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Committee on Transportation and Infrastructure
Subcommittee on Railroads, Pipelines, and Hazardous Materials

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Testimony of
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Good morning Chairwoman Brown, Ranking Member Shuster, and other Members. Thank you for this opportunity to testify on railroad-owned solid waste transload facilities.

This agency was last called to testify before the Subcommittee on this issue in May 2006, when Doug Buttrey chaired the Board. I want to commend Vice Chairman Buttrey on his testimony at that hearing. I would like to take this opportunity, however, to update the Subcommittee on developments that have transpired at the Board in the 17 months since that testimony. The Board has recently taken a more assertive stance toward cases involving waste, but we need to do more to prevent them from becoming cases in the first place. In a more proactive manner, we may need to exercise the full range of our powers to deal with the situations that confront us,[1] and there may be a need for clarification of the railroad preemption law by Congress.

[1] On occasion, a situation arises where an entity claims the benefit of federal preemption under the Interstate Commerce Act, yet has not come before the Board seeking any authority for its alleged rail-related activities. In such circumstances, the Board has general investigatory and enforcement powers. The Board may order compliance with the Act on complaint, and may specifically seek to enjoin a rail carrier from violating the construction, acquisition, and abandonment laws. 49 U.S.C. 11701(a) & 11702 (text reproduced at Attachment A). It may issue a "show cause" order to compel compliance with the Act, or a declaratory order to eliminate a controversy or remove uncertainty about an issue. 49 U.S.C. 11701(a); 5 U.S.C. 554(e); 49 U.S.C. 721 (text reproduced at Attachment A). The Board needs to continue to look creatively at its range of powers to determine how best to deal with each set of circumstances involving waste that comes before it.

In Attachment B to my testimony today, I have listed the various cases involving municipal solid waste (MSW) or construction and demolition (C&D) debris that have come before the Board during the past 17 months. The titles of these cases show that they come to the Board in many different guises, and that entities and their representatives will go to great lengths to obtain federal preemption of solid waste-related rail projects. A review of the Board's decisions confirms that we have become increasingly concerned about the tactics used in this bubble of cases and have become more cautious about permitting certain projects to move forward.

Indeed, just last week, the Board initiated a proceeding to examine whether more information might be warranted up front in situations where an entity seeking authorization from the Board intends to provide facilities for the transportation or transloading of municipal solid waste. See Attachment C, Information Required in Certain Notices of Exemption, Ex Parte No. 673 (STB served Oct. 4, 2007).

Next, as you are aware, the Board held an oral argument this past April in an important and controversial preemption case known as New England

Transrail.[2] It was highly unusual for the Board to hold such a hearing in a non-rate case. On July 10, 2007, the Board issued its decision on which of NET's proposed waste-related activities would be preempted from local regulation if NET were to be authorized as a railroad. I issued a strong dissent describing my views and reasoning. Let me further elaborate on those views today.

But let me first take a moment to reassure you that I am, and have always been, an ardent supporter of federal preemption.[3] Congress and the courts have long recognized the need to regulate railroad operations at the federal level to avoid a patchwork quilt of state and local regulations that could impede the efficient flow of commerce. The Act, especially as amended by the Interstate Commerce Commission Termination Act of 1995, is one of the "most pervasive and comprehensive of federal regulatory schemes."[4] The ability to preempt local laws is one of the prized benefits of receiving Board authority to build and run a railroad.

[2] 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.
[3] See, e.g., CSX Transp., Inc. – Petition For Declaratory Order, STB Finance Docket No. 34662 (STB served March 14, 2005).
[4] Chicago & N.W. Transp. v. Kalo Brick & Tile, 450 U.S. 311, 318 (1981); City of Auburn v. United States, 154 F.3d 1025, 1029 (9th Cir. 1998).

In the rail transportation arena, the purpose of federal preemption is to protect the flow of interstate commerce. Commodities such as MSW, C&D debris, and hazardous materials must move by rail because of their physical characteristics. But because preemption applies in our rail universe only to "transportation by rail carriers,"[5] and because determination of what is "transportation" and who is a "rail carrier" is within the Board's discretion, we should be exceedingly careful of how we exercise that discretion. In considering the spectrum of MSW related activities an entity conducts, we have the discretion to determine at what point "transportation" – and thus preemption – begins. I regret that my colleagues and I disagreed about where this precise point was in New England Transrail, but I recognize that in any fact-bound determination such as that case, there may be disagreements at times.

My experience with the MSW industry and attendant handling and disposal issues spans the past two decades. In the mid-1980s, I was Director of Economic Research for the New York State Legislative Commission on Solid Waste Management. In that capacity, I undertook several economic analyses of the MSW sector and was instrumental in developing an annual

[5] 49 U.S.C. 10501(b) (text reproduced at Attachment A).

Commission-sponsored conference on solid waste management and recycling. In these efforts, I worked closely with Representative Maurice Hinchey of New York, when he chaired the New York State Legislature Commission on Solid Waste Management during his tenure in the New York State Assembly. Because of these experiences, I am conversant with the nature of MSW and the need for state and local control over its handling.

I dissented in New England Transrail not only on the facts of that particular case, but also on policy grounds. Based on the inherent qualities of MSW, I believe that its handling should not be accorded federal preemption as "integrally related" to rail transportation. MSW is an atypical commodity. A comprehensive scheme of state and local law exists to protect the environment and the health and safety of local populations in the vicinity of MSW's handling and disposal.[6] There is a critical reason that the power to regulate the handling of MSW has been delegated by the Environmental Protection Agency (EPA) to the states — and that is because states and localities are in the best position to protect the health and safety of their citizens and to understand the impacts of handling MSW in their area.

[6] See, e.g., United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 261 F.2d 245, 264 (2d Cir. 2001) (Calabresi, J., concurring) ("Waste disposal is both typically and traditionally a local government function."); USA Recycling, Inc. v. Town of Babylon, 66 F.3d 1272, 1275 (2d Cir. 1995) ("For ninety years, it has been settled law that garbage collection and disposal is a core function of local government in the United States.").

For instance, nationally, paper and paperboard products are the largest component of MSW (36%), followed by yard trimmings (12%), food waste (11%), plastic (11%), metals (8%), wood (6%), glass (6%), textiles/rubber/leather (7%), and other materials (3%).[7] But as we all know from living in different parts of the metropolitan Washington, DC area and from the Members' respective districts, different jurisdictions have different rules about what commodities should be kept out of the MSW stream through recycling, or special collection and disposal of yard waste and appliances. These same governments, then, are in the best position to determine how to handle the MSW that is generated in their areas, and how to deal with non-compliant materials when rules are not followed. Unfortunately, while the Board typically harmonizes its interpretation and implementation of the Interstate Commerce Act with other federal laws,[8] there is no federal law to be harmonized here precisely because states have been delegated the authority and responsibility to regulate in the area of MSW handling.

[7] "Municipal Solid Waste: Background," (Nov. 8, 2006), available at http://www.nswma.org, under "Frequently Asked Questions."; http://www.epa.gov/msw/facts.htm.
[8] Tyrrell v. Norfolk Southern Ry., 248 F.3d 517, 523 (6th Cir. 2001); Friends of the Aquifer, STB Finance Docket No. 33966, slip op. at 5 (STB served Aug. 15, 2001).

Finally, let me tell you what my New England Transrail dissent was not intended to do. My dissent focused narrowly on MSW. I did not object to the majority's findings with respect to C&D debris. The primary danger with that commodity is that it might contain asbestos, removal and disposal of which are governed by EPA and Occupational Safety and Health Administration regulations.[9] I also did not intend to disturb the delicate balance between local regulation and enforcement of health and safety laws, on the one hand, and federal preemption of other local laws, on the other -- except with regard to MSW.

In conclusion, I am troubled by the recent up-tick in assertions by entrants into the MSW industry that they are rail carriers subject to the Board's jurisdiction. What concerns me is these firms' attempts to blend the nature of their operations to offer both rail carrier service as well as waste processing, and to use their putative status as rail carriers to shield their waste processing operations from the reach of state and local environmental laws. This tactic is manipulative and abusive of the Board's jurisdiction and powers, and it highlights a method of evading the law that I cannot

[9] See, e.g., http://www.ehso.com/Asbestos/asbestreg.php.

support.[10] Either these entities are truly rail carriers providing transportation, so that their activities warrant federal preemption, or they do not have rail carrier status, and are subject to state and local regulation. They cannot have it both ways. If the Board's existing interpretation of the Act cannot stop this practice, then it is time for Congress to do so.

Thank you for the opportunity to testify today. I look forward to answering any questions you may have.

[10] Preemption should not be used to jeopardize the public health and welfare. I am concerned about the regulatory gaps that can and do result from preemption, and have been so since I dissented from one of the first cases to come before me after I joined the Board. The New York City Econ. Dev. Corp.–Petition For Declaratory Order, STB Finance Docket No. 34429 (STB served July 15, 2004) (Vice Chairman Mulvey, dissenting). Who looks out for the public health and safety when federal preemption deprives state and local governments from doing so?