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Mr. Vernon A. Williams
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Surface Transportation Board
1925 K Street, N.W., Room 700
Washington, DC 20006

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Re: Finance Docket No 34192 (Sub-No.1)
Hi Tech Trans, LLC - Petition for Declaratory Order -
Rail Transload Facility at Oak Island Yard, Newark, NJ

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are the original and ten copies of the Petition for Leave to Intervene and Comments of Delaware and Hudson Railway Company, Inc., d/b/a Canadian Pacific Railway. A computer diskette containing the filing in MS Word 2000 format is also enclosed.

Should any questions arise regarding this filing, please feel free to contact me. Thank you for your assistance in this matter.

Respectfully submitted,

William M. Tuttle,
Senior Attorney

Enclosures

cc: Parties of Record

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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34192 (SUB-No. 1)

HI TECH TRANS, LLC
--PETITION FOR DECLARATORY ORDER--
RAIL TRANSLOAD FACILITY AT OAK ISLAND YARD, NEWARK, NJ



**PETITION TO INTERVENE AND
COMMENTS OF DELAWARE AND HUDSON RAILWAY COMPANY, INC.**

Pursuant to 49 C.F.R. §1112.4, Delaware and Hudson Railway Company, Inc., d/b/a Canadian Pacific Railway ("CPR") requests that the Board grant it leave to intervene in this proceeding and submits these comments for the Board's consideration in connection with Hi-Tech Trans LLC's ("Hi Tech") appeal of the August 14, 2003 decision of the Director of the Office of Proceedings in the above-captioned matter (the "Initial Decision").¹ CPR's participation will not disrupt any schedules set in this proceeding, nor unduly broaden the issues raised. As discussed below, CPR believes the Initial Decision is contrary to both existing precedent and the policies of deregulation and uniformity of regulation underlying the ICC Termination Act of 1995 ("ICCTA"). In addition, CPR is concerned that the Initial Decision, if allowed to stand, will have the effect of stifling innovation and third-party investment in rail-related capital projects. Finally, if the full Board adopts the "under the auspices" test established in the Initial Decision, CPR believes it should provide interested parties with substantially more guidance regarding the parameters and application of that test than was provided in the Initial Decision.

¹ It is unclear whether CPR's Petition for Leave to Intervene is procedurally necessary. CPR has not requested party status in this docket, but has previously filed comments. Nevertheless, to the extent required, CPR seeks the Board's leave to intervene and file these comments.

FACTUAL BACKGROUND

The basic facts of this case have been set forth in Hi Tech's previous filings and the various statements and exhibits submitted in connection with those filings. CPR believes that the relevant facts are those that address the role that Hi Tech and the transload facility play in CPR's transportation of construction and demolition debris ("C&D"). While Hi Tech is undeniably a shipper, Hi Tech's role in the transportation by rail of the C&D is much greater than that normally associated with a shipper. Hi Tech markets the transportation and disposal "product" to the waste-generating and hauling public. Hi Tech enters into agreements with these parties, who are for practical purposes (though perhaps not for legal purposes) the true shippers. Hi Tech physically transloads the C&D from truck to rail. Hi Tech acts as a freight consolidator to optimize car usage.

The facilities and services provided by Hi Tech are integral to CPR's transportation of the C&D. Without Hi Tech, and without the capital and expertise it brings to this venture, CPR would likely not be moving any substantial volume of C&D from Oak Island Yard. In sum, Hi Tech's services and facility are clearly used in interstate commerce for the benefit of both the shipping public and CPR. Without Hi Tech's services and facilities, the shipping public would be denied a rail transportation option and CPR would forgo significant revenues.

Under the test set forth in the Initial Decision, however, the focus has apparently shifted from the role that a service or facility plays in the provision of rail transportation to the degree of carrier involvement in or control over those services and facilities. As the agreements previously submitted by Hi Tech indicate, CPR does have a significant interest in the transload facility and exercises significant control over Hi Tech's operation of that facility. CPR is the leaseholder of the property on which the facility is located. The "non-mobil" infrastructure of the facility,

while currently owned by Hi Tech, will become the property of CPR upon Hi Tech's vacation of the premises. CPR has the right to use the premises and the facilities and equipment Hi Tech has brought to the premises. CPR approved the design of transload facility and has veto power over any alterations to the facility. Hi Tech must operate the facility in accordance with CPR's safety rules. In short, CPR has a significant stake in the facility and exercises significant control over the facility and the services performed there by Hi Tech.

DISCUSSION

I. Florida East Coast and ICCTA Preemption of State Regulation of Non-Carriers.

Prior to this proceeding, the only case expressly addressing the issue of ICCTA preemption of state or local regulation of a non-carrier was Florida East Coast Ry. Co. v. City of West Palm Beach, 110 F. Supp.2d 1367 (S.D. Fla. 200), aff'd, 266 F.3d 1324 (11th Cir. 2001). In its opinion, the Eleventh Circuit engaged in an exhaustive analysis of 49 U.S.C. § 10501(b) and the relevant definitional provisions of ICCTA. While the Court ultimately held that the regulation of the non-carrier aggregate supplier in that case was not preempted by ICCTA, the Court also plainly stated that state or local regulation of a non-carrier could be preempted by ICCTA:

We do not mean to suggest that only regulations applied against railroads are pre-empted by the ICCTA. Certain local regulations applied against a third-party may be so intertwined with the provision of rail transportation service to the public so as to frustrate the objectives of federal railroad regulation.

Florida East Coast, 266 F.3d at 1337, n.9.

The Court further noted Congress's intent "to grant the ICC jurisdiction over those facilities that, while not owned by railroad companies, were nevertheless used in interstate commerce for the benefit of either the shipping public or the railroad companies themselves," but

found that under the facts of that case “[the non-carrier’s] use of the property and the activities performed there by [the non-carrier] serve no public function and provide no valuable service to [the carrier].” Id. at 1336. Accordingly, the Court declined to find the local regulation preempted by ICCTA.

Thus, while Florida East Coast arguably did not establish a single, definitive test for determining when state or local regulation of the activities or facilities of a non-carrier is preempted, it undeniably contemplates preemption in that context. Furthermore, Florida East Coast clearly indicates that the proper focus of analysis for determining whether state or local regulation of activities and non-carrier facilities are preempted is the role the non-carrier plays in “the provision of rail transportation” and the “benefit” the non-carrier’s activities or facility provides the public and/or the rail carrier.

Shortly before the Board issued its Initial Decision in this case, the acting Chief Administrative Law Judge of the New Jersey Office of Administrative Law issued his proposed decision in the parallel state administrative proceeding. Faced with precisely the same issue as the Board, the Chief ALJ, quoting Florida East Coast extensively, held that the New Jersey Department of Environmental Protection’s (“DEP”) permitting requirements were preempted by ICCTA. In reaching that conclusion, the Chief ALJ focused his analysis (as did the Court in Florida East Coast) on the relationship between the facility operated by Hi Tech and services provided by Hi Tech and the railroad’s ability to fulfill its task as a common carrier by moving the C&D in interstate commerce, noting that Hi Tech’s activities “constitute an integral part and indeed a necessary ‘last step’ vital to the ability of the railroad to effectuate the movement of the material over the interstate rail system.” ALJ Initial Decision at 36.

In the Board's previous decision regarding Hi Tech, Hi Tech Trans LLC—Petition for Declaratory Order—Hudson County, NJ, Finance Docket No. 34192 (STB served November 20, 2002) ("Hi Tech I") the Board seemingly placed little weight on Hi Tech's status as a shipper and non-carrier. Instead, the decision implies that the appropriate test for determining whether ICCTA preempts state regulation of Hi Tech is whether the activity or facility in question is "integral to the rail transportation C&D debris." Hi Tech I at 2. Indeed, the decision states that the transload facility "arguably" meets that test. Id.

CPR submits that, under the Florida East Coast analysis, the DEP's permitting requirements are preempted. As noted above, Florida East Coast offers several alternative formulations for determining when non-federal regulation of non-carriers is preempted by ICCTA. All, however, focus on the function of the service or facility provided by the non-carrier and its role in the provision of rail transportation, not the non-carrier's legal relationship to the carrier (e.g. shipper-carrier, agent-principal). In this case, the application of DEP's permitting requirements against Hi Tech would be "so intertwined with the provision of rail transportation service to the public" that such application would "frustrate the objectives of federal railroad regulation." See Florida East Coast, 266 F.3d at 1337, n.9. If the DEP permitting requirements are enforced against Hi Tech in this context, CPR's transportation by rail of C&D from Oak Island Yard will cease or, at a minimum, be interrupted. In addition, the transload facility is undeniably "used in interstate commerce for the benefit of [both] the shipping public [and] the railroad company." See Id. at 1336. Given the Florida East Coast Court's analysis of the issue, it seems clear that the Florida East Coast Court, if faced with the facts of this case, would have found the DEP's permitting requirements preempted by ICCTA.

II. The Initial Decision

Given the backdrop of the decisions discussed above, CPR was admittedly surprised by the outcome of the Board's Initial Decision, and more particularly by the new test enunciated by the Board and the reasoning employed by the Board in arriving at that test. With very little discussion of the policies underlying ICCTA preemption and no mention of Florida East Coast or factors that Court considered important in analyzing ICCTA preemption in the context of a non-carrier, the Board has seemingly announced a new test, which could have far-reaching consequences in an era when railroads are increasingly looking to non-carriers to provide capital investment and innovative approaches to the provision of rail transportation.

The Initial Decision, in sharp contrast to Florida East Coast and the Chief ALJ's Decision, holds that state or local regulation of "transportation" can be preempted by ICCTA only where such transportation is "performed by, or under the auspices of, a rail carrier." Initial Decision at 5. In so holding, the Board has entirely ignored the extensive guidance of Florida East Coast (and, indeed, the very existence of the case most squarely on point) and, in CPR's view, incorrectly shifted the focus of analysis from the function of the facility or service the state seeks to regulate to the nature of the relationship between the non-carrier and the carrier for which the service or facility is being provided or operated. The ultimate factual and legal conclusion reached in the Initial Decision, that "CP's level of involvement with Hi Tech's transloading operation is minimal and insufficient to make Hi Tech's activities an integral part of CP's provision of transportation by rail carrier," demonstrates the fallacy of the reasoning employed. Initial Decision at 7. CPR's "level of involvement" with the actual transloading operation has nothing to do with whether Hi Tech's activities are "an integral part of" CPR's provision of rail transportation. The plain fact is that without Hi Tech the transload facility

would not exist and there would likely be no rail transportation by CPR of C&D from Oak Island.

Further, the Initial Decision provides little guidance as to what constitutes the performance of transportation "under the auspices of" a rail carrier. This lack of guidance is particularly troubling because there is no other source to which an interested party can turn for such guidance; to CPR's knowledge, the phrase does not appear in the Act, its legislative history, or any prior court or agency decision interpreting ICCTA.

Simply put, the Initial Decision raises more questions than it answers. The Board was clearly troubled by Hi Tech's technical status as a shipper and the lack of an employment or agency relationship between Hi Tech and CPR, yet the Initial Decision does not indicate whether those factors, alone or in combination, are truly outcome determinative. See Initial Decision at 6-7. The Initial Decision implies that the outcome might be different if Hi Tech performed its various services -- marketing, contract negotiation and administration, freight consolidation, transloading -- as a "contract operator" of CPR, but fails to provide any meaningful guidance in that regard. See Id. at 7, n.13.²

Finally, the new test, with its emphasis on railroad ownership or control, is likely to have the effect of discouraging investment and innovation, particularly given the uncertainty surrounding the test's parameters. Non-carriers will likely be less inclined to make rail-related capital investment if the facilities in which they are investing may be subject to state or local permitting or land-use requirements or other regulation. Similarly, innovative, non-traditional

² CPR and Hi Tech can, and if necessary will, contractually recast the nature of their relationship to meet whatever test the Board ultimately arrives at. It is difficult to understand, however, how such changes (e.g. establishment of an agency relationship, listing individual waste generators or haulers on shipping documents as consignor, or modifying ownership of the facility) would make the operation more "integral" to the provision of rail transportation.

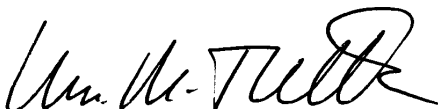
approaches to the provision of rail transportation, such as that developed by Hi Tech and CPR, will be stifled.

CONCLUSION

Based on the foregoing, CPR respectfully requests that the Board reverse the Initial Decision and, consistent with the Florida East Coast analysis, grant Hi Tech's petition. In the alternative, CPR requests that the Board solicit additional comment from interested parties and additional evidence relevant to the new "under the auspices of" test and issue a decision that addresses and reconciles Florida East Coast and provides interested parties with meaningful guidance addressing the circumstances under which non-federal regulation of non-carriers is and is not preempted by ICCTA.

Respectfully Submitted,

By: _____



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