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BEFORE THE

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE'S

SUBCOMMITTEE ON RAILROADS, PIPELINES,
AND HAZARDOUS MATERIALS

AT A HEARING REGARDING

"RAILROAD-OWNED SOLID WASTE TRANSLOAD FACILITIES"

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Testimony of Charles D. Nottingham
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Good morning Chairman Brown and Members of the Subcommittee. My name is Charles Nottingham, and I am Chairman of the Surface Transportation Board (Board or STB). I appreciate the opportunity to appear before this Subcommittee today to address how the STB regulates rail-related solid waste transload facilities.

Although I testified before the full Committee two weeks ago for the hearing on competition, this is my first appearance before the Subcommittee since I became Chairman of the STB in August 2006. It has been an extraordinary year for me personally, and an unusually busy year for the Board. One of the most difficult issues facing the Board this year is how to improve the Board's ability to ensure effective regulation of rail operations involving solid waste; to protect public safety, health and the environment; to enable commerce to use the interstate rail network freely; and to take trucks that would otherwise transport these materials off local roads.

Before elaborating on the Board's efforts in this area in this written testimony, I will first provide the Subcommittee with an overview of the Board's role, and the role of state and local authorities, with regard to rail-related facilities. Next, I will discuss the state of the law on this complex issue. Finally, I will outline the steps the Board recently has taken to allow for effective regulation for rail-related facilities that will handle solid waste, consistent with the law.

The Scope of the Federal Preemption

As all of you are aware, the Board was created in the ICC Termination Act of 1995 (ICCTA). The express Federal preemption contained in the STB's governing statute at 49 U.S.C. 10501(b) gives the STB exclusive jurisdiction over "transportation by rail carriers." Thus, to qualify for preemption, two tests must be met: the operation must be rail transportation, and it must be transportation that is conducted by a rail carrier. I will focus on the "transportation" component in my written testimony today, because it has been the most controversial aspect of the preemption analysis.

Congress has defined the term "transportation" broadly, at 49 U.S.C. 10102(9), to include all of the facilities used for and services related to the movement of property by rail, expressly including "receipt, delivery," "transfer in transit," "storage," and "handling" of property. Thus, under our statute, "transportation" is not limited to the movement of a commodity while it is in a rail car, but includes activities such as loading and unloading material from rail cars and temporary storage. However, manufacturing and commercial activities that occur on property owned by a railroad that are not part of or integral to the provision of rail service are not part of "transportation." Therefore, these activities do not qualify for Federal preemption and are subject to the full panoply of state and local regulation.

Even where the section 10501(b) preemption applies, the Board has made clear that there are limits. The Board has never interpreted the statute to mean that it preempts all other law. Rather, where there are overlapping Federal statutes, they are to be harmonized, with each statute given effect to the extent possible. This is true even for Federal regulatory schemes that are implemented in part by the states, such as the Solid

Waste Disposal Act, the Clean Air Act, and the regulation of rail safety under the Federal Railroad Safety Act.

Where states and localities are acting on their own, both the Board and the courts have found that certain types of actions are necessarily preempted, regardless of the context or basis of the action. This includes any form of permitting or preclearance requirements – such as zoning and environmental and land use permitting – that could be used to deny or defeat a railroad's ability to conduct its operations or to proceed with activities that the Board has authorized. Also, states and localities cannot regulate matters directly regulated by the Board, such as railroad rates or service or the construction, operation, and abandonment of rail lines.

Otherwise, state and local laws are preempted only if the particular action would prevent or unreasonably interfere with rail transportation. Thus, not all state and local regulation affecting rail carriers is preempted. Rather, states retain certain police powers to protect public health and safety. Types of state and local measures that have been found to be permissible, even in cases that qualify for the Federal preemption, include requirements that railroads comply with local fire, electrical, and building codes; allow a local government to inspect their facilities; and share their plans with the community when they are undertaking an activity for which a non-railroad entity would require a permit.

There are three ways in which issues involving the handling of solid waste at facilities proposed to be located along new or existing rail lines come before the Board: (1) proposals to build a new line into a new service area; (2) proposals that involve a new carrier or a small Class III carrier seeking to acquire and operate an existing line; and (3)

the construction of facilities ancillary to already-authorized rail lines. I will address each type of case.

1. New Rail Construction

If a project involves building a new rail line into what would be a new service area for the railroad, it requires a license from the Board. The Board's authorization may take the form of a "certificate of public convenience and necessity" issued under 49 U.S.C. 10901, or an exemption under 49 U.S.C. 10502 from the formal application procedures of section 10901. Regardless of how the authorization is sought, in a rail construction proceeding the Board routinely conducts a detailed environmental review under the National Environmental Policy Act (NEPA) as part of its licensing process. As part of the environmental review, Federal, state, and local agencies, communities, organizations and members of the general public have an opportunity to participate and to raise any environmental concerns they may have. And the Board has broad discretion to impose environmental conditions on any authority it grants to minimize any potential environmental impacts. These conditions may include, as appropriate, reporting, monitoring and oversight; a requirement that the rail carrier comply with specific state and local regulations; and inspections of the rail-related operations on the Board's behalf by appropriate state and local agencies, such as a state department of environmental protection (DEP).

2. Acquisition of an Existing Rail Line

If a project involves a new carrier seeking to acquire or operate an existing rail line, the new carrier must also obtain regulatory authority from the Board. As in the case of new construction, the new carrier may file an application for that authority under 49

U.S.C. 10901, or it may seek an exemption under 49 U.S.C. 10502 from the application requirements of section 10901, where abbreviated processes are adequate. Currently, most of these cases are handled under "class exemptions" at 49 CFR 1150 Subpart D and 49 CFR 1150 Subpart E that allow parties to use abbreviated, summary procedures for obtaining authority, subject to an after-the-fact Board review if objections are received.

NEPA applies to proposals for Board authority to acquire and operate an existing line, whether the authority is sought through an application or an exemption. Where there is a potential for significant environmental impacts in these cases, the Board conducts an environmental review similar to what takes place for rail construction projects.

3. Construction of Facility Ancillary to Already-Authorized Rail Line

Finally, under our governing statute, some activities, although part of rail transportation, may nevertheless not be subject to STB licensing. These activities include making improvements to existing railroad operations, such as adding track and/or facilities – including transload facilities where materials are transferred between truck and rail – at existing railroad locations, to better serve the needs of a railroad's service territory. They also include construction of ancillary spur, industrial, team, switching, or side tracks by an already-authorized rail carrier, since ancillary track and facilities of this nature are excepted by 49 U.S.C. 10906 from the Board's licensing authority.

Because no Board license is required in these types of cases, there is no occasion for the STB to conduct a formal environmental review or impose specific environmental conditions. However, as I have noted, Federal environmental laws continue to apply, and state and local police powers are not preempted entirely. Moreover, the Board

encourages railroads to work with localities to reach reasonable accommodations. In some cases, environmental and safety concerns have been successfully resolved through consensual means, by the railroad and the community working together to address their respective concerns.

Moreover, any interested party, community, or state or local authority concerned that the Federal preemption is being wrongly claimed to shield activities that are not included within the definition of "transportation by rail carrier" can ask the Board to issue a declaratory order under 5 U.S.C. 554(e) and 49 U.S.C. 721, addressing whether the particular operations constitute "rail transportation" by a "rail carrier." Alternatively, they can go directly to court to have that issue addressed. The Board has issued a number of declaratory orders clarifying the reach and applicability of the Federal preemption to particular situations. In some cases, solid waste and other businesses have located close to a railroad and claimed to be a rail facility exempted from state and local laws that would otherwise apply, but have been found by the Board or a court not to be entitled to the Federal preemption because the operations did not actually constitute "rail transportation" or would not involve a "rail carrier." In other cases, activities and operations at facilities have been found to qualify for the Federal preemption, as part of the transportation conducted by a rail carrier. It is worth noting that the Board and court cases on the boundaries of the section 10501(b) preemption have been remarkably consistent, and that the Board and the courts have never reached a different conclusion regarding the applicability of the preemption for particular activities and operations.

New England Transrail

There have been only a few cases that have come before the Board involving solid waste facilities. I would like to focus in my written testimony on New England Transrail, the most controversial and complex preemption case of this type to date. While this matter is still before the Board, I can discuss the issues raised and the events that led to issuance of the Board's preliminary decision on jurisdiction in July 2007.

New England Transrail (NET) plans to acquire existing track, construct new track and operate as a rail carrier over the combined trackage in Wilmington and Woburn, Massachusetts, to transport traffic by rail for about 1 mile for connection to other rail carriers that will carry the product to their final destination. In seeking Board authorization, NET stated that, upon commencement of rail operations, it would receive at its facility, and provide transportation for, a variety of commodities, including sand, gravel, plastic pellets, municipal solid waste (MSW), and construction and demolition debris (C&D).

In its written filings, NET argued that it would be a rail carrier and that all of its planned activities at the facility would facilitate the transportation of the MSW and C&D, and therefore would be integrally related to rail transportation. Opposing parties argued that NET would not be a rail carrier and that some or all of these activities would not be part of rail transportation, as they are no more than routine solid waste management and processing activities.

A coalition of parties headed by the National Solid Wastes Management Association asked the STB to address the threshold issue of the extent of the Board's

jurisdiction over the project. The Board agreed that it would make sense to first examine the extent to which NET's planned activities related to MSW and C&D would come within the scope of the Board's jurisdiction. The Board sought written comments from all interested parties, and in April 2007, held a full day of oral argument to further explore the issues. At the oral argument, a number of the witnesses who opposed the New England Transrail proposal acknowledged that some of the planned activities, such as loading, unloading, and temporary storage, would directly facilitate the rail transportation of C&D and MSW by making that transportation more efficient, more productive and safer. And one witness, the owner of a truck transload solid waste facility in Massachusetts, stated that the state permitting process for his facility had taken four and a half years.

In July 2007, the Board issued a preliminary decision announcing that the proposed transaction, if approved, would make NET a rail carrier, but that the part of NET's plan involving the shredding of C&D would extend beyond the scope of rail transportation. The Board also concluded that other proposed activities – such as loading, unloading, handling and storing – that are defined in Federal statute as being part of "transportation" – would fall within the Board's exclusive jurisdiction. But the Board emphasized that even as to those activities, its decision does not entirely limit the application of state and police powers and that Federal environmental laws would continue to apply.

Finally, the Board explained that NET will not be allowed to enter the rail business until extensive environmental, safety, public health, and other public interest considerations are fully addressed. Specifically, the Board will (1) await completion by

the United States Environmental Protection Agency of an ongoing remedial investigation and feasibility study of the site on which NET proposes to operate; (2) conduct a thorough environmental review pursuant to NEPA and impose any appropriate environmental or other conditions, which could include specific monitoring, inspection, and oversight by the Board or on the Board's behalf by Federal, state and/or local agencies; and (3) make its staff and resources available to facilitate negotiations between NET, Massachusetts, and local agencies to reach a mutually acceptable environmental mitigation plan.

Petitions for administrative reconsideration of the July 2007 decision are now pending before the Board, and a petition for judicial review of that preliminary decision has been filed by the Massachusetts DEP.

Other Recent Initiatives

The Board is not free to find, as some have urged the Board, that no handling or storage of any kind is part of "transportation," given the broad definition of "transportation" in our statute. The courts and the rail industry have consistently understood that transloading operations are part of rail transportation. For the Board to attempt to suggest otherwise could have far-reaching, disruptive implications for a host of other commodities (such as lumber, cement, and automobiles) for which rail carriers often perform transloading at the starting or ending point of the rail movement.

However, the Board recently has taken a number of initiatives to do what it can under the law to allow for effective regulation in this type of case. When, for example, a solid waste facility is involved in a proposal that involves building a new line into a new service area, the Board's existing environmental review processes are sufficient to allow

full consideration of the environmental and other issues that may be presented as part of the rail licensing process. I should point out that even when such projects involve a new carrier or a very small (Class III) carrier seeking to acquire and operate an existing line, regulatory authority is required and NEPA review can be triggered.

But it has become increasingly evident that the summary class exemption procedure under which most acquisition cases involving a solid waste facility are currently handled does not always provide enough information about the proposal to allow the Board to handle its regulatory responsibilities effectively and efficiently. On a number of occasions, the Board has found it necessary to stay the effectiveness of notices invoking a class exemption to allow a more searching inquiry and to solicit further evidence designed to elicit a more complete record before permitting the proposed action to go forward. For example, when the class exemption procedure was invoked to lease and operate 1,600 feet of track in Croton-on-Hudson, New York for use in transferring C&D waste between truck and rail, the Board stayed the proceeding to allow time to provide additional information and later rejected the request for Board authority. Recently, the Board held up the proposal of Ashland Railroad to lease and operate approximately 1.5 miles of currently unused track in Freehold, New Jersey and to develop a transload facility on the track so that the Board could obtain additional information. After Ashland failed to adequately respond to specific questions posed by the Board about the nature of the proposed operations and potential impacts to wetlands and water supply, Ashland's request for authority was rejected without prejudice.

Indeed, the Board has recently instituted a proceeding to consider whether to increase the information required from all of those seeking to use the class exemption

procedure to acquire, lease and operate rail lines. Six Class I rail carriers had asked the Board to institute a rulemaking to consider additions to the information required under the class exemption regulations, such as whether the entity seeking authorization from the Board intends to provide facilities for the transportation or transloading of MSW and C&D and how the railroad facility has been or will be operated. On October 4, 2007, the Board issued a decision stating that, following further analysis, it will prepare a notice of proposed rulemaking and seek public comment on possible proposed changes to the current regulations.

The Board also tries to be proactive where environmental concerns are brought to the Board's attention in cases where the Federal preemption applies but there is no requirement for a Board license and hence no opportunity for a NEPA review. In such cases, STB staff conducts site visits to rail facilities where MSW or C&D is handled, if appropriate. Staff also advises the parties that Federal environmental laws continue to apply and that local police powers are not preempted entirely and encourages rail carriers to work with localities to reach reasonable accommodations. Recently, I sent STB staff to visit a rail facility in Hainesport, New Jersey following allegations that there were huge piles of trash on the premises. Our staff found no exposed trash and consulted with New Jersey DEP, which confirmed that it too had inspected the facility after receiving complaints and had found no violation of any New Jersey DEP regulations. I also personally visited Freehold, New Jersey to meet with the local community to inform them of our denial of Ashland Railroad's request for authority for a rail transload operation there, and to discuss ideas for improving STB communications with local stakeholders.

Finally, some states have adopted regulations that accommodate Federal preemption under 49 U.S.C. 10501(b) but allow them to inspect and impose other requirements on rail related waste facilities under the police powers they retain. For example, New Jersey has regulations – known as the 2D regulations – that shield the carrier from the need to comply with zoning and other preconstruction environmental and land use permits but impose a number of other requirements on rail-related solid waste facilities that are meant to not impede the continued flow of interstate commerce. The Board has never been asked to formally address the New Jersey regulations, and we are not currently a party to the litigation pending in the Federal courts regarding which, if any, provisions of those regulations are preempted. However, it would be consistent with everything the Board has said about the scope of the section 10501(b) preemption that states can apply their regulations to rail-related waste facilities so long as the regulations are not applied in a discriminatory manner and the regulations do not unreasonably interfere with the railroad's right to conduct its operations. Therefore, I would not object to New Jersey implementing its 2D regulations, or to other states adopting and implementing similar regulations.

CONCLUSION

While the statutory and regulatory issues presented in these types of cases are quite complex, the public interest and public policy considerations involved in these controversies require policy makers to balance several important, and often conflicting, policies, including:

1. How do we promote and expand the national rail network when local property owners, competing solid waste facilities that are not located close to a railroad, and local and state governments seek to regulate rail operations?

2. How can rail service help our country meet a growing demand for the transportation of material that some might view as controversial or a nuisance?

3. How can reasonable state, local, and Federal health, safety, and environmental safeguards for this type of rail transportation be implemented and imposed?

4. And what protection should rail operators have if local, state, and Federal regulation becomes unreasonable and tantamount to zoning of the national rail network?

These are difficult issues to balance, and perfect results that leave all stakeholders satisfied are very rare indeed. The Board, however, will continue to work hard to identify and implement administrative and regulatory strategies that improve our ability to ensure effective regulation in this area.

I appreciate the opportunity to discuss these issues today, and look forward to any questions you might have.