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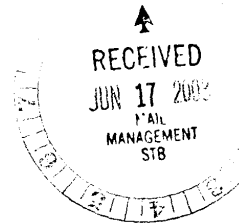
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June 16, 2003

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VIA FEDERAL EXPRESS

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



Re: **Finance Docket No. 34192 - 208096**
Hi Tech Trans, LLC -- Petition for
Declaratory Order -- Hudson County, NJ

Finance Docket No. 34192 (Sub-No. 1) - 208090
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 proceedings are an original and ten copies of the **Petition of Hi Tech Trans, LLC for Emergency Order and Other Relief**, dated June 16, 2003. A computer diskette containing the text of the Petition and the accompanying verified statements in MS Word 2000 format also are enclosed. Please note that expedited consideration of this Petition is requested.

An extra copy of the Petition and of this transmittal letter are included as well. I would request that you date-stamp those items to show receipt of this filing and return them to me in the provided envelope.

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

Respectfully submitted,

Thomas J. Litwiler
Attorney for Hi Tech Trans, LLC

TJL:tl

Enclosures

cc: Parties on Certificate of Service

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Office of Proceedings

JUN 17 2003

Part of
Public Record

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34192 7 208096

HI TECH TRANS, LLC
-- PETITION FOR DECLARATORY ORDER --
HUDSON COUNTY, NJ

FINANCE DOCKET NO. 34192 (SUB-NO. 1) > 208090

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

**PETITION OF HI TECH TRANS, LLC FOR
EMERGENCY ORDER AND OTHER RELIEF**

EXPEDITED CONSIDERATION REQUESTED

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ATTORNEYS FOR HI TECH TRANS, LLC

Dated: June 16, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34192

HI TECH TRANS, LLC
-- PETITION FOR DECLARATORY ORDER --
HUDSON COUNTY, NJ

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 OF HI TECH TRANS, LLC FOR
EMERGENCY ORDER AND OTHER RELIEF**

EXPEDITED CONSIDERATION REQUESTED

Hi Tech Trans, LLC ("Hi Tech") hereby requests that the Board issue an emergency order preventing the New Jersey Department of Environmental Protection ("DEP"), a party to the proceedings in Finance Docket No. 34192, from enforcing a cease and desist order against Hi Tech. In that cease and desist order, the DEP has directed Hi Tech to shut down a rail transloading facility that it operates for the Delaware & Hudson Railway Company, Inc., d/b/a Canadian Pacific Railway ("D&H") at Oak Island Yard in Newark, New Jersey. The basis for DEP's order is Hi Tech's failure to obtain permits or licenses for the construction and operation of the transloading facility, something which, DEP contends, Hi Tech was required to do under New Jersey law regulating solid waste facilities.



As explained below, as well as in the Petition for a Declaratory Order filed concurrently herewith in Finance Docket No. 34192 (Sub-No. 1), the DEP's cease and desist order is based upon a fundamental misunderstanding of the Board's decision in Hi Tech Trans, LLC -- Petition for Declaratory Order -- Hudson County, NJ, Finance Docket No. 34192 (STB served November 20, 2002) ("Hi Tech I"). Specifically, DEP has interpreted the Board's decision as holding that the rail transloading facility operated by Hi Tech for D&H at Oak Island Yard is not a facility used in providing rail transportation service and, thus, is not subject to the Board's exclusive jurisdiction under 49 U.S.C. § 10501(b). As a consequence, DEP apparently relies on the Board's decision to conclude that the ICC Termination Act of 1995 ("ICCTA"), Pub. L. 104-88, 109 Stat. 803, does not preempt New Jersey's environmental permitting requirements as applied to such a rail transloading facility. The Board, of course, reached no such conclusion in its decision in Hi Tech I and, as pointed out in Hi Tech's new petition in Finance Docket No. 34192 (Sub-No. 1), such a conclusion would be contrary to numerous decisions of the Board and state and federal courts holding that ICCTA does preempt the application of state and local permitting requirements to track and other facilities (including specifically rail transloading facilities) used in providing rail transportation service.

Enforcement by DEP of its cease and desist order would have devastating effects on Hi Tech and its many shippers in New Jersey and New York. Hi Tech will be forced to shut down the rail transloading facility at Oak Island Yard and will go out of business, and its shippers will lose their access to rail transportation service. Enforcement of the cease and desist order also would have serious consequences for D&H and its operations at Oak Island Yard. Hi Tech and its customers are collectively the largest shipper served by D&H at the yard. If the D&H/Hi Tech transload facility is shut down, D&H will lose the substantial revenue associated

with its operations to and from Oak Island, jeopardizing the already often marginal economic viability of those operations.

Further, enforcement by DEP of its cease and desist order will infringe upon the exclusive jurisdiction of the Board over rail transportation. Hi Tech believes that the Board has exclusive jurisdiction over the Oak Island rail transloading facility under 49 U.S.C. § 10501(b) and has asked the Board to so rule in its petition for declaratory order in Finance Docket No. 34192 (Sub-No. 1). If DEP enforces its cease and desist order before the Board can rule on Hi Tech's declaratory order petition, the Board would be deprived of its ability to effectively assert and protect its jurisdiction over that facility -- since enforcement by DEP will create a disruptive shut-down of Hi Tech from which it will never be able to recover, and there will quite simply be no facility left for the Board to assert jurisdiction over.

Accordingly, the Board should issue an emergency order that maintains the status quo until it can decide Hi Tech's petition for a declaratory order in Finance Docket No. 34192 (Sub-No. 1), confirm the agency's exclusive jurisdiction over the rail transloading facility at Oak Island Yard, and determine whether New Jersey's environmental permitting requirements have been preempted by ICCTA insofar as DEP is seeking to apply those requirements to the facility. That order should either stay enforcement by DEP of its cease and desist order or request, as a matter of comity, that DEP hold its enforcement of the cease and desist order in abeyance until the Board can decide Hi Tech's petition in Finance Docket No. 34192 (Sub-No. 1). The order should also clarify the Board's decision in Hi Tech I by making it clear that the Board did not decide there that the rail transloading facility at Oak Island Yard operated by Hi Tech is outside the Board's jurisdiction over facilities used in providing rail transportation.

FACTUAL BACKGROUND

Oak Island Yard is a major freight classification yard located in Newark, New Jersey that is owned by Consolidated Rail Corporation ("Conrail"). Conrail leases a portion of the yard to D&H for intermodal and other freight operations. In addition to TOFC/COFC service, D&H also transloads a number of bulk commodities at the yard. Consistent with its general practice, D&H does not itself operate these transloading facilities, but instead relies upon the services of other companies operating as its contractors and agents. One of those companies is Hi Tech. Verified Statement of Steven Lawrance, attached hereto ("Lawrance V.S."), at 1-2.

Pursuant to a license agreement entered into in November, 2000, Hi Tech agreed to develop and operate for D&H at Oak Island Yard a facility for transloading into rail cars construction and demolition ("C&D") debris delivered by truck to the yard. Verified Statement of David C. Stoller, attached hereto ("Stoller V.S."), at 2-3; Lawrence V.S. at 2. The necessary facility was built by Hi Tech, and transloading operations began in September, 2001. Trucks deliver C&D debris to the yard and dump the material into a large container built by Hi Tech adjacent to one of the yard tracks. A Hi Tech excavator then loads the C&D debris into gondola cars positioned by D&H crews on the adjacent track. Hi Tech does not process or store any of the C&D debris; it merely transloads the material into rail cars. Stoller V.S. at 1-2.

After the cars are loaded, they are then transported in D&H trains to out-of-state disposal facilities via interchange with other rail carriers. The cars are moved by D&H pursuant to a long-term transportation contract entered into by D&H and Hi Tech. Stoller V.S. at 2.

Since rail transloading operations at the Oak Island Yard facility began in September, 2001, the volume of C&D debris traffic handled by D&H has grown significantly,

from 1-2 carloads per day in 2001 to 7-8 carloads per day today. Hi Tech is now the largest customer served by D&H at Oak Island Yard. Stoller V.S. at 3; Lawrance V.S. at 3.

Before transloading operations began, Hi Tech sought to assure that the Oak Island Yard facility would not be subject to New Jersey permitting requirements for solid waste facilities. As a consequence, in April and September of 2000, Hi Tech requested and received informal opinions from the Board's Office of the Secretary. In those opinions, the Secretary indicated that the transloading facility, when built, would be within the Board's exclusive jurisdiction under 49 U.S.C. § 10501(b) since it would be a facility used in providing rail transportation service. As a result, the Board advised Hi Tech, the ICCTA preempted New Jersey permitting requirements to the extent those requirements might otherwise be applicable to the rail transloading facility. Stoller V.S. at 3 and Exhibits B and C thereto.¹

Hi Tech also contacted DEP to make sure that DEP agreed that its permitting requirements would not be applicable to the rail transloading facility. Thus, in May, 2001, Hi Tech provided DEP with an informational filing that explained the facility and the transloading operation that Hi Tech planned on conducting with D&H at Oak Island Yard. In October, 2001, DEP inspectors came to the yard and inspected Hi Tech's operation. Subsequently, at a meeting in November, 2001, DEP informed Hi Tech that it too believed that ICCTA preempted the state permitting requirements to the extent those requirements might otherwise be applicable to the rail transloading facility. As a consequence, DEP told Hi Tech it would not have to obtain a construction or operating permit for the facility. Stoller V.S. at 4.²

¹ As each of the informal opinions expressly discloses, such opinions are not binding on the Board.

² Until it issued its cease and desist order less than three weeks ago, DEP never took a different position. Stoller V.S. at 4.

In early 2002, Hi Tech was contacted by a county environmental authority, the Hudson County Improvement Authority ("HCIA"). Hi Tech was told that trucking companies delivering C&D debris to Hi Tech from customers located in Hudson County were doing so in violation of state and local laws regulating "flow control" of solid waste.³ HCIA told Hi Tech that it intended to enforce the flow control laws against trucking companies delivering C&D debris to the rail transloading facility at Oak Island Yard. Stoller V.S. at 4-5.

Because of the threat to its transloading operation posed by enforcement of the flow control laws, in April, 2002 Hi Tech filed a petition for a declaratory order (later amended) with the Board in Finance Docket No. 34192. In its petition, Hi Tech sought, inter alia, a declaration from the Board that the ICCTA preempted the New Jersey flow control laws to the extent those laws were otherwise applicable to trucking companies delivering C&D debris to the Oak Island Yard transloading facility. HCIA and another local environmental authority (the Essex County Utilities Authority), as well as DEP, entered appearances as parties in the case and opposed the declaratory relief sought by Hi Tech. Stoller V.S. at 5.

After filing its petition with the Board, Hi Tech also filed a complaint in the United States District Court for the District of New Jersey against HCIA and the Essex County Utility Authority. Hi Tech Trans, LLC v. Hudson County Improvement Authority, et al., No. 02-3781 ("the Lawsuit"). In its complaint, Hi Tech sought, inter alia, a declaratory judgment that the New Jersey flow control laws violated the Commerce Clause contained in the United States Constitution. Stoller V.S. at 5.

³ Under New Jersey law, a county authority is allowed to designate a facility as the exclusive location to which transporters can carry solid waste generated in the county. A transporter which hauls solid waste to some other facility is subject to fines and other penalties. At the time that the HCIA contacted Hi Tech in early 2002, it had designated a truck-to-truck transfer facility as the exclusive facility to which solid waste generated in the county could be transported. Stoller V.S. at 4-5.

On November 20, 2002, the Board served its Hi Tech I decision in Finance Docket No. 34192. In that decision, the Board concluded that it did not have jurisdiction over the trucking operations that were the subject of Hi Tech's petition -- i.e., the transportation by trucking companies of C&D debris to the Oak Island Yard transloading facility. Hi Tech I at 3-4. As a consequence, the Board concluded ICCTA did not preempt the application of the New Jersey flow control laws to those trucking operations. Hi Tech I at 4.

In its decision, however, the Board did not formally address whether the Oak Island Yard rail transloading facility itself was subject to the Board's jurisdiction under 49 U.S.C. § 10501(b), nor whether ICCTA has preempted New Jersey environmental permitting requirements to the extent those requirements would otherwise be applicable to the facility. Nonetheless, the Board did note in its decision:

Preemption under section 10501(b) hinges on what can reasonably be considered part of "transportation by rail carriers" under section 10501(a) The only Hi Tech activity that might be considered integral to the rail transportation of C&D debris would be transfer of C&D debris from trucks to rail cars at the CP transload facility itself.

Hi Tech I at 4.⁴ Thus, while not conclusively determining whether preemption under ICCTA was applicable to the rail transloading facility, the Board certainly indicated what its finding would likely be were it called upon to decide that issue.

After receiving the Board's decision, Hi Tech continued to pursue judicial relief from the flow control laws in the Lawsuit.⁵ Earlier this year, however, that case took a bizarre

⁴ See also Hi Tech I at 3 (no declaratory order proceeding instituted because "it is clear that the Board does not have jurisdiction over those activities described here that extend beyond the rail-related activities at the CP transloading facility.")

⁵ The Board had specifically noted in Hi Tech I that constitutional challenges to the flow control regime should be pursued in the appropriate court. Hi Tech I at 5, n.8.

turn -- a turn that ultimately has resulted in Hi Tech's need for emergency relief from the Board. On April 1, 2003, the court in the Lawsuit issued an order denying a Hi Tech motion for leave to amend its complaint. Stoller V.S. at 6 and Exhibit D thereto. In its order, the court reviewed the Board's decision in Hi Tech I and concluded that the Board had determined that Hi Tech "is not a rail carrier." Stoller V.S., Exhibit D at 3.

The court's order and, specifically, its interpretation of the Board's Hi Tech I decision caused DEP to reconsider its position concerning the application of preemption under ICCTA to the Hi Tech rail transloading facility at Oak Island Yard. The DEP apparently concluded that if Hi Tech was not a "rail carrier," as the court had interpreted the Board's decision to hold, then none of Hi Tech's facilities or operations could be considered "rail transportation" subject to the jurisdiction of the Board, and ICCTA did not preempt the application of New Jersey's permitting requirements to the Oak Island Yard rail transloading facility. As a consequence, on May 28, 2003, DEP served a cease and desist order on Hi Tech. Stoller V.S. at 6 and Exhibit E thereto.

In the cease and desist order, DEP concluded that Hi Tech had violated New Jersey law by failing to obtain a construction or operating permit for the rail transloading facility or a state "certificate of public convenience and necessity" to engage in the business of transloading C&D debris from trucks into railcars. DEP ordered Hi Tech to "cease and desist the operation of the illegal solid waste facility" and gave Hi Tech 20 days to shut down the Oak Island Yard rail transloading operations. Stoller V.S., Exhibit E at 3. DEP also has made it clear that if Hi Tech does not shut down its rail transload facility by the expiration of the 20-day period (i.e., by June 20, 2003), it will begin an enforcement action against Hi Tech. Stoller V.S. at 7.

It is the May 28, 2003 cease and desist order and DEP's threat to enforce that order by June 20, 2003 that have caused Hi Tech to seek relief from the Board. Hi Tech's concurrently-filed petition for declaratory order in Finance Docket No. 34192 (Sub-No. 1) asks the Board to determine that the C&D debris rail transloading facility at Oak Island Yard and Hi-Tech's operation of that facility are within the exclusive jurisdiction of the Board under 49 U.S.C. § 10501(b), and that ICCTA has preempted New Jersey environmental permitting requirements to the extent those requirements are otherwise applicable to the rail transloading facility. However, because of the imminent threat of enforcement by DEP of its cease and desist order and the irreparable harm that will flow from that enforcement, Hi Tech is asking the Board to immediately issue an emergency order that will (a) maintain the status quo until the Board can rule on Hi Tech's declaratory order petition and (b) clarify its decision in Hi Tech I so as to dispel the misinterpretation of that decision that apparently forms the basis for DEP's actions.

ARGUMENT

1. The Board Has the Authority to Issue an Order Staying or Otherwise Seeking to Prevent Enforcement By DEP Of Its Cease And Desist Order.

There is no question that the Board has the authority to issue an order granting Hi Tech the stay and other relief requested. 49 U.S.C. § 721(b)(4) now specifically provides that the Board can "when necessary to prevent irreparable harm, issue an appropriate order" As the Board has noted, in enacting Section 721(d)(4) Congress "has expressly authorized us to take injunctive-type action to prevent irreparable harm" Public Views on Major Rail Consolidations, Ex Parte No. 582 (STB served March 17, 2000) ("Public Views I") at 10, aff'd sub nom. Western Coal Traffic League v. STB, 216 F.3d 1168 (D.C. Cir. 2000); see also Public Views I at 10, n. 15 ("The legislative history accompanying section 721(b)(4) explains that the

provision 'explicitly authorizes the [Board] to issue unilateral emergency injunctive orders to prevent irreparable harm. This power has been asserted and used by the [Interstate Commerce Commission] in the past, although not specifically granted by statute. The Committee intends to confirm the scope of the former ICC power in this regard . . . ' H.R. Rep. No. 311, 104th Cong., 1st Sess. 124 (1995)."); DeBruce Grain, Inc. v. Union Pacific Railroad Company, Docket No. 42023 (STB served April 27, 1998).

One of the cases where the exercise of the power provided by Section 721(b)(4) is especially appropriate is where a stay or injunction is necessary to protect the Board's jurisdiction. See, e.g., Public Views on Major Rail Consolidations, Ex Parte No. 582 (STB served on April 7, 2000) at 9, aff'd sub nom. WCTL v. STB, *supra*. Indeed, even before Section 721(d)(4) was enacted by Congress, it was clear that the Board (as well as its predecessor, the ICC) had the authority to issue a stay or cease and desist order "to protect the integrity of its jurisdiction." Amoskeag Co. v. ICC, 590 F.2d 388, 393 (1st Cir. 1979).

In this case, the relief that Hi Tech is requesting is necessary in order to protect the Board's jurisdiction. The C&D debris rail transloading facility at Oak Island Yard is used in and integral to the provision of interstate rail transportation service by D&H. As such, it is within the Board's exclusive jurisdiction under 49 U.S.C. § 10501(b), and Hi Tech has requested the Board to so determine in its pending declaratory order petition. However, if the DEP is allowed to proceed with enforcement of its cease and desist order, Hi Tech will be forced out of business, effectively mooted Hi Tech's petition. *Stoller V.S.* at 7. In that situation, the Board's jurisdiction over the rail transloading facility is not only stymied, but destroyed. In order to protect that jurisdiction, the Board clearly has the authority to prevent enforcement of the cease and desist order or provide other emergency relief appropriate to the circumstances of this

matter.⁶ This is particularly true where, as here, the third-party action against which emergency relief is sought is predicated on a misconstruction of a prior order of the Board itself.

**2. Hi Tech Clearly Meets The Requirements For
A Stay And The Other Relief That It Seeks.**

The standards that the Board applies in deciding whether to grant the type of relief that Hi Tech is requesting (i.e., relief tantamount to a stay or injunction) are well established. The movant must show (a) a strong likelihood of success on the merits, (b) that the movant will sustain irreparable injury in the absence of relief, (c) that other interested parties will not be significantly harmed if relief is granted and (d) that the public interest supports granting the requested relief. Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); DeBruce Grain, Inc. v. Union Pacific R. Co., 2 S.T.B. 773, 775, n.3 (1997) (Holiday Tours standards are "[t]he generally accepted criteria for an injunction . . .").

**a. There Is A Substantial Likelihood That Hi Tech
Will Succeed On The Merits.**

As noted above, Hi Tech has concurrently filed its petition for a declaratory order in Finance Docket No. 34192 (Sub-No. 1). In that petition, Hi Tech explains why (a) the rail transloading facility at Oak Island Yard operated by Hi Tech is within the Board's exclusive jurisdiction under 49 U.S.C. § 10501(b) and (b) ICCTA preempts the state permitting requirements that DEP is attempting to enforce against that transloading facility. The arguments contained in Hi Tech's petition demonstrate that Hi Tech has a substantial likelihood of

⁶ There is no question that the Board has the authority to issue a stay or similar order directed at DEP. DEP participated as a party in Finance Docket No. 34192, one of the dockets in which this petition is being brought, and thereby submitted to the jurisdiction of the Board. Ralph J. Zola, et al. -- Show Cause Proceeding, 5 I.C.C.2d 655, 670-71 (1989), aff'd in part and vac'd in part sub nom., Zola v. ICC, 889 F.2d 508 (3d Cir. 1989).

succeeding on the merits of its petition. Indeed, as pointed out above, the Board has already noted that this specific rail transloading facility "might be considered integral to the rail transportation of C&D debris" and thus within the preemptive scope of Section 10501(b). Hi Tech I at 4.

b. Hi Tech Will Sustain Irreparable Injury If The Board Does Not Grant The Emergency Relief Requested.

As Mr. Stoller's verified statement makes clear, if Hi Tech is required to shut down the rail transloading operations at Oak Island Yard, which most assuredly will happen if DEP enforces its cease and desist order, Hi Tech will go out of business. Stoller V.S. at 7. The loss of Hi Tech's business is precisely the type of irreparable injury that an emergency stay or other injunctive relief is designed to prevent. See, e.g., Gateway Eastern Ry. Co. Terminal R. Ass'n. of St. Louis, 35 F.3d 1134, 1140 (7th Cir. 1994).⁷

c. No Other Interested Party Will Be Adversely Affected If The Relief Requested By Hi Tech Is Granted.

The only party that could conceivably be affected by the relief that Hi Tech is requesting is the DEP -- it will be forced to stay enforcement of its cease and desist order until the Board can rule on the merits of Hi Tech's declaratory petition in Finance Docket No. 34192 (Sub-No. 1). While DEP might be affected, it will certainly not be harmed should the Board grant the relief that Hi Tech is requesting. From September, 2001 until May 28, 2003, DEP allowed Hi Tech to operate the Oak Island Yard rail transloading facility without any claim that the facility required a permit. Indeed, as pointed out above, until the court entered its April 1,

⁷ Even if Hi Tech were allowed to resume operations at some later date, its business would still be destroyed. The loss of customer goodwill, as well as the goodwill of its creditors, that would result from a shutdown, even if temporary, would effectively preclude Hi Tech from successfully restarting its business. Stoller V.S. at 7-8.

2003 order in the Lawsuit, DEP apparently conceded that the facility was exempt from any permit requirements as a result of preemption under ICCTA.

The DEP has now changed its position based upon an apparent (and albeit mistaken) belief that the Board has already ruled that this rail transloading facility is not within the Board's jurisdiction or subject to preemption under ICCTA. There would be no prejudice to DEP if it is required to wait to enforce its cease and desist order until the Board has a chance to decide the very issue that forms the basis for the cease and desist order -- whether ICCTA has preempted the New Jersey permitting requirements to the extent they are otherwise applicable.⁸

**d. The Public Interest Strongly Supports
Granting The Relief Requested By Hi Tech.**

For a number of different reasons, the public interest would strongly be served by granting Hi Tech the emergency relief that it seeks. First, Hi Tech serves between 70 and 80 customers located in New Jersey and New York. If Hi Tech is forced to shut down transloading operations at Oak Island Yard, those customers will lose their access to rail transportation. Stoller V.S. at 8. The result will be not only a loss of valuable rail service but an increase in cost to these customers and an increase in truck use to handle their C&D debris waste, with the resultant increase in pollution, fuel consumption and highway congestion.

Second, a shut down of Hi Tech's operation will have a serious adverse effect on D&H and its operations to, from and at Oak Island Yard. Hi Tech is the largest customer served by D&H at the yard. Lawrance V.S. at 3. A loss of the revenue produced by Hi Tech for D&H will adversely affect D&H since there will be no corresponding decrease in its operating costs

⁸ There would be no harm to the public if Hi Tech is allowed to continue operating the Oak Island Yard rail transloading facility pending a decision by the Board on Hi Tech's declaratory order petition. DEP inspectors have inspected the transloading facility on a number of occasions and DEP has never contended that there was any health or safety problem caused by Hi Tech's operations. Stoller V.S. at 7.

and little likelihood that any other entity would be willing or able to provide C&D debris rail transloading services at Oak Island Yard. Lawrance V.S. at 3.

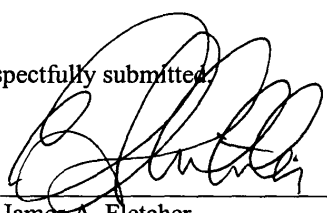
Further, a shut down of Hi Tech's operations could have a larger effect on D&H. D&H's practice is to have companies operating as independent contractors perform the transloading operations that it utilizes at the yards where its trains operate. Lawrance V.S. at 1-2. If state regulation can cause a shutdown of Hi Tech's operation, then other state and local regulation could be used to interfere with other transloading operations utilized by D&H simply because those operations are performed by independent contractors, agents or licensees, and not by D&H itself.

More importantly, enforcement by DEP of its cease and desist order before Board action on Hi Tech's declaratory order petition in Finance Docket No. 34192 (Sub-No. 1) will effectively eviscerate any Board decision and clearly infringe on the Board's jurisdiction. 49 U.S.C. § 10501(b) gives the Board exclusive jurisdiction over transportation by rail which includes the facilities used in providing rail transportation service. That grant of exclusive jurisdiction includes the authority to decide, without interference from a state agency, whether the Board has jurisdiction over a particular facility. The Board will not be able to exercise that authority here if the DEP is allowed to enforce the cease and desist order, since there will be no facility left for the Board to assert jurisdiction over. Congress made a conscious decision to give to the Board (and not to state or local agencies) exclusive jurisdiction over facilities used in providing rail transportation service. That decision, as well as Congress' will, should not be frustrated by the actions of the DEP.

does not support the application of New Jersey's permitting requirements to the rail transloading facility operated by Hi Tech on behalf of D&H.

WHEREFORE, Hi Tech Trans, LLC respectfully requests that the Board enter an order granting the emergency relief requested herein.

Respectfully submitted,

By: 

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ATTORNEYS FOR HI TECH TRANS, LLC

Dated: June 16, 2003

**VERIFIED STATEMENT
OF
DAVID C. STOLLER**

My name is David C. Stoller. I am the President and Chief Executive Officer of Hi Tech Trans, LLC ("Hi Tech"). I am submitting this verified statement in support of Hi Tech's Petition for an Emergency Order and Other Relief.

I started my career in 1972 as an environmental engineer for Bechtel Corporation. After leaving Bechtel, I directed a public participation program for energy utilization for the Scientists' Institute for Public Information. In 1979, I joined Long Island Lighting Company as Associate Director of Public Affairs. From 1984 to 1992, I practiced law with the firm of Milbank, Tweed, Hadley & McCloy, ultimately becoming a partner and co-chairman of the firm's global project finance group. I then founded and served as chief executive officer of a waste services company, American Disposal Services Company. The company, which became publicly traded in 1996, was later acquired by Allied Waste. I then founded and operated a financial services company now called American Wholesale Insurance Group, which has become one of the nation's largest wholesale insurance brokerages. In July, 2001, I became an investor in Hi Tech, and in October, 2002, I joined Hi Tech as its president and chief executive officer.

Hi Tech and Its Operations

Hi Tech is a limited liability company organized under the laws of the State of New Jersey. Its principal office and place of business is at 91 Bay Avenue in the Oak Island rail yard located in Newark, New Jersey.

The Oak Island yard is a major rail classification yard that is owned by Consolidated Rail Corporation ("Conrail"). A portion of the yard is leased by Conrail to the Delaware & Hudson Railway ("D&H") for intermodal operations. The intermodal operations

conducted at the yard by D&H include the transloading of various bulk commodities onto rail cars after delivery to the yard by truck.

Hi Tech operates a rail transloading facility for D&H at the Oak Island yard. Construction and demolition ("C&D") debris is delivered to the yard by truck and then transloaded by Hi Tech onto rail cars. Trucks carrying C&D debris arrive at the yard and then dump the C&D debris into a hopper constructed by Hi Tech adjacent to one of the tracks in the yard. The C&D debris is then loaded directly into rail cars from the hopper by an excavator that is owned and maintained by Hi Tech. The rail cars that are used are gondolas leased by Hi Tech and dedicated for the service that Hi Tech provides. D&H crews are responsible for spotting empty cars and pulling loaded cars on the track next to the hopper.

Hi Tech neither stores nor processes any of the C&D debris that is delivered for transloading to the Oak Island yard, and has never done so at any time since the rail transloading facility was opened in September of 2001. All that Hi Tech does is to transload the C&D debris onto the rail cars. The cars loaded with the C&D debris by Hi Tech are then transported by D&H to interchange points with other rail carriers enroute to disposal facilities. All of the disposal facilities to which the C&D debris is delivered are located outside the state of New Jersey. The railcars loaded by Hi Tech are transported by D&H pursuant to a long-term transportation contract entered into by and between Hi Tech and D&H.

There are between 70 and 80 customers who regularly use Hi-Tech's rail transloading service at the Oak Island yard. The customers are located in New York and New Jersey. When C&D debris is delivered to Hi Tech at the yard, title to the C&D debris remains with the customer. For virtually all of these customers, Hi Tech, through its transloading operation, provides their only access to rail transportation. In other words, without the rail

transloading service that Hi Tech provides, these customers would have no alternative other than to use trucking for transporting the C&D debris that they generate.

Since Hi Tech began operating the Oak Island yard rail transloading facility in September, 2001, its business has grown substantially, increasing from less than 4,000 tons per month in 2001 to an average of more than 13,000 tons per month during the first five months of 2003. As a result of the growth of its transloading business, Hi Tech has become the largest customer (in terms of revenue produced) using D&H's transportation service at Oak Island.

Construction of the Transloading Facility

The rail transloading service provided by Hi Tech at the Oak Island yard is performed pursuant to a license agreement that it entered into with D&H in November, 2000. A redacted copy of that agreement is attached hereto as Exhibit A. Under the agreement, Hi Tech agreed to construct, develop and operate the transloading facility for D&H at the yard.

Because Hi Tech was going to have to commit significant capital in constructing and developing the transloading facility, it wanted to determine whether the facility would be subject to New Jersey permitting requirements for solid waste facilities before incurring any significant expense. Therefore, Hi Tech requested from the Board informal opinions as to whether the rail transloading facility would be within the Board's jurisdiction and whether the ICC Termination Act of 1995 ("ICCTA") preempted New Jersey permitting requirements to the extent they would otherwise be applicable to the rail transloading facility. Hi Tech received informal opinion letters from the Board on May 3, 2000 and October 19, 2000 (Exhibits B and C attached hereto). In those letters, the Board informed Hi Tech that the facility would be subject to the Board's jurisdiction and that the ICCTA would preempt any state or local permitting requirements for the facility.

Hi Tech also endeavored to check with the New Jersey Department of Environmental Protection ("DEP") to insure that DEP recognized that the rail transloading facility would be exempt from the solid waste facility permitting requirements enforced by DEP. In May of 2001, Hi Tech sent to DEP an informational filing describing fully the facility that we were constructing and the transloading operations we would be performing.

At a meeting in November, 2001 with officials from the DEP and the state attorney general's office, we were told that the DEP agreed that our rail transloading facility was exempt from the permitting requirements -- i.e., that the ICCTA had preempted New Jersey's permitting requirements to the extent that they otherwise might apply to our transloading facility. Until the events of the last 30 days, which I discuss below, the DEP has never taken a different position and has never claimed that the permitting requirements were applicable to the Oak Island yard transloading facility.

On the basis of these opinions, communications and formal and informal interactions with the Board and the DEP, we were satisfied that we were not required to obtain a construction or operating permit for the transloading facility. We believed and still believe that because of ICCTA, the facility and our rail transloading operations are exempt from New Jersey's permitting requirement.

Dispute Over the Flow Control Laws

Hi Tech began operating the rail transloading facility in September, 2001. In early 2002, after we had been operating for several months we were contacted by the Hudson County Improvement Authority ("HCIA"), a Hudson County agency. We were informed by HCIA that it believed that the trucking companies that were transporting C&D debris to our facility from customers in Hudson County were violating state and local "flow control" laws.

Under a New Jersey statute, a county is authorized to designate a facility as the exclusive facility for receiving solid waste generated in the county. If a county does so, then any transporter of solid waste that delivers solid waste to any other facility (whether located inside or outside the county) violates state law and is subject to fines and other penalties.

The HCIA informed us that it had designated a truck to truck transfer facility as the exclusive facility for receiving solid waste generated in Hudson County. The HCIA also told us that it intended to enforce the flow control laws against any trucking company that continued to deliver C&D debris to the rail transloading facility at Oak Island yard. Another local agency, the Essex County Utility Authority ("ECUA") told us the same thing.

Because of the threat to our business from enforcement of the flow control laws by HCIA and ECUA, we decided to seek relief from the Board. On May 3, 2002, we filed an amended petition for a declaratory order with the Board, which was docketed as Finance Docket No. 34192. In that petition, we asked the Board, inter alia, to issue an order declaring that the flow control laws that HCIA and ECUA sought to enforce had been preempted by the ICCTA.

In addition, on August 7, 2002, we filed a complaint against the HCIA and ECUA in the United States District Court for the District of New Jersey. Hi Tech Trans, LLC v. Hudson County Improvement Authority, et al., No. 02-3781 ("the Lawsuit"). In our complaint, we sought, inter alia, a declaratory judgment that the flow control laws violated the Commerce Clause in the United States Constitution.

HCIA, ECUA and the DEP all entered appearances as parties in Finance Docket No. 34192 and each filed a reply to our petition opposing the relief that we had requested. On November 19, 2002, the Board issued a decision denying our request for a declaratory order. In doing so, the Board found that it did not have jurisdiction over the trucking operations that were

the subject of our petition -- i.e., the operations of the trucking companies transporting C&D debris to the rail transloading facility. The Board did not make any finding as to whether the rail transloading facility itself or Hi Tech's transloading operation at Oak Island yard were within its jurisdiction nor did the Board determine whether the ICCTA has preempted New Jersey's permitting requirements to the extent they might be otherwise applicable to the rail transloading facility.

The DEP Cease and Desist Order

After receiving the Board's decision, we continued to prosecute the Lawsuit. On April 1, 2003, the court entered an order denying Hi Tech leave to amend its complaint. A copy of that order is attached hereto as Exhibit D. In its order, the court reviewed the Board's decision in Finance Docket No. 34192. After doing so, the court concluded that what the Board had done was to decide that Hi Tech was not a rail carrier. Order, Exhibit D, at 3.

That order prompted the DEP to assert that Hi Tech's rail transloading facility was not exempt from the permitting requirements under New Jersey law and was therefore operating illegally (after a full two years with unchallenged operation). On May 28, 2003, the DEP served on Hi Tech a cease and desist order. See Exhibit E, attached hereto. In that order, DEP asserted, contrary to what it had told us back in November, 2001, that Hi Tech was required under New Jersey law to obtain a construction and operating permit for the rail transloading facility at Oak Island yard and a certificate of convenience and necessity to accept waste from haulers; and that since Hi Tech had constructed and operated the facility without a permit, Hi Tech had violated New Jersey law. The order directed Hi Tech to cease operation of the transloading facility within 20 days and not to resume operation until it had obtained the necessary permits and a certificate of convenience and necessity from the DEP.

In announcing the issuance of the cease and desist order, the DEP's assistant commissioner for compliance and enforcement indicated that what had caused the DEP to change its position on permitting was the court's April 1, 2003 order. Specifically, she indicated that because the court (based on its interpretation of the Board's decision in Finance Docket No. 34192) had concluded that Hi Tech was not a rail carrier, then none of Hi Tech's facilities, including the rail transloading facility at the Oak Island yard, were exempt from state permitting requirements under the ICCTA. She also indicated that if Hi Tech did not cease operation of the transloading facility by the end of the 20-day period, the DEP would begin an enforcement action against Hi Tech and me.

I would emphasize that the reason given by DEP for the cease and desist order is Hi Tech's not having obtained a construction or operating permit for the transloading facility. Representatives of DEP have inspected our operations on several occasions over the last two years and have never claimed that our operations produce any health, safety or other problem.

Effect of the Cease and Desist Order

The 20-day period provided in DEP's cease and desist order will expire on June 17, 2003. Unless Hi Tech receives relief from the Board, it will be forced to close the rail transloading facility at the Oak Island yard. Since the transloading business conducted by Hi Tech at the yard provides the only source of revenue for Hi Tech, the company will be forced out of business; and given the size of that business, the D&H may well question the scope and viability of its continued operations at Oak Island as well. Moreover, even if at some later date Hi Tech were authorized to resume rail transloading operations at the yard, it is unlikely that Hi Tech could successfully do so. If Hi Tech is forced to close its transloading operation for any period of time, it will sustain significant and likely permanent damage to the goodwill that it

enjoys with its customers, who will be forced to find other options for transporting the C&D debris that they generate, and a substantial and unrecoverable loss of revenue. Hi Tech will also suffer a serious loss of credibility and the support that it enjoys with its creditors, including railcar and equipment lessors, banks and other vendors.

Finally, if Hi Tech is forced out of business as a result of the DEP cease and desist order, Hi Tech's customers in New Jersey and New York will be deprived of their access to rail service. As I noted above, for each of these customers, Hi Tech's transloading service at the Oak Island yard provides their only practical access to rail service.

OPERATIONAL LICENSE AGREEMENT

THIS AGREEMENT made this 6th day of November, 2000, by and between HI TECH TRANS, LLC, a limited liability corporation duly organized under the laws of the State of New Jersey ("HTT") and the DELAWARE AND HUDSON RAILWAY COMPANY, INC., a Delaware corporation, doing business as "Canadian Pacific Railway" ("CPR").

RECITALS:

WHEREAS, pursuant to an agreement dated April 25, 1979 with Consolidated Rail Corporation ("Conrail"), CPR operates an Intermodal Facility in the Oak Island rail yard in Newark, New Jersey, (the "Railyard"); and

WHEREAS, CPR desires to utilize a portion of the Railyard as designated on Exhibit A (the "Premises") for the transloading of non-hazardous construction and demolition debris ("C&D") and non-hazardous contaminated soils ("Soils"), and intermodal transloading of containerized sludges and solid waste ("Containerized Waste") (C&D, Soils and Containerized Waste are hereinafter collectively referred to as "Waste Products"), and

WHEREAS, HTT is engaged in the transportation of Waste Products from various loading terminals to landfills and treatment facilities, accepting such Waste Products from any customer and specializes in the efficient handling and transloading of Waste Products and the management of the entire transportation service for the customer; and

WHEREAS, CPR desires to retain HTT to develop and operate the Premises for the benefit of CPR and for the solicitation of Waste Product traffic and for the efficient transloading of Waste Products in transit for the carriage by CPR which development shall take place on the terms and conditions set forth herein

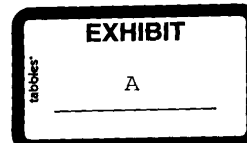
NOW, THEREFORE, in consideration of the terms and conditions set forth herein the parties do hereby agree as follows:

1. **LICENSE.** CPR hereby grants to HTT and HTT accepts a non-exclusive, priority license to access and use the Premises. This includes the construction of facilities described herein, store equipment and conduct truck operations as necessary to efficiently transfer Waste Products from truck to rail and in accordance with the terms and conditions of this Agreement

2. **TERM.** This Agreement shall be effective as of the date of execution by both parties and upon written notification by CPR of the occurrence of all of the following contingencies: (a) negotiation and acceptance of a lease agreement between CPR and Conrail, and (b) acknowledgment by Conrail that the operation of the facility by HTT represents a permitted use within the intermodal restriction contained in the Agreement between Delaware and Hudson Railway Company and Consolidated Rail Corporation dated April 25, 1979, and (c) obtaining a financing commitment for construction of the facility and purchase or lease of rolling stock by HTT to be obtained no later than 3 months from the date hereof, and shall continue for a term of twenty (20) years, terminating 2020 (the "Effective Date"). Use of the Premises shall commence (the "Commencement Date") when HTT completes construction of the planned facilities to transfer non-hazardous construction and demolition waste and debris ("C&D") from truck to rail and obtains all necessary permits, approvals or exemptions to operate the Premises as a transfer facility in accordance with applicable law as determined by CPR for the transfer of C&D from truck to rail. HTT shall have two (2) years, or upon the first scheduled or repetitive use of the Premises by HTT to move C&D as contemplated by this Agreement, whichever is sooner from the Effective Date of this Agreement to commence operations at the facility. If operations are not commenced within that time, CPR shall have the right to terminate this Agreement. Delivery of containers to CPR's Oak Island Intermodal Facility (which are loaded onto railcars for transport by CPR by its terminal operator) shall not constitute a repetitive use of the Premises by HTT which will cause the Commencement Date to occur and the license term to commence.

3. **FEES** Beginning 120 days after the Effective Date, up to the Commencement Date, HTT shall pay to CPR a use and access fee in the amount of \$ per month for the first three (3)

1



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months, and thereafter,

per month until the Commencement Date. Beginning on the Commencement Date, HTT shall pay to CPR a fee (the "Annual Car Load Guarantee Fee") equal to the fee per car to the extent that HTT does not move a minimum number of cars each year (the "Annual Car Load Guarantee") during the term of this Agreement. The Annual Car Load Guarantee shall be as follows measured in terms of loaded cars (as opposed to empty returning cars) transported under the Transportation Agreement between the parties, dated even date herewith, plus Transportation Agreement No. STB-CPRS 126814: loaded cars for the first twelve months after the Commencement Date; loaded cars per year starting on the first anniversary of the Commencement Date and continuing for the next 4 years; and loaded cars per years thereafter. Annual Car Load Guarantee Fees shall be due and payable hereunder so long as CPR has system capacity to handle the traffic and is providing the services as contemplated pursuant to the Transportation Agreement. Annual Car Load Guarantee Fees shall be payable on a quarterly basis (i.e. based on cars per quarter for the first year, cars per quarter for years 2 through 5, and cars per quarter thereafter), and at the end of each year CPR shall refund to HTT overpayments, if any, made by HTT during such year based on annual calculations.

After year nine (9), the Annual Car Load Guarantee Fee payable per year shall be not be less than per loaded car, and shall be the higher of (a) as indexed in accordance with the adjusted RCAF retroactive to the Effective Date of the Agreement or (b) a pro rata portion of the Extraordinary costs incurred by Railroad in connection with the performance of this Agreement. For purposes of this Section, the term "Extraordinary costs" shall mean costs imposed directly upon the Railroad by third parties pursuant to applicable package rights and haulage agreements proportionate to the amount of load utilized under this Agreement, and divided by loaded cars per year.

4. USE OF THE PREMISES. During the term of this Agreement, HTT agrees as follows:

(a) HTT shall use the Premises only for the transfer of Waste Products from truck to railcars operated by CPR. For purposes of this Agreement, the term "Waste Products" shall mean, C&D, STCC Code 40-291-54, Municipal Solid Waste, STCC Code 40-291-73, Soils STCC Code 40-291-01, Soils, STCC 40-291-02 and Bio Solids, STCC Code 40-291-89.

(b) HTT shall use only that portion of the Premises depicted at the attached Exhibit A of this Agreement.

(c) HTT may not assign, sell or otherwise allow other persons to utilize the Premises without the prior written permission of CPR which permission shall not be unreasonably withheld or delayed. HTT may encumber Premises for financial purposes as they relate to this transaction, provided that any holder of a security interest shall agree that any successor to HTT shall be a competent operator that is not a competitor of CPR or its affiliates and not disqualified to do business in the City or State of New York or the State of New Jersey for any reason other than citizenship. The parties acknowledge and agree that CPR shall not agree to any assignment which will deprive CPR of any commercial benefit or opportunity relating to the use or occupancy of the Oak Island Intermodal Facility or which would deprive it of any revenue which it might otherwise enjoy relating to such use or occupancy over and above that which is set forth herein. CPR shall have the right to assign this Agreement to any party purchasing the stock or substantially all the assets of CPR or should CPR's right to use or occupy the Oak Island Intermodal Facility terminate for any reason. (d) HTT, at its sole expense, shall undertake construction, installation, maintenance and improvement of facilities and equipment at the Premises as outlined at the attached Exhibit A. Any projects not outlined in the attached Exhibit A require the prior written approval of CPR. HTT acknowledges the existence of and effect of

collective bargaining agreements between CPR, Conrail and the union employees in regard to such activity on the Premises. To that end, HTT agrees that such employees of CPR and/or Conrail may have the sole right to engage in construction, modification, maintenance, improvement and renewal of facilities at the Premises in accordance with those agreements as well as in accordance the agreement between CPR and Conrail dated April 25, 1979. CPR, to the extent permitted under those agreements shall allow and require HTT to construct, install, maintain and improve the facilities, however, HTT acknowledges and agrees that such construction, modification, maintenance, improvement or renewal may have to be performed by forces of CPR or Conrail. Regardless of the party performing the work, all work shall be performed at the HTT's sole expense based on costs incurred by CPR and/or Conrail, and CPR shall not mark-up such costs.

(d) HTT shall access the Premises using only CPR's primary access route off Delancy Street. Should Delancy Street access be closed, CPR shall use its best efforts to relocate street access via means then available.

(e) Prior to commencement of any operations, HTT shall obtain all permits or exemptions or evidence of same necessary for the construction, use and operation of the facility. CPR shall cooperate with HTT by providing necessary documentation required so long as they do not materially change the parties' obligations. CPR shall reasonably determine the nature and extent of any cooperation necessary. Any costs incurred by CPR in the process of obtaining any leases (other than Conrail leases), permits or operating authority for HTT will be paid by HTT. HTT will not be responsible for any legal fees incurred by CPR in reviewing submissions made by HTT or costs incurred by CPR in obtaining permits, authority or exemptions in the name of CPR including costs incurred by CPR in connection with meetings with the New Jersey Department of Environmental Protection by Public Affairs Consultants. Should CPR's operations be interrupted by any government agency, public authority or any entity authorized to do so, due to any deficiency in HTT's permits or as the result of HTT's failure to obtain or comply with same, HTT shall defend, indemnify and hold CPR harmless from any costs associated therewith including attorney's fees and any loss of business which results therefrom.

(f) HTT shall not handle Waste Products from any hauler, motor carrier or other person party or entity on the Premises who is not duly licensed and authorized to operate under applicable federal, state or local law.

(g) HTT and its subcontractors shall adhere to CPR's standard safety policies then in effect based on rule books, and revisions thereto, as provided to HTT by CPR.

5. CONDITION OF THE PREMISES.

(a) HTT promises: 1) not to damage or misuse the Premises or allow its employees or guest to do so; 2) not to make any structural changes to the Premises without the prior written consent of the CPR; 3) to immediately notify the CPR of any conditions on the Premises that are dangerous to human health or safety, or that may damage the Premises; 4) that if HTT vacates

the Premises, all non-mobil facilities will be left in good condition, except for ordinary wear and tear and shall become the sole property of CPR; and 5) not to permit waste of the Premises

(b) HTT, at its expense, subject to sub-section 4 (d), above, shall be solely responsible for all necessary repairs, maintenance and upkeep of the Premises

(c) HTT shall not permit any liens to encumber the Premises for any labor or material furnished in connection with any work performed or claimed to have been performed in or about the Premises.

(d) If the Premises are destroyed or damaged so they are unfit to occupy due to any cause, HTT will be responsible for returning the Premises to a condition such that CPR may continue its operations.

(e) HTT will reimburse CPR for all property taxes assessed against the Premises or such portion of such taxes assessed against Premises which shall fairly represent the portion of such taxes attributable to the Premises. Such taxes, as well as any penalties payable in connection therewith as well as any additional assessments attributable to improvements made on the Premises, shall be paid pursuant to Section 3 of this Agreement. None of the payments made pursuant to this subsection shall be subject to refund credit or offset for the transportation services as provided for in the Transportation Agreement. Should taxes and/or penalties relating to taxes be assessed against CPR attributable to the Premises, HTT will pay the same upon presentation of the assessment to HTT in a timely fashion so as to avoid the imposition of interest and/or penalties by any taxing authority. The provisions of this Paragraph 5 will not apply to such portion of the Premises which is being used by CPR for operations not associated with those of HTT.

6. NON-EXCLUSIVE LICENSE. The Parties understand that the HTT will not have exclusive possession and enjoyment of the Premises. HTT may use the Delancy Street access route and CPR's scale at the Premises contemporaneously with the CPR's rail and intermodal operations, provided that the HTT may not make use of any of the facilities at the Premises in a manner which interferes with CPR's use of the Premises. A use is deemed to interfere if it has a material detrimental impact on CPR's ability to conduct its normal business practice. CPR shall use its best efforts to conduct its operations so as not to interfere with the operations of HTT. CPR may use HTT's facilities on the Premises, including, but not limited to any truck scale or gantry crane so long as such use does not interfere with HTT's use thereof. HTT will provide CPR with keys to any gates installed to control access to the Premises or to the crane or truck scale. Absent extraordinary circumstances this statement of priorities shall mean that CPR may use the Premises and the facilities thereon at times of the day or week when these facilities are not being used by HTT. CPR may also use areas of the Premises which are in excess of those needed for HTT's operations at the time CPR seeks such use. CPR shall suspend or terminate its use of such facilities on the Premises should HTT have need for them. CPR will hold HTT harmless against any loss or liability resulting from CPR's use of HTT's crane or truck scale.

7. LIABILITY OF PARTIES.

- (a) CPR is not responsible for any loss, liability, damage or injury that is done to HTT, its property, its guests, employees, invitees, agents, or the property of any guest, employee, invitee or agent regardless of the cause.
- (b) CPR is not responsible for the actions, or any loss, liability, damages, injury or harm caused by third parties.
- (c) HTT shall defend, indemnify and hold CPR harmless for any claim, loss action or liability arising out of use by HTT or HTT's employees, agents or guest; any loss, property damage, or cost of repair or service, including any problems caused by negligence or improper use by HTT, or HTT's employees agents or guests as well as any for any claim, loss action or liability resulting from any violation of any, federal, state or local law or ordinance. HTT shall also defend, indemnify and hold CPR harmless from any injury or damage resulting from any environmental contamination or pollution resulting from HTT's use of the Premises pursuant to this Agreement.
- (d) Any attachments and addenda to this Agreement are part of this Agreement. If a term of any attachment or addendum conflicts with any term of this Agreement, the attachment or addendum term will be controlling. No oral agreements have been made. This Agreement, its attachments and addenda, and any other written agreements are the entire agreement between HTT and the CPR and may be modified only by a writing signed by the HTT and CPR.
- (e) CPR does not warrant that any services that it provides, whether utilities or otherwise, will be free from interruption.
- (f) The covenants and agreements in this Agreement shall bind and be to the benefit of the successors and assigns of the parties to this Agreement. This contract shall be construed in accordance with the laws of New York.
- (g) HTT shall not cause or permit to be caused any act or practice, by negligence, omission or otherwise, that would affect the environment or do anything or permit anything to be done that would be in violation of any law, regulation or guideline. This includes, but is not limited to the improper or illegal use or disposal of any flammable, combustible, hazardous, or explosive fluid, material, chemical, or substance. A violation of this clause will be considered default of this Agreement.

8. INDEMNIFICATION BY BOTH PARTIES. HTT shall indemnify and defend the CPR against all claims, expenses and liabilities incurred, including reasonable attorney fees, related to claims for loss of life, personal injury, and/or damage to property arising out of any occurrence in, upon or at the Premises, or the occupancy of use thereof by HTT, or occasioned wholly or in part by any act or omission of HTT, its agents, employees, contractors or licensees. HTT shall not be required to indemnify and defend CPR for claims, expenses and liabilities in instances where CPR is using a portion of the Premises and HTT's conduct played no part in

causing claim, expense or liability or where they were caused by the gross negligence or intentional torts of CPR.

9. **INSURANCE.** HTT, at its sole cost and expense, shall maintain in full force and effect during the term of the Agreement and any renewal thereof, general liability insurance acceptable to CPR.

- (a) At a minimum amount of \$7,000,000 per occurrence for property damage, death, or personal injury to one individual.
- (b) Naming CPR as an Additional Insured with the general liability policy containing a stipulation that HTT's insurers will provide thirty (30) days prior written notice of cancellation of such insurance to the HTT.
- (c) Property Insurance covering HTT's property, other than betterments and improvements, in an amount necessary to replace HTT's and CPR's property.
- (d) Worker's Compensation and Employers' Liability insurance, naming CPR as an additional insured on those of its employees who are on the Premises.

10. **MAINTENANCE.** HTT shall obtain and pay for all utility charges for the Premises. HTT shall also pay the costs of maintenance and repair of the Premises.

11. **TERMINATION.** HTT may terminate this Operational License Agreement at any time prior to the Effective Date, as defined in Section 2 by giving CPR five (5) days notice of its intention to abandon the Premises. At its option, CPR shall have the right to terminate this Agreement, in event HTT fails to meet its minimum volume commitment agreed to under the transportation agreement between CPR and HTT dated , 2000 or if said transportation agreement is terminated for any reason. CPR shall also have the right to terminate this Agreement in the event HTT breaches or fails to comply with any of the terms and conditions of this License Agreement or if CPR loses the right to provide HTT with access to the Premises for any reason. Should HTT breach or fail to comply with any of the terms and conditions of this License Agreement, CPR shall give HTT notice of such violation and HTT shall have thirty (30) days from the date of such notice to cure such breach or violation. In the event HTT fails to cure such breach or violation within the aforesaid thirty (30) day period, this License Agreement and HTT's right to use and gain access to Oak Island shall terminate. Notwithstanding the foregoing, should any condition be created by HTT on the Premises that creates or contributes to a dangerous condition or results in CPR being cited or charged with a violation of any federal, state or local law, rule, ordinance or regulation regulating health, safety or the environment or which result in conviction of a crime, misdemeanor or violation, CPR, in its sole and absolute discretion, may immediately suspend HTT's rights under this License Agreement without notice.

Upon termination HTT shall cease using the Premises and shall remove its property therefrom. Except for termination by reason of breach, upon termination, the parties obligations to each other shall immediately cease and, except for money then currently due and owing, the parties financial obligations to the other shall cease.

12. **BINDING EFFECT; ASSIGNMENT.** The terms and conditions of this contract are hereby made binding upon and shall inure to the benefit of the parties and their respective

heirs, executors, administrators, successors, and assigns. HTT shall not assign its rights and interest hereunder without the prior written consent of CPR. HTT shall not seek nor will be granted any assignment that would deprive CPR of any commercial or financial benefit or opportunity relating to use or occupancy of the Premises.

13. COMPLIANCE WITH FEDERAL, STATE AND MUNICIPAL REGULATIONS. HTT agrees to use the Premises in strict conformance with all applicable rules, regulations and ordinances of federal, state and municipal authorities.

14. ENTIRE AGREEMENT; AMENDMENTS. This Agreement constitutes the entire agreement between the parties; and no other agreement prior to this Agreement or contemporaneous herewith shall be effective except as expressly set forth or incorporated herein. Any purported amendment shall not be effective unless it shall be set forth in writing and executed by both parties.

15. NOTICE. Any notice, demand, request or other communication that may or shall be given or served by the parties, shall be deemed to have been given or served on the date the same is deposited in the United States mail, registered or certified, postage prepaid and addressed as follows:

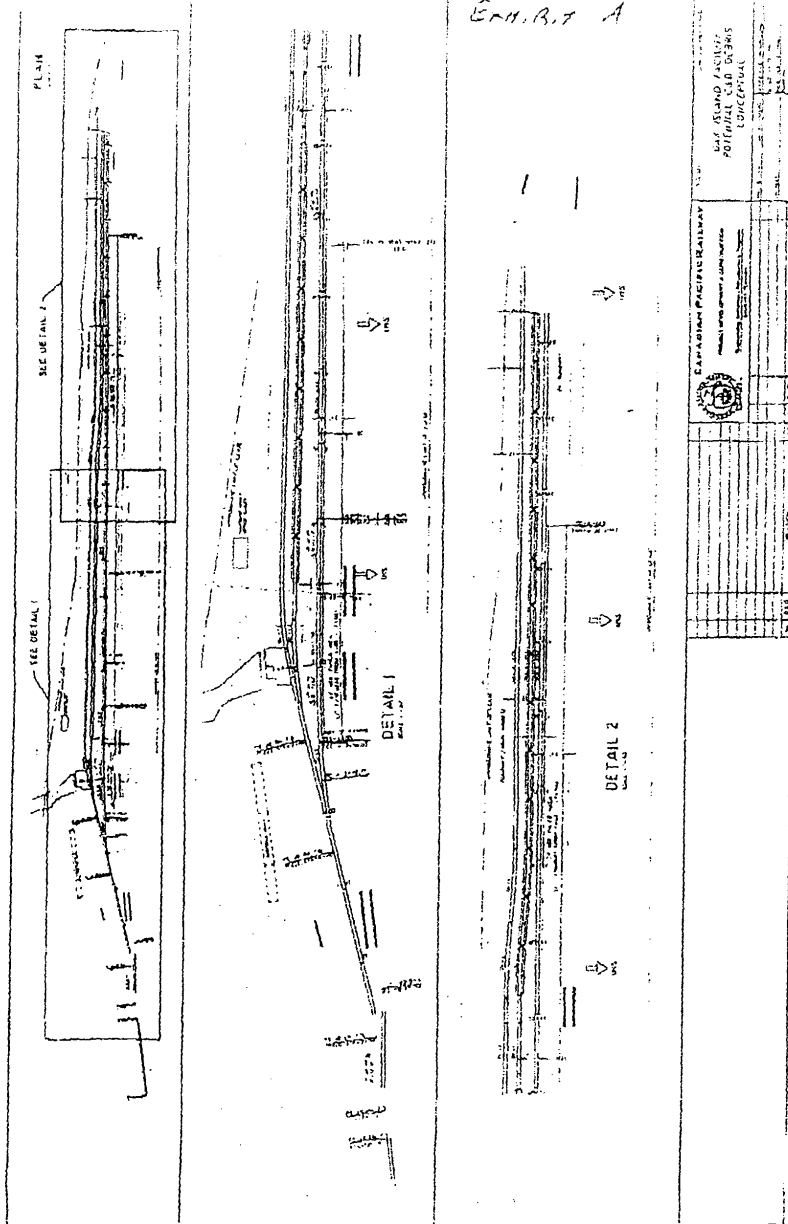
If to CP: Delaware and Hudson Railway Company, Inc.
c/o Director-Commercial
Windsor Station
910 Peel Street, Suite 300
Montreal, QC H3C 3E4
Canada

If to HTT: Hi Tech Trans. LLC
c/o Ronald A. Klempner
843 Red Road
Teaneck, NJ 07666

Either party may provide changes in the above addresses to the other party by personal service or certified mail.

Except for disputes arising under Sections 7, 8 and 11 of this Agreement, any
16. ARBITRATION. Any dispute arising under this agreement shall be submitted to binding arbitration before a single arbitrator provided by the American Arbitration Association (hereinafter "AAA") in New York, N.Y. 212-484-3266. No dispute as to a sum billed may be raised more than thirty days following the rendering of such bill. Any party seeking arbitration shall institute such arbitration by faxed letter to the other party with a copy by fax to the AAA c/o Steven Romano or successor at 212-307-4387 with a hard copy and a check for the applicable fee by Federal Express or other recognized overnight courier service to the AAA only. The AAA will provide a list of potential arbitrators by telefax within one business day of receipt of the fax copy of the notice of arbitration. The parties will agree on an arbitrator who is available, free of conflicts and willing to serve within three business days of the date of

01-d





Surface Transportation Board
Washington, D.C. 20423-0001

May 3, 2000

Office of the Secretary

Mr. Ronald Klempner
Hi Tech Trans, LLC
843 Red Road
Teaneck, NJ 07666

Dear Mr. Klempner:

This responds to your letter of April 24, 2000, requesting an informal opinion regarding the scope of Federal preemption of state and local environmental and zoning permitting requirements for the proposed development and operation of a truck-to-rail transshipment facility by Hi Tech Trans, LLC (HTT) at the Oak Island Rail Yard (OIRY) in Newark, NJ.

HTT plans to file with the Surface Transportation Board (STB or Board) for authority to operate as a common carrier. Under an agreement with the Delaware and Hudson Railway (DHR), a Class II carrier currently using the OIRY for rail storage, transfer and transport, HTT will lay rail for mobile pieces of equipment and asphalt for trucks to enable the transloading of bulk cargo from truck to rail gondola cars. HTT will also install and operate switches and connecting tracks to facilitate the movement of rail cars around the yard. DHR will transport the loaded rail gondola cars to their destinations.

Although you do not specify in your letter the exact nature of the local zoning and permitting requirements to which this project might be subject, I assume that the local authorities could deny any permit application you might file thereby preventing the project from going forward. It is my informal opinion that this action is preempted by the ICC Termination Act of 1995 (ICCTA) (49 U.S.C. 10101 *et seq.*)

Under 49 U.S.C. 10501(b) jurisdiction of the Board over rail transportation is exclusive and State laws are expressly preempted. Preemption, of course, does not withdraw from State and local governments the power to impose appropriate health and safety regulations and the police powers reserved to the States by the Tenth Amendment to the Federal Constitution. But the local law is preempted when the challenged statute or regulation stands as an obstacle to authorized interstate rail transportation. See STB Finance Docket No. 33200, *Cities of Auburn and Kent, WA - Petition for Declaratory Order*, served July 2, 1997 (copy enclosed).

EXHIBIT

B

Section 10501(b) states:

"The jurisdiction of the Board over-

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to rail transportation are exclusive and preempt the remedies provided under Federal or State law."

The term "transportation" includes any facility related to the movement of passengers or property by rail, and services related to that movement. See 49 U.S.C. 10102(9).

In *Soo Line Railroad Co. v. City of Minneapolis*, 38 F.Supp.2d 1096 (D.Minn., 1998), the court enjoined the City from utilizing local regulations to bar demolition of five buildings located on railroad property as part of the carrier's proposed redevelopment of a rail yard. The court said "when section 10501(b) grants the STB exclusive jurisdiction over 'transportation by rail carriers' it logically includes the yard, property, facilities and any intermodal equipment used in connection with a railroad, or related to the movement of passengers or property".

Faced with a similar issue in *Norfolk Southern Ry. Co. v. City of Austell, GA*, No CIVAI:97-CV-1018-RLV, (N.D.Georgia, 1997) (copy enclosed), the court said, "the local regulation, via a zoning ordinance and a land-use permitting requirement, of the construction, development, and operation of an intermodal facility, a facility which is operated in order to transfer containers or trailers of cargo between trains and tractor-trailers so that the cargo may be shipped in interstate commerce, certainly appears to come within the 'regulation of rail transportation' which is explicitly preempted by section 10501(b)". This case seems to be nearly identical to the case you submit to me for an informal opinion.

A case dealing with preemption is currently pending before the Board in STB Finance Docket No. 33466. Please look for that case when it comes out on our web site at www.stb.dot.gov. I cannot give you a date of release at this time, but a press release will accompany the case when it is served.

You also ask if the proposed project is exempt from the Board's regulation under 49 U.S.C. 10906. In my informal opinion the operation of a transloading facility by a rail carrier falls within that exemption. I have said that the operation of HTT's proposed project falls clearly within the Board's jurisdiction under 49 U.S.C. 10501(b)(2). 49 U.S.C. 10906 provides a

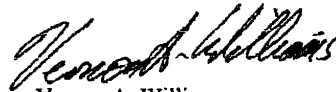
Jun 12 20 02:15p

p. 6

statutory exemption from the licensing requirements of part 109 for the "construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching or side tracks." Tracks used to enable transloading operations fall within that category.

This is an informal staff opinion and is not binding on the Board.

Sincerely,

A handwritten signature in dark ink, appearing to read "Vernon A. Williams", written in a cursive style.

Vernon A. Williams
Secretary

Enclosures

Jun 12 20 02:14p

10/20/00 FRI 11:11 FAX 202 927 6597

ICC FMB

p. 2

002



Surface Transportation Board
Washington, D.C. 20423-0001

Office of the Secretary

October 19, 2000

Mr. Ronald A. Klempner
Hi Tech Trans, LLC
843 Red Road
Teaneck, NJ 07666

Dear Mr. Klempner:

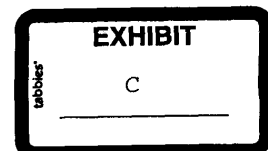
This responds to your letter of September 29, 2000, requesting an informal opinion on, first, whether or not the operations of a proposed truck-to-rail transloading facility are subject to 49 U.S.C. 10906.

The operations you describe in your letter seem substantially similar to those you described in your letter to me of April 24, 2000, i.e. that the facility is to be used for rail storage, and for transfer and transport of commodities in interstate commerce. The essential difference is that no new rail will be built, but existing rail and structures will be used.

My initial informal opinion is, therefore, unchanged. The operation of a transloading facility by a rail carrier falls within the 10906 exemption. I said in my earlier letter that the operation of the proposed project falls clearly within the Board's jurisdiction under 49 U.S.C. 10501(b)(2). 49 U.S.C. 10906 provides a statutory exemption from the licensing requirements of part 109 for the "construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching or side tracks." Tracks used to enable transloading operations fall within that category.

You also ask if New Jersey state permitting requirements set forth in Title 13 of N.J.S.A. 13:1E-126 et seq. and in the regulations contained in N.J.A.C. 7:26-3.6 are pre-empted under the ICC Termination Act. It is my informal opinion that they are preempted by that Act. Although preemption does not withdraw from State and local governments the power to impose appropriate health and safety regulations and the police powers reserved to the States by the Tenth Amendment to the Federal Constitution.

But the local law is preempted when the challenged statute or regulation may stand as an obstacle to interstate operations. Clearly "permitting" by a state presents such an obstacle because the state could deny the permit application and thereby prohibit the interstate operations. See *City of Auburn v. Surface Transportation Board*, 154 F.3d 1025 (D.C. Cir. 1998), STB Finance Docket No. 33200, *Cities of Auburn and Kent, WA - Petition for Declaratory Order*,



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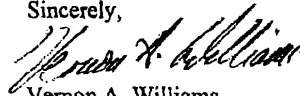
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003

served July 2, 1997, and STB Finance Docket No. 33466, *Borough of Riverdale - Petition for Declaratory Order - New York, Susquehanna and Western Rail Corporation*, served December 15, 1999.

This is an informal staff opinion and is not binding on the Board.

Sincerely,



Vernon A. Williams
Secretary

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HI TECH TRANS LLC,

Plaintiff,

v.

**HUDSON COUNTY IMPROVEMENT
AUTHORITY, et al.,**

Defendants.

Civil Action No. 02-3781 (FSH)

OPINION and ORDER

This matter comes before the Court upon Plaintiff's motion to amend its complaint pursuant to Fed. R. Civ. P. 15(a), and upon Defendants' cross-motion for a preliminary injunction; and the Court having reviewed the parties' submissions and considered the matters pursuant to Fed. R. Civ. P. 78; and good cause having been shown;

1) and Plaintiff alleging that “with the ICCTA Congress has specifically barred regulation of rail transportation services, including rail intermodal transportation, by State and Local Government” and Plaintiff further alleging “Prior to the passage of the ICCTA, the Interstate Commerce Commission had jurisdiction over trucks used to convey cargo between a railhead and a shipper or consignee as part of intermodal rail-truck transportation services. After the ICCTA the STB has held that it does not have jurisdiction over the trucking element of rail intermodal services. Therefore, the ICCTA has removed the trucking segment of rail intermodal transportation services from regulation by the STB and denied the States and the defendants the authority to impose any regulation on this segment of such transportation”; and Defendants having opposed the motion to amend on the ground that such amendment would be futile and would unduly prolong the proceedings in the instant action; would be subject to dismissal

EXHIBIT

D

pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim; and the Court noting that "[i]n the absence of any apparent or declared reason - such as undue delay, bad faith, or dilatory motive. . ." or "undue prejudice to the opposing party by virtue of the amendment . . . leave sought should . . . be freely given" (*Foman v. Davis*, 371 U.S. 178, 182 (1962)); and the Court finding that it would cause undue delay to grant this motion at this time as both parties are aware that this Court has determined that the commerce clause count of this Complaint (Count 2) needs to be heard in an expedited manner in order to resolve Defendants' application for injunctive relief to enforce the municipal ordinances at issue in this case; and the Court further finding that granting the motion to amend at this late date would unduly prejudice Defendants; and the Court further noting that it may deny a party leave to amend a complaint if the proposed amendment would be futile (*See Alvin v. Suzuki*, 227 F.3d 107, 121 (3d Cir. 2000) (citing *Smith v. NCAA*, 139 F.3d 180, 190 (3d Cir. 1998), *rev'd on other grounds*, 525 U.S. 459 (1999))); and the Court further finding that the proposed amendment is futile in that it would not survive a motion to dismiss for failure to state a claim upon which relief could be granted (*Id.*); and the Court further noting that to determine if an amendment would be futile, it should apply the same standard of legal sufficiency as would be applied to a 12(b)(6) motion (*See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997) (citing *Glassman v. Computervision Corp.*, 90 F.3d 617, 723 (1st Cir. 1996))); and the Court further noting that when considering a motion to dismiss pursuant to 12(b)(6), it shall take all allegations as true and consider them in the light most favorable to the plaintiff (*See Brown v. Phillip Morris Inc.*, 250 F.3d 789, 795 (3d Cir. 2001)); and the Court determining that Plaintiff's attempt to explain away an adverse decision by the Surface Transportation Board (and its own failure to appeal such decision to the United

States Court of Appeals for the D.C. Circuit)¹ and instead conflate that decision into a new claim in this forum is fruitless; and this Court finding that the STB's decision that Plaintiff is not a rail carrier is conclusive and Plaintiff is therefore collaterally estopped from bringing such a claim under the present guise; and the Court therefore finding that amendment of the complaint will be denied at this time based on undue delay, prejudice to Defendants and futility;

2) and the Court noting that Defendants have filed a renewed motion for a preliminary injunction because "the records show that Hi Tech has not slackened its waste operations at all since being advised by the STB that it has no federal exemption from state and local solid waste laws;" and the Court noting that the grant of injunctive relief is an extraordinary remedy, which should be granted only in limited circumstances (*See Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 586 (3d Cir. 2002)); and the Court further noting that to grant a preliminary injunction, a movant must satisfy the following four factors favoring relief: 1) the likelihood that the moving party will succeed on the merits; 2) the extent to which the moving party will suffer irreparable harm without injunctive relief; 3) the extent to which the nonmoving party will suffer irreparable harm if the injunction is issued; and 4) the public interest (*See Clean Ocean Action v. York*, 57 F.3d 328, 331 (3d Cir. 1995)); and the Court finding that it is unnecessary to reach prongs 1,3 and 4 of the aforesaid test because Defendant has not adequately demonstrated any irreparable harm; specifically, Defendant has not shown the inadequacy of money damages to recompense its losses, if it were to succeed on the merits (*See Wetter v. Caesars World, Inc.*, 541 F. Supp. 68, 74 (D.N.J. 1982)) except to the limited extent noted below.

¹ The Court notes that Plaintiff could have appealed the STB's decision but clearly chose not to do so as a matter of legal strategy.

3) and the Court finding that Defendants' concern set forth in the preliminary injunction motion that "[Plaintiff's] records do not account for or reflect the receipt of contaminated soils that plaintiff is apparently processing, and contain numerous entries that list "NR" or "Not Recorded" under the categories "Origin" and "Type" of waste" is a bonafide issue as to which Defendants have shown a likelihood of success on the merits and irreparable harm in that it is essential that Defendants Hudson County Improvement Authority and Essex County Utilities Authority must know what solid waste is being trucked through their respective streets, and Plaintiff will be ordered to fully comply with such portions of the state and local regulations and shall furnish to Defendants those records that indicate the origin and type of waste that Plaintiff is processing, whether such waste contains contaminants and identify such contaminants. Entries in the records such as "NR" and "Not Recorded" are unacceptable. These records should be produced to Defendants in accordance with Magistrate Judge Hedges's "for attorney's eyes only" protective order until such time as this Court entertains the Appeal of that order.

IT IS on this 1st day of April, 2003,

ORDERED that Plaintiff's Motion for leave to file an Amended Complaint is DENIED; and it is further

ORDERED that Defendants' supplemental motion for a preliminary injunction is GRANTED in part and DENIED in part; and it is further

ORDERED that Plaintiff is required to produce waste receipt records to Defendants that are fully completed in all respects.



HON. FAITH S. HOCHBERG, U.S.D.J.



State of New Jersey

James E. McGreevey
Governor

Department of Environmental Protection
Division of County Environmental and Waste Enforcement Programs
Bureau of Solid Waste Compliance & Enforcement
PO Box 407
Trenton, NJ 08625-0407
Telephone: (609) 584-4180 Fax: (609) 584-2444

Bradley M. Campbell
Commissioner

HAND CARRY

May 28, 2003

Hi Tech Trans, LLC
Bay Street
Oak Island Rail Yard
Newark, New Jersey

RE: Administrative Order
HI TECH TRANS LLC and DAVID STOLLER

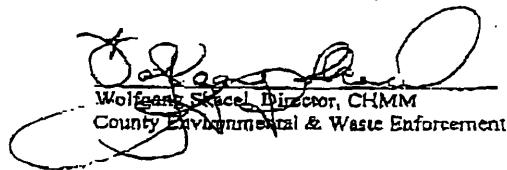
EA ID #: PEA030001 - U131

Dear Mr. Stoller:

Enclosed for service upon you is a(n) Administrative Order issued by the Department.

If you have any questions concerning the enclosed Administrative Order you may contact Rai Belonzi, Chief, Bureau of Solid Waste Compliance & Enforcement at (609) 584-4180 or by letter at the address above.

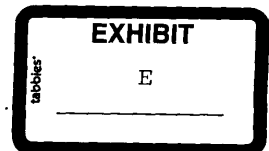
Sincerely,


Wolfgang Skacel, Director, CHMM
County Environmental & Waste Enforcement

Enclosure

New Jersey is an Equal Opportunity Employer
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"I"





State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION
COUNTY ENVIRONMENTAL AND WASTE ENFORCEMENT PROGRAMS
BUREAU OF SOLID WASTE COMPLIANCE AND ENFORCEMENT
300 HORIZON CENTER
P.O. BOX 407
TRENTON NJ 08625-0407
Tel. (609) 584-4180
Fax. 609) 588-2444

James E. McGreevey
Governor

Bradley M. Campbell
Commissioner

IN THE MATTER OF

ADMINISTRATIVE ORDER

HI TECH TRANS, LLC and DAVID
STOLLER, Individually and in his capacity as
Chairman and Chief Executive Officer of HI
TECH TRANS, LLC.

EA ID # PEA030001 - U131

This Administrative Order is issued pursuant to the authority vested in the Commissioner of the State of New Jersey, Department of Environmental Protection (hereinafter "NJDEP" or the "Department") by N.J.S.A. 13:1D-1 et seq., and the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq. and the Solid Waste Utility Control Act N.J.S.A. 48:13A-1 et seq., and duly delegated to the Director, Division of County Environmental and Waste Enforcement Programs, pursuant to N.J.S.A.13:1B-4.

FINDINGS

1. HI TECH TRANS LLC, owns and operates a facility located at Bay Street, Oak Island Rail Yard, Newark, Essex County, New Jersey (ID# U131).
2. As the result of a site visit conducted on 04/16/2003, the Department has determined that HI TECH TRANS LLC, unlawfully failed to comply with applicable statutes and regulations of the State of New Jersey as follows:

Requirement: Pursuant to N.J.A.C. 7:26-2.8(f), "No person shall begin construction or operation of a solid waste facility ["SWF"] without obtaining a SWF Permit unless exempt pursuant to N.J.A.C. 7:26-1.1, 1.7 or 1.8."

Description of Noncompliance: On 4/16/03, DEP investigators obtained records demonstrating, or directly observed, the weighing of solid waste, tipping solid waste from roll-off containers into a roofless structure on the ground (called the "east box"), and then transferring that waste via grapple loader into rail cars. At least 700 cubic yards of ID # 13 and ID # 13C solid waste were observed being processed at the facility on this date. Thus, due to DEP investigators' observations of the receipt, tipping, and reloading of construction and demolition waste, the facility is operating as a solid waste facility. Because the facility does not possess a solid waste facility permit, registration, or engineering design, the facility is an illegal solid waste facility and thus operating in violation of N.J.A.C. 7:26-2.8(f), failure to obtain a SWF permit prior to constructing or operating a solid waste facility.

Requirement: Pursuant to N.J.A.C. 7:26H-1.6(a), "No person shall engage in the business of solid waste collection or solid waste disposal as defined by N.J.S.A. 48:13A-3 unless such person is the holder of a Certificate of Public Convenience and Necessity issued by the Department."

Description of Noncompliance: On 4/16/03, Department representatives observed HI TECH TRANS, LLC to be charging haulers money (a fee) to deposit waste at the facility. Because HI TECH TRANS, LLC possesses neither a Certificate of Public Convenience and Necessity nor a tariff, it is found to be in violation of N.J.A.C. 7:26H-1.6(a), failure to obtain a Certificate of Public Convenience and Necessity prior to engaging in the business of commercial solid waste disposal.

Requirement: The Solid Waste Management Act authorizes the DEP to hold liable any "person" who engages in proscribed solid waste activity. N.J.S.A. 13:1E-9(b)(4). The term "person" is defined by regulation to include "corporate official[s]." N.J.A.C. 7:26-1.4.

Description of Noncompliance: DAVID STOLLER, as Chairman and Chief Executive Officer of HI TECH TRANS, LLC, has actual responsibility for the operation of this illegal solid waste facility and was and is in a position to be able to prevent the occurrence of the violations set forth above but has failed to do so. As such, DAVID STOLLER is in violation of N.J.A.C. 7:26-2.8(f), failure to obtain a SWF permit prior to constructing or operating a solid waste facility; and N.J.A.C. 7:26H-1.6(a), failure to obtain a Certificate of Public Convenience and Necessity prior to engaging in the business of commercial solid waste disposal.

3. As the result of a compliance evaluation(s) conducted on 4/16/03, the Department has determined that HI TECH TRANS LLC, and DAVID STOLLER have violated the laws of the State of New Jersey as follows:
 - Operation of an unpermitted solid waste facility; and
 - Engaging in the commercial disposal of solid waste in New Jersey without having obtained a Certificate of Public Convenience and Necessity.
4. Based on the facts set forth in these FINDINGS, the Department has determined that HI TECH TRANS LLC, and DAVID STOLLER have violated the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., and the Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 et seq., and the regulations promulgated pursuant thereto, specifically N.J.A.C. 7:26-2.8(f), and N.J.A.C. 7:26H-1.6(a).

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

5. HI TECH TRANS LLC, and DAVID STOLLER shall, within 20 (twenty) calendar days of receipt of this Order, comply with the following:

CEASE AND DESIST the operation of the illegal solid waste facility by ceasing to accept, transfer, tip, process, transfer, load or reload solid waste. [N.J.A.C. 7:26-2.8(f)]; and

CEASE AND DESIST the operation of an uncertificated public utility by ceasing to accept, transfer, or dispose of, solid waste for a fee. [N.J.A.C. 7:26H-1.6]
6. This Order shall be effective upon receipt by HI TECH TRANS, LLC, or any officer or director thereof.

NOTICE OF RIGHT TO A HEARING

7. Pursuant to N.J.S.A. 13:1E-1 et seq., failure to comply with the terms of this Administrative Order may, in addition to any other civil administrative penalty assessed, subject the respondents to forfeiture of any economic benefit which a violator has realized as a result of not complying with, or by delaying compliance with, the requirements of the Act.
8. Pursuant to N.J.S.A. 52:14B-1 et seq., and N.J.S.A. 13:1E-9(e), HI TECH TRANS LLC, and DAVID STOLLER are entitled to request a hearing. HI TECH TRANS LLC, and DAVID STOLLER shall, in their request(s) for a hearing, complete and submit the enclosed ADMINISTRATIVE HEARING REQUEST AND CHECKLIST TRACKING FORM along with all required information. Submission or granting of a hearing request shall not stay the terms or effect of this ORDER.

9. If no request for a hearing is received within twenty (20) calendar days from receipt of this Administrative Order, it shall become a Final Order upon the twenty-first (21st) calendar day following its receipt.

GENERAL PROVISIONS

10. This Administrative Order is binding on HI TECH TRANS, LLC, its principals, directors, officers, agents, successors, assigns, employees, tenants, any trustee in bankruptcy or other trustee, and any receiver appointed pursuant to a proceeding in law or equity. This Administrative Order is binding upon DAVID STOLLER individually and in his capacity as Chairman and Chief Executive Officer of HI TECH TRANS, LLC.
11. This Administrative Order is issued only for the violation(s) identified in the FINDINGS hereinabove. Therefore, be advised that violation of any statutes, rules or permits other than those herein cited may be cause for additional enforcement actions, either administrative or judicial. By issuing this Administrative Order, NJDEP does not waive its rights to initiate additional enforcement actions, including but not limited to the assessment of penalties or other remedies for failure to immediately comply with the requirements of this Order.
12. Neither the issuance of this Administrative Order nor anything contained herein shall relieve HI TECH TRANS LLC, or DAVID STOLLER of the obligation to comply with all applicable laws, including but not limited to the statutes and regulations cited herein.
13. Pursuant to N.J.S.A. 13:1E-9e, NJDEP is authorized to assess a civil administrative penalty of not more than \$50,000 for each violation, and each day during which the violation continues shall constitute an additional, separate and distinct offense.
14. Pursuant to N.J.S.A. 13:1E-9f, any person who violates the provisions of N.J.S.A. 13:1E-1 et seq. or any code, rule, or regulation promulgated pursuant thereto shall be liable to a penalty of not more than \$50,000 per day to be collected in a civil action, and any person who violates an administrative order issued pursuant to N.J.S.A. 13:1E-9c, including this Administrative Order, or a court order issued pursuant to N.J.S.A. 13:1E-9d, or who fails to pay a civil administrative penalty assessed pursuant to N.J.S.A. 13:1E-9e in full after it is due is subject upon order of a court to a civil penalty not to exceed \$100,000 per day of such violations. Each day during which the violation continues constitutes an additional, separate and distinct offense.
15. Pursuant to N.J.S.A. 48:13A-12(b), any person who shall violate any provisions of the Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 et seq., or the Solid Waste Collection Regulatory Reform Act, N.J.S.A. 48:13A-7 et seq., or any rule, regulation or administrative order adopted or issued pursuant thereto, including an interdistrict, intradistrict or interstate waste flow order, or who shall engage in the solid waste collection or solid waste disposal business without having been issued a certificate of public convenience and necessity, shall be liable to a penalty of not more than \$10,000 for a first offense, not more than \$25,000 for a

second offense and not more than \$50,000 for a third and every subsequent offense. Each day during which the violation continues constitutes an additional, separate and distinct offense.

16. Notice is further given that, pursuant to N.J.S.A. 48:13A-12(c), whenever it shall appear to the Department, a municipality, local board of health, or county health department, as the case may be, that any person has violated, intends to violate, or will violate any provision of the Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 et seq., or the Solid Waste Collection Regulatory Reform Act, N.J.S.A. 48:13A-7.1 et seq., or any rule, regulation or administrative order adopted or issued pursuant thereto, the Department, the municipality, local board of health or county health department may institute a civil action in the Superior Court for injunctive relief and for such other relief as may be appropriate in the circumstances and the court may proceed in any action in a summary manner.
17. Notice is further given that, pursuant to the Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 et seq., specifically N.J.S.A. 48:13A-12(a), any person or officer or agent thereof who shall knowingly violate any of the provisions of this Act or aid or advise in such violation, or who, as principal, manager, director, agent, servant, or employee knowingly does any act comprising a part of such violation, is guilty of a crime of the fourth degree and shall be punished by imprisonment for not more than 18 months or by a fine of not more than \$50,000, or both; and if a corporation by a fine of not more than \$100,000. Each day during which the violation continues constitutes an additional, separate and distinct offense.

DATE:

Wolfgang Skacel, C.H.M.M., Director
Division of County Environmental and Waste Enforcement
Programs

**Administrative Hearing Request Checklist
and Tracking Form**

Document Being Appealed: **EA ID #** PEA030001 - U131

Person Requesting Hearing:	Date Document Issued
_____ Name/Company	_____ Name of Attorney (if applicable)
_____ Address	_____ Address
_____ Telephone #	_____ Telephone #

Please Include the Following Information As Part of Your Request:

- A The date the alleged violator received the Enforcement Document.
- B **A copy of the Enforcement Document** and a list of all issues being appealed.
- C An admission or denial of each of the findings of fact, or a statement of insufficient knowledge;
- D The defenses to each of the findings of fact in the enforcement document;
- E Information supporting the request;
- F An estimate of the time required for the hearing;
- G A request, if necessary, for a barrier-free hearing location for physically disabled persons;
- H A clear indication of any willingness to negotiate a settlement with the Department prior to the Department's processing of your hearing request to the Office of Administrative Law; and
- I This form, completed, signed and dated with all of the information listed above, including attachment, to:
 - 1. New Jersey Department of Environmental Protection
Office of Legal Affairs
Attention: Adjudicatory Hearing Requests
401 E. State Street, P.O. Box 402
Trenton, New Jersey 08625
 - 2. A. Raimund Belonzi, Chief
Waste Compliance and Enforcement & Release Prevention
Bureau of Solid Waste Compliance and Enforcement
P.O. Box 407
Trenton, New Jersey 080625-0407

3. All co-permittees (w/attachments)

IV. Signature: _____ Date: _____

VERIFICATION

David C. Stoller, under penalty of perjury, declares and verifies that he is President and Chief Executive Officer of Hi Tech Trans, LLC, that he has read the foregoing statement and knows the facts asserted therein, and that the same are true as stated.



David C. Stoller

Dated: June 16, 2003

**VERIFIED STATEMENT
OF
STEVEN LAWRENCE**

I am Director Sales, Eastern North America for Canadian Pacific Railway, (CPR). As such, I am involved in exploring business opportunities for CPR in the eastern provinces of Canada and perform the same function in the eastern United States for the Delaware and Hudson Railway Company, Inc., (D&H), a wholly-owned subsidiary of CPR. I am familiar with the operations of Hi Tech Trans, LLC (Hi Tech) and have personal knowledge of the facts stated herein.

The D&H is a Class 2 rail carrier that operates in the northeastern United States, including the State of New Jersey. At many of the rail yards that are used by D&H in providing its transportation services, there are transloading facilities that are used to transload bulk commodities onto rail cars after delivery to the yard by truck. Generally, D&H does not itself operate and maintain those transloading facilities even though they are located in D&H's yards. Instead, it has been and continues to be D&H's practice to enter into license and operating agreements with other companies to operate and maintain the transloading facilities. These companies that D&H uses, and the transloading service that they provide, are an important and integral part of D&H's rail transportation service since they allow D&H to provide rail service to shippers with no direct rail access.

The Oak Island rail yard is a large classification yard located in Newark, New Jersey. The yard is owned by Consolidated Rail Corporation ("Conrail"). Conrail leases to the D&H a portion of the yard, which D&H is able to reach via trackage rights that it obtained at the time of the

creation of Conrail. Under the terms of the lease, the yard is used by D&H for providing various types of intermodal service.

At the Oak Island yard, D&H has trailer-on-flat car and container on flat car facilities that are used in loading and unloading trailers and containers from rail cars brought to the yard by D&H. In addition, there are transloading facilities at the yard that are used to transload a variety of different commodities onto rail cars after the commodities are delivered to the yard by truck. The commodities that are transloaded at the Oak Island yard for D&H include plastics, aggregates and other materials. The facilities that are used at the yard for loading and unloading trailers and containers, and the facilities that are used for transloading bulk commodities, are operated by other companies. This is consistent with D&H's practice at most of the yards that it operates, i.e., the transloading facilities are operated for D&H by third parties.

The commodities that are transloaded at the Oak Island yard include construction and demolition debris ("CDD"). The CDD is transloaded at the yard by Hi Tech Trans, LLC ("Hi Tech") pursuant to a license agreement that was entered into by D&H with Hi Tech on November 6, 2000. Under the terms of that license agreement, Hi Tech agreed to develop and operate a transloading facility at the yard for the purpose of transloading CDD delivered by truck to the yard. D&H also entered into a transportation contract with Hi Tech pursuant to which D&H transports CDD transloaded by Hi Tech at the yard either to disposal facilities or to interchange points with other carriers for transportation to disposal facilities. All of the disposal facilities to which the CDD is transported are located outside of New Jersey.

The transloading facility built and operated by Hi Tech was put into service in September 2001. Since that time, the number of carloads of CDD transloaded by Hi Tech and transported by D&H has increased substantially, from 1-2 carloads per day in 2001 to 7-8 carloads per day

today. Hi Tech has become a significant customer generally for D&H and is the largest shipper served by D&H at the Oak Island yard.

I am aware that the New Jersey Department of Environmental Protection ("DEP") has issued a cease and desist that by its terms will require Hi Tech to terminate its operation of the transloading facility at the Oak Island yard. If Hi Tech is forced to shut down its transloading operation at the yard, there will be a significant adverse effect on D&H. D&H will lose significant revenue that is generated by the transportation service that it provides to Hi Tech, without an offsetting reduction in the cost that D&H incurs in connection with its operations at the Oak Island yard.

If Hi Tech is forced to shut down its operation as a result of the cease and desist order, the transloading operation may be lost for good. D&H will not likely operate the facility itself, and D&H is unaware of any other company that can provide this transloading service.

VERIFICATION

Steven Lawrance, under penalty of perjury, declares and verifies that he is Director Sales, Eastern North America for Canadian Pacific Railway, that he has read the foregoing statement and knows the facts asserted therein, and that the same are true as stated.



Steven Lawrance

Dated: June 16, 2003

NOT A SIGN

NOT A SIGN

NOT A SIGN

NOT A SIGN

NOT A SIGN

NOT A SIGN

NOT A SIGN

NOT A SIGN

NOT A SIGN

NOT A SIGN

NOT A SIGN

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2003, a copy of the foregoing
Petition of Hi Tech Trans, LLC for Emergency Order and Other Relief was served by
overnight delivery upon:

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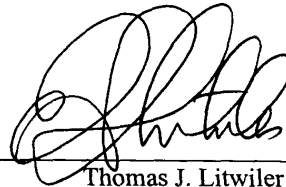
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