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Hearing on "Railroad-Owned Solid Waste Transload Facilities"

House Transportation and Infrastructure Committee
Subcommittee on Railroads, Pipelines and Hazardous Materials

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Chairman Brown, Ranking Member Shuster, Members of the Subcommittee, my name is Rob Jones. I am a managing member of New England Transrail, LLC, and I am very pleased to have the opportunity to testify at today's hearing. Thank you for inviting me to appear.

New England Transrail is a company headquartered in Clifton, New Jersey. We have proposed to build a state-of-the-art multi-commodity transloading facility, and to use the current best management practices for the operation of that facility. We also petitioned the Surface Transportation Board ("STB") for authority to acquire and rehabilitate existing track, construct new track, and to operate as a rail carrier in Wilmington, Mass.

We are well aware of the problems that have arisen at some solid waste transloading facilities, specifically those located not too far from my own home in New Jersey. We have tried to learn from those experiences and we have focused a great deal of time and resources on figuring out how to design and operate the NET facility in a way that minimizes those problems.

We have also followed the efforts of some in Congress to draw attention to those problems through legislation, and we appreciate the good intentions behind that work.

Perhaps the biggest contribution I can make to the Subcommittee's examination today of the issue of railroad-owned solid waste transloading facilities is to explain the effort we have made to address the legal and practical issues. The benefit of that analysis may be especially useful if the Committee considers taking up legislation in this area.

First however, for those Members who may be unfamiliar with the concept of "transloading," it may be helpful if I describe what transloading is, and very clearly and simply describe what we propose to do at the New England Transrail site.

What Is Transloading?

A transloading facility is one that transfers any of a variety of commodities – including solid waste – from one mode of transportation (i.e., a rail car) to another (i.e., a truck), or vice versa. True rail transloading facilities are beneficial to the environment and for commerce because they alleviate highway congestion and air pollution from large trucks, and allow a wide variety of commodities to be transported by rail in a safer and more fuel-efficient manner. Historically, the STB, and before that the Interstate Commerce Commission, has had exclusive jurisdiction over the construction and operation of transloading facilities operated by railroads, because these facilities are integral to the freight rail transportation network of the United States and are essential to interstate commerce.

Activities of New England Transrail, LLC

The concept of the proposed New England Transrail facility is what some refer to as the "last mile" connection to mainline rail transportation. As the members of this Committee know very well, the "last mile" is a frequent missing element for port infrastructure, highways, and sometimes even public transit. In our case, the area where we propose to operate near Wilmington is underserved by rail providers, and we hope to provide the missing link.

Our railroad operation will transport a variety of commodities, including sand, gravel, plastic resins, plastic pellets, liquids, rock salt, aggregates, woodchips, coal fly ash, soda ash, liquefied natural gas, corn sweeteners, vegetable oil, biofuels, coal, lumber, construction stone, sheet metal, structural steel, and cosmetic products. We will transport that rail traffic for about one mile – literally the "last mile" – then interchange it with connecting carriers that will continue moving the commodity to its final destination. Attached is a rendering of our proposed facility.

A portion of our proposed facility would be dedicated to the handling of municipal solid waste ("MSW") and construction and demolition debris ("C&D"). These are the commodities that the Committee is chiefly concerned about today. These are also the commodities that are most likely to lead to local health and safety concerns if the railroad and local enforcement officials do not work cooperatively to prevent such problems from arising. Undoubtedly, problems such as loose debris floating through the neighborhood or objectionable odors not properly contained to the facility are the kinds of problems that have led to today's hearing. However, the point I would like to make today is that nothing in the existing law prevents state and local authorities from addressing those problems, and others like them already.

The Legal and Practical Issues

The legislative efforts that have led to this hearing proceed from a mistaken premise about the existing law – the idea that the Board's exclusive jurisdiction prevents state and local regulatory authorities from enforcing state and local health and safety laws, creating a "regulatory gap." I am not a lawyer, but even to my untrained eye, there is no question that that is a mistaken interpretation of the existing law.

As you know, 49 U.S.C. Section 10501(b) gives the STB exclusive jurisdiction over "transportation by rail carriers" and the definition of "transportation" includes a "warehouse . . . yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property" in interstate commerce. 49 U.S.C. Section 10102(9)(A). The definition also includes "services related to th[e] movement" of property, "including receipt, delivery, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange." That statute is not some recent aberration in the law. It was enacted about 100 years ago as part of the Hepburn Act. The statute has been the subject of numerous cases in the federal courts, including the U.S. Supreme Court, and there is no inconsistency in the decisions. If you read those cases, the law is very clear, and has been clear for a very long time. In the past, Congress has rejected attempts to repeal it or carve out exceptions.

As the STB and the federal courts have made clear, the STB's exclusive jurisdiction has limits. Specifically, state and local health and safety laws are not, and have never been, preempted. In addition, federal environmental laws must be harmonized with the jurisdiction of the Board. In fact, the only state and local laws that are clearly preempted are economic regulations and state or local siting, preclearance, or permitting requirements, that could be used to deny a railroad's ability to conduct its operations.

These principles are well-settled, have remained largely unchanged for over a century. They were recently confirmed by the STB in an Order issued in our proceeding (Finance Docket No. 34797). They were also confirmed by a recent decision of the U.S. Court of Appeals for the Third Circuit, in New York Susquehanna and Western Ry. Corp. v. Jackson, No. 07-1675 (3rd Cir. Sept. 4, 2007), in which the federal appeals court concluded that New Jersey's state health and safety regulations are not categorically preempted by the STB's jurisdiction.

In sum, the STB and the federal courts have repeatedly held that states retain their police powers to enforce state and local health and safety regulations, as long as those regulations do not unreasonably burden rail transportation in interstate commerce.

For example, if a local health inspector came by the facility to investigate neighborhood complaints about debris and loose trash blowing into the yards of nearby homes, that investigation and any subsequent remedial order is not preempted. If the city environmental authorities find that the facility has allowed motor oil to spill into nearby waterways, the ability to order corrective action is not preempted. If a state inspector found that a facility had no fire suppression equipment on site, state regulators have the ability to enforce state law.

The concerns expressed in the communities where these problems have appeared are legitimate. It is very unfortunate that a few operators of transloading facilities have argued an overbroad interpretation of existing law to preclude enforcement of local health and safety requirements. That interpretation is clearly incorrect, and has already been corrected by the courts.

The Federal government relies on the principle of preemption to prevent patchwork regulation by states and local authorities over activities – like rail transportation – that affect

interstate commerce. As I previously stated, the STB has "exclusive" jurisdiction over transportation by rail carriers, including related facilities and activities that are part of rail transportation. There is long-standing precedent holding that the Board's exclusive jurisdiction covers transloading operations, including facilities for transloading solid waste.

Enacting legislation to change the STB's jurisdiction for one specific commodity would overrule an unbroken line of more than 100 years of decisions by the Interstate Commerce Commission, the STB, and the Federal courts, including the U.S. Supreme Court. If Congress singles out one commodity for special treatment, it would open the door to similar legislation allowing complete local control over rail transportation of other commodities.

In the past, Members of Congress, and Members of this Committee, have been strong supporters in a bipartisan manner of federal preemption and the STB's exclusive jurisdiction over rail transportation of all commodities (for example, hazardous materials and nuclear waste). For example, in 2005 both Chairman Brown and Congressman LaTourette placed written comments in the STB docket in a case involving the District of Columbia's hazardous materials transportation ban. In that situation, the District singled out one type of commodity – certain hazardous materials transported by rail – and passed a law ordering that they be prohibited from entering the city. The views of Chairman Brown and Congressman LaTourette were ultimately affirmed by the U.S. Court of Appeals for the District of Columbia Circuit, which held that the local law was preempted. If hazardous materials cannot be singled out as a commodity for local control, why should non-hazardous solid waste be any different?

I make no excuse for the deplorable conditions at the other sites that have prompted today's hearing, and I want to make clear that our proposed facility has been designed from the ground up to address all of those potential problems in advance. And if problems do arise, we have pledged to work cooperatively with state and local authorities to correct them.

How can legitimate health, safety, and environmental issues be resolved? First, in addition to the full range of local health and safety regulations, solid waste transloading facilities are subject to federal environmental laws. In addition, when a new railroad project is proposed, the STB has the power to require the project to undergo a complete environmental review at the Federal level before it grants operational authority for that project. The STB's environmental review is comprehensive and provides multiple opportunities for state and local comment. The STB has the power to issue an order requiring the applicant to agree to mitigation conditions that will address any environmental concerns relating to the site or the operations of the facility. Those mitigation conditions can be enforced by local regulatory authorities. The STB also can condition its order on concurrence by the Environmental Protection Agency ("EPA") that the operation of the facility on the site poses no environmental danger.

Without a doubt, there have been some recent examples of inadequate facility management, inadequate environmental and safety stewardship, and just being a bad neighbor. Ultimately, however, we do not believe that changing federal law is the answer to cleaning up the problems at a few transloading facilities for one very simple reason. The power to clean up those facilities already exists at the state and local level. The reason it exists is because although the STB has preemption authority over *some* state rules and regulations, federal law *does not*

preempt state and local rules and regulations pertaining to the health and safety of the community.

It is not a deficiency of federal law that a solid waste transloading facility has not properly installed fire extinguishers and safety gear. It is not a deficiency of federal law that a facility has ignored local rules about free-floating debris, or state regulations prohibiting odors above a certain level. The way to fix these problems is not to overrule a long, unbroken line of legal decisions, including decisions of the U.S. Supreme Court, but to enforce existing law.

The first step to addressing these problems could be through stronger STB oversight of transloading facility compliance with state and local rules and regulations. We believe the STB fully understands the problem and is already committed to that goal. Second, local enforcement authorities need to have a better understanding of their legal rights to enforce health and safety laws. Finally, operators of these facilities need to recognize their responsibility to be good corporate citizens and to work with state and local authorities to reach reasonable accommodations. For example, in our case, we have publicly and formally notified Massachusetts authorities that we would comply with almost all of their regulations.

Conclusion

I would like to conclude my testimony by stressing the environmental benefits and efficiencies of solid waste transloading operations. The American Association of Railroads ("AAR") has said that "a single intermodal train can take up to 280 trucks (equivalent to more than 1,100 cars) off our highways. Trains carrying other types of freight can take up to 500 trucks off our highways."[1] Transportation by rail has emissions benefits as well. AAR has also cited estimates by the EPA that "for every ton mile, a typical truck emits roughly three times more nitrogen oxides and particulates than a locomotive."[2]

Those benefits will be fully realized when smaller railroad operations, like NET's, are able to construct and operate transloading facilities to handle that commodity in the "last mile" of the interstate rail network. The pending legislation will effectively prohibit companies like ours from doing that.

Again, thank you for the opportunity to appear before you today. I would be pleased to answer any questions you may have.

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[1] American Association of Railroads, Railroads: Building a Cleaner Environment, June 2007 available at http://www.aar.org/getFile.asp?File_id=364
[2] Id.