

**CHAIRMAN NOTTINGHAM'S OPENING STATEMENT**  
**New England Transrail Oral Argument**  
**April 19, 2007**

Good morning. Welcome to the Surface Transportation Board's oral argument in the New England Transrail matter. Today we will hear arguments on the much debated issue of the scope of the agency's preemption authority in this case.

NET has sought authority from the Board to acquire and construct a combined 7,500 feet of track on a parcel of land in Massachusetts, about 12 miles from downtown Boston. NET plans to receive by truck at the site, and provide rail transportation for, a variety of commodities including sand and gravel, plastic resins and liquids, and, at issue here today, municipal solid waste and construction and demolition debris. NET asserts that it will operate as a common carrier and will engage in interstate commerce by connecting its rail line to existing railroads. The Board is being called on to determine whether NET is a rail carrier, and if so, whether its activities at the facility are integral to "transportation" and thus preempted from most state and local regulations.

In reaching a decision in this matter, I will be guided by two simple premises: first, that the STB must abide by the clearly worded language contained in federal statute; and second, that the STB must not allow Congress' broad grant of preemption from state and local regulations to compromise federal health and environmental standards. I believe that both of these premises can be honored when applied to the facts of this case.

Today's argument marks an important juncture in a regulatory and environmental review process that will likely take many years before concluding. If the STB finds that it has jurisdiction, this agency will have a number of opportunities to protect public health and the environment and to accommodate the reasonable local, state, and federal concerns – consistent with federal law. In the end, I can assure my colleagues on the Board and all interested parties that I will not approve a railroad project that is allowed to evade federal health and safety standards, or a project that is allowed to operate free of inspection and free from meaningful recourse for local, state, or federal officials concerned about health and environmental compliance.

I look forward to hearing today's participants address the full range of issues presented, including:

- 1) What did Congress mean in ICCTA when it stated that the STB will have exclusive jurisdiction over the construction, acquisition, operation, abandonment...and facilities of a rail carrier?
- 2) What provisions in the statute would give the STB discretion to selectively apply the broad grant of preemption to some types of rail operations but not others?
- 3) Assuming that STB retains broad jurisdiction to regulate operations by rail carriers free of state or local regulation, what measures, procedures, or conditions may the STB impose to ensure that state and local governments have a meaningful way to ensure that appropriate health and environmental inspections are made and that prompt and forceful STB intervention (or delegation of that intervention) can be assured in cases where carriers deviate from federal health and environmental standards?
- 4) Additionally, if a specific activity at a rail facility is clearly "integral to transportation" but also happens to be a routine activity undertaken during processing or manufacturing, does the STB have the authority

to ignore the transportation nexus and thereby avoid applying the broad statutory preemption provided for rail operations? If the STB has this authority, what would prevent the STB from removing the preemption status from a wide range of longstanding rail operations that fall out of favor with local and state governments for a variety of reasons that may have nothing to do with health or the environment?

5) And finally, should the STB consider the costs and benefits and public policy issues raised by preempting rail carriers' operations involving the transportation of MSW? Should the STB promote rail transportation of a lawful commodity that contributes to highway congestion and that addresses public concern over truck traffic?

As these questions indicate, I am concerned that we adhere to Congress' clearly stated statutory grant of preemption to railroads, while also protecting the broad public interest by ensuring that no rail operation under our purview is able to jeopardize public health or violate federal environmental safeguards simply because they fall under the STB's regulatory purview and are preempted from state or local regulation.

Finally, I think it is important to note that, regardless of the arguments today and the STB's decision in this matter, it is unclear that NET's proposed project will clear the USEPA RI/FS process related to the Olin Superfund site on which NET proposes to operate, and it is also unclear whether, if we were to assert jurisdiction, the results of the STB's environmental review process required by NEPA would allow NET to operate at all or perhaps operate only in a limited manner. The STB would, during the NEPA process, carefully listen to and try to accommodate all environmental concerns. USEPA has recently notified the STB that it has made no progress in 12 months towards beginning the RI/FS process. The STB would be unable to complete our environmental review until USEPA has completed its work. In sum, it appears that we are many years away from the completion of the environmental review process required before any possible rail operations may commence on the former Olin site. We will have many opportunities to weigh in on this project in the interim.

Just a few procedural notes regarding the testimony itself. As usual, we will hear from all the speakers on a Panel prior to questions from the Commissioners. Speakers, please note that the timing lights are

in front of me on the dais. You will see a yellow light when you have one minute remaining, and a red light when your time has expired. Please do your best to keep to the time you have been allotted. I assure you that we have read all of your statement and comments, and there is no need to read those statements here. After hearing from the entire panel, we will rotate with questions from each Board Member until we have exhausted the questions. Additionally, just a reminder to please turn off your cell phones.

And now I would like to turn to Vice Chairman Buttrey for his opening remarks.