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**BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, D.C.**

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**STB EX PARTE NO. 684**

**SOLID WASTE TRANSFER FACILITIES**

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**COMMENT OF THE AMERICAN SHORT LINE AND REGIONAL  
RAILROAD ASSOCIATION**

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**February 23, 2009**

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The American Short Line and Regional Railroad Association ("ASLRRA") respectfully submits its Comments concerning the Notice of Proposed Rulemaking Adoption of Interim Rules concerning solid waste transfer facilities. These comments are submitted in response to the January 14, 2009 Notice by the Board soliciting public comment on its proposed rules.

**Statement of Interest**

ASLRRA represents 464 class II and class III railroads in the United States, Canada and Mexico as well as numerous suppliers and contractors to the short line and regional railroad industry. On behalf of its members, ASLRRA thanks the Board for the opportunity to comment on its proposed rulemaking and adoption of interim rules for Solid Waste Rail Transfer Facilities.

In its Notice of Proposed Regulation, the Board sets forth its narrative interpretation of the Clean Railroads Act, including an assertion of what constitutes a Solid Waste Rail Transfer Facility. Slip op pp 4-5. In that discussion the Board refers to its "general jurisdiction" and to its "jurisdiction under the Clean Railroads Act," page 5, but the Board does not explain the differing scope of those jurisdictions. The ASLRRA believes the Board's language in that narrative is subject to misunderstanding and, as such, clarification would mitigate frivolous petitions that would substantially strain the Board's limited resources.

## 1 Legislative History

The Clean Railroads Act of 2008 ("CRA") was propelled by the now-familiar photographs of mountainous piles of garbage far exceeding the capacity of certain railroad loading facilities in New Jersey, and by the outcry raised by the State of New Jersey in attempting to enforce its waste handling regulations at a facility claiming ICCFA preemption. Congress also knew that the Board<sup>1</sup> and the Third Circuit<sup>2</sup> have held that the STB's former jurisdiction over waste transload facilities turned on whether those facilities were operated "by rail carrier" under a very narrow and literal reading of 49 U.S.C. § 10501(a)(1).

The original Staff Working Draft of the Senate Committee Amendment (September 25, 2007), which first articulated the provisions of what would become the CRA, contemplated the complete removal of STB jurisdiction over solid waste transfer facilities ("9-25-07 Draft"). The 9-25-07 Draft amended Subtitle D of the Solid Waste Disposal Act (42 U.S.C. § 6941) (Subtitle D) to prohibit any solid waste transfer facility from operating unless it had obtained State or municipal approvals and eliminated STB authority over any such facility. The Senate Staff was promptly advised (a) of the dangers and difficulties of amending the Solid Waste Disposal Act to insert a new definition (i.e. "transfer facility")<sup>3</sup> that is already defined by each of the several states; and (b) that the complete removal of solid waste transloading facilities from the Board's jurisdiction and concomitant preemption would leave such facilities subject to the rankest kind of parochialism -- local zoning and land-use restrictions. The Staff Working Draft was amended on Sept. 27, 2007 ("9-27-07 Draft"), deleting the previously offered "transfer facility" definition.

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<sup>1</sup> *F.g., Town of Babylon and Pinelawn Cemetery—Petition for Declaratory Order*, STB Docket No. 35057 (STB served Feb. 1 and Sept. 26, 2008).

<sup>2</sup> *Hitech Trans LLC v. New Jersey*, 382 F.3d 295 (3<sup>rd</sup> Cir. 2004).

<sup>3</sup> (2) Transfer Facility—The term "transfer facility"—(A) means *any transportation related facility* other than a site of generation or disposal at which, during transportation, shipments of solid waste are—(i) removed from original shipping containers, (ii) processed or sorted outside of their original shipping containers, or (iii) segregated by removing any constituent thereof, whether for recycling or otherwise, but (B) does not include a facility— (i) associated with the rail movement of solid waste after being placed on or in a rail car (including associated with the interchange between railroads of rail cars containing solid waste), or (ii) where the transfer to or from a rail facility occurs either in fixed or flexible shipping containers, or without intervening processing, sorting or constituent removal.

and introduced, still as amendment to Subtitle D, a definition of a "Solid Waste Rail Transfer Facility" ("SWRTF")<sup>4</sup>.

In early December 2007, the Senate Staff concluded that attempts to amend Subtitle D were fraught with complications and also acknowledged that virtually no local community would willingly accept a SWRTF and rail transportation of solid waste would likely be stymied at the source and the destination. The draft was subsequently changed to grant a narrow jurisdiction to the STB under carefully limited circumstances to determine in particular cases whether the local interest in land-use regulation outweighed the federal interest in maintaining and expanding the national rail system. That change no longer had the CRA as amendment to Subtitle D, but rather inserted as an amendment to the Interstate Commerce Commission Termination Act (Title 42 United States Code) ("ICCTA"), while maintaining (in relevant part) the definition of a SWRTF as "the portion of a facility owned or operated by or on behalf of a rail carrier (as defined in section 10102 of Title 49, United State Code "

## 2 Clarification of Board's Jurisdiction under the CRA

The Commerce Committee was very much aware of the on-going litigation attempting to define the precise demarcation between Board jurisdiction under ICCTA and state and local jurisdiction under various state and local laws. Congress' solution to this situation was to eliminate the Board's ICCTA jurisdiction with broad language that swept up all arguably "railroad" facilities, and to specifically grant authority to the States to regulate facilities "owned or operated by or on behalf of a rail carrier" like any similar non-rail facility<sup>5</sup>

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<sup>4</sup> (A) means *the portion of a facility owned or operated by or on behalf of a railroad carrier* (as defined in section 10102 of Title 49, United States Code, where solid waste, as a commodity to be transported in commerce, is collected, stored, separated, processed, treated, managed, disposed of, or transferred outside of the original sealed shipping containers, but (B) does not include a facility to the extent that the activities taking place at such facility are comprised of the railroad transportation of solid waste after the solid waste is placed on or in a rail car, including railroad transportation for the purpose of interchanging railroad cars containing sealed solid waste shipments "

<sup>5</sup> The Clean Railroads Act definition is necessarily broader than the ICCTA definition. Under ICCTA the Board only has jurisdiction over transportation "by railroad," but the new statute applies also to facilities that are owned by a railroad and to facilities that are operated on behalf of a railroad. ICCTA jurisdiction explicitly does not turn on ownership of facilities. 49 U.S.C. § 10102(9)(A). This Board itself disclaims ICCTA jurisdiction over operations that are not "by railroad." See *Town of Babylon and Pinelawn Cemetery—Petition for Declaratory Order*, STB Docket No. 35057 (STB served Feb. 1 and Sept. 26, 2008).

The Board itself recognized the broad reach of the newly coined “owned or operated by or on behalf of” phrase in two ways. In its February 7, 2008 comment letter to the Senate Staff, the Board

(a) did not suggest that “owned” and “on behalf of” be deleted from the definition of a SWRTF to mirror the jurisdictional language of ICCTA in §10501, and

(b) The Board’s own language reflected its understanding that the scope of what constitutes a SWRTF is broader than what the Board views as its jurisdiction under §10501

1 Eliminate the siting permit process for those existing facilities that are not controversial. It would be a significant strain on the Board’s limited resources to attempt to issue siting permits simultaneously for all **rail-related facilities** around the country that handle any type of solid waste. Moreover, STB permitting of existing facilities that are not controversial seems unnecessary, as existing **facilities that allow waste to move by rail** may be welcomed by the states in which they are located, and the proposed language specifically makes all Federal and State environmental laws requirements applicable to existing **rail-related facilities**. To avoid unnecessary review of existing facilities, we suggest conducting a siting review for an existing facility *only* if the Governor of the state where a solid waste rail transfer facility is located (or the Governor’s designee) believes that the facility poses an unreasonable risk to public health or safety due to its location and asks the Board to initiate a siting permit proceeding

STB Comments On Language Of Sections 601 Through Section 604 Overview, February 7, 2008, p 1 (emph added) In fact, Senator Lautenberg’s description in his Press Release (copy attached) of the type of facilities covered by this legislation is: **“if they are located on a railroad”**

Congress chose broad language in defining SWRTFs to preclude continuing controversy over which rules and regulations apply to facilities that load or unload waste in rail cars

### 3. Necessity to address.

Despite the broad language of the Clean Railroads Act, some are now attempting to equate the Board’s jurisdictional scope under ICCTA with the subsequent affirmative and explicit jurisdictional grants to the States (and others) over operations and to the Board over certain siting questions. See *Town of Babylon and Pinelawn Cemetery—Petition for Declaratory Order*, STB Finance Docket No 35057, Petition to Reopen/Reconsider filed December 18, 2008. Thus, although the Board has carefully quoted the statutory language in its

discussion of its CRA jurisdiction, it should clearly indicate that some facilities that might fall outside the Board's general jurisdiction are nonetheless subject to Congress' specific grant and apportionment of jurisdiction over waste transloading facilities set forth in the CRA

Congress did not design nor intend the CRA to discourage the use of rail to transport waste. To the contrary, such rail transportation is in the public interest, particularly in portions of the Eastern Seaboard where landfill capacity is rapidly disappearing, and waste must be transported many miles into the interior of the country for disposal. What Congress intended, and effectuated – as indicated by the title of the Act – is that transloading and associated activities be conducted at permitted facilities in accordance with generally applicable safety and sanitary standards, and that the STB conduct any balancing of local and national interests in land-use, but that waste should be transported by clean railroads

The STB's narrowly defined jurisdiction (and concomitant preemption of local law) under ICCTA should not be imported into the CRA in a fashion that allows broader application of local land-use, zoning and other siting requirements than was intended by Congress. Such a narrow construction would fail to give effect to Congress' intent to preempt local siting requirements for existing facilities unless this Board under specified circumstances finds that such requirements should outweigh the public interest in rail transportation of solid waste. Rail transportation of solid waste is an important revenue source for some short line and regional railroads, and is especially important to members of this association because of their particular *involvement with the origination and termination of rail freight traffic*

The ASLRRRA respectfully suggests that the narrative paragraph concerning state and Board jurisdiction, pp. 5-6, should include a sentence to this effect:

Without regard to whether the Board would have had general jurisdiction over a facility under 49 U.S.C. §10501, any facility that meets the expanded definition of a Solid Waste Rail Transfer Facility under 10908(e)(1)(H)(i) is subject to the provisions of the Clean Railroads Act.

Lastly, ASLRRRA would like to commend the Board for including at §1155 27(a) a due date for a decision on the merits within 90 days after a full record is developed. As

ASLRRA often notes in proceedings before the Board, small railroads are particularly dependent upon their ability to move quickly to seize new opportunities in the marketplace. Uncertainty and long delays in obtaining regulatory decisions about approval for commercial transactions greatly reduce the likelihood of success when those opportunities arise. The Board's commitment to providing decisions in a reasonable time makes it possible to evaluate projects in the context of a dependable regulatory schedule, and ASLRRA encourages the Board to adopt rules imposing due dates for its decisions in all proceedings where commerce may be adversely affected by uncertainty or delay in Board decision making.

Respectfully submitted,

American Short Line and Regional Railroad Association

*Keith T. Borman*

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# ATTACHMENT TO ASLRRRA COMMENT

## **Newsroom: Press Releases**

Press Release of Senator Lautenberg

Legislation Requiring Clean Up Of Rail Solid Waste Sites Becomes Law

Lautenberg, Menendez Pallone Lead Effort to Close Dangerous Environmental Loophole

Contact Lautenberg Press Office 202 224 3224  
Monday, October 20 2008

NEWARK, N.J. – Last week legislation authored by U.S. Sen. Frank R. Lautenberg (D-N.J.) to allow states to regulate solid waste processing facilities along rail lines was enacted into law. The law closes a federal loophole that prohibited states from enforcing environmental, health and safety regulations at these rail sites. The bill, the *Clean Railroads Act of 2008*, was included in a larger package of rail legislation signed by the President. It was cosponsored by Sen. Robert Menendez (D-N.J.) and championed in the House of Representatives by Rep. Frank Pallone (D-N.J.-06).

"Our law will save our backyards from becoming junkyards for industry. This is a major victory for New Jersey—it will allow our communities to protect residents from fire hazards and pollution caused by waste on rail sites," Sen. Lautenberg said. "I am proud we permanently opened the door for New Jersey to clean up this waste."

Sen. Menendez said, "New Jersey is now back in charge of this New Jersey issue, just as it should be. When it comes to safety, health, environmental and waste transportation issues, we cannot allow the bureaucracy of Washington to trump the well-being of our citizens. This is an important achievement for our health and our environment."

"This new law sends a strong message that Washington is no longer going to allow the Surface Transportation Board to be the sole regulator of waste transfer facilities," Rep. Pallone said. "Thanks to this law, state and local governments will now have the authority to protect their communities and the environment by regulating these facilities that have flown under the radar for too long."

This federal loophole has allowed railroad companies to pile trash, largely consisting of construction debris, at times two stories high. These hazards represent serious health, safety and environmental risks to residents who live near these sites, including groundwater contamination and fires.

Courts and federal agencies have ruled against New Jersey's regulators when trying to enforce the state's public health, safety and environmental standards on rail sites. These rulings preserved the federal loophole by basically protecting the federal Surface Transportation Board (STB) as the only agency that can oversee rail waste sites, however, the STB does not actively regulate them. No federal safety or environmental standards exist for these sites and the agency has no inspectors. In fact, the STB has prevented any state from regulating rail solid waste sites within their borders.

The new law will ensure that New Jersey Department of Environmental Protection has the authority and leverage to oversee these waste sites.

### *Under the Clean Railroads Act of 2008*

- States are granted the permanent right to enforce their public health and safety and environmental laws at facilities that handle solid waste, regardless if they are located on a railroad,
- The STB may continue to site railroad facilities in order to maintain a unified interstate railroad system of transportation, but may not allow the operation or creation of a rail solid waste transfer site in environmentally-sensitive areas, including the Pinelands National Reserve or in protected areas of New Jersey's Highlands region, and
- Existing facilities will be required to come into compliance with applicable state laws within 90 days.

There are 9 existing sites in New Jersey:

- North Bergen, Hudson County (4).
  - Paterson, Passaic County,
  - Newark, Essex County,
  - Passaic, Passaic County
- Pleasantville City, Atlantic County, and
- Hainesport, Burlington County

And at least seven more have been proposed in the State:

- Paterson, Passaic County,
- North Bergen, Hudson County (2)
- Winslow Township, Gloucester County
  - Red Bank, Monmouth County,
  - Freehold, Monmouth County and
  - Mullica Township, Atlantic County