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Via E-filing

April 17, 2008

Hon. Ann K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, SW.
Washington, DC 20423-0001

Re **STB Ex Parte No. 677, *Common Carrier Obligations of Railroads*
Testimony and Comments of Robert P. Fixter
On Behalf of Clean Earth of North Jersey, Inc.**

Dear Secretary Quinlan:

Enclosed for filing in the above-captioned docket is the **Testimony and Comments of Robert P. Fixter On Behalf of Clean Earth of North Jersey, Inc.**, submitted in advance of appearance on April 25, 2008, Panel V

The Testimony and Comments are presented in both original and PDF version in WORD format.

Additional public copies of the Testimony and Comment will be made available at the Board's hearings on April 24 and 25, 2008

Please file the Testimony and Comments, and acknowledge receipt. Thank you.

Yours truly,

_____/s/_____

Paul H. Lamboley

PHL/nd
Enc

UNITED STATES OF AMERICA
BEFORE THE SURFACE TRANSPORTATION BOARD
STB Ex Parte No. 677
COMMON CARRIER OBLIGATION OF RAILROADS
TESTIMONY and COMMENTS OF ROBERT P. FIXTER
ON BEHALF OF CLEAN OF NORTH JERSEY, INC.

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April 17, 2008

**TESTIMONY and COMMENTS OF ROBERT P. FIXTER
ON BEHALF OF CLEAN EARTH OF NORTH JERSEY, INC.**

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**TESTIMONY and COMMENTS OF ROBERT P. FIXTER
ON BEHALF OF CLEAN EARTH OF NORTH JERSEY, INC.**

CLEAN EARTH OF NORTH JERSEY, INC ("CENJ") appreciates the opportunity to appear and participate in this proceeding before the Surface Transportation Board ("Board" or "STB"). Pursuant to the Board's Notice, served February 22, 2008, 73 FR 10509, CENJ submits the testimony and comments of Robert P. Fixter, its V.P. & General Manager, in support of CENJ's appearance before the Board on Panel V, April 25, 2008, as follows:

My name is Robert P. Fixter. I am V.P. & General Manager of CLEAN EARTH OF NORTH JERSEY, INC ("CENJ"). I have been so employed since December 14, 1978 to the present. I was previously employed by S&W Waste, Inc. until its acquisition and name change by CENJ in 2001. I have personal knowledge of, and am competent to testify to, the factual information provided herein.

1. INTEREST OF CLEAN EARTH OF NORTH JERSEY, INC.

CENJ is one of eight industrial waste and soil reclamation companies owned by Clean Earth, Inc, a Pennsylvania corporation, headquartered in Hatsboro, PA.

CENJ is a RCRA Part B permitted Transfer, Storage and Disposal Facility (TSDF) that accepts hazardous and industrial waste predominately from the greater NY/NJ area for environmentally safe treatment, storage, transfer and disposal. CENJ's operations are authorized under a Hazardous Waste Facility Permit issued by the Division of Solid and Hazardous Waste of the New Jersey Department of Environmental Protection ("NJDEP") and subject to all applicable local, state and Federal laws.

CENJ's facility is located at 115 Jacobus Ave., Kearny, NJ, 07032 and lies within the North Jersey Shared Assets Area ("NJSAA") as defined in Decision No. 89, in CSX

Corp et al - Control - Conrail, Inc et al, 3 S 1 B 196 (1998) A dual-track industrial spur at CENJ's facility connects to a segment of the Meadows Industrial Track No 2, ("Meadows No 2") purchased from Conrail ("CR") by shipper, Gardner Asphalt ("GA") and over which CR provides switching service for line-haul traffic via CSX Transportation ("CSXT") and/or Norfolk Southern ("NS")

CR must by-pass CENJ's facility to provide switching service to GA for CSXT line-haul traffic, but has refused to provide switching service requested by CENJ

Rail service is efficient, cost-effective, and essential for the traffic needs of CENJ's operations For similar destinations of CENJ traffic, truck is 40% higher than rail, e g rail is \$25 N/T, truck \$35 N/T The absence of rail service prevents CENJ from committing to remediation projects whose undertaking requires rail service For example, such projects generally are 50,000 N/T or larger and must be completed within 3-6 months Daily 10-car rail service is necessary for that volume, since once a month service equals 1,000 N/T and once a week service equals 4,000 N/T per month

In addition, CENJ rail service would remove substantial truck traffic from congested highways For example, one 263K gondola (100 0 N/T) equals 4 54 trucks (45' dump trailer), and one 286K gondola (110 5 N/T) equals 5 trucks Daily 10-car rail service means 45-50 trucks less per day Utilizing rail service to remove trucks from highways was viewed favorably in NJDEP's review of CENJ operations

CENJ anticipates its out-bound rail traffic will produce an estimated \$7-10 million in new revenue for carriers In-bound traffic may also be available if CENJ can participate in larger remediation projects

A map of the CENJ facility and the South Kearny Yard is attached as Exhibit A

2. CENJ's EFFORTS TO OBTAIN RAIL SERVICE.

(a) CONSTRUCTION OF INDUSTRIAL SPUR.

In 2004, CENJ initiated discussions with NS and CSXI about rail service to landfill destinations located in various states on their respective lines. While NS expressed interest, CSXI declined, citing potential "operational impediments." CENJ also approached CR about service, without response. CENJ also filed requisite customer profiles, development forms and applications with NS, CSXI and CR for service. CENJ was informed that service would require that it construct an industrial spur that connected to Meadows No. 2.

In September, 2005, CENJ entered into a Track Agreement with GA in order to connect to and utilize that segment of Meadows No. 2 owned by GA for switching and line-haul rail service to/from CENJ's facility.

In September, 2006, CENJ engaged Tracks Unlimited, Inc., a rail engineering and construction firm, to design and build a twenty-car capacity, dual track industrial spur, to railroad specifications (preliminary design completed by NS for CENJ), that connects to Meadows No. 2. The project was completed and operational in February, 2007 at a capital cost of \$515,100.00 (cost includes installation of a rail car scale and spur and does not include ground prep, concrete foundations and asphalt pavement).

Upon completion of the industrial spur, CENJ reopened discussions with NS and CSXI about line-haul service, and with CR about switching service. NS again responded favorably, but this time CSXI merely referred to CR, and CR declined response. After several unsuccessful efforts to establish contact with CR, CENJ sought the assistance of counsel.

(b) CONRAIL SIDETRACK AGREEMENT AND REFUSAL TO SERVE.

As a result of unsuccessful "business-to-business" efforts to obtain rail service, even with counsel, CENJ on August 30, 2007 filed the first of two informal complaints with the Board's Office of Compliance and Consumer Assistance ("OCCA"). Contact from OCCA prompted CR to respond to CENJ, and resulted in a meeting September 24, 2007 at CENJ, which included an on-site view of the facility, industrial spur and connection with Meadows No. 2. Following that meeting CR undertook a more thorough inspection of the spur and tolerances on October 5, issued a track inspection report indicating no deficiencies, and opened negotiations for a Sidetrack Agreement with CENJ. Those negotiations produced in a Sidetrack Agreement between CR and CENJ, which was also approved by GA the owner of a Meadows No. 2 segment.

CENJ and GA signed the Agreement on October 19, 2007. However, CR refused to execute the final negotiated Agreement. CR's refusal caused CENJ to file a second informal complaint with OCCA on October 30, 2007. Hereafter, CR reported that it had "suspended completion of our sidetrack agreement process until the matter is resolved either by agreement between the parties or through an SIB determination".

CENJ's customer profile that was provided to, approved by, and on file with, CR provides for 5 day per week service.

Upon receiving CENJ's second informal complaint October 30, 2007, OCCA contacted CSXI regarding CR's refusal to serve CENJ, reporting that CSXI's terminal superintendent at South Kearny denied CR access, and informed CENJ that "service was not monetarily feasible" and that "he would not allow [CR] access through the yard to serve [CENJ] until the CSXI legal department tells him he must do so." " Again, it

must be noted that during this period of service negotiations GA was served by CR on numerous occasions with the train bypassing the CENJ Facility in route to GA

Through counsel and other representatives, CENJ and CSXT exchanged views during November and December, 2007 CSXT floated the idea of service to CENJ at the same time GA received service. CENJ responded that it needed daily service, not service tied to or dependent upon GA service. Ultimately, by letter to OCCA on December 20, 2007, CSXT formally offered rail service to CENJ on the same basis as service to GA, i.e. two times a month with additional limiting conditions

In addition, CSXT held out the possibility of an "engineering-based solution" that would address alleged "very real operational and safety concerns" associated with service through the CSXI South Kearny Yard. In so doing, CSXT noted that it had "proposed various engineering-based solutions to CENJ without success in response to its past requests for service over the years." This comment refers to a letter from CR dated April 11, 2006 that stated CENJ should explore options to acquire property rights from the Town of Kearny or other third parties. These options were evaluated by CENJ at that time and were determined to be unrealistic for many reasons including legal issues, timing issues and cost issues. CENJ shared these concerns with CR and felt that CR knew of the great difficulties associated with this option and was using it as an impediment to provide us the requested service.

CSXT's proposal was to provide "limited service to CENJ on a temporary basis commencing as soon as practical once a commercial representative of CSXT has confirmed CENJ's acceptance of limited service until an alternative arrangement can be developed."

CSXT proposed meeting to discuss its proposals, to which CENJ promptly agreed and set about scheduling a meeting with CSXT representatives. Finally, after overcoming a pre-meeting condition regarding limited service, on January 24, 2008 a meeting between CENJ executives and CSXT representatives was held at CENJ's facility. CENJ's counsel also attended.

In sum, the meeting was both positive and constructive: positive, in opening a "business-based" dialogue with each expanding on mission, activities and concerns; and constructive, in the willingness of each to go forward with efforts to resolve rail service issues.

CENJ gained from CSX's summary of the general operational and safety concerns at the South Kearny Yard that rail service through the yard could present. With input from freight and intermodal perspectives, CENJ learned the concerns mainly stemmed from the fact the Yard was very busy, and that portions of Meadows No. 2 and the Grape Lead in the Yard were being used to park tractors, chassis trailers and lift equipment.

CSX heard Clean Earth executives' explanation of the nature of its operations, and specifically that of CENJ's Kearny facility, with emphasis on the reason, purpose and need for daily rail service at CENJ, as well as on the anticipated new annual revenue of \$7-10 million to be generated by that rail traffic. Also noted was that rail service linkage between a CSX served, Clean Earth facility in West Virginia and the CENJ, Kearny facility would be valuable.

The history of the line and previous CSX discussions with CENJ proved informative, as did report on CENJ's recently negotiated a written rail service Side Track Agreement with CR, signed by CENJ and GA as agreed, but not by CR.

Following CSX's presentation of a proposed "engineering solution" with diagram for a "wye" to be constructed within the CSXI Yard, CENJ responded directly that "it appears to be a viable plan" However, CENJ expressed concern that critical details of the proposal were not available, such as estimated actual construction costs, cost-sharing, and timing of build-out/completion, all necessary for full understanding and evaluation of the plan

Regarding assumption of costs, CENJ expressed wonderment at the idea of paying again to make available new traffic revenue for a rail carrier, which revenues, now and as projected, would be substantial, in as much as CENJ has already made a considerable capital expenditure for construction of a dual track industrial spur and facilities on its property to obtain and facilitate rail service

The meeting concluded with reciprocal commitments for (a) CSX to provide the details of its proposal, hopefully within the next week, and (b) CENJ to ensure an adequate customer profile with CSX and that its employees become familiar with CSX's loading requirements, operational and safety protocols by actual practice with the 5 cars that had been delivered for that purpose

Impressed by the business tone and candid exchanges between the CSX and CENJ executives over rail service issues, CENJ was optimistic that a business solution could be found

On January 28, 2008, CR provided an executed copy of the CR/CENJ Sidetrack Agreement negotiated in October, 2007

Since the CENJ/CSXI meeting, progress has, however, been slight if non-existent Despite repeated requests for details supporting CSXI's "engineering" solution,

especially construction costs, time of completion, and capital contribution expectations, CSXT has not provided any such information, nor is it clear that CSXI has obtained bids from contractor(s) based on CENJ's inquiry of the contractor CSXI had identified

CSXI's promises have not been kept regarding crucial information or service prospects Frustrated by delay, CENJ prepared to seek more formal remedies utilizing courts, agencies, and Congressional forums, and so notified CSXT Adding to CENJ's frustration, NS informed CENJ that its service and rates were "contingent upon NS' ability to provide service, which is dependant upon [CENJ's] on-going discussions with CSXT et al "

(c) PRESENT STATUS AND LEVEL OF RAIL SERVICE.

In a February 19, 2008 letter, CENJ expressed its frustration over lack of information and service, and informed CSXT it would seek various avenues for relief CENJ then proceeded with remedial plans.

In apparent response, CSXI on Friday, March 15, 2008, offered to provide service to CENJ one day per week on a day and time specific, preferably Sunday, for a 4 hour window during which all movement through the CSXI yard must be completed

On March 19, 2008, CENJ responded favorably to CSXT's proposal provided it was understood as interim and of short duration until daily service available, and further that it was evaluating the operational and cost impacts of "Sunday-only" service. Also on that date, CENJ filed and served its Notice of Intent to Participate in Ex Parte No 677 advising CSXI it was protecting its right to timely do so

One week later, on Tuesday, March 25, 2008, CENJ began to receive CR switching and CSXI line-haul service, and has received such service each Tuesday

thereafter until Tuesday, April 15, 2008, CENJ's scheduled service date, at which time no service was provided. When CENJ questioned CR why we were not getting service we were told that CSXI representatives in the South Kearny yard denied access to CR and stated that CENJ is only to be serviced once a month. The yardmaster denying CR access is reported to have stated: "they only get service once per month and if Gardner has not requested service-no service to CENJ"

Again it is important to remember that all throughout the time CENJ has been pursuing rail service, GA was receiving rail service, and that service to GA requires CR to directly pass by the CENJ facility

**(d) ASSISTANCE FROM OFFICE OF COMPLIANCE AND
CONSUMER AFFAIRS (OCCA).**

It is evident that CENJ's informal complaints to OCCA were effective in opening channels of communications with CR, and later with CSXI, and that speaks to the respect for that office. But for CENJ, it has not resulted in sustained effort by CR or CSXI to continue serious follow-up to meetings and to supply essential information.

For CENJ, the experience suggests that OCCA should be given the authority to ensure compliance, either as a separate function of that office or by its lodging a complaint with the Board, should OCCA find cause to believe that rail carriers are not complying with the Act, regulations or precedent. It appears to CENJ that CR and CSXI responses merely serviced OCCA's contact, and did not anticipate any agency enforcement action for compliance. This view is buttressed by facts that demonstrate that although CSXI advised OCCA it had proposed engineering solutions to CENJ in the past without success, of which CENJ is not aware, CSXI did not then and apparently cannot

now support any proposal for an engineering-based solution, despite CENJ's favorable response to CSXT's current proposal.

In this case there are grounds to find non-compliance with common carrier obligations, first by CR in refusing to serve CENJ, and then, by CSXT in refusing access through the South Kearny Yard for alleged operational and safety reasons, when in fact CSXT traffic for GA was being served by CR through the Yard. Thus, CENJ recommends that OCCA be granted added enforcement authority

3. USE OF OFA "PAPER BARRIER" LANGUAGE.

This case demonstrates an improper use of "paper barrier" language inserted by CR in an OFA purchase agreement.

GA's approval of the final CR/CENJ Sidetrack Agreement was necessary because of its purchase of a segment of the Meadows No 2 line that CR sought to abandon in 1996, S1B Docket No AB-167 (Sub-No 1158X) *Consolidated Rail Corporation-Abandonment Exemption-in Hudson County, NJ*, and to which CENJ's industrial spur connects. The OFA resulted in several agreements between CR and GA. (1) a Purchase and Sale Agreement, dated August 21, 1996, (2) a Transportation Service Agreement, dated August 31, 1996, and (3) a Sidetrack Agreement in 2005.

The "WHEREAS" clauses of the CR/GA Transportation Service Agreement state that "[GA] will assume the common carrier obligations as to the Subject Line" and that "[CR] is willing to provide rail operations over the Subject Line as a contract carrier on behalf of [GA] to enable [GA] to perform its common carrier obligations but [CR] will not assume any common carrier obligations as to the Subject Line after its sale thereof."

Later, Section 1 provides that CR will perform rail operations on the Subject Line on behalf of [GA] and shall be doing so as “a contract carrier”

In an April 11, 2006 letter CR relied on this “contract carrier” language to decline review of CENJ engineering plans for the industrial spur. In 2007 negotiations, CR again asserted “contract carrier” status as reason to refuse CENJ’s requests for service.

CR’s logic has been astoundingly circular and contradictory. CR contracted with GA for GA to be the common carrier on Meadows No. 2 and at the same time agreed to provide service to satisfy GA’s common carrier obligation over that line, but nonetheless has refused service requests by rail customers on the line, claiming to be a contract carrier that does not have to service GA’s obligation – in all, an obvious breach of contract.

The OFA “contract carrier” language has been a ruse and “paper barrier” that CR employed to delay negotiations with CENJ, avoid service obligations to rail customers on the Meadows No. 2, such as CENJ, in breach of the CR/GA agreement, and possibly avoid STB oversight.

4. COMMENTS ON NOTICE ITEM NOS. (1)-(6) AND (8).

While the main focus of this testimony is common carrier obligations to shippers and especially those in the NJSA such as CENJ, CENJ wishes to generally comment on item nos. (1) – (6) and (8) set out in the Board’s Notice, all as it relates to denial of rail service to CENJ’s facility.

Item No. 1 – Capacity Constrained Environment.

Limitations on rail service to CENJ by CR are, at first blush, arguably due a capacity constrained environment. Service is being refused by CR for alleged operational and safety concerns associated with common carrier service obligations that must access

the South Kearny Intermodal Yard acquired by CSX and operated by CSX Intermodal ("CSXI"), after consummation of the 1998 CR/CSX/NS transaction. The property was formerly an APL yard.

Access through the yard is being denied by CSX/CSXT/CSXI for allegedly "very real operational and safety concerns." However, the described concerns appear to be based on the fact that portions of the rail line necessary to serve CENJ through the yard are used to park tractors, chassis trailers and lift equipment, all of which has to be moved to allow access. In short, the Meadows No. 2 and the Grape Lead in the yard are used as a "parking lot" which requires removal of items from what is otherwise an active rail line.

The capacity constraint is CSX/CSXI/CSXI's failure to have sufficient space in which to place intermodal equipment in the yard, on which issue CENJ has offered to assist if possible.

Item No. 2 - Cost and Safety Issues Related to Transport of HazMat.

CENJ is a licensed RCRA facility involved in the safe, environmental treatment and disposal of hazardous and industrial waste. In the absence of rail service, transport to and from its facility is, of necessity, by truck over public highways.

Transport of treated waste materials from CENJ's facility to landfill destinations best protects the public health and safety when accomplished by rail, and economically for CENJ, rail can be more cost-effective than truck.

Neither CR nor CSXT have claimed, or provided evidence, that CENJ's traffic is not economical or unsafe to transport.

Item No. 3 – Carrier Imposed Requirements for Infrastructure Investment by Shipper.

CSXI's proposal for rail service to CENJ anticipates construction of rail facilities on its property paid for by CENJ, which could benefit not only CENJ but CSXT as well. To date, CSXT's proposal, initially appearing to be "a viable plan" by CENJ, has not been supported by any essential information such as construction costs, timing and capital expenditure assumption or contribution requirements. CSXI's failure to supply necessary details questions whether the proposal is made in good faith or only to satisfy a response to OCCA.

As noted, CENJ has not rejected out of hand the idea of capital contribution, but the failure of CSXT to provide details prevents CENJ from fully evaluating and responding to CSXT's proposal. In the meantime, it is not clear whether service to CENJ will be limited to one day per week, twice a week or once per month.

Item No. 4. – Impact of Volume Requirements.

Volume requirements, per se, have not been an issue, but line-haul opportunity has been. On more than one occasion CSXT has noted that NS would appear to receive the lion's share of the line-haul rail traffic from CENJ to landfill destinations.

As noted, service to GA involves CSXT line-hauls. Suggestions of anti-competitive attitude, if not behavior, are evident. Following the CR/CSX/NS split date, there have been other rail service disputes in the NJSAA that have been resolved in favor of rail customers and NS over CSXT objections.

Item No. 5 – Economically Motivated Service Reductions/Metering Demand.

As CENJ's comment to Item No. 4 suggests, CSXT refusal of service to CENJ is economically motivated for perhaps improper reasons. The terminal manager's remarks

to CENJ are consistent with that view. Proposals to limit service to CENJ to the same as that to GA tie CENJ's service to GA's demand. Service to one rail customer should not be made dependent on service to another customer, whose needs may be, and in this case are, wholly distinct and far more limited.

CSXT's economic motivation to limit service and not address CENJ's need is evident. However, CSXT has never presented any substantial evidence to demonstrate daily service to CENJ would not be economical or compensatory, would not be operationally feasible, or would not be safe. CSXT only suggests it would not be convenient.

Item No. 6 – Proper Use of Rail Embargo.

As a practical matter, until CENJ's complaints to OCCA, CENJ was effectively subjected to an informal embargo of rail service; first, by CR's no-response position and refusal to serve, then later, by CSXT/CSXI's refusal to allow access for CR through the South Kearny Yard. Failure to properly manage equipment and utilize space with the CSXI yard effectively embargoes service when the active service line is used as a "parking lot."

CSXT has never presented substantial evidence of conditions on the line that demonstrate daily service to CENJ would not be economical or compensatory, would not be operationally feasible, or would not be safe. Any limited service to CENJ, for indefinite period, would not be reasonable.

Item No. 8 - Application of the Common Carrier Obligation.

CENJ's circumstances track rail service problems visited upon shippers in the NJCAA of the as a result approved 1998 CR/CSX/NS transaction and subsequent carrier failures to adjust operations to the new competitive environment

This case however may present additional issues such as CR's attempt to avoid common carrier obligation by inserting "contract carrier" language in an OFA agreements As CR's owners, CSX and NS, have not demonstrated much willingness to ensure that the benefits of each of their respective common carrier obligations reach NJCAA customers, such as CENJ, for traffic that CR services as the switching carrier.

Dated this 17th day of April, 2008 by



Robert P. Fixter
V P & General Manager
Clean Earth of North Jersey, Inc
105 Jacobus Avenue,
Kearny, NJ 07032

DECLARATION

I, ROBERT P. FIXTER, declare, under penalty of perjury, that the factual information in the foregoing Testimony and Comments is true and correct to the best of my personal knowledge and recollection Further, I certify that I am qualified and authorized to file the foregoing Testimony and Comment submitted on behalf of Clean Earth of North Jersey, Inc for purposes of appearance and participation in Ex Parte No 677

Executed on April 17, 2008


Robert P. Fixter