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August 20, 2007

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Via Hand Delivery

The Honorable Vernon A Williams
Secretary
Surface Transportation Board
395 E Street, SW
Washington, D C 20423

RE New England Transrail, LLC
FD-34797



Dear Secretary Williams

Enclosed for filing in Finance Docket Number 34797 are an original and ten (10) copies each of the Response of New England Transrail, LLC to the Commonwealth of Massachusetts' Petition for Reconsideration, or in the Alternative, for Clarification. Please time-stamp the extra copy and return it to our messenger.

Thank you in advance for your consideration

Sincerely,

Jeffrey M. Bauer

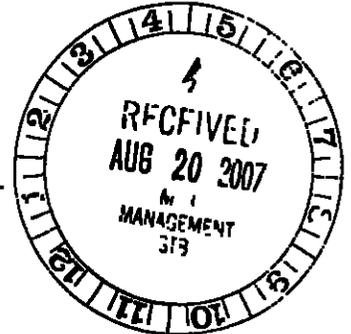
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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34797



New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway—Petition For An Exemption From 49 U.S.C. § 10901 To Acquire, Construct And Operate As A Rail Carrier On Tracks and Land In Wilmington and Woburn, Massachusetts

RESPONSE OF NEW ENGLAND TRANSRAIL, LLC TO THE COMMONWEALTH OF MASSACHUSETTS' PETITION FOR RECONSIDERATION, OR IN THE ALTERNATIVE, FOR CLARIFICATION

On July 30, the Commonwealth of Massachusetts ("Massachusetts") filed a Petition For Reconsideration, Or In The Alternative, For Clarification ("MA Petition") of the Board's July 10 decision in New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway – Construction, Acquisition and Operation Exemption – In Wilmington and Woburn, MA, STB Finance Docket No. 34797 (STB served July 10, 2007). In that decision, the Board held that, if authorized, NIFT would be a rail carrier and that all of NIFT's proposed operations, with one exception, would constitute "transportation."¹ Massachusetts argues, among other things, that the Board erred in concluding that "extracting refrigerators, so to avoid a legal impediment to the delivery of a shipment at a receiving landfill, would be part of rail transportation and covered by Federal preemption." See MA Petition at 4. The MA Petition should be denied for two reasons:

First, as the transcript of the April 19, 2007 oral argument ("Tr.") makes clear, NIFT's references to extracting refrigerators, Tr. at 141, 155, were merely illustrative of the type of inspection and removal activities that NIFT, as a rail common carrier, would have to undertake to assure that each shipment conforms to the bill of lading, the contract with the shipper, and the

¹ The only activity proposed by NIFT that the Board determined did not constitute "transportation" was the proposed shredding of construction and demolition debris. June 29 Order at 15.

applicable law of the receiving jurisdiction. A common carrier's inspection and removal activities are instrumental to the common carrier's transportation of commodities, and are an additional cost item, rather than a "value added service," as Massachusetts suggests. Those activities are performed as one of the normal duties of a common carrier in transporting goods, and are not performed for some ancillary purpose, such as manufacturing or recycling. As NET has stated, non-conforming materials will be sent back to the shipper by NET, will be picked up by the shipper, or will be disposed of in accordance with applicable law. Fr at 154. The inspection and removal activities are the same, regardless of the type of commodity, and in theory, the removal of non-conforming material will occur only infrequently.

Despite the fact that a shipper may certify that the consignee listed on the bill of lading has contracted to accept the cargo and that the cargo is consistent with applicable state or local regulations, it is possible that non-compliant material could accidentally be included in a shipment presented for transportation. If the non-conforming material were delivered, the receiver might be required to reject the entire shipment. See, e.g., Ohio Admin. Code §§ 3745-400-11(F)(1). To prevent the rejection of a shipment, it is normal practice for a common carrier to inspect the shipment and remove materials that are not acceptable to the consignee or are not otherwise permitted by applicable law. Presumably, the Board's reference to "extracting refrigerators" in the July 10 decision was in recognition of this normal common carrier function and responsibility to inspect shipments to ensure compliance with the bill of lading and legal requirements.

Second, the motive underlying Massachusetts' request for the Board to reconsider its decision is purely economic. Massachusetts is seeking to use the requested "clarification" as a means of enforcing its "waste ban" regulations, which require certain materials to be recycled.

The "waste ban" regulations are intended to create artificial economic support for the recycling industry within Massachusetts. However, purely economic regulations, like the Massachusetts "waste ban" regulations, are precisely types of state and local laws that have been categorically preempted. See, e.g., City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998).

In sum, in the July 10 decision, the Board made clear what specific activities constitute transportation subject to its jurisdiction. Accordingly, there is no basis for reconsideration or further clarification. For these reasons, and for the reasons stated in the Board's July 10 decision, the MA Petition should be denied.

Respectfully submitted,



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J. Patrick Berry

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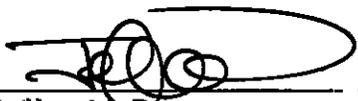
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Attorneys for New England Transrail, LLC

Date: August 20, 2007

CERTIFICATE OF SERVICE

I do hereby certify that on this August 20, 2007, I served a copy of the foregoing by causing a copy to be delivered by first class mail, postage prepaid, to each person listed on the STB Service list for Finance Docket No 34797



Jeffrey M. Bauer