

BEFORE THE SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35397

ABC & D RECYCLING, INC. -  
LEASE AND OPERATION EXEMPTION OF A LINE  
OF RAILROAD IN WARE, MASSACHUSETTS

**TOWN OF WARE'S MOTION FOR  
PARTIAL WAIVER OF 49 C.F.R. 1104.13(c)**

Submitted by:

David A. Wojcik, Esq.  
John A. Mavricos, Esq.  
Nicole B. Caprioli, Esq.  
Christopher, Hays, Wojcik & Mavricos, LLP  
370 Main Street  
Worcester, Massachusetts 01608  
508-792-2800  
dwojcik@chwmlaw.com

Counsel for the Town of Ware

September 10, 2010

BEFORE THE SURFACE TRANSPORTATION BOARD

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ABC & D RECYCLING, INC.  
LEASE AND OPERATION EXEMPTION OF A LINE  
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**TOWN OF WARE'S MOTION FOR  
PARTIAL WAIVER OF 49 C.F.R. 1104.13(c)**

Pursuant to 49 C.F.R. §1117, the Town of Ware, Massachusetts ("Ware") hereby petitions this Board for a partial waiver of 49 C.F.R. §1104.13(c) prohibiting the filing of a reply to a reply. On July 27, 2010, ABC&D Recycling, Inc. ("ABC&D") filed a Notice of Exemption to operate trackage in Ware, Massachusetts. Ware filed a Verified Petition to Reject and/or Dismiss Verified Notice of Exemption and Request for Stay of Effective Date of Exemption ("Petition to Reject") on August 17, 2010. On September 2, 2010, ABC&D filed a Verified Reply to the Town's filings in which it raised, *for the first time*, the claim that it "is already virtually a common carrier railroad operation"<sup>1</sup> and that its "motivation for filing the Notice of Exemption is to preserve and protect ABC&D's existing rail operations and to enhance those operations," and that the "Town seeks to terminate ABC&D's interstate railroad business without providing it any opportunity to seek a determination that its facility does not pose an unreasonable risk to public health, safety or the environment." The Town could not have anticipated these issues in its initial Petition to Reject and therefore, although the Board generally prohibits the filing of a reply to a reply, the Town requests a partial waiver of that prohibition so that the Town may respond to the new and unanticipated issues

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<sup>1</sup>At footnote 2 of its Verified Notice of Exemption ABC&D "states that it is not and has never been a common carrier."

raised by ABC&D.

Additionally, the Town notes that ABC&D has had the Town's Opposition to its first Notice of Exemption<sup>2</sup> since March 19, 2010. After receiving the Town's Opposition, on April 1, 2010, ABC&D withdrew its filing. Therefore, ABC&D has had, because of its procedural maneuvers, the opportunity to twice review (over approximately five months) many of the Town's arguments before responding to same. ABC&D shouldn't be allowed to gain an advantage in this proceeding as a result of this obvious procedural gamesmanship. Fairness requires that the Town be allowed to respond to ABC&D's latest filing. Allowing the Town to file such a Reply will serve the interests of justice, will not unduly delay the proceedings, and will not prejudice any party. A copy of the Town's proposed Verified Sur-Reply is attached hereto.

Respectfully Submitted:

/s/ David A. Wojcik  
David A. Wojcik, BBO#532040  
John A. Mavricos, BBO#325350  
Nicole B. Caprioli, BBO#643829  
Christopher, Hays, Wojcik & Mavricos, LLP  
370 Main Street  
Worcester, Massachusetts 01608  
508-792-2800  
Dwojcik@chwmlaw.com

Counsel for the Town of Ware

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<sup>2</sup>which was filed by ABC&D on February 24, 2010.

CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the attached Town of Ware's Motion for Partial Waiver of 49 C.F.R. 1104.13(c) upon all parties of record in this proceeding, by electronic mail to:

Leonard M. Singer, Esq.  
101 Arch Street, Ninth Floor  
Boston, MA 02110

Jamey Tesler, Esq.  
Massachusetts Department Of Transportation  
Ten Park Plaza  
Boston, MA 02116-3969

And by first class mail, prepaid to:

James Colman  
Commonwealth Of Massachusetts  
Executive Office of Environmental Affairs  
Department of Environmental Protection  
One Winter Street  
Boston, MA 02108

September 10, 2010

/s/ David A. Wojcik  
David A. Wojcik, Esq  
Christopher, Hays, Wojcik & Mavricos, LLP  
370 Main Street  
Worcester, MA 01608  
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SURFACE TRANSPORTATION BOARD

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ABC&D RECYCLING, INC. -  
LEASE AND OPERATION EXEMPTION OF A LINE  
OF RAILROAD IN WARE, MASSACHUSETTS

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VERIFIED SUR-REPLY OF TOWN OF WARE  
TO VERIFIED REPLY OF ABC&D RECYCLING, INC.

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Submitted by:

David A. Wojcik, Esq.  
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BEFORE THE SURFACE TRANSPORTATION BOARD

STB FINANCE DOCKET NO. 35397

ABC&D RECYCLING, INC. -  
LEASE AND OPERATION EXEMPTION OF A LINE  
OF RAILROAD IN WARE, MASSACHUSETTS

**VERIFIED SUR-REPLY OF TOWN OF WARE TO  
VERIFIED REPLY OF ABC&D RECYCLING, INC.**

Plaintiff ABC&D Recycling, Inc.'s ("ABC&D") Verified Reply raises the new claim that "ABC&D's present ongoing business is already virtually a common carrier railroad operation ..." (Verified Reply @ p. 2) and that "The motivation for filing the Notice of Exemption is to preserve and protect the [sic] ABC&D's existing rail operations and to enhance those operations." (Verified Reply @ p. 7) Based on these new assertions AB&CD argues:

Thus should ABC&D seek to preempt any state or local requirements relating to solid waste by initiating a proceeding under Ex Parte 684, it would be doing precisely what Congress intended. It would be seeking the application of federal law, rather than state or local law, to interstate transportation. (Verified Reply @ p. 11)

These new assertions and arguments by ABC&D are demonstrably false.

1. ABC&D IS NOT "ALREADY VIRTUALLY A COMMON CARRIER RAILROAD OPERATION".
  - ABC&D was incorporated on May 27, 2004 "to operate a construction demolition recycling facility." (Exhibit 14 to Verified Petition<sup>1</sup>)
  - ABC&D's Articles of Organization have never been amended to include common carriage as a business activity of the corporation.

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<sup>1</sup>"Verified Petition" refers to the "Verified Petition to Reject And/Or Dismiss Verified Notice of Exemption and Request for Stay of Effective Date of Exemption" filed by the Town of Ware on August 17, 2010.

- ABC&D and its related entity, the O'Riley Family Trust, began the process of becoming a construction and demolition material processing and handling facility (not a railroad or common carrier) in 2001. (Exhibit 6 to Verified Petition)
- Since 2001, ABC&D and its related entity, the O'Riley Family Trust, sought approvals to operate a facility to process and handle construction and demolition debris pursuant to Massachusetts law and Town of Ware by-laws and regulations and never sought approval to operate as a common carrier or rail carrier.
- For the period January 2001 through February 24, 2010, ABC&D never held itself out as a common carrier or rail carrier.
- ABC&D's interest in becoming a common carrier or rail carrier arose solely because the Town of Ware Board of Health denied ABC&D's request for site assignment to handle MSW at its facility. ABC&D's Notice of Exemption is motivated solely by a desire to seek refuge under federal preemption or a land use exemption under 49 U.S.C. §10909. See ¶18 of Exhibit 17 to Verified Petition, Complaint of the O'Riley Family Trust in Hampshire Superior Court as follows:

The Management Company's vision for the business includes a petition to the Surface Transportation Board (federal) for approval as a rail carrier and thus would federally preempt the Town from restricting a vast majority of the types of materials that could be processed at the facility including but not limited to MSW.

- Upon information and belief since February of 2010, ABC&D has not shipped any materials by rail from its facility but rather has relied solely on trucking.

2. THE MOTIVATION BEHIND THE FILING OF THE NOTICE OF EXEMPTION IS APPROVAL TO HANDLE MSW NOT PRESERVATION AND PROTECTION OF EXISTING RAIL OPERATIONS.

- Since ABC&D was incorporated on May 27, 2004, it has been in the business of operating a construction and demolition debris solid waste processing facility. ABC&D has always operated as a facility which charges a drop-off fee for construction and demolition debris. Those materials then become the property of ABC&D which sorts them, processes them and then ships them out for resale or disposal.
- The 773 feet of rail line at the ABC&D facility has been used sporadically but only

for movement of materials owned by ABC&D not by the public.

- ABC&D is not a rail carrier which operates a solid waste rail transfer facility; rather ABC&D is, and has always been, a construction and demolition debris handling and processing facility which has 773 feet of track at its facility.

3. CONGRESS DID NOT INTEND FOR 49 U.S.C. §§10908 AND 10909 TO BE MISUSED IN THE MANNER PROPOSED BY ABC&D.

ABC&D and its related entity, the O'Riley Family Trust, set out to permit, build and operate a construction and demolition debris facility pursuant to Massachusetts state law and the by-laws and regulations of the Town of Ware. The project, commenced in 2001, became operational in February of 2006. The facility has been in operation since February, 2006 and ABC&D has never held itself out as a rail carrier or as a provider of common carriage. In 2007, ABC&D began the process of attempting to obtain site assignment from the Massachusetts Department of Environmental Protection (DEP) and from the Town of Ware Board of Health to handle MSW at its facility. ABC&D failed to obtain site assignment approval from the Ware Board of Health and then appealed that decision to the Hampshire Superior Court which upheld the Ware Board of Health decision. In May 2010 after the Town of Ware brought certain zoning issues to the attention of ABC&D (see email attachment of May 7, 2010 forwarded by Town Manager attached as Ex. 16 to Verified Petition), ABC&D and the O'Riley Family Trust sued the Town of Ware in Hampshire Superior Court. (See Complaint attached as Ex. 17 to Verified Petition.) After voluntarily proceeding for some nine years under Massachusetts state law and local Ware by-laws and regulations with respect to this facility, ABC&D decided to file a Notice of Exemption with the STB in February of 2010 because it was unhappy with the results of the permitting process and litigation which it voluntarily undertook pursuant to Massachusetts state law and the regulations and by-laws of the Town of Ware.

The clear language of 49 U.S.C. §§10908 and 10909 makes it obvious that the provisions of the statute are not applicable to ABC&D and its facility. Section 10908 is applicable only to solid waste rail transfer facilities "owned or operated by or on behalf of a rail carrier ...." Similarly, the exemption provided for in 49 U.S.C. §10909 applies only to "a solid waste rail transfer facility that is or is proposed to be operated by or on behalf of a rail carrier ...." To the extent that all or a portion of the ABC&D facility is "a solid waste rail transfer facility" it is abundantly clear that it is not a solid waste rail transfer facility owned by or on behalf of a rail carrier. ABC&D is not a rail carrier which is operating or proposes to operate a solid waste rail transfer facility. Rather, ABC&D is, at best, in part a solid waste rail transfer facility which seeks to become a rail carrier for the sole purpose of invoking the provisions of 49 U.S.C. §§10908 and 10909. Under ABC&D's reading of 49 U.S.C. §§10908 and 10909, all solid waste rail transfer facilities would automatically be entitled to file a Notice of Exemption for the purpose of placing themselves under the provisions of these federal statutes. Every non-rail carrier that operated or proposed to operate a solid waste rail transfer facility would merely have to go through the procedural step of filing a Notice of Exemption with the STB to make itself a rail carrier. Clearly, this was not the intent of Congress which enacted language specifically distinguishing solid waste rail transfer facilities operated by or on behalf of a rail carrier from those "not owned or operated by or on behalf of a rail carrier ...." Under ABC&D's interpretation of the law, every owner or operator of a solid waste rail transfer facility would, as a matter of right, be entitled to claim rail carrier status and the protections of 49 U.S.C. §§10908 and 10909. Had this been the intent of Congress, the statute would have been written to apply to all solid waste rail transfer facilities regardless of whether they were owned or operated by or on behalf of a rail carrier. Congress chose not to do this and ABC&D cannot rewrite the statute to its liking.

It is clear from ABC&D's "Verified Reply" that while it quibbles with the Town's characterization of ABC&D as the "owner of the materials it handles", it admits that in fact ABC&D takes possession of the debris and becomes responsible for its proper disposal. (Verified Reply @ p. 13) It is, therefore, undisputed that once construction and demolition debris is dropped off at the ABC&D facility for a fee, ABC&D controls the processing, resale, disposal and shipping of these materials.<sup>2</sup> ABC&D is not "virtually a common carrier" but rather is a shipper of its own materials<sup>3</sup>.

ABC&D has not been, is not now, and will not be a rail carrier under 49 U.S.C. §10102. The ICCTA<sup>4</sup> at §10102(5) defines "rail carrier" as:

...person providing common carrier railroad transportation for compensation ... [emphasis supplied]

See, Bar Technologies, Inc. v. Conemaugh & Black Lick R.R., 73 F. Supp. 2d 512, 515 (W.D. Pa. 1999), quoting, Kelly v. General Elec. Co., 110 F. Supp. 4, 6 (E.D. Pa. 1953), as follows:

A common carrier has been defined generally as one who holds himself out to the public as engaged in the business of transportation of persons or property from place to place for compensation, offering his services to the public generally. The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently, and hence is regarded in some respects as a public

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<sup>2</sup>Tellingly, ABC&D has supplied no evidence that it operates a facility "where solid waste is treated as a commodity transported for a charge;" STB Ex Parte No. 684 @ p. 5.

<sup>3</sup>For example, upon information and belief, as recently as August of 2010, ABC&D, through its manager, Patrick Hannon, shipped approximately 250 tons of "screened materials" from the ABC&D facility to a property owned by Mr. Hannon located in Acton, Maine for the purpose of Mr. Hannon using the materials to build a berm around his property in Acton, Maine. The Maine DEP and the Acton Code Enforcement Officer inspected the materials (which according to the Maine DEP consisted of a mixture of wood and dirt with a large amount of other materials including metal, plastics, glass, paper, polystyrene foam and foil backed insulation, asphalt shingles, landscape fabric, ceramic tile, hardboard, fiberglass and other small items such as a plastic tampon applicator, a car stereo equalizer and some lego toy blocks) and proposed berm and informed Mr. Hannon that the material was not acceptable for use in berm construction and that berm construction in general would require a license. ABC&D and Mr. Hannon thereafter shipped the material back to ABC&D.

<sup>4</sup>Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §10101 et. seq.

servant. The dominant and controlling factor in determining the status of one as a common carrier is his public profession as to the service offered or performed.

ABC&D is not now and will not in the future be in the business of transporting people's property from place to place as they direct for compensation. Customers pay ABC&D to accept their construction and demolition materials. ABC&D then sorts and processes the materials which become the property of ABC&D.<sup>5</sup> The materials are thereafter resold, recycled or disposed of at the sole discretion of ABC&D. The decisions with respect to when, where and how to ship the materials are made by ABC&D. This is not now and will never be common carriage or rail carriage. 49 U.S.C. §§10908 and 10909 apply to rail carriers which decide to operate solid waste rail transfer facilities. These statutes do not hold that owners/operators of solid waste rail transfer facilities are, merely by virtue of such ownership or operations, rail carriers. Since ABC&D is not now and will never be a rail carrier, its Verified Notice of Exemption should be rejected or dismissed. ABC&D's contention that: "The interstate commerce that ABC&D provides is as much entitled to the protection mandated by Congress as that commerce would be if it were provided by Massachusetts Central [railway]." (Verified Reply @ p. 22) is flat out wrong. Massachusetts Central is indisputably a rail carrier; its primary business is providing common carrier railroad transportation for compensation. ABC&D is indisputably not a rail carrier; it does not provide common carrier railroad transportation for compensation, rather it accepts ownership of construction and demolition debris for a fee. See, Town of Milford, MA-Petition for Declaratory Order, STB Fin. Docket No. 34444, Aug. 11, 2004, as follows:

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<sup>5</sup>See ABC&D Advertisement from July 9, 2010 Quaboag Current attached hereto as Ex. 29. ABC&D is not a common carrier but rather is solely in the business of accepting and disposing of construction and demolition debris for a fee.

... many shippers that own and operate locomotives and transloading facilities are not considered to be rail carriers under the statute.

Congress specifically mandated that the protections of §§ 10108 and 10109 apply only to rail carriers. ABC&D wants to become a rail carrier solely to gain the protections of 49 U.S.C. §§ 10108 and 10109, not to provide common carriage.

The fact that ABC&D submitted a Notice of Exemption to the STB pursuant to 49 C.F.R. 1150.31 does not change the analysis or the applicability of Town of Milford. The mere filing of a Notice of Exemption with the STB cannot change the underlying fact that ABC&D is not and will not be a rail carrier since it is not a common carrier (and thus not a rail carrier) and therefore ABC&D cannot attempt to cloak itself with ICCTA preemption or bring itself under the protection of 49 U.S.C. §§ 10908 and 10909. See, Mack v. East Camden & Highland Railroad Company, 297 F. Supp. 2d 1052, 1056 (W.D. Tenn. 2003) noting:

The question is "not whether the defendant is licensed as a common carrier but whether defendant offers or provides common carrier services."

Similarly, see Lone Star Steel Company v. McGee, 380 F.2d 640, 648 (5<sup>th</sup> Cir. 1967). Indeed, it is apparent that the sole motivation for ABC&D's filing of the Notice of Exemption with the STB is to attempt to cloak itself with ICCTA preemption and to attempt to obtain the protection of 49 U.S.C. §§ 10908 and 10909.

4. ABC&D SEEKS TO OVERWHELM THE TOWN OF WARE WITH THE COST OF THE PROCESS.

At p. 21 of its Verified Reply, ABC&D states that:

The Town seeks to terminate ABC&D's interstate railroad business without providing it any opportunity to seek a determination that its facility does not pose an unreasonable risk to public health, safety or

the environment.

In fact, upon information and belief, ABC&D has not conducted any railroad business at its facility since February of 2010 when Country Bank and Mr. Berardi's new management team took over the facility.<sup>6</sup> It appears that since February 2010 all materials to and from the facility have been moved by trucks. Furthermore, the Town did not take any affirmative action to terminate ABC&D's business. Rather, the Town brought to ABC&D's attention the fact that the ABC&D facility has no frontage on a public way and other zoning violations and requested that these serious zoning issues be addressed. Rather than seek to address these zoning issues with the appropriate Town officials and Town boards, a lawsuit was brought in the name of the O'Riley Family Trust and ABC&D against the Town of Ware in Hampshire Superior Court. In defending this lawsuit, the Town of Ware necessarily brought a counterclaim seeking enforcement of its zoning by-laws but the litigation was initiated by ABC&D and the O'Riley Family Trust.<sup>7</sup> It is ludicrous for ABC&D to assert that it has not been provided with an opportunity "to seek a determination that its facility does not pose an unreasonable risk to public health, safety or the environment." In fact, ABC&D was afforded a five day public hearing before the Town of Ware Board of Health with respect to the public health, safety and environmental impacts of its proposed MSW facility and thereafter ABC&D filed and litigated an appeal, before the Hampshire Superior Court, of the Board of Health's findings with respect to the public health, safety and environmental impact of the proposed MSW facility.

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<sup>6</sup>Upon information and belief, ABC&D may now be in the process of loading debris on rail cars so that it can argue to this Board that it engages in rail operations. However, the fact remains that virtually no rail shipments were made from February 2010 through the present.

<sup>7</sup>Although the litigation was brought in the name of the O'Riley Family Trust and ABC&D, it is apparent that the actual parties in interest in that litigation are Mr. Berardi and Country Bank for Savings and that they are the ones directly or indirectly funding the litigation.

Furthermore, ABC&D and the O'Riley Family Trust filed litigation in May 2010 against the Town seeking a judicial determination of the various zoning issues and ABC&D and the O'Riley Family Trust requested and were granted a speedy trial on those issues and the case was tried before the Hampshire Superior Court from August 23 to August 26, 2010. A decision by the Hampshire Superior Court is pending.

It is apparent that the powerful financial interests now behind ABC&D and the O'Riley Family Trust are attempting to overwhelm the Town of Ware<sup>8</sup> and to defeat the Town of Ware's strong substantive positions in both state court and before this Board by making it impossible for the Town of Ware to bear the litigation costs<sup>9</sup>. ABC&D and the O'Riley Family Trust and their financial backers including Mr. Berardi and Country Bank for Savings have assembled a team of at least eight lawyers in an attempt to bury the Town of Ware with the costs of the various legal proceedings. ABC&D and the O'Riley Family Trust are being represented by two lawyers from the law firm of Sugarman, Rogers, Barshack & Cohen, P.C., and two lawyers from the law firm of Donahue, Hyland and Donahue, in these matters. Country Bank is represented by at least two lawyers from the law firm of Sapirstein & Sapirstein, and Mr. Berardi and ABC&D are also represented by Attorneys George Lemelman and Leonard Singer, with respect to the STB proceedings. Country Bank is a regional bank with assets of over \$1,000,000,000 and over \$172,000,000 in equity, and Mr. Berardi is an individual who is apparently the former president of North American Site Developers, Inc. (NASDI), a company which has touted itself as the "fifth largest demolition contractor in the US".

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<sup>8</sup>Ware is a small community in central Massachusetts with a population of approximately 9,707.

<sup>9</sup>Indeed, Mr. Berardi had ABC&D place a large sign on Rts 9 & 32 in Ware unfairly and publicly chastising the Ware Town Manager for "wasting" Town funds opposing litigation and proceedings before this Board which were initiated by ABC&D. ABC&D set the barn afire so that it can now complain that the fire department is wasting money fighting the fire that ABC&D set.

These powerful economic entities are using the costs of state court litigation and STB proceedings to force the Town of Ware to accept their plans to have an MSW facility in Ware to avoid the great expense of battling the proceedings which they have brought in Massachusetts Superior Court and before this Board. Mr. Berardi and Country Bank for Savings<sup>10</sup> are clearly using the costs of these proceedings as a hammer to force the Town of Ware to acquiesce to their demands that ABC&D be allowed to handle MSW despite the adverse impact such an operation will have on the public health, safety and environment of the Town of Ware.

ABC&D's claim that it has tried unsuccessfully to settle matters with the Town is also ludicrous. ABC&D and its financial backers, Country Bank and Mr. Berardi, have told the Town of Ware that the Town must agree to allow the facility to handle MSW and that the Town's agreement to MSW is a precondition to any settlement discussions. Therefore, as a precondition to any settlement discussion, ABC&D and Country Bank and Mr. Berardi require that the Town of Ware simply ignore the public health, safety and environmental concerns cited by the Ware Board of Health after five days of public hearings and after those Board of Health's findings were challenged, litigated and upheld by the Hampshire Superior Court. Put simply, ABC&D, Country Bank and Mr. Berardi insist upon unconditional surrender by the Town of Ware with respect to MSW before they will engage in "settlement discussions."

5. ABC&D'S NOTICE OF EXEMPTION IS FUTILE.

As discussed above, it is apparent that the sole purpose of ABC&D's Notice of Exemption

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<sup>10</sup>At footnote 1, p. 4 of the Verified Reply, ABC&D disputes the fact that it presently exists and operates at the discretion of Country Bank for Savings. In fact, this is the case since the Management Agreement between ABC&D and Valley Management Services provides at Section One (G) that Country Bank can terminate the Management Agreement at any time (Ex. 5 to Verified Petition at p. 2) and termination of the Management Agreement automatically terminates both the Stock Purchase Agreement and the agreement to sell the real estate. Given these provisions of these agreements, there can be no doubt that Country Bank controls these transactions.

is to gain railroad status for the purpose of seeking a land use exemption pursuant to 49 U.S.C. §10909.

As this Board noted in STB Ex Parte No. 684 @ p. 7, an exemption under 49 U.S.C. §10909 would only exempt a solid waste rail transfer facility from state and municipal laws and by-laws "affecting the siting" of the facility. This Board stated:

But we also recognize that Congress did not want to shield solid waste rail transfer facilities from complying with the same types of pollution, public health and safety, and environmental laws which other similar solid waste management facilities must comply.

Therefore, even if a land use exemption was granted, the ABC&D facility would still be subject to the provisions of the Ware zoning by-law relating to "public health and safety". In clear violation of the Town of Ware zoning by-laws which require that the ABC&D facility have at least 125 feet of frontage<sup>11</sup> on a public way, the facility was built on a landlocked parcel with no frontage on a public way. The only access to the property on which the ABC&D facility has been constructed is across a 90 foot wide strip of land owned by the Commonwealth of Massachusetts DOT and presently used for railroad purposes. ABC&D and the O'Riley Family Trust have only a personal revocable license to use an approximately 20 foot wide strip of land across the Commonwealth's property. (Ex. 11, Verified Petition) Furthermore, for public safety, dust suppression and fire fighting purposes, the ABC&D facility requires an eight inch water main to service the property and also requires adequate electric power to run the facility. As a result of the recent trial in Hampshire Superior Court, it was learned that ABC&D unlawfully laid the eight inch water line and a power

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<sup>11</sup>Zoning frontage requirements are public safety regulations since without frontage a property has no guaranteed access for public safety vehicles including fire trucks, ambulances and police vehicles. Adequate public safety access is obviously a necessity for a facility such as ABC&D's which handles high volumes of combustible debris in an environment where employees work with heavy equipment and machinery.

line across property of the Commonwealth of Massachusetts without any license, easement or other permission to do so. (See Ex. 30 attached hereto) The ABC&D facility was built and operates in defiance of the public safety frontage requirement of the Town of Ware zoning by-law and is supplied with water and power by virtue of an unlawful trespass upon land of the Commonwealth of Massachusetts DOT. This is a rogue facility which was built and is operating in disregard of property rights and of public safety frontage requirements which are universally recognized as necessary for the safe operation of a facility of this nature. These undisputed public safety defects of this facility demonstrate that any application for a siting exemption pursuant to U.S.C. 49 §10909 would be futile and a waste of time and money.

**CONCLUSION**

For the reasons set forth herein and in the Town of Ware's Verified Petition, this Board should dismiss and/or reject the Notice of Exemption.

**THE TOWN OF WARE,  
MASSACHUSETTS**

By /s/ David A. Wojcik  
David A. Wojcik, BBO#532040  
John A. Mavricos, BBO#325360  
Nicole B. Caprioli, BBO#643829  
Christopher, Hays, Wojcik  
& Mavricos, LLP  
370 Main Street  
Worcester, MA 01608  
508-792-2800

CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the attached Town of Ware's Verified Sur-Reply to ABC&D's Verified Reply, upon all parties of record in this proceeding, by electronic mail to:

Leonard M. Singer, Esq.  
101 Arch Street, Ninth Floor  
Boston, MA 02110

Jamey Tesler, Esq.  
Massachusetts Department Of Transportation  
Ten Park Plaza  
Boston, MA 02116-3969

And by first class mail, prepaid to:

James Colman  
Commonwealth Of Massachusetts  
Executive Office of Environmental Affairs  
Department of Environmental Protection  
One Winter Street  
Boston, MA 02108

September 10, 2010

/s/ David A. Wojcik  
David A. Wojcik, Esq  
Christopher, Hays, Wojcik & Mavricos, LLP  
370 Main Street  
Worcester, MA 01608  
508-792-2800

**VERIFICATION**

I, Nancy J. Talbot, Town Clerk for the Town of Ware and Ware Board of Selectmen member, declare under penalty of perjury that, upon information and belief, the foregoing factual statements are true and accurate to the best of my knowledge and belief. Further, I certify that I am qualified and authorized to file the *Verified Sur-Reply of the Town of Ware to Verified Reply of ABC&D Recycling, Inc.*

Executed: September 9, 2010.

  
\_\_\_\_\_  
Nancy J. Talbot

# EXHIBIT 29

**Summer Clean Up Time!**

**ABC&D Recycling Inc.**

**We have 10, 15, 20 & 30 Yard Containers Available  
for All Your Construction/Demolition Projects!**

*We deliver the container  
to your address,  
pick up and recycle  
the construction  
demolition for you.*



**5% OFF**  
with mention  
of this ad

**198 East Street Ware, MA**  
**413.967.7046**

CC

# EXHIBIT 30



DEVAL L. PATRICK  
GOVERNOR  
TIMOTHY P. MURRAY  
LT. GOVERNOR  
JEFFREY B. MULLAN  
SECRETARY & CEO



I, Chalita Belfield, being the Manager of Railroad Properties for the Massachusetts Department of Transportation and having custody of the official records of this office pursuant to Mass. R. Civ. P. 44(a)(1), state that after diligent search, I have found no records of any easements or agreements authorizing ABC&D Recycling, Inc. and/or The O'Riley Family Trust to install, lay, construct or maintain water lines, electric power lines or other utilities on, through, or above the land that is owned by the Commonwealth of Massachusetts – Massachusetts Department of Transportation adjacent to the ABC&D recycling, Inc./O'Riley Family Trust facility in Ware, Massachusetts.

Dated: August 24, 2010

*Chalita Belfield*  
Chalita Belfield  
Manager of Railroad Properties

