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March 23, 2009

VIA e-File

Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: STB EX PARTE No. 684

To Whom It May Concern:

This letter, filed on behalf of the New Jersey Department of Environmental Protection ("DEP") and the New Jersey Meadowlands Commission ("NJMC") constitutes a response to comments submitted on the above proposed rulemaking by the American Short Line and Regional Railroad Association ("ASL") and Salem Rail Logistics, LLC ("Salem"). Because DEP and the NJMC also join in the reply comments filed by Beveridge & Diamond, P.C. on behalf of the National Solid Wastes Management Association and others (hereafter referred to collectively as the "NSWMA"), to the comments of ASL and Salem, our comments are brief.

The ASL Comments

In its comments the ASL urges the STB to give a very broad reading to the term "solid waste rail transfer facility" as defined in the Clean Railroads Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 ("CRA"), codified at 49 U.S.C.A. §10908(e)(1)(H).



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ASL argues¹ that the CRA definition of "solid waste rail transfer facility" in 49 U.S.C.A. §10908(e)(1)(H) is broader than the allegedly analogous definition of "rail carrier" in the Interstate Commerce Commission Transportation Act 1995, 49 U.S.C.A. §10101 et seq. ("ICCTA") at §10102(5). The CRA defines a "solid waste rail transfer facility" in pertinent part as

"the portion of a facility owned or operated by or on behalf of a rail carrier (as defined in section 10102 of this title) where solid waste...is...transferred...." [49 U.S.C.A. §10908(e)(1)(H)]

ASL illogically compares this definition with the definition of "rail carrier" in ICCTA at 49 U.S.C.A. §10102(5), which is defined as a

person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation . . .

It concludes that the CRA definition of "solid waste rail transfer facility" is broader than the definition of "rail carrier" in ICCTA and that therefore the STB has broader jurisdiction over the type of facilities falling under its siting authority in 49 U.S.C.A. §10909 than it has over facilities under ICCTA.

ASL is comparing apples and oranges. The pertinent comparison of the CRA definition of a "solid waste rail transfer

¹The ASL, in its comments, makes assertions outside the record in support of its proposed broad reading. Thus, on page 3 of the ASL comments, it says that "the Senate Staff was promptly advised of the dangers and difficulties of amending the Solid Waste Disposal Act." On page 4, it notes that "in early December 2007, the Senate Staff concluded that attempts to amend Subtitle D were fraught with complications..." Again, it asserts that "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 federal laws." These assertions are not supported by references to the legislative history of the CRA and should therefore be given no weight.

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facility" is with the ICCTA definition of "transportation", because it is that definition, not the definition of "rail carrier", which deals with facilities related to rail transport. "[T]ransportation" in ICCTA is defined to include

a...facility...related to the movement of passengers or property, or both, by rail, **regardless of ownership or an agreement concerning use...**" [49 U.S.C.A. §10102(9)(a), emphasis added]

This language is functionally similar to the language in CRA defining solid waste rail transfer facility as "...a facility **owned or operated by or on behalf of a rail carrier** (as defined in section 10101(2) of this title)..." 49 U.S.C.A. §10908(e)(1)(H) (emphasis added). The CRA language, referring to a facility "owned or operated by or on behalf of a rail carrier" is no broader than the definition of "transportation" as including a "facility...regardless of ownership or an agreement concerning use." 49 U.S.C.A. §10102(9)(A).

The ASL seems to be asserting that any facility which functions as a transfer station located along rail tracks engaged in transferring solid waste, regardless of whether the facility is owned by a rail carrier, operated by a rail carrier, or operated on behalf of a rail carrier, is a solid waste rail transfer facility. To state the argument is to rebut it. If a facility is not owned or operated by a rail carrier, or operated "on behalf of" a rail carrier, it is not a "solid waste rail transfer facility" as that term is defined in 49 U.S.C.A. §10908(e)(1)(H). Again, the STB's jurisdiction is over "transportation by rail carrier", 49 U.S.C.A. §10501, and a facility that is not operated, by a rail carrier, "regardless of ownership or an agreement concerning use", 49 U.S.C.A. §10102(9), is not "transportation by rail carrier." Hi Tech Trans, LLC v. State of New Jersey, 382 F.3d 295 at 309 (3d. Cir. 2004). The mere fact that a facility which is neither owned nor operated by or on behalf of a rail carrier is located alongside rail tracks and utilizes the rail carrier to transport waste does not transform such a facility into a "solid waste rail transfer facility."

For these reasons ASL's suggested language at the bottom of page 6 of its comment to the effect that even if the STB would not have had jurisdiction over a facility under 49 U.S.C.A. §10501, any facility that meets the (allegedly) expanded definition of a solid waste rail transfer facility under section 10908(e)(1)(H)(i)

is subject to the provisions of the Clean Railroads Act, should be rejected.

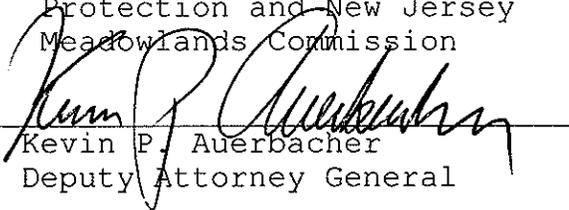
The Salem Comments

As noted, DEP and the NJMC join in the NSWMA reply to Salem's comments.² Those comments did not address Salem's first comment, however. In that first comment Salem suggests that the proposed rule be amended to require that a state agency (sic) that submits a petition to require a "transloader" (sic) to apply for a siting permit indicate in that petition all laws that the petitioner believes affect the siting of the facility under consideration. Salem's suggestion has no purpose, and we urge the Board to reject this and any other comment that would impose additional requirements upon a State Governor and his/her designee as inconsistent with the CRA. See 49 U.S.C.A. § 10909(a)(2).

Sincerely yours,

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² It is important to note that Salem is not a rail carrier, but characterizes itself as a "transloader," a loaded and self-serving term, and that Salem, a non-rail carrier, is commenting on a rule dealing with siting of rail carrier solid waste facilities, not the siting of non-rail carrier waste facilities such as itself. We urge the STB to exercise caution when evaluating the concerns of such non-rail carrier entities that are not subject to its jurisdiction, many of which have actively attempted to thwart state regulatory efforts by claiming federal preemption with only the slightest, if any, attenuated relationship to a rail carrier.

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