does not provide any clear, objective standard by which to measure compliance with respect to this issue. Plaintiff simply did not establish a violation of that subsection of the regulations.

N.J.A.C. 7:26-2D.1(d)(4) requires that the operator clean each area where waste has been deposited "within each 24 hour period." Ms. McPeak noted that waste was

sometimes left on the tipping floor at the end of the day. That is not necessarily inconsistent with the specific terms of the regulation which does not specify when during the day the area is to be cleaned. Plaintiff did not establish a violation of that subsection of the regulations.

N.J.A.C. 7:26-2D.1(d)(7) requires implementation of “methods of effectively controlling dust... to prevent migration outside the enclosed building and off-site.” Ms. McPeak described defendants’ method of controlling dust as a “garden hose,” presumably used to water any area where dust might be generated. Defendants disputed that description, suggesting only that the hose that was used was somewhat larger than a garden hose. It is clear defendants did not have any dust suppression system in place when the Facility first began operating, and never implemented any sophisticated dust suppression system. By the same token, the regulation does provide any objective standard for determining whether or not a system which is in place is “effective.” Plaintiff did not establish any ongoing violation of that subsection of the regulations.

N.J.A.C. 7:26-2D.1(d)(9) requires that an adequate water supply and adequate fire-fighting equipment are to be maintained or be readily available. Ms. McPeak questioned the adequacy what ever arrangements were initially made for fire suppression, but her testimony on that issue was based on what others had told her. She also appeared to concede that an appropriate fire suppression system was ultimately in place. Mr. DeClement testified that the Facility was inspected by the Pleasantville fire inspector who was apparently satisfied with what was presented. Plaintiff did not establish an ongoing violation of that subsection of the regulations.

N.J.A.C. 7:26-2D.1(d)(11) requires that each facility “shall operate certified scales” for certain reporting requirements established under other regulations. Ms. McPeak noted there were no truck scales at the Facility. Defendants noted that Magic was permitted to use truck scales owned by another business located in the immediate area, which was involved in the transloading of other materials with the railroad. The regulations do not require that the scales be located at the facility itself. Plaintiff did not establish a violation of that subsection of the regulations.

N.J.A.C. 7:26-2D.1(d)(12) provides that facilities on-site roadways and storage areas shall have concrete or asphalt paving “in those area subject to vehicle loading and unloading activities.” Ms. McPeak noted that the roadway was not paved. Unfortunately, in the circumstances presented here is unclear just how to define what should be considered “on site.” This Facility is located on one portion of a property owned by J.P. Rail, apparently used for a variety of transloading activities apart from the transloading of solid waste that occurs at the building constructed by Magic. While the road leading to the building may be unpaved, the loading and unloading activities at issue here generally occur in or around the building. Plaintiff did not establish a violation of that subsection of the regulations.

N.J.A.C. 7:26-2D.1(d)(21) provides that with the exception of certain materials stored in sealed containers nonputrescible solid waste shall not remain at the rail facility for more than 10 days. Ms. McPeak’s testimony indicated that had occurred, at least with respect to materials that had been extracted from the materials initially placed on the tipping floor. There were apparently times when materials remained at the facility for as

long as 20 days. It does appear there were some violations of that subsection of the regulation.

N.J.A.C. 7:26-2D.1(d)(23) provides that NJDEP's representatives have the right to enter and inspect any building or other portion of the rail facility at any time. It also provides NJDEP has the right to review and copy all records which are required to be maintained by state or federal law. N.J.A.C. 7:26-2D.1(d)(27) also deals with recordkeeping and NJDEP's right to inspect documents. Ms. McPeak indicated that certain O&D forms were not maintained when the Facility was first operating. She also noted that records were ultimately kept at Mr. DeClement's offices, a substantial distance from the facility and were not readily accessible when she visited the Facility. While the regulations might be interpreted as requiring all records to be kept at the Facility itself, they are also subject to different interpretations. Plaintiff did not establish an ongoing violation of those subsections of the regulations.

By way of summary, the court has concluded there were several violations of the 2D Regulations while the Facility was operating, generally involving the processing or storage of materials outside the building. By and large, however, plaintiff has failed to establish there were any substantial violations of those regulations which posed a specific threat to public health or safety.

Analysis—Preemption

As already noted, a number of courts and the STB have addressed the questions of whether and how ICCTA preempts state regulation of the processing of solid waste which occurs as a part of the transloading process, offering somewhat different perspectives on those questions. The issues presented are troubling, as suggested by the

detailed and somewhat conflicting analyses that have been presented. The decisions in Hi Tech Trans., LLC, J.P. Rail, Inc., and N.Y., Susquehanna suggest the issue may turn on a fact sensitive analysis, focusing on the issues of ownership or control. The STB's decision in New England Transrail LLC suggests the issue may turn on the particular activity involved. All those decisions have been considered. Indeed, in appropriate circumstances, this court could defer to the analysis offered by any one of the courts in question, or to the STB. It is also clear, however, that this court is not bound by those decisions. See Dewey v. R.J. Reynolds, 121 N.J. 69, 80 (1990) (holding that circuit court decisions should be afforded due respect by state courts, but are not binding on them); Glukowsky v. Equity One, 180 N.J. 49, 71 (2004) (holding that federal court decisions are entitled to "respectful consideration in the interest of judicial comity," but are not binding on state courts); Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) (clarifying that a state that follows a circuit court's interpretation of federal law is doing so "because it chooses to and not because it must."). See also Glukowsky, 180 N.J. at 64 (holding that the interpretation of a statute by a federal agency responsible for enforcing that statute is entitled to substantial deference).

In addressing plaintiff's request for the issuance of a preliminary injunction, this court adopted a very restrictive view on the issue of preemption, concluding in simple terms that ICCTA should not be interpreted as preempting state regulation of the processing of solid waste when that occurs as a part of the transloading process. That perspective appears to be consistent with Commissioner Mulvey's dissent in New England Transrail LLC, focusing on the authority and responsibility vested in the states with respect to the handling of solid waste. Under that type of analysis, even regulating

through permitting would be permitted. From this court's perspective, the processing of solid waste is qualitatively different from the handling of other materials more typically involved in the transloading process. In that context it is reasonable to suggest that the transloading of solid waste should be considered "transportation to rail" rather than "transportation by rail" irrespective of the identity of the individuals or entities involved in the transloading process, at least when it involves the type of dumping and extraction or segregation of materials involved here. All processing of solid waste, even that performed by a railroad's own employees, would be subject to state regulation, including permitting. (An entirely different analysis might be appropriate where solid waste is being transported in sealed containers and is not exposed to the environment. That circumstance is not presented here.) From that perspective, the type of fact sensitive and case specific analysis suggested by Hi Tech Trans., LLC, J.P. Rail Inc. and N.Y., Susquehanna may not be necessary. The STB's focus on specific activities such as shredding may be misplaced. In the end this court is not convinced that Congress intended the preemption provisions of ICCTA to extend to the processing of solid waste. Similarly, this court is not convinced Congress intended that the types of distinctions that have developed in the various reported decisions dealing with the matter would be determinative on that issue.

In Ridgefield Park the New Jersey Supreme Court concluded that ICCTA preempted permitting, with respect to local zoning and land use regulation, while permitting more limited regulation pursuant to police powers. That opinion is obviously binding on this court, and could suggest a different result than that noted above. That opinion, however, did not deal with the processing of solid waste. It did not deal with the transloading process. Indeed, the STB's recent decision in New England Transrail LLC

suggests that agency has concluded that the states may be able to regulate railroad facilities involved in the processing of solid waste, even through permitting, in appropriate circumstances. The STB was clearly aware of the body of case law indicating that the states' police powers were not entirely preempted by ICCTA, and cited the opinion in Ridgefield Park in a footnote to the portion of its opinion dealing with that issue. New England Transrail, 2007 STB LEXIS 391, *21 n.43. It was in that context that the STB indicated that "[i]f NET chooses to conduct the shredding activities, they would be subject to the full panoply of state and local regulation," clearly suggesting that state permitting of the transloading operation would be appropriate in that circumstance. 2007 STB LEXIS 391 at *36.

In other circumstances, this court might have been required to resolve the question of whether ICCTA does in fact preempt state regulation of the processing of solid waste by rail carriers through permitting. That issue, however, is not presented here. As noted above, New Jersey's regulatory scheme, as implemented through NJDEP's own regulations, does not subject rail carriers to the permitting process. The permitting issue, under SWMA, is not before this court.

NJDEP has attempted to regulate this Facility based on its claim that it is, in essence, a solid waste transfer station being operated by Magic. NJDEP's concerns as to that issue are understandable, but the facts established at trial simply do not support that claim. In the end, this court is satisfied that J.P. Rail has retained control over the Facility itself and the transloading process, and that it is appropriate to treat this as a railroad facility exempt from permitting under the regulations in question.

This court is satisfied, however, that the State's effort to regulate this Facility through the application of the 2D Regulations is not preempted by ICCTA. There are a number of perspectives that can be offered on that issue. First, and most basically, this court is not convinced that ICCTA should be interpreted as preempting state regulation of railroads which elect to become involved in the processing of solid waste. On that basis alone, the 2D Regulations would appear to be an appropriate exercise of New Jersey's authority and responsibility in that area.

J.P. Rail has owned and used the Pleasantville property for a substantial period of time. This court has concluded that J. P. Rail did retain control of the Facility and the transloading process while the Facility was operating, and that it is generally appropriate to treat this as a railroad operation. None of that necessarily limits the State's ability to regulate the Facility. The opinions in Hi Tech Trans., LLC and J.P. Rail Inc. did prohibit specific transloading operations, based on the involvement of entities other than the railroads, on the theory that those operations involved "transportation to rail" rather than "transportation by rail." Those opinions did not address what regulation would have been permitted, if only the railroads were involved in those operations. At the least, it would appear appropriate to treat the 2D Regulations as the type of limited regulation permitted under the analysis in Ridgefield Park. That is not necessarily inconsistent with the STB's decision in New England Transrail LLC, which does recognize some limits on ICCTA preemption, even in the absence of the type of activity which would subject a railroad to "the full panoply" of state and local regulation.

Accordingly, this court recognizes NJDEP's right to regulate the Pleasantville Facility pursuant to the 2D Regulations but is not convinced NJDEP has the right to

prohibit operations at the Facility based either on Magic's involvement in the transloading process or violations of the regulations themselves. NJDEP did establish there were some violations of those regulations at the Pleasantville Facility while it was operating. Those violations, however, were relatively limited and would not justify an order prohibiting continued operations. The entry of such an order would clearly be problematic. Portions of the regulations in question govern the actual transloading operation. It is not at all clear how J.P. Rail would establish it was in full compliance with the regulations if it is not permitted to operate. In any event, in the context of this case, the entry of an order prohibiting operation until there was full compliance with the regulations would be the equivalent of requiring permitting, which is not appropriate under the regulations themselves.

CAFRA

New Jersey has attempted to regulate the processing of solid waste through SWMA, but has not required railroads to obtain a permit before operating a transloading facility which processes solid waste. NJDEP has also asked the court to prohibit the operation of this Facility under CAFRA. CAFRA was enacted to regulate development within certain coastal areas and does that primarily through the permitting process. See, for example, N.J.S.A.13:19-5 through N.J.S.A.13:19-6. The property at issue here appears to be within the areas which are subject to regulation under CAFRA. There is no indication the state has acted to excuse railroads from permitting under CAFRA, as had occurred under SWMA with the enactment of the 2D Regulations in 2004. In that context, one could argue that defendants should not have proceeded with the construction of this Facility without an appropriate permit under CAFRA.

This court is satisfied, however, ICCTA does preempt the type of permitting generally required under CAFRA, with respect to railroad property. Unlike SWMA, CAFRA does not regulate a specific activity. It regulates the development of property within certain specific areas. It is akin to the zoning and land use regulations at issue in Ridgefield Park. This court is satisfied the New Jersey Supreme Court's opinion in that case bars the state from requiring the issuance of permits prior to the development of railroad property located within areas that are otherwise subject to CAFRA. Plaintiff has not established a right to injunctive relief under CAFRA.

Conclusion

The preliminary injunction which was previously entered will be vacated. J.P. Rail will be permitted to reopen the Facility, without prior approval from NJDEP, subject to one specific condition related to the controversy presented in this litigation. To the extent J.P. Rail elects to involve Magic in the transloading of materials at this facility, that is to be done pursuant to a written agreement clearly defining Magic's role and the financial arrangements between Magic, J.P. Rail and SRNJ Logistics. NJDEP is to be provided with a copy of any such agreement, as soon as the agreement has been executed. Modifications of any such agreement are also to be provided on an ongoing basis.

The operation of the Facility will be subject to the 2D Regulations. To the extent J.P. Rail elects to resume operations, NJDEP will have the right to enforce those regulations prospectively. NJDEP's representatives shall have the right to visit and inspect the Facility at any time. To the extent NJDEP concludes defendants do violate the 2D Regulations in the future, it may proceed against defendants under the enforcement provisions of SWMA. See N.J.S.A. 13:1E-9, authorizing NJDEP, through the

commissioner, to issue orders, institute civil proceedings, levy civil administrative penalties, bring actions for civil penalties, and to petition the Attorney General to bring criminal actions. Depending on the specific action taken, those matters may be pursued in municipal court or in the trial division of Superior Court. Alternatively, other actions will be subject to review through the Office of Administrative Law, and on appeal to NJDEP itself and the Appellate Division of Superior Court.

Judgment will be entered accordingly.

Beveridge & Diamond, P.C.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35090

JP RAIL, INC. – LEASE AND OPERATION EXEMPTION – NAT INDUSTRIES, INC.

**PENNSYLVANIA WASTE INDUSTRIES ASSOCIATION'S
PETITION TO REVOKE EXEMPTION
OR IN THE ALTERNATIVE TO STAY EFFECTIVENESS OF EXEMPTION**

EXHIBIT C

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(856) 234-6800
Attorneys for Defendants J.P. Rail, Inc. d/b/a Southern Railroad
Company of New Jersey and SRNJ Logistics

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THE STATE OF NEW JERSEY, NEW	:	
JERSEY DEPARTMENT OF	:	CIVIL ACTION NO. 06-cv-1603
ENVIRONMENTAL PROTECTION,	:	
	:	
Plaintiff,	:	
vs.	:	
	:	
	:	BRIEF ON BEHALF OF DEFENDANTS
J.P. RAIL, INC., a	:	J.P. RAIL, INC. D/B/A SOUTHERN
Pennsylvania Corporation	:	RAILROAD COMPANY AND SRNJ
(d/b/a SOUTHERN RAILROAD OF	:	LOGISTICS IN OPPOSITION TO
NEW JERSEY, SRNJ LOGISTICS,	:	REQUEST FOR INJUNCTIVE RELIEF
and MAGIC DISPOSAL, INC.,	:	
	:	
Third-Party Defendants.	:	

shipments) or unloaded from railcars to trucks for delivery to their final destination (in the case of inbound shipments). In the case sub judice, SRNJ proposes to transload lumber, (palletized) finished goods, recyclables and other dry goods to railcars bound for destinations in interstate commerce, including the State of Ohio. See SRNJ Certification a paras. 12-15.

SRNJ is a well managed railroad that is an authorized common carrier of freight with the federal Surface Transportation Board ("STB"). See SRNJ Certification paras. 5,6 and 25. SRNJ does not have a history of regulatory problems, environmental or otherwise. See SRNJ Certification at para. 25. SRNJ is interested in opening and maintaining an efficient, clean, and legally compliant transloading facility. Id. at para. 26 and SRNJ 2D Certification. SRNJ is the owner of the property and the primary party with an interest in the Pleasantville facility. See SRNJ Certif. at para. 8. Contrary to the DEP's allegations, the only relationship that SRNJ has with Magic Disposal, Inc. is that Magic, like all other properly licensed and legally operating haulers, may utilize the facility as SRNJ's customer. See SRNJ Certif. at _24.

The facility and operations

As stated above, SRNJ designed the facility to operate as a railroad transloading facility. The facility will not handle

liquid or hazardous materials from all licensed and authorized shippers. SRNJ will transload materials such as lumber, finished goods, and recyclables, which includes construction and demolition debris. See SRNJ Certification at paras. 12-15.

For each type of commodity, SRNJ uses the appropriate railcar for transportation. For example, finished goods generally use boxcars, lumber providers use lumber flatcars, construction and demolition material is shipped in tarped gondola cars. See SRNJ Certif. at para. 14.

Regarding the actual loading of materials to be shipped, the shipper arranges to have the appropriate cars arrive at the facility to be loaded or unloaded. See SRNJ Certification at para. 15. Once the cars arrive, the shipper is instructed to bring the commodity to the site to be appropriately prepared for shipment. If the goods to be shipped are palletized, SRNJ will perform the loading will be by forklift.

As construction and demolition waste arrives to be shipped, the material is placed on the facility's tipping floor. See SRNJ Certification at para. 16. Because SRNJ will ship these materials in gondola railcars, all metals are removed prior to loading and inappropriate sized materials are segregated and prepared for shipment to the appropriate

destinations.⁴ Id. SRNJ must perform this kind of sorting and separation in order to avoid damage to its railcars, such as puncture damage from steel bars or poles. Id. This type of process is specifically described in N.J.A.C. 7:26D-20.1(d)(1). Id.

The site and facility are described in detail on the drawings prepared by SRNJ and provided to the City of Pleasantville. See SRNJ Certification at para. 18. The drawings clearly and accurately describe the location of all of the improvements to the property.

The role of SRNJ and its transloading agent

The Pleasantville facility is a railroad facility operating under SRNJ's complete direction and control. See SRNJ Certification at para. 8. The entity responsible for environmental compliance and liability is SRNJ. In providing transportation services to shippers, railroads commonly engage specialized firms with transloading expertise, as well as brokers to market services and aid in managing traffic flows. See Id. In this case, SRNJ hired SRNJ Logistics to perform the actual transloading.

⁴ Gondola cars are railcars that typically have low sides and ends, a solid floor and no roof. They are used mainly for transportation of commodities not requiring protection from weather. Removable covers and other attachments are available for specialized services.

SRNJ contracted with SRNJ Logistics ("Logistics") as an agent of the railroad. As the railroad's agent, Logistics will comply with all applicable federal and state regulations regarding the loading of railcars and is under the direction and control of SRNJ. See Id. at para. 11. As described at length in the argument section below, SRNJ retains full authority and control over the transloading operations at the facilities. Logistics cannot use the Facility for any other purpose including the storage of trucks and trailers.

SRNJ will locate shippers and ensure that their freight will move from the facility to a given destination. See SRNJ Certification at paras. 12-15. SRNJ will match shippers with the available railcars, ensuring that the facility does not accept more freight than it can timely handle, and likewise ensuring that railcars do not remain idle. Shippers cannot simply arrive unannounced at the facility; they must first obtain a reservation. Again, this is to ensure that the appropriate railcars and capacity are available. SRNJ will also market its facility to shippers under the SRNJ name. No broker will be utilized in connection with the operations at this facility.

Beveridge & Diamond, P.C.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35090

JP RAIL, INC. – LEASE AND OPERATION EXEMPTION – NAT INDUSTRIES, INC.

**PENNSYLVANIA WASTE INDUSTRIES ASSOCIATION'S
PETITION TO REVOKE EXEMPTION
OR IN THE ALTERNATIVE TO STAY EFFECTIVENESS OF EXEMPTION**

EXHIBIT D

ORIGINAL

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION-ATLANTIC COUNTY

DOCKET NO. ATL-C-41-06

THE STATE OF NEW JERSEY, :

NEW JERSEY DEPARTMENT OF

ENVIRONMENTAL PROTECTION, :

Plaintiffs,

vs. :

J.P. RAIL, INC., et al.,

Defendants. :

- - - - -

DEPOSITION OF DAVID M. DeCLEMENT, ESQUIRE

WEDNESDAY, MAY 30, 2007

CIPOLLONI & ASSOCIATES, INC.

CERTIFIED SHORTHAND REPORTERS

1125 Atlantic Avenue - Suite 416

Atlantic City, New Jersey 08401

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1 Deposition of DAVID M. DeCLEMENT, ESQUIRE,
2 taken in the above-entitled matter before Gerri
3 R. Troiano, a Certified Shorthand Reporter
4 (License No. 1274) and Notary Public of the State
5 of New Jersey, taken at the Law Offices of David
6 M. DeClement, 55 Simpson Avenue, Pitman, New
7 Jersey, on WEDNESDAY, MAY 30, 2007, commencing at
8 10:30 a.m.

1 A P P E A R A N C E S:

2
3 STATE OF NEW JERSEY

4 DEPARTMENT OF LAW & PUBLIC SAFETY

5 BY: JON C. MARTIN, DAG

6 R.J. Hughes Justice Complex

7 25 Market Street

8 Trenton, New Jersey 08625

9 Counsel for the Plaintiffs

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11 CAPEHART & SCATCHARD, P.A.

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13 Laurel Corporate Center

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15 Mt. Laurel, New Jersey 08054

16 Counsel for Defendants J.P. Rail
17 and SRNJ Logistics

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19 Law Offices of Frank G. Olivo, P.C.

20 BY: FRANK G. OLIVO, ESQUIRE

21 460 S. White Horse Pike

22 Hammonton, New Jersey 08037

23 Counsel for Defendant Magic
24 Disposal, Inc.

I N D E X

WITNESS	EXAMINATION BY	PAGE
DAVID M. DeCLEMENT, ESQ.	MR. MARTIN	5

E X H I B I T S

NUMBER	DESCRIPTION	PAGE
J-1	Management Order	5
P-1	Packet of 8 Magic Disposal invoices	5

NOTE: (EXHIBITS J-1 and P-1 ANNEXED TO
TRANSCRIPT.)

1 A. Normal employee.

2 Q. Now SRNJ Logistics, is that also a corporation?

3 A. Yes.

4 Q. And when was SRNJ Logistics established?

5 A. Can I refer back to one of these for a second?

6 Q. Sure.

7 A. I believe it was formed in the fall of '05.

8 Q. Was that, was the formation of SRNJ related at
9 all to you becoming director of freight operations?

10 A. No.

11 Q. As I understand it you have a 50 per cent
12 ownership interest in SRNJ Logistics?

13 A. Yes.

14 Q. And have you always had that 50 per cent
15 interest since it was established?

16 A. Yes.

17 Q. And how has the other 50 percent?

18 A. J.P. Rail.

19 Q. Just describe for me as briefly as you can what
20 it is that SRNJ Logistics does.

21 A. They do the, they do the data compilation and the
22 tracking and coordination of car movements and freight
23 transfers.

24 Q. From the time SRNJ Logistics was established
25 until now how many different people have actually worked

Beveridge & Diamond, P.C.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35090

JP RAIL, INC. – LEASE AND OPERATION EXEMPTION – NAT INDUSTRIES, INC.

**PENNSYLVANIA WASTE INDUSTRIES ASSOCIATION'S
PETITION TO REVOKE EXEMPTION
OR IN THE ALTERNATIVE TO STAY EFFECTIVENESS OF EXEMPTION**

EXHIBIT E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN COUNTY
CIVIL ACTION NO. 05-275

IN THE MATTER OF:

ORIGINAL

J.P. RAIL, INC.

Plaintiffs,

-v-

NEW JERSEY PINELANDS COMMISSION

Defendants,

-v-

MAGIC DISPOSAL, INC., et als.,

Third Party Defendants:

Deposition Testimony Of: THOMAS A. COLLARD

Date: Wednesday September 14, 2005

GUY J. RENZI & ASSOCIATES

824 West State Street

Trenton, New Jersey 08618

609-989-9199 or 800-368-7652 (TOLL FREE)

www.renziassociates.com

Page 2

Computer-aided transcript of
deposition testimony of THOMAS A. COLLARD
taken stenographically in the above-entitled
matter before LINDA L. PSYLLOS, a Certified
Shorthand Reporter and Notary Public of the
State of New Jersey, at the law offices of
Capehart & Scatchard, 8000 Midlantic Drive,
Suite 300, Mount Laurel, New Jersey on Wednesday,
September 14, 2005 commencing at 10:00 a.m.

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Attorneys for the Third Party

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(609) 641-1166

BY: TIMOTHY PATRICK MAGUIRE, ESQ.

(VIA TELEPHONE)

Attorneys for Township of Mullica

1 Q. All the inbound shipments come over
2 that bridge?

3 A. Everything into South Jersey, there
4 is only one way into South Jersey.

5 Q. What about the outbound, are there
6 other directions to go or would it also have
7 to go over that bridge?

8 A. One bridge.

9 Q. Were you involved in selecting the
10 Elwood site?

11 A. I was not directly involved in
12 selecting the Elwood site, no.

13 Q. Who handled that?

14 A. I was approached by solid waste
15 producer that was looking for a way to ship
16 waste by rail. I had no property that the
17 railroad owned that was sufficient size and
18 knew of no property adjacent to the railroad
19 that was for sale of a such sufficient size,
20 so I told these folks that while I would like
21 to be able to help them, I couldn't, but I
22 would continue looking.

23 In the meantime, David DeClement
24 called the owner of our company and
25 introduced himself and he was at this time

Page 38

1 working for the same solid waste company and
2 we looked around for additional sites and
3 between the solid waste producer and David
4 they came up with the site in Millville.

5 Q. Who was the solid waste producer?

6 A. Magic Disposal.

7 Q. And when did Mr. DeClement call the
8 owner, to your knowledge?

9 A. I don't have knowledge of that.

10 Q. When did you first learn of this?

11 A. I didn't know that the initial call
12 was made to Joe Petaccio until I had a
13 meeting with Joe on Monday afternoon.

14 Q. Monday of this week?

15 A. Yeah.

16 Q. I will ask you in more detail, how
17 did you first become involved in the Elwood
18 site?

19 A. You know, I don't remember the
20 exact sequence of events. I had met with
21 Magic Disposal and looked at a piece of
22 property along our railroad in Egg Harbor
23 Township that I determined was not going to
24 work and I had met with them, I think three
25 times. Then I don't frankly recall how I

1 A. Yes.

2 Q. What was your understanding?

3 A. That the predominance of his waste
4 was commercial waste originating in the
5 Atlantic City, Pleasantville, Egg Harbor
6 area.

7 Q. Is commercial waste a term of art
8 to distinguish it from municipal waste?

9 A. It is a term of art to separate it
10 from household waste, that's typically picked
11 up by municipality.

12 Q. Did you have an understanding of
13 the specific industries that would be
14 producing that waste?

15 A. No, it doesn't make any difference
16 to me.

17 Q. Did Mr. Waszen give you a history
18 of his own company in your discussions with
19 him?

20 A. No. These were, discussions that
21 we had at that point were merely
22 introductions and very preliminary
23 information.

24 Q. Did you carry in your own mind at
25 this meeting an idea of the size of the

1 Q. And just, the five cars a day, 25
2 cars a week, 50 weeks, is that what you were
3 looking at?

4 A. Yes.

5 Q. Now, also the, was it still your
6 understanding that this was going to be
7 commercial waste as you termed it?

8 A. Yes, commercial waste which
9 includes demolition materials, predominantly
10 demolition materials.

11 Q. That is construction demolition
12 materials?

13 A. Yes.

14 Q. Up until this point, had you
15 discussed the necessity of obtaining any type
16 of regulatory approvals for this operation?

17 A. I don't remember when the Elwood
18 site was brought to my attention, I don't
19 have a good time frame of that, but at some
20 point in our conversations and we had several
21 different conversations, we decided that
22 because the railroad wanted to have a
23 transload site and because of the preemption
24 issue, it made sense for the railroad to
25 operate and control the facility.

1 switch on my railroad for about 55 thousand
2 dollars but this is a high speed passenger
3 line and more than half of the cost of that
4 is in the signaling system as necessary.

5 Q. So this would definitely be an
6 outlay as such by J.P. Rail in connection
7 with developing this site?

8 A. Yes.

9 Q. In contemplating that outline, did
10 you do any kind of an analysis of the revenue
11 that would be projected to develop from this
12 site in order to ensure that this was a
13 prudent expenditure?

14 A. Did we do a formal analysis, no.
15 Did I do back of the envelope calculations,
16 yes.

17 Q. Do you have the envelope?

18 A. No. But if you think in terms of
19 the number of cars per year, what is now
20 looks to be something that would be
21 developing to 10 to 15 cars per day, it
22 doesn't take an awful lot to figure you will
23 get that back.

24 Q. For you?

25 A. Yes.

1 Q. But I think for me you have to kind
2 of help me out. Take me through that
3 analysis you did. I know it may seem like
4 second nature to you, I want to understand
5 how you made a determination, I assume your
6 boss agreed with this that how you made a
7 determination that this would be something
8 that would justify the expenditure of over
9 half a million dollars?

10 A. Well, I would need sometime to sit
11 down and reconstruct the annual revenues and
12 that gets into, frankly, our division of
13 revenue with the class one carrier which is I
14 could not disclose that information without
15 permission from the class one carrier.

16 Q. But you did do that?

17 A. Yes.

18 Q. But you did it in your head?

19 A. I did it on my handy calculator
20 which no longer works but it is right there,
21 works occasionally, other times it is all
22 eights.

23 Q. What did you put in your calculator
24 to get a number?

25 A. I developed the number of carloads

Page 110

1 per year.

2 Q. How did you arrive at that?

3 A. I used, I did it at ten carloads
4 per day and at 15 carloads per day for five
5 days a week, times 52 and then I was able to
6 calculate the revenue which would we would
7 get and develop a rate.

8 Q. So is this assuming both inbound
9 and outbound car loads because I think you
10 said that their commitment was to have four
11 to five carloads per day of solid waste
12 material?

13 A. They started out, the initial
14 discussions and the discussions of starting
15 this facility is with four to five carloads
16 of construction and demolition per day, but
17 the use of this facility is going to grow,
18 and we are going to be handling municipal
19 solid waste as well as construction and
20 demolition material and we have on record
21 that we expect this to grow, to be 10 to 15
22 carloads per day, and there has been some
23 confusion about that, the difference between
24 the four to five cars and the 10 to 15 cars.
25 The four to five cars is day one what we are

1 going to bring in. The 10 to 15 cars is
2 what we think we are going to be able to
3 reasonably develop.

4 Q. Again, in determining whether or
5 not this was a prudent investment and course
6 for JP Railroad to take you made the
7 assumption of 10 to 15 carloads per day?

8 A. Yes.

9 Q. What number did you plug in perfect
10 carload?

11 A. I cannot give you that information
12 because that information is part of an
13 agreement with the Norfolk Southern railroad
14 and they would have to give you the
15 information.

16 Q. But it's information that you know,
17 you readily know in your mind to do this
18 calculation?

19 A. Yes.

20 Q. I am not going to press you on this
21 right now we will make a determination later
22 whether or not it is worth learning that.
23 Just so I am clear, the 10 to 15 then was
24 based on Brokerage securing outbound
25 shipments of solid waste material in that

Beveridge & Diamond, P.C.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35090

JP RAIL, INC. – LEASE AND OPERATION EXEMPTION – NAT INDUSTRIES, INC.

**PENNSYLVANIA WASTE INDUSTRIES ASSOCIATION'S
PETITION TO REVOKE EXEMPTION
OR IN THE ALTERNATIVE TO STAY EFFECTIVENESS OF EXEMPTION**

EXHIBIT F

: ANSWER AND
: COUNTERCLAIM/THIRD PARTY
: COMPLAINT

created; and so that Federal water quality and potable federal and state water standards that are set forth by the United States and the State of New Jersey are satisfied.

15. In addition, pursuant to N.J.A.C. 7:50-6.33 and 34, development in the Pinelands National Reserve shall avoid "irreversible adverse impacts on habitats" of threatened or endangered animal species and shall avoid disturbance of wildlife habitats "that are essential to the continued nesting, resting, breeding and feeding of significant populations of . . . wildlife" in the Pinelands National Reserve.

FACTS

16. The Pinelands Commission repeats the allegations contained in the preceding paragraphs of this Answer and Counterclaims/Third Party Complaint with the same force and effect as if fully stated herein.

17. The Elwood facility site was previously a junkyard owned and operated by Perona Brothers, Inc. As the result of a fire at this property, on December 10, 1986, DEP issued a Spill Directive pursuant to N.J.S.A. 58:10-23.11f to Perona Brother's, Inc. ordering a cleanup of the site. It is not yet known whether clean up of the site has been completed. Mullica Township anticipates doing soil testing to ascertain whether there are hazardous substances in the soil at actionable levels.

18. The site was deeded to Steven Waszen, Sr. on or about October 21, 2003.

19. In 2003, Magic Disposal acting under the direction of Steven Waszen, Sr. dumped construction and demolition debris onto the Elwood facility site. As a result, Atlantic County initiated an action against Steven Waszen, Sr. and Magic Disposal, Inc. Steven Waszen, Sr. pled guilty in municipal court to illegal dumping and entered into a Consent Order with Atlantic County on December 16, 2003. A fine of \$49,000 and a cleanup

Order were issued against Steven Waszen, Sr. and Magic Disposal. Specifically, Steven Waszen, Sr. agreed that any development at the Elwood facility is subject to compliance with "all Federal laws and Codes, State Laws and Codes, County Laws and Codes, Municipal Ordinances and Codes, including but not limited to any Laws and Codes by the New Jersey Pinelands Commission regulations." The Order further provided that "[n]o additional solid waste or recyclable materials may be brought to the property for storage, processing or other purposes by any party. This prohibition shall include materials dumped on the ground." The Order also required that no further activity, except for cleanup activity, take place at the Elwood facility.

20. The Elwood facility site is presently the subject of ongoing construction and operation activities by Plaintiff and Third-Party Defendants. A site inspection on May 25, 2005 by the Pinelands Commission revealed that there has been clearing of wooded area in excess of 5,000 square feet and stockpiling of rock or gravel at the Elwood facility in violation of the Pinelands Act and the CMP.

21. The ongoing construction and operation of the Elwood facility by Plaintiff and Third-Party Defendants constitutes "development" as defined by the CMP, since, *inter alia*, it constitutes a disturbance of land and a material change in the external appearance of land. N.J.A.C. 7:50-2.11.

22. Prior to these development activities, no applications were submitted to the Pinelands Commission and no state, county or local approvals were obtained by the Plaintiff or the Third Party Defendants, nor have any approvals pertaining to the Elwood facility been obtained prior to the ongoing development activities. Counsel for Southern Railroad, John K. Fiorilla, Esquire, on May 11, 2005 only submitted a map to the

Corporation ("NJ Transit"), an instrumentality of the State of New Jersey, granting Trackage Rights for rail line owned by NJ Transit to Southern Railroad. Pursuant to the Agreement, Southern Railroad may contract with other industries for the construction of "freight facilities" provided that NJ Transit grants Southern Railroad a permit for this construction. Also pursuant to the Agreement, "each party" must obtain all necessary regulatory approvals. On May 6, 2005, the Plaintiff entered into a contract--containing the same terms as the Agreement--in which it accepted NJ Transit's "terms for construction of the Lica Siding Turnout" concerning the spur that would connect the existing rail line to the Elwood facility. On June 3, 2005, NJ Transit advised Southern Railroad that pursuant to the Agreement, "NJ Transit is required to seek all requisite approvals from the Pinelands Commission" and that no permit can be given and no work may proceed without this approval.

28. Based upon numerous and repeated violations of the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., and its implementing regulations, the New Jersey Department of Environmental Protection ("DEP") issued three Administrative Orders and Notices of Civil Administrative Penalty Assessments on January 27, 1999, July 17, 2000 and January 28, 2005, against Magic Disposal and Steven Waszen, Sr. Penalties totaling \$770,000 were assessed in these three documents. DEP revoked Magic Disposal's permit to operate its solid waste transfer station in Egg Harbor Township on or about March 26, 2005. Magic Disposal has continued to unlawfully operate this transfer station after its permit was revoked.

FIRST CLAIM FOR RELIEF

Beveridge & Diamond, P.C.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35090

JP RAIL, INC. – LEASE AND OPERATION EXEMPTION – NAT INDUSTRIES, INC.

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PETITION TO REVOKE EXEMPTION
OR IN THE ALTERNATIVE TO STAY EFFECTIVENESS OF EXEMPTION**

EXHIBIT G



NOTICE OF UNSAFE STRUCTURE

Permit #
Date Issued
- or -
Control #:

IDENTIFICATION

Work Site Location 16 N. FRANKLIN BLVD. Block 265 Lot 3 Qualification Code _____
PLEASANTVILLE, NJ 08232
Owner in Fee JP RAIL INC Agent _____
Address 2732 E. ANN ST Address _____
PHIL, PA 19134

To: ☒ Owner ☐ Other: _____
☐ Agent/Contractor _____

DATE OF INSPECTION: 9/17/07 DATE OF THIS NOTICE: 11/05/07

ACTION

Take NOTICE that as a result of the inspections conducted by this agency on _____ on the above property, an unsafe condition has been found to exist pursuant to N.J.S.A. 52:27D-132 and N.J.A.C. 5:23-2.32. The building or structure, or portion thereof, deemed an unsafe condition is described as follows:

SEE ATTACHED LIST

You are hereby ORDERED to:

☒ Vacate the above structure by 11/30/07
☐ Demolish the above structure by _____ or correct the above noted unsafe conditions by no later than _____

Failure to correct the unsafe condition or refusal to comply with this ORDER will result in this matter being forwarded to legal counsel for prosecution and assessment of penalties up to \$500 per week per violation. You must immediately declare to the Construction Official, your acceptance or rejection of the terms of this ORDER.

Any building or structure vacated pursuant to this ORDER shall not be reoccupied unless and until a certificate of occupancy is issued by the Construction Official.

Should you wish to contest the validity of the above action in accordance with N.J.A.C. 5:23-2.38, you may do so by filing within fifteen (15) days from the receipt of this notice a request for a hearing before an administrative law judge by contacting:

Hearing Coordinator
Division of Codes and Standards
PO Box 802
Trenton, NJ 08625-0802

If you have any questions concerning this matter, please call: 609 984-7672

By ORDER of: John F. Dotoli Date: 10/23/07
CONSTRUCTION OFFICIAL

JOHN F. DOTOLI

U.G.C. F241(4/2003)

16 N. Franklin Blvd. Pleasantville, NJ 08232

The following code references are from the International Building Code 2000, NJ Edition (IBC) and the NJ Uniform Construction Code (NJAC 5:23):

1. Submit three sets of signed and sealed construction documents for building, fire, plumbing and electrical systems. NJAC 5:23-2.15.
2. Provide signed and sealed evidence indicating approval of required inspections as referenced in NJAC 5:23-2.18.

The following code references are from the National Electrical Code 2002:

1. 110.26(A) Working space around electrical equipment
2. 110.26(D) Illumination removed
3. 225.22 Raceway need for grounded conductor
4. 250.24(A) Service grounded conductor need in service disconnect
5. 250.20(D) Grounding of separately derived system
6. 250.50 Verify grounding electrode system
7. 250.120 Equipment grounding conductor not installed
8. 408.16(F) Back-fed breaker shall be secured in place
9. 110.12(A) Close unused openings
10. 314.25 Cover need on box

State of New Jersey
Department of Community Affairs
Office of Regulatory Affairs
Post Office Box 818
Trenton, New Jersey 08625-0818

Date 11-5-07

In the Matter of: Southern Railway Facility
(J.P. Rail, Inc., Owner)
16 North Franklin Boulevard
Block 265, Lot 3
Pleasantville, New Jersey 08232

ORDER
Compliance Number:
OR-031-07

Please take NOTICE that the Department has reviewed the above referenced project pursuant to N.J.S.A. 52:27D-124k. and N.J.A.C. 5:23-4.3(f)2. which in pertinent part read as follows:

52:27D-124. Powers of the Commissioner

The commissioner shall have all the powers necessary or convenient to effectuate the purposes of this act, including but not limited to, the following powers in addition to all others granted by this act:

k. ...To supplant or replace the local enforcing agency for a specific project,...

5:23-4.3 Municipal enforcing agencies-establishment

(f) Department intervention:

2. In any case where it may find it necessary to do so, the Department may supplant or replace a local enforcing agency for a specific project.

Please take NOTICE that the Department has determined that it is in the public interest for the Department to administer and enforce the provisions of the Uniform Construction Code in connection with this project. The Department hereby assumes jurisdiction over said project.

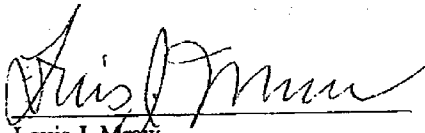
Further, it is hereby ORDERED that the City of Pleasantville turn over all plans, correspondence and other such documents pertinent to this project to the Department of Community Affairs.

Any questions regarding this ORDER shall be directed to the below listed individual:

John F. Dotoli
Office of Regulatory Affairs
Post Office Box 818
Trenton, New Jersey 08625-0818
Phone (609) 984-7672

Joseph V. Doria, Jr.
Acting Commissioner

By:


Louis J. Mraw
Supervisor
Office of Regulatory Affairs

Beveridge & Diamond, P.C.

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

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EXHIBIT H



Save trees. Go green!

Download Google Maps for mobile
Text maps to 466453

