

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 34797

NEW ENGLAND TRANSRAIL, LLC, d/b/a
WILMINGTON & WOBURN TERMINAL RAILWAY
—CONSTRUCTION, ACQUISITION AND OPERATION EXEMPTION—
IN WILMINGTON AND WOBURN, MASS.

Decided: June 19, 2012

In a petition for exemption filed December 5, 2005, New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway (NET) sought authority from the Board to acquire 1,300 feet of existing track, construct 6,200 feet of new track, and operate as a rail carrier over the combined 7,500 feet of track on and adjacent to a parcel of land owned by the Olin Corporation and located in Wilmington and Woburn, Mass. In a decision served July 10, 2007, the Board found that, under its proposal, NET would, if authorized, become a rail carrier subject to the Board's jurisdiction. The Board also addressed the extent to which NET's planned activities relating to the handling of construction and demolition debris and municipal solid waste would come within the scope of the Board's jurisdiction. The Board noted that, before it could address whether to authorize NET's proposal, the parties would need to submit evidence on the transportation merits of the proposal, the Environmental Protection Agency (the EPA) would need to complete its Remedial Investigation and Feasibility Study (RI/FS), and the Board would need to complete its own environmental review.

In July 2007, the State of Massachusetts, through its Department of Environmental Protection and Attorney General's Office, filed a petition for reconsideration asking the Board to reconsider or clarify a portion of its ruling. Before the issues raised on reconsideration could be adjudicated, however, Congress enacted the Clean Railroads Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (codified at 49 U.S.C. §§ 10501(c)(2), 10908-10910) (CRA) in October 2008. The CRA largely removed from the Board's jurisdiction the regulation of solid waste rail transfer facilities such as the one planned by NET.

Because of the enactment of the CRA and to update the progress of matters in this docket, the Board directed NET to file a status update in a decision served on July 23, 2010. On August 23, 2010, NET filed a status report stating that it planned to pursue its petition for exemption and that it would not transload solid waste at the facility unless it obtained all legally required approvals to do so in the future. NET continued to request that the Board complete its environmental review and approve its proposal. The EPA and the Town of Wilmington, Mass. (the Town), filed responses in opposition to NET's request. In a decision served May 24, 2011, the Board concluded that, as the EPA had not completed its investigation and study, the Board

would continue to defer its environmental analysis and decision on the petition until relevant reports had been issued by the EPA. NET was directed to file another status report in 90 days.

NET filed its most recent status report on August 23, 2011. The report summarizes progress made since the earlier status update, and NET requests again that the Board complete its environmental review and grant the petition for exemption.

On September 12, 2011, the Town and EPA filed separate comments. The EPA states that it is still in the site investigation phase of the RI/FS process, that a significant amount of field data has been collected, and that a preliminary assessment of human health and ecological risks was submitted by Olin Corporation on August 22, 2011, which has yet to be reviewed by EPA. Therefore, the EPA again requests that the Board continue to defer environmental analysis until the relevant EPA reports have been issued and finalized. The EPA adds that, at its current pace, it anticipates finalizing the reports for the site in 2012. The Town claims that NET is misrepresenting the status of the investigation and assessment, and argues that the Board should not yet take action on NET's petition.

Before the Board can address NET's petition, the EPA's investigation and study will need to progress further. EPA has not yet published a draft RI/FS Study, and the RI/FS process can be considered final only after EPA responds to public comments on the draft RI/FS report, issues a RI/FS addressing the public comments, and issues a Record of Decision (ROD).

The Board will continue to defer its environmental review until the RI/FS study has been completed and a ROD has been issued that explains which cleanup alternatives have been approved for the Olin Site. A ROD must be issued before NET can construct on the Olin Site. Accordingly, it would be premature for the Board to grant NET's request to resume processing the application at this time. As requested by the EPA, the Board will continue to defer its environmental analysis and decision on the petition.

The next status report will be due within 30 days of EPA's publication of a ROD for the Olin Site.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. NET is directed to file a status report within 30 days of EPA's publication of a Record of Decision.
2. This decision is effective on its service date.

By the Board, Richard Armstrong, Acting Director, Office of Proceedings.