

**Oral Statement of Charles D. Nottingham**  
**Chairman of the Surface Transportation Board before the**  
**House Committee on Transportation and Infrastructure's**  
**Subcommittee on Railroads, Pipelines and Hazardous Materials**  
*Hearing Regarding Railroad-Owned Solid Waste Transload Facilities*  
2167 Rayburn House Office Building - 10 a.m.  
October 16, 2007

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

The express Federal preemption contained in the STB's governing statute gives the STB exclusive jurisdiction over "transportation by rail carriers." To qualify for preemption, two tests must be met: the operation must be rail transportation, and it must be conducted by a rail carrier.

Congress has defined the term "transportation" broadly 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.

But even where an activity is transportation and 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. Nor is all state and local regulation affecting rail carriers preempted. Rather, states retain certain police powers to protect public health and safety. These powers include requiring railroads to comply with local fire, electrical, and building codes; to allow local government to inspect their facilities; and to share their plans with the community when they are undertaking an activity for which a non-railroad entity would require a permit.

It is also important to keep in mind that preemption applies both to cases that require STB licensing authority, and also some that do not.

First, 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. Second, if a project involves a new carrier seeking to acquire or operate an existing rail line, the new carrier must also obtain authority from the Board, usually in a summary class exemption process. The Board has grown concerned recently that this process does not always provide enough information about a pending proposal to allow us to handle our regulatory responsibilities effectively and efficiently.

We recently initiated a rulemaking 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. In some cases, the Board has stayed the effectiveness of a notice invoking a class exemption to allow a more searching inquiry and to solicit further evidence. For example, we recently 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, because we needed to obtain additional information. After Ashland failed to adequately respond to specific questions about the nature of the proposed operations and potential impacts to wetlands and water supply, the Board rejected Ashland's request for authority. We hope that our rulemaking will improve this process and lessen the need for stay requests.

In the third and final category, there are those activities that although part of rail transportation, may not be subject to STB licensing. These activities include making improvements to existing railroad operations, such as adding track or facilities at existing railroad locations – including transload facilities where materials are transferred between truck and rail – 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. It is this area that I believe creates the biggest challenge for the Board.

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, Federal environmental laws continue to apply, and state and local police powers are not preempted. In addition, any interested party, community, or state or local authority concerned that the Federal preemption is being wrongly claimed to shield activities that are not "transportation by rail carrier" can ask the Board to issue a declaratory order addressing that issue. Alternatively, they can go directly to court to have that issue addressed. Just last week, the Board issued an order related to a project in Yaphank, NY requiring the entity constructing facilities to immediately cease that

activity and to either obtain Board authorization for the activity or a Board decision finding that such activity does not require our approval.

The Board also tries to be proactive where environmental concerns are brought to our 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. Recently, I sent STB staff to visit a rail facility in Hainesport, New Jersey following allegations that there were huge piles of exposed 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.

Finally, some states have adopted regulations that accommodate Federal preemption 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 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.

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, such as:

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?

The Board 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.