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August 23, 2003

VIA FEDERAL EXPRESS

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

FEE RECEIVED

AUG 25 2003

**SURFACE
TRANSPORTATION BOARD**



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

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an original and ten copies of the **Appeal of Hi Tech Trans, LLC Pursuant to 49 C.F.R. § 1011.2(a)(7)**, dated August 23, 2003. A check in the amount of \$150, representing the appropriate fee for this filing, also is enclosed.

An extra copy of the Appeal 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,

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Office of Proceedings

AUG 25 2003

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Public Record

Thomas J. Litwiler
Attorney for Hi Tech Trans, LLC

TJL:tl

Enclosures

cc: Parties on Certificate of Service

FILED

AUG 25 2003

**SURFACE
TRANSPORTATION BOARD**

ORIGINAL

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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



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APPEAL OF HI TECH TRANS, LLC
PURSUANT TO 49 C.F.R. § 1011.2(a)(7)

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ATTORNEYS FOR HI TECH TRANS, LLC

Dated: August 23, 2003

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

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



**APPEAL OF HI TECH TRANS, LLC
PURSUANT TO 49 C.F.R. § 1011.2(a)(7)**

Pursuant to 49 C.F.R. §§ 1011.2(a)(7) and 1115.2, Hi Tech Trans, LLC ("Hi Tech") hereby appeals the decision of the Director of the Office of Proceedings served August 14, 2003 (the "Initial Decision") denying Hi Tech's petition for a declaratory order herein. While purportedly a procedural order declining to institute a declaratory order proceeding, the Initial Decision instead adopts a new, substantive and restrictive view of the scope of the Board's jurisdiction and federal preemption under 49 U.S.C. § 10501(b) (as broadened by the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 ("ICCTA")) that is contrary to the relevant statutory provisions, all prior precedent on the subject, and the transportation and deregulatory policies underlying ICCTA.

The Initial Decision determined that state and local regulation of rail transportation facilities and operations that otherwise plainly fall within the preemptive scope of ICCTA -- in this instance, a rail transload facility in the middle of a railroad yard -- is not preempted where the facility is not directly owned or controlled by a rail carrier. In making this sweeping determination, the Initial Decision does not reference -- let alone address -- federal court precedent addressing this precise issue and reaching the opposite conclusion. Nor is the Initial Decision consistent with the Board's own prior decisions indicating that preemption can

apply to facilities of shippers or other non-carrier entities where such facilities "are integrally related to the provision of rail transportation service." The Initial Decision simply abandons this well-established principle, and instead holds that preemption turns not on the rail-related function of a transportation facility but on the contractual details of the relationship between the rail carrier and the third party which owns operates the facility. This form-over-substance approach fails to give effect to the clear provisions and important purposes of ICCTA. As a New Jersey administrative law judge found in a comprehensive decision in a parallel state proceeding (issued the same day as the Initial Decision), the scope of ICCTA preemption should and does extend to rail transload facilities such as that at issue here. The Board should reverse the Initial Decision as a matter of law and grant Hi Tech's petition for declaratory order.

The new rail carrier "control" test that the Initial Decision adopts as a trigger for the application of ICCTA preemption may have significant industry-wide implications in a variety of rail transportation contexts. And, even if the Board were to adopt the new "control" test of the Initial Decision, it is far from clear on the present record that Hi Tech would fail to meet such a test -- the parties did not submit evidence or argument directed to the issue of control, which was not a relevant criterion until the Initial Decision made it one. Indeed, a complete factual record here would likely demonstrate that a rail carrier does exert substantial control over the rail transload facility at issue. If the Initial Decision is not directly overturned, then at the very least the Board should reopen this proceeding for receipt of: a) comments from other members of the rail transportation community who may be affected by the broad new policy of the Initial Decision; and b) specific factual evidence on the status of the rail transload facility here under the new "control" test adopted by the Initial Decision.

BACKGROUND

The Board is familiar with the basic facts of this proceeding, which we briefly summarize here. Hi Tech operates a rail transloading facility for construction and demolition debris ("CDD") at the Oak Island Yard in Newark, New Jersey, as a licensee of Delaware & Hudson Railway Company, Inc., d/b/a Canadian Pacific Railway ("CPR"), itself a tenant at Oak Island Yard. The transload facility was constructed by Hi Tech at the request of CPR, and is operated by Hi Tech for the benefit of CPR. Customers of the facility deliver CDD to Oak Island Yard, and Hi Tech transloads the CDD (without any treatment or processing) into rail cars. The cars are then transported by CPR in single-line or joint-line service to licensed disposal sites.

Because of the differing sizes of the customers using the rail transload facility and the fact that various customers' CDD can be intermingled at the facility before being loaded into rail cars, Hi Tech is treated by CPR as the shipper for billing purposes, even though Hi Tech never acquires title to the CDD lading. Under the license agreement between CPR and Hi Tech, CPR has to approve any changes or alterations to the transload facility (having approved the initial facility itself), and the facility must be operated by Hi Tech in accordance with CPR's safety rules. Even though other rail carriers operate into Oak Island Yard (which is owned by Consolidated Rail Corporation), the license agreement prohibits Hi Tech from transloading CDD for those carriers and restricts Hi Tech from taking various actions if such would adversely affect CPR's revenues.

In a prior proceeding before the Board, Hi Tech sought a declaratory order that state and local laws restricting the operations of motor carriers that delivered CDD to the rail transload facility at Oak Island Yard were preempted under ICCTA. Hi Tech Trans, LLC -- Petition for Declaratory Order -- Hudson County, NJ, Finance Docket No. 34192 (STB served

November 20, 2002) ("Hi Tech I"). The Board concluded that such trucking operations were not within its exclusive jurisdiction, and thus that state regulation was not preempted under ICCTA, because the operations were "not integrally related to rail transportation services." Hi Tech I at 4. In so concluding, the Board noted that "[t]he only Hi Tech activity that might be considered integral to the rail transportation of C&D debris would be the transfer of C&D debris from trucks to rail cars at the CP transload facility itself." Id. The Board made this observation with the recognition at the time that Hi Tech was a licensee, rather than an agent, of CPR, and that Hi Tech was the "shipper" for the purposes of CPR's transportation of rail cars from the Oak Island Yard transload facility. Hi Tech I at 2.

The present declaratory order proceeding resulted from the efforts, in late May and June of this year, of the New Jersey Department of Environmental Protection ("NJDEP") to shut down the Hi Tech rail transloading facility at Oak Island Yard because Hi Tech had not acquired a construction and operating license from the state for the facility. In its petition for declaratory order filed in this docket on June 16th, Hi Tech sought a declaratory order that its rail transloading facility at Oak Island Yard was within the Board's exclusive jurisdiction and that, as a result, New Jersey's licensing and permitting requirements were preempted as to that facility.¹ While Hi Tech's petition was pending before the Board, an administrative proceeding was begun in New Jersey to consider whether a cease and desist order issued by the NJDEP against Hi Tech was proper. That matter was assigned to the Hon. Jeff S. Masin, acting Chief Administrative Law Judge in the New Jersey Office of Administrative Law. In considering the matter, Judge

¹ Hi Tech did not claim, and has never claimed, that all substantive New Jersey environmental regulations are preempted with respect to the Oak Island Yard rail transload facility. Hi Tech has consistently conceded that, even if within the STB's exclusive jurisdiction under ICCTA, its transloading facility is subject to state environmental regulations that do not involve permitting or licensing requirements and do not discriminate against or unreasonably interfere with interstate rail transportation.

Masin was required to address the same issue raised by Hi Tech's petition for declaratory order here: whether the Hi Tech rail transloading facility at Oak Island Yard was within the Board's exclusive jurisdiction and whether, as a result, the state licensing and permitting requirements which NJDEP sought to enforce against Hi Tech were preempted by ICCTA.

Judge Masin issued his decision in the state administrative proceeding (the "ALJ Order") on August 13, 2003, just a few hours before the Board served the Initial Decision. A copy of the ALJ Order is attached hereto as Exhibit A. In a lengthy and detailed decision, Judge Masin found that preemption under ICCTA did apply to the Oak Island Yard transload facility.² In beginning his preemption analysis, Judge Masin noted that Hi Tech's transloading facility squarely fit within the definitions of "railroad" in 49 U.S.C. § 10102(6)(c) and "transportation" in 49 U.S.C. § 10102(9). ALJ Order at 24-25. This, he concluded, tended to support a finding that the facility was within the Board's jurisdiction under ICCTA. On the other hand, the Judge recognized that Hi Tech is not a common carrier by rail. The issue, he thus concluded, that had to be resolved was whether a facility, otherwise within the Board's jurisdiction, was removed from that jurisdiction because it was operated by a third-party non-carrier. ALJ Order at 28.

Judge Masin found controlling authority on this issue in the Eleventh Circuit's decision in Florida East Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324 (11th Cir. 2001) ("FEC II"), and he analyzed that case at length. ALJ Order at 25-34. He noted the conclusion in FEC II that the key in deciding whether a facility operated by a third party is within the STB's jurisdiction is whether activities at the facility are "an integral part of the railroad's operations." ALJ Order at 34. After reviewing FEC II and other ICCTA preemption

² Judge Masin specifically noted that the only preemption claim made by Hi Tech was as to the NJDEP permitting requirements -- Hi Tech did not claim that its rail transload facility was not subject to "traditional police powers of state agencies." ALJ Order at 6.

case law, Judge Masin concluded that Hi Tech's transloading facility was within the STB's jurisdiction since it "does serve the railroad in fulfilling its task as a common carrier" and constitutes "an integral part and indeed a necessary 'last step' vital to the ability of the railroad to effectuate the movement of the material [CDD] over the interstate rail system." ALJ Order at 36.

As noted above, the Initial Decision in this case was served several hours after the ALJ Order was issued, and reached the opposite result -- finding that the Hi Tech transload facility at Oak Island Yard did not fall within the Board's jurisdiction or the scope of ICCTA preemption. The Initial Decision does not discuss or mention FEC, and rejected Hi Tech's contention that the relevant test of whether a facility operated by a third party is within the STB's exclusive jurisdiction is whether the facility is integrally related to providing rail transportation -- the test utilized by Judge Masin and implicated by FEC II.

Instead, the Initial Decision found that -- even if a facility could be considered integrally related to the provision of interstate rail transportation -- the facility would not fall within the scope of ICCTA preemption unless the third party operating the facility was doing so "under the auspices" of a rail carrier. Initial Decision at 5-6. The Initial Decision concluded that no such relationship existed here because (a) Hi Tech was a shipper vis a vis CPR as to the transportation of the rail cars of CDD and (b) there was no "agency or employment relationship" between Hi Tech and CPR evidencing CPR's control of Hi Tech. Initial Decision at 6-7.

STANDARD OF REVIEW

Because of recent, incomplete revisions to the Board's rules, the regulations that would seemingly govern this appeal incorrectly indicate that an appeal can be granted "only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice." See 49 C.F.R. § 1011.7(b)(6) (Office of Proceedings delegated authority to determine whether to

institute requested declaratory order proceedings) and 49 C.F.R. § 1115.1(c) (providing clear error and manifest injustice standard for appeals from decisions of employees delegated authority "pursuant to § 1011.7"). A recent Board decision repeated this erroneous standard of review. Charles M. Sotelo -- Petition for Declaratory Order -- Line Relocation in Cochise County, AZ, Finance Docket No. 34191 (STB served August 11, 2003) at 3. It is clear, however, that the more generally de novo standard of review specified in 49 C.F.R. § 1115.2(b) governs this appeal.

Prior to the issuance of Revision of Delegation of Authority Regulations, Ex Parte No. 588 (STB served September 25, 2002) ("Delegation Regs"), the delegation to the Office of Proceedings of authority to institute declaratory order proceedings was codified at 49 C.F.R. § 1011.8(c)(6). Appeals from such orders were not governed by 49 C.F.R. § 1115.1(c), which applied only to "[a]ppeals from the decisions of employees acting under authority delegated to them by the Chairman of the Board pursuant to § 1011.7" ³ The Board in Delegation Regs made unrelated changes to its rules that resulted in a slight renumbering of the delegation regulations. Delegations by the Chairman were recodified from Section 1011.7 to Section 1011.6, and delegations by the Board were recodified from Section 1011.8 to Section 1011.7. As a result of the latter change, the delegation to the Office of Proceedings to institute declaratory order proceedings was recodified from Section 1011.8(c)(6) to Section 1011.7(b)(6). No conforming change was made, however, to the cross-reference in the appellate provisions of Section 1115.1(c). That cross-reference continues to cite Section 1011.7, even though the clear subject matter of Section 1115.1(c) -- delegations of authority by the Chairman -- has been

³ Delegations of authority under former Section 1011.8 (now Section 1011.7) are made by the Board, while delegations of authority under former Section 1011.7 (now Section 1011.6) are made by the Chairman. By its terms, the appellate standards of Section 1115.1(c) apply only in the latter circumstance.

recodified to Section 1011.6. A review of Delegation Regs makes clear that no change in existing standards of review was proposed or contemplated as part of that rulemaking. Under these circumstances, Section 1115.1(c) plainly does not apply here, and the review standards of Section 1115.2(b) govern this appeal as they would have prior to the issuance of Delegation Regs.

We note that this result is consistent with the true nature and effect of the Initial Decision. The delegation of authority to the Office of Proceedings to institute declaratory order proceedings was adopted by a divided Commission in 1989 on the basis that such "procedural" decisions would be made under 5 U.S.C. § 554(e) and "handled under clear guidelines under established precedent." Delegation of Authority -- Declaratory Order Proceedings, 5 I.C.C.2d 675, 676 (1989). Yet the Initial Decision makes only passing reference to 5 U.S.C. § 554(e), and no reference to any of the established guidelines and precedent governing when institution of a declaratory order proceeding is appropriate. Instead, the Initial Decision essentially does constitute a declaratory order, establishing a new and far-reaching policy regarding the scope of ICCTA preemption. It is no answer to say (as the Initial Decision does, at 5) that no declaratory order proceeding is necessary because "it is clear" that the Board does not have jurisdiction here; as discussed further below, in reciting that supposedly "clear" holding the Initial Decision ignores and reaches a result inconsistent with the existing case law on the subject. Whatever else it is, the Initial Decision cannot be considered a "procedural" order that simply reiterates a well-established and non-controversial principle of law as the basis for non-involvement by the Board. A full review by the Board of the important legal issues implicated by the Initial Decision is warranted.

Hi Tech does not contend here that the Director of the Office of Proceedings was without authority to issue the Initial Decision, and acknowledges that in issuing that decision the Board faced significant time constraints not of the agency's making. Plainly, however, reviewing the Initial Decision under a "clear error" or "manifest injustice" standard would be procedurally and substantively unfair. This appeal involves important questions of law and policy and an Initial Decision that is contrary to law and unsupported by substantial evidence of record. Application of the review standards of 49 C.F.R. § 1115.2(b) is required.

DISCUSSION

The Initial Decision specifically acknowledges as undisputed that the CDD transload facility and operations at Oak Island Yard are elements of "rail transportation" that have been repeatedly held to fall within the preemptive scope of ICCTA and Section 10501(b). Initial Decision at 5-6. If an identical rail transload facility in the identical location was operated in an identical manner, but by CPR rather than Hi Tech, the Initial Decision leaves no doubt that preemption would apply. The Initial Decision holds, however, that preemption can only apply to activities "performed by, or under the auspices of, a rail carrier." Initial Decision at 5. The decision provides no supporting citation for this holding, which to our knowledge is the first of its kind by any decision-maker. The statute and governing precedent demonstrate plainly the unduly and erroneously restrictive nature of this holding.

A. The Initial Decision is Inconsistent with Governing Statutory Language and Case Law Construing the General Preemptive Effect of ICCTA

Under 49 U.S.C. § 10501(b), the Board has exclusive jurisdiction over "transportation by rail carriers," and the remedies provided by ICCTA with respect to regulation of "rail transportation" are exclusive and preempt state and local law. ICCTA, in turn, defines each of these relevant terms in extremely broad fashion, reinforcing the expansive scope of

preemption intended under the statute.⁴ 49 U.S.C. § 10102(9)(A) defines transportation to include a "yard, property [or] facility . . . of any kind related to the movement of [property] by rail, regardless of ownership or an agreement concerning use." (emphasis added).⁵ A "rail carrier" is a "person providing common carrier railroad transportation," 49 U.S.C. § 10102(5), and "railroad" in turn is defined to include "a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad" and "a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation." 49 U.S.C. § 10102(6)(A) and (C) (emphasis added).⁶

As each of these definitions demonstrates, the critical statutory analysis is the relation of a particular facility or service to rail transportation -- whether the facility serves a rail-related function sufficiently linked to the "transportation by rail carrier" over which the Board has exclusive and preemptive jurisdiction. Certainly there is nothing in such statutory criteria to support a bald assertion that preemption under the statute can apply only to those things "performed by, or under the auspices of, a rail carrier."

⁴ See Florida East Coast Ry. Co. v. City of West Palm Beach, 110 F. Supp. 2d 1367, 1375 (S.D. Fla. 2000) ("The broad scope of the ICCTA's preemptive reach is evidenced by the expansive definitions Congress has given the terms 'transportation' and 'railroad.'"), aff'd, 266 F.3d 1324 (11th Cir. 2001); Soo Line R. Co. v. City of Minneapolis, 38 F. Supp. 2d 1096, 1099 (D. Minn. 1998) (same).

⁵ The Initial Decision (at 5) paraphrases this definition, but oddly excludes any reference to the critical language providing that ownership or agreements regarding use of such facilities are irrelevant.

⁶ 49 U.S.C. § 10102(6)(B) also defines "railroad" to include "the road used by a rail carrier and owned by it or operated under an agreement" (emphasis added). Congress thus knew how to limit definitions to facilities owned or controlled by a rail carrier when it so intended. No such limitation is included in the definitions of "railroad" provided in Section 10102(6)(A) and (C). Cf. 49 U.S.C. § 10102(9)(A) (including facilities within definition of "transportation" "regardless of ownership or an agreement concerning use.").

The Board itself has consistently understood that the relevant preemption analysis is whether a particular facility "is integrally related to the provision of interstate rail service." Borough of Riverdale -- Petition for Declaratory Order -- The New York, Susquehanna & Western Railway Corporation, Finance Docket No. 33466 (STB served September 10, 1999) ("Riverdale I") at 9. Indeed, one of the most perplexing aspects of the Initial Decision is its seeming rejection of the well-established "integrally related" principle. After reciting Hi Tech's reliance on that test in its petition for declaratory order, the Initial Decision goes on to state that:

By Hi Tech's reasoning, any third party or noncarrier that even remotely supports or uses rail carriers would come within the statutory meaning of transportation by rail carrier.

Initial Decision at 6. Such a holding is nonsensical on its face; by definition, an activity that "remotely supports" rail carriers is not and cannot be "integrally related" to rail transportation. The test of whether a facility is integrally related to rail transportation would be the same for a rail carrier-controlled facility (as in Riverdale I) or a non-carrier-controlled facility (as here) -- it cannot logically be determinative in the first instance and meaningless in the second. The Initial Decision hints at a "floodgates" concern, that parties might claim ICCTA preemption for a broad range of non-rail related (or tangentially rail-related) facilities and activities, but that would be no less of a concern for non-rail activities of a rail carrier than for non-rail activities of a non-carrier. The relevant and effective test for all circumstances is the one the Board has previously adopted: whether the facility is integrally related to the provision of rail transportation, over which the Board does have exclusive jurisdiction. That is the test which should apply here, and (as the Board has repeatedly held) the rail transload facility at Oak Island Yard plainly falls within the criteria of that test.

Moreover, the Initial Decision wholly ignores the provisions of 49 U.S.C. § 10501(b)(2), which expressly provides for the Board's exclusive jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching or side tracks, or facilities . . . " (emphasis added). As the Board knows well, this provision has provided the substantial basis for many of the decisions finding that rail intermodal and transloading facilities fall within the scope of ICCTA preemption. E.g., Norfolk Southern Ry. Co. v. City of Austell, 1997 WL 1113647 at *6 (N.D. Ga. 1997); Village of Ridgefield Park v. New York, S. & W. Ry. Corp., 163 N.J. 446, 750 A.2d 57 (2000); see generally City of Auburn v. U.S., 154 F.3d 1025, 1030 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999). And Section 10501(b)(2) does not contain the "by rail carrier" qualifier that seemed to preoccupy the Initial Decision in its interpretation of Section 10501(b)(1). The Oak Island Yard rail transload facility is akin to the team and side track facilities covered by Section 10501(b)(2), and the efforts of the DEP to impose licensing and environmental permitting requirements on that facility are preempted under the plain language of ICCTA.

B. The Initial Decision is Inconsistent with Specific Precedent on the Application of ICCTA Preemption to Non-Carriers

The foregoing statutory analysis would have required a finding of preemption here even if the Initial Decision had been addressing the issue as a matter of first impression. But the decision was not written against a clean slate -- and it is inconsistent with each of the several prior decisions that have considered the subject. The most significant of these specifically considered at length the application of ICCTA preemption to the activities of a non-carrier on property leased from a rail carrier. See Florida East Coast Ry. Co. v. City of West Palm Beach, 110 F. Supp. 2d 1367 (S.D. Fla. 2000) ("FEC I"), aff'd, 266 F.3d 1324 (11th Cir. 2001) ("FEC II"). The ALJ in the New Jersey administrative law proceeding logically found

these decisions a natural starting point for the analysis of the Oak Island Yard rail transload facility, and Hi Tech relied extensively on FEC in its declaratory order request. ALJ Order at 25; Hi Tech Petition at 12-14. The Initial Decision neither addresses nor even mentions FEC.

The courts in FEC ultimately concluded that preemption under ICCTA did not apply to the activities of the third-party tenant on railroad-owned property. They did so, however, through a careful analysis of whether the activities were sufficiently and integrally related to rail transportation -- not through a formulaic determination of whether the activities were technically "controlled" by a rail carrier. The Eleventh Circuit engaged in an extensive (and somewhat tortuous) review of the definition of "transportation" under ICCTA, and specifically the phrase "regardless of ownership or agreement concerning use" as applied to facilities included within the definition. While adopting a narrow construction of the phrase's meaning, the court nonetheless went on to hold that:

Congress employed this language specifically to grant to the ICC jurisdiction over those facilities that, while not owned by the railroad companies, were nevertheless used in interstate commerce for the benefit of either the shipping public or the railroad companies themselves.

...

In this case, Rinker's use of the property at the 15th Street yard and the activities there performed by Rinker serve no public function and provide no valuable service to FEC

FEC II, 266 F.3d at 1336. In finding no preemption, the Eleventh Circuit expressly rejected the type of blanket presumption adopted in the Initial Decision that preemption could never apply to activities not undertaken or controlled by a rail carrier:

In emphasizing that the scope of the preemption provision is limited to the direct regulation of rail transportation, we do not mean to suggest that only regulations applied against railroads are preempted by the ICCTA. Certain local regulations applied

against a third-party may be so intertwined with the provision of rail transportation services to the public so as to frustrate the objectives of federal railroad regulation.

FEC II, 266 F.3d at 1337, n.9. Ultimately, the Eleventh Circuit, like the district court before it, "based its conclusion on the nature of the operation, not who was at the helm." FEC I, 110 F. Supp. 2d at 1378, n.4.

It is impossible to square the Initial Decision with the decisions of the district and appellate courts in FEC. Here, it is undisputed that the rail transloading activities undertaken by Hi Tech at Oak Island Yard are identical to the transloading services often provided by rail carriers themselves as an integral component of the interstate rail transport of bulk commodities. In the absence of Hi Tech, CPR would have to provide such transloading facilities and services itself at Oak Island Yard in order for CPR to handle any CDD by rail, and state or local regulation imposing licensing or permitting requirements on those facilities or services would irrefutably be preempted under judicial and agency case law. Unlike the third-party tenant in FEC, Hi Tech's transloading activities benefit both the rail carrier (CPR) and the shipping public (CDD generators) as an integral part of the rail transportation of CDD in interstate commerce. See FEC II, 266 F.3d at 1336.⁷

In this respect, it is difficult to meaningfully distinguish what Hi Tech does at Oak Island Yard from what rail shippers routinely do at team tracks throughout the nation. The district court in FEC recognized just this analogy in concluding that Rinker's activities were not "integrally related to the provision of interstate rail service":

⁷ Rinker, the third-party tenant in FEC, was engaged in an aggregate sales business on the property leased from the rail carrier. Rail carriers, of course, do not engage in the sale of aggregates in the ordinary course of providing rail transportation. Rail carriers do routinely provide transloading services for commodities moved by rail, and it is such services that Hi Tech is performing as CPR's licensee at Oak Island Yard.

In reaching this conclusion, the Court relies in part on the narrative direct testimony of the City's expert, [who] maintains that 15th Street [yard] could continue to be used as a transportation facility in the face of the City's regulations. According to [the expert], the City has not prohibited FEC from delivering rail cars to the tracks at the 15th Street facility or Rinker [i.e., the third party] from unloading the aggregate into trucks for movement to Rinker customers or Rinker facilities. He describes such an arrangement as "a traditional 'team track' situation" in which a "railroad delivers cars to one of its tracks and the consignee unloads the commodity from those cars into a vehicle to take the commodity to the consignee's location."

FEC I, 110 F. Supp. 2d at 1378-1379 (citations omitted). Hi Tech's transloading operations at Oak Island Yard are substantially similar to the "traditional team track situation" that the parties and court in FEC I plainly considered within the scope of ICCTA -- the only difference being that Hi Tech transloads CDD for numerous generators and not just a single shipper. If left in place, the Initial Decision would logically remove all shipper activities at team tracks from the scope of ICCTA preemption, in direct contravention of the Board's clear, exclusive jurisdiction over the "operation . . . of . . . team . . . tracks and facilities" 49 U.S.C. § 10501(b)(2). Team tracks and rail transload facilities are integrally and essentially related to interstate rail transportation regardless of who may own or operate them and, consistent with the principles enunciated in FEC, the Board should reverse the findings of the Initial Decision to the contrary.

The Board itself considered the application of ICCTA preemption to shipper facilities and activities in Fletcher Granite Company, LLC -- Petition for Declaratory Order, Finance Docket No. 34020 (STB served June 29, 2001), another case relied on by Hi Tech in its petition for declaratory order (at 11-12) and not mentioned or considered in the Initial Decision. In Fletcher Granite, a shipper moved railcars on its own industrial sidetrack between the shipper's quarry and fabrication mill, and was considering resuming movements over an additional piece of the shipper's sidetrack that extended to a rail carrier's line. As the decision makes clear, the

rail carrier would not operate on the shipper's sidetrack; the shipper would itself move cars on the shipper's sidetrack between the quarry, the fabrication mill and the rail carrier. The shipper was concerned that local authorities might seek to regulate the shipper's resumption of operations on its sidetrack, and sought a preemption determination from the Board.

Under the rationale of the Initial Decision, the disposition of Fletcher Granite should have been swift and perfunctory. The rail carrier there would not conduct or control in any manner operations on the shipper's sidetrack; the shipper would conduct its own operations on its own sidetrack, using the sidetrack simply to load and tender carloads of traffic to the rail carrier. If Hi Tech here "is merely using CP's property to transload cargo," Initial Decision at 7, the shipper in Fletcher Granite was merely using its own property to load cargo. If the Initial Decision is correctly reasoned, a finding of no preemption in Fletcher Granite should have been virtually automatic.

That was not, however, the Board's conclusion in Fletcher Granite. While finding that specific resolution of the issue was not required at that time, the Board undertook to "summarize relevant court and agency case law" in order to "provide guidance to the parties." Fletcher Granite at 3. The relatively detailed summary that followed makes no reference to whether the rail carrier would conduct or "control" operations on the shipper's sidetrack, and provides no indication that the shipper's obvious non-carrier status would have any impact on the relevant preemption analysis. Instead, the decision cites to the Board's exclusive jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks or facilities" under 49 U.S.C. § 10501(b)(2), and reviews the various judicial and agency decisions holding that local zoning and permitting

requirements are preempted as to facilities which are an integral part of interstate rail transportation. Fletcher Granite at 3-5.

Where the substantive criteria for preemption are met -- as with a team or side track facility under Section 10501(b)(2), or another rail facility integrally related to rail transportation -- the Fletcher Granite decision plainly and appropriately demonstrates that a finding of preemption is not precluded simply because the facility is not owned or "controlled" by a rail carrier.⁸ The Initial Decision is inconsistent with the Board's own prior pronouncements regarding ICCTA preemption, and should be reversed.

The decision of Judge Masin in the New Jersey administrative proceeding aptly demonstrates the application of the relevant legal principles and precedent to the rail transload facility operated by Hi Tech at Oak Island Yard. After reviewing the general parameters of ICCTA, Judge Masin noted as "particularly relevant to the present dispute over Hi Tech's transfer facility" the Board's discussion in Riverdale I as to whether a facility is "integrally related to the provision of interstate rail service." ALJ Order at 21. The Judge then considered the statutory definitions of "transportation," "rail carrier" and "railroad" in 49 U.S.C. 10102, ALJ Order at 24-25, and the extensive treatment in the FEC decisions of ICCTA preemption as applied to facilities or operations of non-carriers. ALJ Order at 25-34. The Judge specifically noted that, under FEC, "that a third-party operator is involved is not necessarily determinative of the preemption issue." ALJ Order at 25.

⁸ See also North San Diego County Transit Development Board -- Petition for Declaratory Order, Finance Docket No. 34111 (STB served August 21, 2002) (finding that a public transit authority which proposed to construct a passing siding was a rail carrier, but alternatively finding that the passing siding would benefit a freight carrier and that "[b]ecause of this benefit to BNSF's common carrier interstate rail freight operations, there is no doubt that we have jurisdiction and that this case falls within section 10501(b).").

Considering the statutory language, the FEC precedent and the Board's own pronouncements on facilities "integrally related to rail transportation," Judge Masin concluded that the Oak Island Yard rail transload facility falls within ICCTA's preemptive scope with respect to the environmental and public convenience licensing that NJDEP sought to impose. As the Judge explained:

[While] here the CPR does not own the transfer station, even the Eleventh Circuit opinion in *FEC*, *supra*, appears to recognize that . . . the ICC had understood its jurisdiction to extend to "those activities that served the railroads in fulfilling their tasks as common carriers *or* that affected the general public through concerns of possible discrimination." (emphasis on the disjunctive added). *FEC*, *supra*, [266 F.3d] at 1336. That transfer stations or transloading facilities are activities that are "related to transportation services," *Riverdale*, *supra*, at 12, has been shown in such cases as *Riverdale* (although there of course only in a hypothetical context), and *Norfolk Southern Ry. Co. v. City of Austell*, 1997 WL 1113647 (N.D. Ga. 1997) (intermodal facility); See also *Boston and Maine Corporation and Town of Ayer*, *supra* (facility for unloading automobiles from railroads cars, temporary storage and transfer to motor carriers).

I FIND that the transfer station located within the rail yard does serve the railroad in fulfilling its task as a common carrier. Its activities in receiving truckloads of C&D waste products and effectuating their transfer into rail cars for transport by CPR constitute an integral part and indeed a necessary "last step" vital to the ability of the railroad to effectuate the movement of the material over the interstate rail system.

ALJ Order at 36 (*italics in original*). That seems to us just the result required by the statute and governing judicial and agency precedent.

Finally, we note that the Initial Decision is inconsistent with what appears to be the underlying premises of the Board's earlier decision in Hi Tech I. While the Initial Decision (at 5) notes -- not without justification -- the less than cohesive presentation of matters regarding Hi Tech to the Board over the last three years, by the time of Hi Tech I the Board clearly

understood Hi Tech as a "licensee" of CPR that itself operated the rail transload facility at Oak Island Yard and "shipped" CDD via CPR's rail lines. Hi Tech I at 2. In declining to extend Board jurisdiction and ICCTA preemption to the movement of CDD by motor carrier to the transload facility, the Board determined that "[t]he particular activities at issue here are not integrally related to rail transportation services." Hi Tech I at 3. In dicta, the Board went on to explain that:

The Board and its predecessor, the Interstate Commerce Commission, have indicated that the jurisdiction of the agency may extend to certain activities and facets of rail transloading facilities, but that any such activities or facilities must be closely related to providing direct rail service. . . . The only Hi Tech activity that might be considered integral to the rail transportation of C&D debris would be the transfer of C&D debris from trucks to rail cars at the CP transload facility itself.

Hi Tech I at 4.

Yet if, as the Initial Decision would now hold, ICCTA preemption can never attach to activities not performed or "controlled" by a rail carrier, none of this analysis in Hi Tech I was necessary or even relevant. CPR plainly had no involvement in or control over the motor carrier movement of CDD to the rail transload facility, yet the Board in Hi Tech I based its preemption finding not on that supposedly preclusive fact but on the familiar test of whether such activities were "integrally related" to rail transportation. Similarly, in its dicta discussion of transloading activities at Oak Island Yard itself, Hi Tech I says nothing about who conducts or controls such activities or Hi Tech's purported "shipper" status, and instead focuses on whether the transloading activities are "closely related to providing direct rail service" -- and implying strongly that they are. Hi Tech I at 4. None of these holdings and discussions makes any sense if rail-related activities of non-carriers are automatically excluded from ICCTA's preemptive reach.

Ultimately, Hi Tech I, like FEC and Fletcher Granite before it and the ALJ Order after it, applied the correct test for determining the scope of preemption under ICCTA: whether a facility or activity is "integrally related" to the provision of interstate rail transportation. Under that test, the rail transloading facility operated by Hi Tech at Oak Island Yard is plainly encompassed within ICCTA's preemption provision. The Board should reverse the Initial Decision and so find.

C. The Initial Decision Adopts a New Test That May Have Industry-Wide Consequences, and That Cannot Be Properly Applied in this Proceeding Without Additional Evidence

As the foregoing discussion demonstrates, at the very least the Initial Decision marks a significant departure from existing precedent (in the form of FEC, Fletcher Granite and the well-established "integrally related" test) addressing when ICCTA preemption may apply to non-carrier facilities and activities. It is apparently no longer relevant what function (to use the present example) a rail transload facility serves with respect to interstate rail transportation. Instead, what matters is who is contractually responsible for what at the facility. Two transloading operations identical in appearance and function -- one run by a rail carrier and the other by a non-carrier, or one run by a non-carrier acting as "agent" for a rail carrier and the other run by a non-agent, non-carrier -- would be treated differently for purposes of the Board's jurisdiction and preemption under ICCTA, with the distinction seemingly turning on the details of the paperwork between the parties.

This new and somewhat non-intuitive approach to ICCTA preemption could conceivably have significant effects on rail carriers in their relationships with third-party facility operators. CPR has previously indicated in this proceeding that it has other arrangements in place on its rail network similar to that with Hi Tech, and that such arrangements are an

important element of the rail service that CPR provides. See Verified Statement of Steven Lawrance, attached to Hi Tech's Petition for Emergency Order and Other Relief dated June 16, 2003, at 2. Presumably other rail carriers face similar situations. Under the Initial Decision, rail carriers that enter into such arrangements -- even where the third party is doing exactly what the rail carrier could and would otherwise do itself -- could face a balkanized regulatory regime in which federal preemption applies in some instances but not in some comparable others. Rail carriers may have to restructure their relationships with third-party operators to maintain regulatory uniformity, or may simply elect to withdraw from such relationships altogether, thereby adversely affecting the availability of rail transportation service to shippers.

Whatever its precise effects may be, a new policy with such potentially broad application should not be accomplished in a "procedural" order declining to institute a declaratory order proceeding. As the Board has done in comparable situations, solicitation of comments from interested parties is appropriate.

Furthermore, if the new test enunciated in the Initial Decision is adopted by the Board, additional evidence would be necessary to fairly apply that new test to the rail transload facility at Oak Island Yard. Neither Hi Tech nor the respondents to Hi Tech's petition for declaratory order addressed or briefed in any meaningful way the measure of CPR's "control" over Hi Tech's operation of the rail transload facility, and the Initial Decision relies solely on the licensing agreement between CPR and Hi Tech to determine that CPR does not possess the requisite "control" here. While the licensing agreement does require Hi Tech to bear any liability that CPR may face arising out of Hi Tech's actions (something which, we might add, is fairly typical even in a principal/agent relationship), it provides CPR with significant ability to control Hi Tech's operations. See discussion supra, at 3. Whether that ability would rise to the level of

"control" necessary to satisfy the new test set out in the Initial Decision is not an issue that has been previously addressed. Moreover, evidence that could be presented as to actual operations would demonstrate an exercise by CPR of even greater control than that spelled out in the license agreement.

Similarly, additional consideration is necessary for the other major factor relied upon by the Initial Decision in declining to find preemption here: that Hi Tech is simply a "shipper" with respect to the CDD transported by CPR. The insertion of Hi Tech as the consignor in the bills of lading for the CDD movements and Hi Tech's execution of the transportation contract with CPR says more about the inherent nature of CDD traffic than it does Hi Tech's "status" as a shipper. CDD does not come in carload lots, and requiring the owners of the cargo (which Hi Tech never becomes) to be shown as the shipper and consignor for each individual lot combined in a rail car with other lots would be a significant logistical and accounting burden. The arrangements between Hi Tech and CPR represent the most efficient and feasible way for CDD to move by rail. If those arrangements technically make Hi Tech a "shipper," that is in Hi Tech's view a designation of form rather than one of substance. If the analysis under the standards adopted by the Initial Decision is to turn on whether Hi Tech is truly a "shipper," a more conscious and informed presentation of that question is required.

**D. There are No Policy Considerations
 That Support the Initial Decision**

Lastly, there is no logical policy consideration that is served by the new distinctions created in the Initial Decision, and indeed the decision seems to work against the pro-competitive and deregulatory policies underlying ICCTA. The Initial Decision elevates form over substance, and artificially constrains the flexibility of rail carriers to respond in innovative and effective ways to the changing transportation needs and opportunities they face. Hi Tech

certainly can, if necessary, restructure its contractual relationship with CPR to conform to the notions of "control" and "rail carrier auspices" contained in the Initial Decision. Presumably many other rail carriers and third-party operators could as well. What is the point of such an exercise? The function of the rail transload facility at Oak Island Yard for rail shippers will remain exactly the same, as will the integral relation of that facility to the common carrier rail services provided by CPR for CDD traffic. Those should be the relevant interstate commerce considerations that inform determinations of jurisdiction and preemption under ICCTA.

The attempts of the Initial Decision to pigeon-hole Hi Tech as a "shipper" highlight the decision's problematic and unduly restrictive construction of ICCTA preemption. Depending on the perspective, Hi Tech can be seen as performing functions that are normally associated with a shipper, or with a carrier, or with a broker. In reality, Hi Tech is one of a growing breed of third-party intermediaries whose development is -- and will increasingly be -- important for rail carriers, rail customers and the nation's rail system as a whole. Such third-party entities are the ones who will provide much of the capital needed to expand the availability and increase the efficiency of rail transportation. Where (as here) the services provided by such third-party intermediaries are integrally related to rail transportation, the balkanization of regulation and preemption depending on the "control" of the intermediary's activities makes no sense -- and indeed threatens the very pro-competitive and pro-rail developments that ICCTA was meant to encourage.

Judge Masin recognized just this point in finding that NJDEP's efforts to impose licensing requirements on the Hi Tech rail transload facility were preempted under ICCTA:

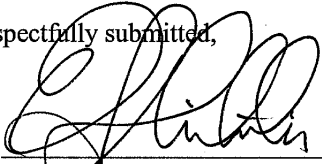
In the present case, Hi Tech's solid waste transfer station in the Oak Island Rail Yard, while assuredly meant to assist Hi Tech in a profitable private enterprise, seems to be located in such a place as to readily effectuate the transfer of the solid waste materials from

multiple haulers to the railroad through the conduit of the transfer station. It seems apparent that some method of transporting the waste to the railroad and then transferring it from trucks to rail cars is necessary if the railroad is to obtain this business, for if none were in existence, the railroad would be frustrated in its ability to ship this sort of material and thereby compete in the marketplace with other modes of transportation, most likely motor carriers, causing a possible impediment to the very competition and revived economic activity that the deregulation under the ICCTA was meant to advance.

ALJ Order at 36 (citing Village of Ridgefield Park v. New York, S. & W. Ry. Corp., 318 N.J. Super. 385, 398-400, 724 A.2d 267 (App. Div. 1999)). The Board should similarly find that policy, along with statutory and case law, supports a conclusion that the rail transload facility at Oak Island Yard falls within the preemptive scope of ICCTA.

WHEREFORE, Hi Tech respectfully requests that the Board reverse the Initial Decision herein and grant Hi Tech's petition for a declaratory order.

Respectfully submitted,

By: 

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ATTORNEYS FOR HI TECH TRANS, LLC

Dated: August 23, 2003



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. ESW 05815-03

AGENCY DKT. NO. SWE PEA030001-

U131

**STATE OF NEW JERSEY,
DEPARTMENT OF ENVIRONMENTAL
PROTECTION, SOLID WASTE
COMPLIANCE AND ENFORCEMENT,**

Petitioner,

and

**ESSEX COUNTY UTILITIES
AUTHORITY and HUDSON COUNTY
IMPROVEMENT AUTHORITY,**

Intervenors,

v.

**HI TECH TRANS, LLC and DAVID
STOLLER,**

Respondents.

James H. Martin, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney) (**Mr. Martin** and **Rebecca L. Hobbs**, Deputy Attorneys General, on the brief)

Benjamin Clarke, Esq., for intervenors (DeCotiis, Fitzpatrick, Cole & Wisler, attorneys) (**Mr. Clarke** and **Victoria A. Flynn**, Esq., on the brief, **Michael R. Cole**, Esq., of counsel)

Andrew L. Indeck, Esq., for respondent (Scarinci & Hollenbeck, attorneys) (**Mr. Indeck** and **Christine M. Vanek**, Esq., of counsel, on the brief)

Record Closed: July 30, 2003

Decided: August 13, 2003

BEFORE **JEFF S. MASIN**, ACTING CHIEF ALJ:

The New Jersey Department of Environmental Protection (“DEP”), acting through its Solid Waste Compliance and Enforcement Unit, filed an Administrative Order (“Order”) dated May 28, 2003, charging therein that the respondent, Hi Tech Trans LLC (“Hi Tech”), and David Stoller, individually and in his capacity as Chairman and Chief Executive Officer of Hi Tech, violated provisions of the Solid Waste Management Act (“SWMA”), *N.J.S.A. 13:1E-1 et seq.*, and the Solid Waste Utility Control Act (“SWUCA”), *N.J.S.A. 48:13-1 et seq.*, in connection with their operation of a facility located at Bay Street, Oak Island Rail Yard, Newark, New Jersey. On June 17, 2003, Hi Tech and Stoller (hereinafter referred to collectively as “Hi Tech”) notified the DEP by letter that they desired a hearing. They also requested therein that the requirements of the Order be stayed pending the hearing. The DEP acknowledged the requests by letter dated June 18, 2003. On June 24, the Essex County Utilities Authority and the Hudson County Improvement Authority filed a joint request with the Commissioner of the DEP, seeking leave to intervene in the proceedings pending between the DEP and Hi Tech. By Letter Order dated June 26, 2003, Commissioner Campbell granted intervention to the two Authorities (hereinafter referred to collectively as the “intervenors”). On June 30, Commissioner Campbell issued an Order Granting Emergency Relief, providing therein that the DEP would forbear from seeking judicial enforcement of its Administrative Order for a period of sixty (60) days, or until further order of the Department vacating or amending its order for emergency relief. The Commissioner then transferred the contested case to the Office of Administrative Law (“OAL”) for hearing, under an agreement with this judge, in his capacity as Acting Director of the OAL, that the matter would be concluded at OAL within 50 days of transmittal. I thereafter held a conference call with counsel, who advised that the sole issue for determination was whether the DEP’s attempt to regulate the activities of Hi Tech that are the subject of the Administrative Order was preempted by the Federal Government’s authority and jurisdiction over operations such as that of the respondent, which it characterizes as those of “a rail transload facility.” The parties and the intervenors filed briefs on this issue, and the record closed on July 30, 2003, upon receipt of the respondent’s reply brief.

In its brief, Hi Tech has challenged the jurisdiction of the Commissioner of DEP, and of the OAL, to grant the relief requested by the petitioner and intervenors. In addition, it urges that the DEP and OAL should not hear this matter because such consideration would require the Commissioner of DEP to rule upon the preemption of a state regulation, which he has the duty to enforce against Hi Tech.

The Administrative Order

The Administrative Order recites that Hi Tech owns and operates “a facility” that is located at Bay Street, Oak Island Rail Yard, Newark, New Jersey. It states that inspection of the site and the operations carried out there by Hi Tech on April 16, 2003, revealed that the company was unlawfully operating a solid waste facility without having applied for and obtained a solid waste facility (“SWF”) permit, as mandated by *N.J.A.C. 7:26-2.8* (f), which requires that such a permit “shall” be obtained prior to any person beginning construction or operation of a solid waste facility, unless exempt from that requirement by *N.J.A.C. 7:26-1.1*, 1.7 or 1.8. The Administrative Order recited the observations made by DEP personnel during their inspection of April 16, 2003. In addition, the Administrative Order charged that the respondents were in violation of *N.J.A.C. 7:26H-1.6(a)*, which prohibits any person from engaging in the business of solid waste collection or 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” DEP. Further, the Administrative Order asserted that pursuant to the SWMA, *N.J.S.A. 13:1E-9(b)(4)*, it could hold liable any “ ‘person’ who engages in proscribed waste activity.” The term “person” is defined by *N.J.A.C. 7:26-1.4* as including “corporate official(s).” It asserted that David Stoller, as the Chairman and Chief Executive Officer of Hi Tech, “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.” He therefore was in violation of the requirements regarding the failure to obtain a SWF permit prior to construction or operation of a SWF and of failing to obtain a Certificate of Public Convenience and Necessity prior to engaging in the business of commercial solid waste disposal.

The Administrative Order directed that the respondents cease and desist the operation of the illegal and un-certificated SWF by ceasing to accept, transfer, tip, process, transfer, load or reload solid waste and cease to do any of these activities for a fee.

Hi Tech's Objections to DEP and OAL
Consideration of this Case

Hi Tech argues that this case presents a pure issue of law, that is, whether federal law preempts the application of state law to this respondent. "Pure legal questions are exclusively reserved for the courts." *M.C. v. Bergenfield Board of Education*, citing LeFelt, 37 *N.J. Prac.* 107, 108, 3.8 (2000). Further, it contends that administrative agencies are not authorized to determine whether statutes are unconstitutional. However, while the petitioner cites Judge LeFelt's treatise for the proposition that "Accordingly, an agency has no power to determine the constitutionality of a statute on its face. Agencies may not strike down statutes as being unconstitutional," *Id.* at 108,3.8, this case does not involve any facial challenge to the constitutionality of a statute at all. The petitioner does not contend that the environmental permitting and certification laws that the DEP seeks to enforce against it are unconstitutional on their face. It instead argues that the application of these laws to it violates the preemption doctrine. Thus, the case involves an "as applied" challenge to the application of a law whose facial constitutionality is not questioned by a party that claims that such application would violate Constitutional principles. In order to determine this question, various facts must be determined, and even if the parties have not disputed the basic facts, the case still is not a "facial" challenge, or a pure question of law. As will be seen in the discussion below, a determination as to the use and purpose of the respondent's facility is at least arguably necessary to decide the issue of preemption, which applies in some instances to facilities in some way arguably associated with "railroads" and "rail carriers" and does not apply in other instances. Thus, there is no basis for concluding that the DEP does not have jurisdiction to determine this preemption challenge. As for the OAL, its sole statutory authority to hear contested cases is derivative from the agency that is empowered to hear and determine the case. Thus, if the DEP has jurisdiction and the Commissioner has exercised his option to have the matter heard initially at OAL rather than to hear the matter directly as the Agency Head, the OAL has jurisdiction over the case. *N.J.S.A. 52:14F-8(b)* and *N.J.S.A. 52:14B-10*.

As for the contention that the Commissioner should not determine a case in which he might have to decide that a law that the agency he heads is required to enforce cannot be enforced against a particular party because the agency's action is preempted by federal jurisdiction, there is no support for such a proposition. Petitioner's citation of *Abbott v. Burke*,

100 *N.J.* 269, 302 (1985), appeal after remand, 119 *N.J.* 287 (1997), in support of this concept completely neglects the fact that the OAL *Initial Decision* rendered in that case by Judge LeFelt was, like any other OAL education case (with the exception of special education hearings) subject to review by the Commissioner of the Department of the Education and the State Board of Education. The asserted potential for conflict supposedly arising because the Commissioner is a defendant in a federal lawsuit brought by the respondent in regard to the same issue pending in this case is a very weak reed upon which to support a claim of disqualification of the Commissioner from performing his statutory obligation to fairly decide the issues in a contested case.

For the reasons expressed, the respondent's attempt to deny either the jurisdiction of the DEP and the OAL or the appropriateness of either agency and the Commissioner of the DEP to hear this matter is **DENIED**.

Hi Tech's Bay Island Rail Yard Operation

Hi Tech is a limited liability company formed under New Jersey Law. David Stoller is the Chairman and Chief Executive Officer. Hi Tech has a business relationship at the Oak Island Rail Yard in Newark with the Canadian Pacific Railroad ("CPR") that purchased the assets and trackage rights of the former Delaware and Hudson Railroad Company in 1990. In 2000, CPR entered into an "Operational License Agreement" with Hi Tech, which allowed Hi Tech to develop and operate a bulk loading facility in the Oak Island Rail Yard. This agreement provided

CPR desires to utilize a portion of the Railyard as designated . . . for the transloading of non-hazardous construction and demolition debris ("C&D")

...

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;

...

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 . . .
[“Operational License Agreement,” “Recitals” section]

By the terms of this agreement, Hi Tech’s use of the premises is limited to the transfer of waste products from truck to rail cars operated by CPR. More details of the several “Agreements” relevant to this matter will be discussed below. However, it is pertinent to note that in both its own Operating Agreement and the Operational License Agreement entered into by Hi Tech with the CPR, mention is made of the need to obtain all *necessary* approvals. The need for certain such “approvals” and “permits” is the heart of the current contested case.

Hi Tech claims to have commenced operations in the rail yard on or about September 17, 2001. It contends that the facility operates thusly: trucks hauling C&D waste arrive at the facility, discharge their contents into a “hopper” provided by Hi Tech located at the facility, and Hi Tech then directly loads the waste into railroad cars “in a continual throughput operation from truck to rail.” It denies that it either stores or processes any C&D at the facility. The transportation of the C&D from the Oak Island Yard to out-of-state disposal sites is performed by CPR, which uses rail cars that it provides.

The Issue of Federal Preemption

While in this case Hi Tech does not contest the factual observations of the DEP inspectors as recited in the Administrative Order, throughout its dispute with the DEP Hi Tech has argued that the State has, at best, a limited authority to regulate its operation. It argues that the effect of federal legislation has been to preempt most State and local regulation of railroads and of activities carried on by “rail carriers,” a status to which it makes claim. Most directly, as regards its operation at the Oak Island Rail Yard, it argues that the State is barred from requiring that it obtain any permit or certificate of public necessity. However, it concedes that Hi Tech remains “subject to the traditional police powers of state agencies. It is merely the permitting and licensing requirements contained in the challenged statutes and regulations that are preempted. In sum, a careful reading of the ICCTA and the decisions of the STB and the state and federal courts confirms that HTT is most certainly required to comply with environmental

regulations regarding the continued operation of its transload rail facility. . . .” Respondent’s Reply Brief, page 3.¹

The Statutory Basis for Preemption

Hi Tech’s preemption argument stems from its reading of 49 USC 10501. This provision defines the jurisdiction of the Surface Transportation Board (“STB”), a federal regulatory agency established by Congress in the Interstate Commerce Commission Termination Act of 1995, *Pub. L.* 104-88, 109 Stat. 803 (1995) (“ICCTA”), which legislation abolished the ICC. The STB is charged with regulating the economic aspects of railroading. *Village of Ridgefield Park v. New York, Susquehanna & Western Ry. Corp.*, 163 N.J. 446, 449 (2000) (“Ridgefield Park”). The jurisdiction of the STB is set forth at 49 USC 10501. In pertinent part that provision provides that

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier . . . -

b) The jurisdiction of the Board over -

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rule (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 regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

Do Collateral Estoppel and *Res Judicata* Bar

Hi Tech’s Preemption Claim?

The record reflects that on several occasions in 2000 and 2001, Hi Tech solicited informal opinions from the STB as to the scope of federal preemption of state and local environmental and zoning permitting requirements for the proposed facility and operation of a

¹ The ICCTA is the Interstate Commerce Commission Termination Act of 1995, *Pub. L.* 104-88, 109 Stat. 803 (1995). The STB is the Surface Transportation Board, successor to many of the functions of the ICC regarding rail activities.

truck-to-rail transshipment facility by Hi Tech at Oak Island Rail Yard. Thereafter, on May 3, 2002, Hi Tech filed an amended petition with the STB, seeking a “finding that the Board has exclusive jurisdiction over Hi Tech’s activities and those of its customers relating to the transportation of construction and demolition (C&D debris) from construction sites to a truck-to-rail transloading facility in the State of New Jersey, and that the Board’s jurisdiction preempts New Jersey state and local laws requiring trucks carrying C&D debris to process their shipments at a single, designated truck-to-truck solid waste management facility.” *Hi Tech Trans, LLC*, STB Finance Docket No. 34192, 2002 WL 31595417 (I.C.C.) (“*Hi Tech (STB)*”) The STB denied the petition for declaratory order in a decision dated November 19, 2002. *Ibid.* The significance in this contested case of this federal agency decision and of subsequent federal court activity related to this same issue is hotly disputed by the parties. Whereas the petitioner and the intervenors contend that the STB ruling has preclusive impact on core issues in this case, and that based on its outcome the application of principles of *res judicata* and collateral estoppel bar Hi Tech from asserting any preemption in this case, Hi Tech submits that the STB’s November 2002 ruling only dealt with a limited aspect of its activities and did not reach the central core of the issue in controversy in this case. Thus, it denies that it is precluded from asserting that federal law preempts the demands made upon it by the DEP in that agency’s Administrative Order of May 28, 2003.

In *Hi Tech (STB)*, the STB noted that the Hudson County Improvement Authority had adopted a solid waste management plan. As the agency responsible for implementing that plan, HCIA had designated a single truck-to-truck facility to receive all C&D debris originating in Hudson County. Hi Tech asserted that HCIA had demanded that Hi Tech identify for it transporters who had delivered waste to the CPR transload facility in the Oak Island Yard and the origins of all shipments it had handled, so that those who had violated the management plan could be fined or otherwise sanctioned for their failure to comply with the plan. Hi Tech alleged that requiring all trucks to process their shipments of C&D debris as a single truck-to-truck facility added unnecessary and burdensome cost to the transportation of these materials and “thereby renders the rail mode of transportation either illegal or noncompetitive with other modes.” *Ibid.* at page 2. Such an attempt to regulate its intermodal activities “invad(ed) the jurisdiction of the Board, while serving no purpose and burdening interstate commerce.” *Id.* In support of Hi Tech’s petition, CPR filed a statement in which it described Hi Tech as a licensee of CPR, whose transloading operation was “an integral component of CP’s movement of this

particular type of freight by rail, and it relies heavily on Hi Tech to perform duties that are essential to the successful marketing of its rail services.” *Hi Tech*, at 2. The DEP and the intervenors in this case, also participants in the STB proceeding, argued before the STB that all that they were doing was attempting to regulate solid waste collection and disposal activities, such as the local transport of solid waste by truck, not the rail transportation in interstate commerce, and that preemption did not apply to prevent these efforts.

In its decision, the Board noted that its jurisdiction was over “transportation by rail carrier.” “Transportation” by definition included a “ ‘facility’ related to the movement of property by rail and ‘services’ related to that movement by rail.” 49 *U.S.C.* 10102 (9) (A), (B). Where the Board had jurisdiction over rail transportation, that jurisdiction is “exclusive.” 49 *U.S.C.* 10501 (b). In such cases, “state and local laws and regulations are generally preempted.” *Id.* at 2-3. The Board further defined the scope of the preemption, “To come within the preemptive scope of 49 *U.S.C.* 10501 (b), however, these activities must be integrally related to the railroad’s ability to provide rail transportation services.” *Id.* at 3. The Board found that the activities described by Hi Tech as those that the state was seeking to regulate (the truck movement of C&D debris) were

not integrally related to rail transportation services. To the contrary, the impact of HCIA’s single, truck-to-truck facility designation for the processing of C&D debris is on truck shipments within the state, not on interstate rail shipments. Hi Tech’s attempt to link these activities as one continuous intermodal rail movement must fail. As NJDEP points out, under Hi Tech’s theory, all state and local regulation of activities that occur before a product is delivered to a rail carrier for transportation would be preempted. Preemption clearly does not go that far; nor does the Board’s jurisdiction.

Preemption under section 10501 (b) hinges on what can reasonably be considered to be part of “transportation by rail carrier” under section 10501 (a). *The Board and its predecessor, the Interstate Commerce Commission, have indicated that the jurisdiction of the agency may extend to certain activities and facets of rail transloading facilities, but that any such activities or facilities must be closely related to providing direct rail service. . . Courts have agreed that the section 10501 (b) preemption applies to a rail intermodal transfer facility. See Norfolk S. Ry. v. City*

of Austell, No. 1:97-CV-1081-RLV, 1997 U. S. Dist. LEXIS 17236 (N.D. Ga. Aug. 18, 1997). The only Hi Tech activity that might be considered integral to the rail transportation of C&D debris would be the transfer of C&D debris from trucks to rail cars at the CP transload facility itself. Therefore, the Board's jurisdiction, and preemption under section 10501 (b), would not reach movements of C&D debris haulers on public roads en route to the CP transload facility. (emphasis supplied)
[*Id.* at 2,3]

Subsequent to the STB's decision, Hi Tech chose not to appeal the agency decision to the United States Court of Appeals for the D.C. Circuit, but it instead filed a Verified Complaint in the United States District Court for the District of New Jersey, seeking a declaratory judgment. *Hi Tech Trans, LLC, v. Hudson County Improvement Authority, Essex County Improvement Authority et al.*, Civil Action No. 02-3781 (FJH) ("*Hi Tech* USDC"). The body of the Verified Complaint addresses the operations of Hi Tech at the Oak Island Yard, and most particularly addresses the issue of the HCIA and ECUA and their demands regarding the direct generators and hauling customers who do business with Hi Tech. The District Court's subsequent actions in connection with the case must be understood in light of the specific focus of the Complaint. In its demand for relief, Hi Tech sought a declaration from the District Court that "the authority of the Surface Transportation Board over the operations of HTT and the operations of its shippers and haulers seeking to utilize HTT's services is exclusive;" and that "HTT's operations are exempt from the application of any state or local law including administrative regulations here at issue relating to its intermodal rail operations."

Significantly, Hi Tech later moved before the District Court, seeking to amend its Complaint. In its motion, Hi Tech recited that as a result of the ICCTA, "Congress has repealed jurisdiction over local trucking which the [ICC] had previously exercised. This conclusion provided "[T]he only explanation of the decision of the [STB] relating to the issues before this Court. . . The truck portion of rail intermodal transportation is therefore unregulated." In an Opinion and Order issued by Honorable Faith S. Hochberg, U.S.D.J. on April 2, 2003, the judge denied the motion to amend for several reasons. Pertinent to the issues and arguments presented in the current contested case, she wrote, in partial explanation of her decision, "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) 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." *Hi Tech* USDC, *Id.* at 2-3.

On June 30, 2003, Judge Hochberg issued an Order in response to an Order to Show Cause as to why Hi Tech's Complaint should not be dismissed. She noted that Hi Tech had previously withdrawn its preemption claim contained in the first count of the Complaint. In a footnote, Judge Hochberg recited that Hi Tech had claimed in Count 1 that it had the status of a "rail carrier" as defined in 49 U.S.C. §10102(5) under the STB's exclusive jurisdiction and control. She then noted that the STB, in response to Hi Tech's declaratory judgment action before that agency, had denied the request for a declaratory judgment, *finding that the movement of trucks carrying C&D debris over New Jersey roads to the CP transload facility operated by Hi Tech "is not part of 'transportation by rail carrier' as defined in section 10501(a)' and therefore section 10501(b) preemption does not apply."* (Emphasis supplied).

As the proceedings in Federal Court in Newark were proceeding, Hi Tech also pursued further action at the STB. On June 27, 2003, the STB permitted Hi Tech to withdraw a petition filed on June 9, 2003, in which Hi Tech had sought clarification of the Board's November 20, 2002 decision. The clarification sought was a determination whether Hi Tech is, or is not, a rail carrier subject to the Board's jurisdiction. In lieu of the petition for clarification, Hi Tech filed another petition for a declaratory ruling, this time seeking a determination that the STB had exclusive jurisdiction over a rail transloading facility "owned by Delaware and Hudson Railway Company, Inc., d/b/a Canadian Pacific Railway (CP) and operated by Hi Tech, and the attempted regulation and closure of that facility by [DEP] is preempted under federal law. . . ." The STB docketed the new petition, which is at present pending before the Board, as STB Finance Docket No. 34192 (Sub-No. 1). In its Order granting the withdrawal of the June 9 request for clarification, the Board determined that no such clarification was necessary.

The issue before the Board in the November decision was limited to a determination that the Board's jurisdiction, and preemption under *section 10501 (b)*, would not reach movements of construction and demolition debris haulers

on public roads en route to the CP transload facility. *The question of whether Hi Tech is a rail carrier has not come before the Board, and the Board has made no determination on that issue, which in any event would have no bearing on the status of the truck traffic.* (emphasis supplied).

All of the above description of the proceedings before the STB and the District Court is important in order to understand the scope and effect of the rulings made, and those not made, by the Board and by Judge Hochberg. The STB proceeding initiated by Hi Tech in May 2002 was focused upon the HCIA and ECUA waste management plans and their attempts to determine whether customers of Hi Tech were violating those plans. The STB ruling issued in November 2002 only addressed that portion of the STB operation, that is, it only determined whether the Board had exclusive jurisdiction over that aspect of Hi Tech's operation and whether federal preemption negated the attempts of the Authorities to regulate Hi Tech's customers in connection with their over-the-New Jersey road transport of debris. The issues in that case did not reach the question of the status of state or local attempts to regulate the activities of Hi Tech itself within the Oak Island Rail Yard. The Board's decision issued in November clearly did not rule upon the possible preemptive impact of the ICCTA and section 10501(b) upon the operations of Hi Tech within the Yard. Indeed, the Board noted the latter issue, but in a manner that Judge Hochberg described in her June 16, 2003, Order denying the emergent relief sought by Hi Tech to enjoin the DEP's May 28th Administrative Order, as, "what can best be described as equivocal dicta." The STB posited that "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* STB, *supra.* at p. 4.

Judge Hochberg's determination that the STB had determined that Hi Tech was not a "rail carrier" and her conclusion that Hi Tech was collaterally estopped from claiming such in the case before her can only be understood in the context of the STB's actual ruling, which does not go so far as to decide that in no instance could Hi Tech be so characterized in conformity with the statutory definition. Indeed, in her June 30 Order, the judge's footnote regarding the STB decision clearly recognizes that the Board had only addressed the status of the truck transportation on New Jersey highways and determined that that movement of debris was not part of "transportation by rail carrier." The June 27th Order from the STB further establishes that

the Board itself was aware that it had not yet addressed the question of whether Hi Tech itself was a “rail carrier.”

Based upon the above, any contention that the STB’s November ruling precludes Hi Tech from claiming in this case that its operations within the Oak Bay Rail Yard qualify it as a “rail carrier” is without merit. The STB has never ruled on that proposition, nor has Judge Hochberg. Since neither the federal agency nor the District Court has even addressed the merits of this claim, much less ruled thereon, the principles of collateral estoppel and *res judicata* are inapplicable. Thus, in this case Hi Tech is not precluded from contending that it is a “rail carrier,” as that status may impact upon its claim of preemption. Indeed, in order for preemption to apply, Hi Tech must establish that despite its not itself being the sort of business entity that may in common parlance be perceived of as a “railroad” or “rail carrier,” nevertheless, under the terms of the ICCTA it fits within these definitions. It is first important to understand the scope and application of federal regulation of the rail industry under ICCTA and then assess its possible application to this respondent.

Preemption

Preemption of state and local authority to regulate various aspects of railroad and rail carrier activity stems from the Supremacy Clause of the United States Constitution. *Teper v. Miller*, 82 F.3d 989, 993 (11th Cir. 1996); See U. S. Const. Art. VI, cl. 2. Conflicts between federal and state laws must be resolved in favor of federal law. “The Supremacy Clause prohibits the enforcement of any state law that conflicts with a valid federal statute.” *CSX Transportation, Inc. v. Georgia Public Service Commission*, 944 F.Supp. 1573,1580 (N.D. Ga. 1996); *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 152-53, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982).

In *Florida East Coast Railway Company v. City of West Palm Beach*, 266 F.3d 1324 (11th Cir. 2001)(“Florida East Coast”), the court reflected upon the principles applicable in any consideration of pre-emption.

“Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.” *Bldg. & Constr. Trades Council v. Associated*

Builders & Contractors, 507 U.S. 218, 224, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993)(quoting *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981)). We recognize that "an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108, 120 S.Ct. 1135, 146 L.Ed.2d 69 (2000) (state regulation of maritime commerce and employment). See also *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988, 55 L.Ed.2d 179 (1978) (same). Where the State acts "in a field which the States have traditionally occupied," however, we retain the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447 (1947)). Principles of federalism, including the recognition that "the States are independent sovereigns in our federal system," *Medtronic*, 518 U.S. at 485, 116 S.Ct. 2240, dictate that in the absence of such clarity of intent, Congress cannot "be deemed to have significantly changed the federal-state balance." *Jones v. United States*, 529 U.S. 848, 860, 120 S.Ct. 1904, 146 L.Ed.2d 902 (2000) (Stevens, J., concurring) (quoting *United States v. Bass*, 404 U.S. 336, 349, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971)). Reliance on the presumption against pre-emption limits "congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *City of Boerne v. Flores*, 521 U.S. 507, 534, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). [FN1] Thus, "[i]f the statute's terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 116-17, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) (Souter, J., dissenting).

The New Jersey courts considered the preemption issue regarding railroads in *Village of Ridgefield Park v. New York, Susquehanna and Western Railway Corporation*, 318 N.J. Super. 385 (App Div. 1999), *modified and remanded*, 163 N.J. 446 (2000). The case involved the attempt of the Village to regulate certain aspects of the railroad's train maintenance facility situated in a light-industrial area of the Village located near to a residential area and a park. The Village contended that the facility constituted a nuisance. In its decision, the Supreme Court reviewed in detail the Appellate Division's analysis of preemption as it applied to the ICCTA.

The Appellate Division had first examined the express language of the statute. The Supreme Court quoted its opinion at length.

The language of the statute does not expressly limit preemption to strictly "economic regulation" nor does it state that the states retain historic police powers over railroads and their property. We are told, pursuant to the clear language of the statute, that the "construction" and "operation" of the railroad's "facilities" falls within the Board's express and exclusive jurisdiction. 49 U.S.C.A. §10501(b)(1) and (2). By definition, a railroad's "facility," "warehouse," "yard," "property," "instrumentality," and "equipment of any kind related to the movement of passengers or property," "regardless of ownership or an agreement concerning use" are all within the scope of the Act's concept of "transportation." 49 U.S.C.A. § 10102(9)(A). Thus, pursuant to the statutory language, the Board appears to have exclusive jurisdiction over everything pertaining to the railroad's facility in the Village mentioned in the Act's definition of transportation, *i.e.*, the tracks and sidetracks, the sand tower, the lube oil and diesel fueling facilities and tanks, the converted box cars, the yard bulls, the proposed engine house, and so on.

The legislative history and policy surrounding the statute may also be considered in determining the scope of a statute's preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. at 494, 116 S.Ct. 2240. The section-by-section analysis portion of the congressional "history" to the ICC Termination Act, entitled *Section. 10301. General Jurisdiction*, for example, states

This provision replaces the railroad portion of former Section 10501. Conforming changes are made to reflect the direct and complete pre-emption of State *economic regulation* of railroads.... The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the Federal policy of occupying the entire field of economic regulation of the interstate rail transportation. *Although States retain the police powers reserved by the Constitution, the Federal scheme of economic regulation and deregulation is intended to address and encompass all such regulation and to be completely exclusive.*

[H.R. Conf. Rep. No. 104-422, Dec. 18, 1995; (emphasis supplied).]

When the Act was adopted, Congress retained the section entitled general jurisdiction, delineated as § 10501. However, the Congressional intent stated above with regard to the proposed § 10301 readily applies to § 10501. Both sections cover the same topic, general jurisdiction. The only distinction is the section number assigned. From the language in this legislative history, Congress surely intended the Act to preempt all State *economic* regulation of railroads. But it is also apparent from the noted history that Congress intended the states retain certain police powers reserved by the Constitution. *We conclude that all state action with any economic impact on railroads was preempted by the Act and that the states retained a certain residuum of historic police powers, but presumably those not related to railroad service, operations and physical properties or structures.* (emphasis supplied).

A review of the "Rail Transportation Policy" section of the Act reveals the Act's focus is on the deregulation of many aspects of the interstate railroad system, not only on strictly economic aspects. For example, one policy stated is to "reduce regulatory barriers to entry into and exit from the industry." 49 U.S.C.A. § 10101(7). Another policy is to "minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required." 49 U.S.C.A. § 10101(2). Another policy is to increase "competition and demand for services." 49 U.S.C.A. § 10101(1). The "Policy" section also states that "it is the policy of the United States Government ... (8) to operate transportation facilities and equipment without detriment to the public health and safety." 49 U.S.C.A. § 10101(8). The policy section also states that safety, safe and suitable working conditions, unlawful discrimination, anti-trust violations, and energy conservation are policy considerations. *Id.* at (3), (11), (12) and (14). However, the dominant public policy emphasis is on a very substantial overall deregulation of the railroad industry. As aptly stated in *CSX Transportation, Inc. v. Georgia Public Service Commission*, 944 F.Supp. 1573, 1583 (N.D.Ga.1996), "[b]y preempting state regulation of railroad operations, and granting exclusive jurisdiction over the regulation of almost all aspects of railroad operations to the [Board], Congress removes the ability of states to frustrate its policy of deregulating and reviving the railroad industry." The Act obviously intended that national

transportation interests dominate over parochial concerns and impulses. *Ridgefield Park*, *supra*, 318 N.J. Super. at 398-400, 724 A.2d 267.

The Appellate Division determined that the STB was the forum in which the Village must first seek relief. The STB was “uniquely qualified to determine whether state law should be preempted.” *Ridgefield Park*, 318 N.J. Super. at 405-407.

After reviewing the Appellate Division’s ruling, the Supreme Court next considered the STB’s “preliminary” decision in *Borough of Riverdale Petition for Declaratory Order, The New York Susquehanna and Western Railway Corporation*, 1999 WL 715272 (S.T.B. September 9, 1999), available in <http://www.stb.dot.gov>, STB Finance Docket No. 33466 (“Riverdale”). In *Riverdale*, the Borough contended that the railroad’s construction of a truck terminal and a corn processing plant in a residential zone without first obtaining approval from the municipal Planning Board raised health and safety concerns. It sought a ruling as to whether the facilities were subject to federal jurisdiction, and if so to what extent local laws and regulations applied, specifically those concerning zoning. The facilities in question were constructed within the railroad’s (“NYSW”) right-of-way or on the property that NYSW owned. A water pipe installed within the right-of-way had multiple outlets to transfer hot water to standing railroad tank cars for the purpose of heating the materials inside the tank cars to facilitate transfer of the materials to trucks. Additionally, a corn processing plant had been established by the railroad that brought in 10 to 20 tanker trucks to the site to off-load NYSW’s rail cars. These were prohibited uses for the residential zone under the Borough’s zoning ordinances. A weigh station was also located on the subject property, and the Borough contended that it posed a risk of injury to the public because of the proximity of large tractor trailers to high tension power lines. Other concerns were expressed about potential flooding, traffic disruption, and unacceptable noise levels.

Riverdale filed suit in the Superior Court of New Jersey, and the court ordered that the railroad file a Site Plan Application with the Planning Board, that the Planning Board review the application in the normal manner, but “in a way that would not inappropriately obstruct the operation of NYSW’s facility; and that the Planning Board either approve the application by a certain date or report back to the court. NYSW was directed to stop further construction except for emergency measures and to “comply with ‘applicable safety, health and welfare regulations.” However, the court also determined that NYSW was not “bound by Local Zoning regulations as

to Land Use and Utilization” due to the preemptive effect of the ICCTA. The court directed that the Borough “shall not use regulatory measures regarding safety, environmental or health matters as a device for getting rid of NYSW’s [Riverdale] facilities,” nor “preclude or interfere with [NYSW’s] operation of the facilities.”

The dispute between Riverdale and the railroad next moved to the STB. That agency’s decision reviewed the preemption question, noting that much of the case law that had arisen to define its parameters came about through cases that were outside of its direct jurisdiction and in which it had not been a party. As for preemption, it said,

One court that has addressed the issue concluded that zoning ordinances and local land permit requirements are preempted by 49 U.S.C. 10501(b) where the facilities are an integral part of the railroad’s interstate operations. In particular, in *Norfolk Southern Ry. v. City of Austell*, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236, at 17 n.6 (N.D. Ga. 1997) (Austell), the court found that a local land use permit was not required before a railroad could construct and operate an intermodal facility. The court held that “a city may not . . . attempt to regulate land use and planning via local laws when Congress’ intent to preempt such local laws is clear and manifest.” Similarly, other courts have viewed the preemption provisions broadly. See *CSX Transp., Inc. v. Georgia Public Service Com’n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996) (Georgia) [“It is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations” than Congress provided in 49 U.S.C. 10501(b)]; *Burlington N. Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288, 1294-95 (D. Mont. 1997) (the preemption provisions in ICCTA show an intent to occupy the entire field of regulation).¹⁰

¹⁰ See also *Georgia Pub. Serv. Comm’n v. CSX Transp. Inc.*, 481 S.E.2d 799, 801 (Ga. Ct. App. 1997); *In re Burlington N.R.R.*, 545 N.W.2d 749, 751 (Neb. 1996).

B. Board Rulings. Where railroad activities have required Board approval, the Board has had occasion to address the scope of the Federal preemption law. In the *Stampede Pass*² cases, the Board found that state and local permitting or pre-clearance requirements (including environmental requirements) are preempted because, by their nature, they interfere with interstate commerce by giving the state or local body the ability to delay or deny the carrier the right to construct facilities or conduct operations. The Ninth Circuit, in reviewing the matter, agreed and specifically rejected (as contrary to the statutory text and unworkable in practice) the argument that the statutory preemption in section 10501(b) is limited to state and local “economic” regulations. *City of Auburn*, 154 F.3d at 1029-31.¹¹

At the same time, in *Stampede Pass* we expressed our view that not all state and local regulations that affect railroads are preempted.¹² In particular, we stated that state or local regulation is permissible where it does not interfere with interstate rail operations, and that localities retain certain police powers to protect public health and safety.¹³ We also explained that state and local agencies can play a significant role under many federal environmental statutes. We offered the following examples of state and local regulation that in our view would not be preempted:¹⁴

¹¹ The court explained that “. . . if local authorities have the ability to impose ‘environmental’ permitting regulations on the railroad, such power will in fact amount to ‘economic regulation’ if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.” *City of Auburn*, 154 F.3d at 1031. Although it recognized that some statutes limit preemption as to state and local environmental regulation, the court found preemption under provisions such as section 10501(b) to be broad. *Id.*

¹² We also determined in *Stampede Pass* that section 10501(b) does not nullify the Board’s own obligation to follow the requirements of the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* (NEPA), and related federal environmental laws in contexts where they are applicable. See 49 CFR 1105.1. Because the Board itself controls the proceedings in which it applies those requirements, there is no risk of interference with our jurisdiction over rail transportation.

¹³ See H.R. Conf. Rep. No. 104-422 at 167, reprinted in 1995 U.S.C.A.A.N. 850, 852 (identifying criminal law prohibitions on bribery and extortion as examples of the police powers that the Act does not preempt); *Robey et al.* — *Petition for Declaratory Order* — *Levin et al.*, STB Finance Docket No. 33420 (STB served June 17, 1998).

¹⁴ *Stampede Pass*, slip op. at 7.

² *Cities of Auburn and Kent, WA—Petition for Declaratory Order—Burlington Northern Railroad Company—Stampede Pass Line*, STB Finance Docket No. 33200, July 1, 1997.

Even in cases where we approve a construction or abandonment project, a local law prohibiting the railroad from dumping excavated earth into local waterways would appear to be a reasonable exercise of local police power. Similarly, . . . a state or local government could issue citations or seek damages if harmful substances were discharged during a railroad construction or upgrading project. A railroad that violated a local ordinance involving the dumping of waste could be fined or penalized for dumping by the state or local entity. The railroad also could be required to bear the cost of disposing of the waste from the construction in a way that did not harm the health or well being of the local community.

Finally, in the *Stampede Pass* cases we noted that, where Board authorization is required, state and local governments can participate in the Board's environmental review process under NEPA and related laws. We further concluded that Congress did not intend to preempt federal environmental statutes such as the Clean Air Act and the Clean Water Act.

The STB then addressed the specific case before it, agreeing with the New Jersey Superior Court's analysis that "the zoning regulations that the Borough would impose clearly could be used to defeat NYSW's maintenance and upgrading activities, thus interfering with the efficiency of railroad operations that are part of interstate commerce. As the courts have found, this is the type of interference that Congress sought to avoid in enacting section 10501(b)." As for local land use restrictions, the STB viewed these as having the potential to be "used to frustrate transportation-related activities and interfere with interstate commerce. To the extent that they are used in this way (*e.g.* that restrictions are placed on where a railroad facility can be located), courts have found that the local regulations are preempted by the ICCTA. . . Of course, whether a particular land use restriction interferes with interstate commerce is a fact-bound question" *Riverdale, id.* at 10.

As for environmental and other public health and safety issues, the STB stated

Environmental and Other Public Health and Safety Issues. Similarly, recent precedent has made it clear that, to the extent that they set up legal processes that could frustrate or defeat railroad operations, state or local laws

that would impose a local permitting or environmental process as a prerequisite to the railroad's maintenance, use, or upgrading of its facilities are preempted because they would, of necessity, impinge upon the federal regulation of interstate commerce.¹⁵ *City of Auburn*, 154 F.3d at 1029-31; *Stampede Pass*, slip op. at 6-7. That means that, while state and local government entities such as the Borough retain certain police powers and may apply non-discriminatory regulation to protect public health and safety, their actions must not have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burdening interstate commerce.¹⁶ We cannot go beyond these general principles here without more information as to the particular police power issues that may be involved in this case. Parties may file further information and comment on these issues. *Id.* at 11.

The STB then addressed an issue that is particularly relevant to the present dispute over Hi Tech's transfer facility.

Non-Transportation Facilities. Finally, it should be noted that manufacturing activities and facilities not integrally related to the provision of interstate rail service are not subject to our jurisdiction or subject to federal preemption. According to the Borough, NYSW has established a corn processing plant. If this facility is not integrally related to providing transportation services, but rather serves only a manufacturing or production purpose, then, like any non-railroad property, it would be subject to applicable state and local regulation. Our jurisdiction over railroad facilities, like that of the former ICC, is limited to those facilities that are part of a railroad's ability to provide transportation

¹⁵ Railroads are required to provide adequate facilities for their traffic. *Interchange of Freight at Boston Piers*, 253 I.C.C. 703, 707 (1942). Moreover, an incident of the right to construct and operate a line is the right to maintain it and keep it in good operating condition. See *Detroit/Wayne v. ICC*, 59 F.3d 1314, 1317 (D.C. Cir. 1995). Accordingly, interfering with such activities could interfere with a railroad's right to operate its lines.

¹⁶ Notwithstanding the usual presumption to the contrary [see *Shanklin v. Norfolk Southern Ry.*, 173 F.3d 386, 394 (6th Cir. 1999), citing *Hillsborough County v. Automated Med. Lab., Inc.*, 471 U.S. 707, 719 (1985); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)], even health and safety regulation is preempted where Congress intended to preempt all state and local law. As explained in *City of Auburn*, 154 F.3d at 1030-31, congressional intent to preempt a state or local permitting process for prior approval of rail activities and facilities related to interstate transportation by rail is explicit in the plain language of section 10501(b) and the statutory framework surrounding it.

services, and even then the Board does not necessarily have direct involvement in the construction and maintenance of these facilities. See *Growers Marketing Co. v. Pere Marquette Ry.*, 248 I.C.C. 215, 227 (1941). We cannot determine from the current record whether this facility is actually a corn processing plant or some sort of transloading operation (for the transfer of corn syrup, for example) that is related to transportation services. Accordingly, NYSW, in its opening statement, should describe the exact nature of this facility. *Id.* at 12.

The New Jersey Supreme Court's ultimate conclusion regarding the *Ridgefield Park* appeal was based upon its understanding of the STB's *Riverdale* decision. The Court held

Our review of the STB's preliminary *Riverdale* decision reveals that it is less preemptive but otherwise analytically consistent with the Appellate Division's interpretation of the ICCTA. Although acknowledging that the STB had not yet defined its jurisdiction, the Appellate Division found any economic impact." *Ridgefield Park, supra*, 318 N.J. Super. at 399, 724 A.2d 267. The STB, however, stated that preemption of all police-power regulations with " the ICCTA does not preempt "non-discriminatory" public health and safety regulations that do not foreclose or restrict a railroad's ability to conduct its operations. *Riverdale, supra*, 1999 WL 715272 at *9. The STB observed that although states cannot require permits as prerequisites to the maintenance or construction activities of railroads, states can enforce local fire, health, safety and construction regulations against railroads and can inspect railroad facilities. *Ibid.* The STB also held that states are permitted "to address any genuine emergency on railroad property." *Ibid.*

...

Consistent with the STB's opinion in *Riverdale*, we hold that the Railroad may not deny the Village access for reasonable inspection of its maintenance facility. We further hold that although the Village may not require permits of the Railroad, the Railroad must notify the Village when it is undertaking an activity for which another entity would require a permit. The Village may enforce its local fire, health, plumbing, safety and construction regulations to the extent they are applicable to the existing maintenance facility. Because the "maintenance facilities"

consist essentially of two diesel tank cars with pumping equipment, three boxcars containing administrative offices, shops and bathroom facilities, and a hand-pumped septic system, a certain degree of pragmatism on the part of the Village will be necessary in attempting to apply its relevant ordinances and regulations to the Railroad's facilities. Because of the nature of those facilities, literal compliance with all of the requirements of the Village's ordinances and regulations may be impractical, and may not be necessary to protect the public interest.

All of the above discussion of the preemption question leads to consideration of the factual scenario presented in this case involving Hi Tech and its Oak Island Rail Yard transfer site. A facility located within a rail yard owned and operated by CPR, which is itself undoubtedly a "rail carrier," is operated by Hi Tech, a company that has a license from CPR to operate at that location a facility at which trucks arrive with C&D debris which is then transferred to a holding area [box] and grappled into railroad gondolas for shipment to out-of-state locations. As the DEP and intervenors themselves characterize the facility, it is a solid waste transfer station. The Operating Agreement under which the company proposed to do business provided that its purpose was "obtaining the Approvals and Permits and constructing, developing and operating the Facility . . . for the direct loading onto rail of construction and/or demolition debris and/or soils" Operating Agreement, Section 2.5. The Operating Agreement defined "approvals" as "(i) the City of Newark approvals which may be required for the inclusion of the Facility . . . into the Essex County Solid Waste Plan, if such inclusion is required; or (ii) an opinion letter from the Surface Transportation Board (STB) stating that state and/or local environmental, health and safety approvals which may be required for the inclusion of the Facility into the Essex County Solid Waste Plan are pre-empted by federal law, that all actions necessary to realize such federal law pre-emption have occurred and the Company . . . is defined as a "railroad" under the jurisdiction of the STB; . . ." *Id.*, at Article I, Section 1.1 (a).

The Operational License Agreement entered into by Hi Tech with the Delaware and Hudson Railway Company, d/b/a Canadian Pacific Railway, provides that "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." A separate "Transportation

Agreement” between the same two parties provided that CP would provide and Hi Tech would utilize “rail transport for the movement of Waste Products between Oak Island and disposal sites on or near the Railroad’s network or to points of interchange with other rail carriers.” Transportation Agreement, section 1. Section 8 of the Transportation Agreement provided that Hi Tech would provide its own rail cars “dedicated to the movement of HTT traffic.” The Transportation Agreement also provided in Section 17 that “[T]he parties acknowledge and agree that nothing in this Agreement shall be construed as creating an employment or agency relationship between HTT and the Railroad. Neither party may hold out or represent to any third party that there exists any agency or employment relationship with the other” Hi Tech also bound itself to obtain “any and all necessary permits or licenses for the transportation, transfer, delivery, treatment, unloading, storage or disposal of the Waste Products.” *Id.* at section 18.

Clearly, in its Operating Agreement, Hi Tech recognized the possibility that it might have to obtain certain permits and approvals, but at the same time it recognized that its operations might fall within the confines of the definition of “railroad” in ICCTA and thus be exempt from the application of at least some aspects of state and local regulation. Nothing in the agreements entered into with CPR negates the possibility of such exemption, if the company does indeed meet the definition and possess the qualifications necessary to gain the protection afforded by preemption from at least some state and local laws.

Based upon the positions expressed by the parties in their briefs and the wording of the ICCTA’s “General Jurisdiction” provision, 49 U.S.C. §10501(b), there appear to be several factors that are viewed as crucial in determining whether preemption applies under the facts of this case. The first of these is the question of whether Hi Tech is engaged in “transportation by rail carrier.” This is the terminology employed by §10501(b) to define the scope of its jurisdiction. Unless Hi Tech’s operations at the Oak Island Rail Yard constitute some activity embraced within the definition of “transportation by rail carrier,” those operations are not within the scope of STB’s jurisdiction and federal preemption does not apply.

A “rail carrier” is defined in 49 U.S.C. 10102(5) as “a person providing *common carrier railroad transportation* for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation.” (Emphasis supplied.) A “Railroad” includes “a switch, spur, track, terminal, terminal facility, and a freight

depot, yard, and ground, used or necessary for transportation.” 49 U.S.C. 10102(6)(C). “Transportation” includes “(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, *property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use*; and (B) *services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.*” 49 U.S.C. 10102(9). (emphasis supplied).

Of course, a possibly significant factor in applying these definitions in this case is that Hi Tech is not readily understood at first glance to be a railroad, as the CPR most assuredly is. Hi Tech is a “third-party,” as opposed to a railroad as traditionally understood, or a governmental unit seeking to impose environmental permitting and certificating requirements. However, that a third-party operator is involved is not necessarily determinative of the preemption issue. As the Eleventh Circuit said in a significant footnote, number 9, in *Florida East Coast*, 266 F.3d 1324 at 1337,

In emphasizing that the scope of the pre-emption provision is limited to the direct regulation of rail transportation, we do not mean to suggest that only regulations applied against railroads are pre-empted by the ICCTA. Certain local regulations applied against a third-party may be so intertwined with the provision of rail transportation services to the public so as to frustrate the objectives of federal railroad regulation. Likewise, some regulations applied directly to railroads may not necessarily be pre-empted. See *N.Y. Susquehanna and W. Ry. Corp.*, STB Fin. Docket No. 33466, 1999 WL 715272, at *4-5 & n. 7 (Sept. 9, 1999) [Riverdale] (suggesting that environmental regulation on dumping of waste, as applied to railroads, would not be pre-empted) (quoting *Cities of Auburn and Kent, Wash.--Petition for Declaratory Order--Burlington N. R.R. Co.--Stampede Pass Line*, STB Fin. Docket No. 33200, 1997 WL 362017, at *6 (July 2, 1997), *aff'd*, *City of Auburn*, 154 F.3d 1025).

The subject of preemption as it may or may not apply to the activities of so called, “third party” entities, such as Hi Tech may be considered herein, does not appear to have as yet received significant attention from the STB or the courts. However, *Florida East Coast* does address the issue. There, the railway company sought a declaratory judgment that the city could

not apply its zoning and licensing ordinances against Rinker Materials Corporation (“Rinker”), a lessee of property owned by the railroad, due to preemption under the ICCTA. The city counterclaimed. The District Court held that preemption did not apply. The Eleventh Circuit described the pertinent facts thusly: FEC owned property in West Palm Beach. The area was zoned as a multi-family, high density residential district. The railroad had conducted various intermodal operations at the site, known as the 15th Street yard, for several years, but had ceased those operations in 1999, because of economic concerns. At the time that it changed its operations at the 15th Street yard, Rinker was its largest customer. Rinker supplied building material, including “aggregate,” the primary feedstock for cement. The aggregate was quarried in Miami-Dade County and for years Rinker had engaged FEC to transport the aggregate by rail to Rinker’s plants throughout Florida, including a plant located on 7th Street in West Palm Beach. In 1999, the companies negotiated a lease agreement and a trackage agreement that provided Rinker with a lease on twenty-one acres of the 15th Street yard. FEC would no longer transport aggregate from Miami-Dade to plants throughout the state, but would instead do so only to the 15th Street yard. This operation started in January 2000. The aggregate was brought into the leased portion of the yard and at that point, “FEC’s involvement ended.” *Florida East Coast*, 266 F.3d 1324, 1326-27. Rinker operated its aggregate distribution business on the property leased from FEC. Signs on the property identified the operation initially as “CSR Rinker—West Palm Beach—Aggregate Distribution, and later as “FEC Distribution Terminal.” Rinker hired a company to unload the aggregate and itself provided some equipment necessary for aggregate distribution. Its employees loaded trucks owned or hired by Rinker and dispatched them to other Rinker plants or to external customers. It performed all other tasks related to the operation of the site, including paying expenses for electricity, landscape maintenance and telephone service.

The Circuit Court first determined that the application of zoning ordinances of general applicability against a private entity leasing property from a railroad “for non-rail transportation purposes, are not sufficiently linked to rules governing the operation of the railroad so as to constitute laws ‘with respect to regulation of rail transportation.’ ” *Id.* at 1331. Of course, as the Court noted, the STB has ruled that the attempt by a municipality to restrict a *rail carrier’s* construction of an automobile unloading facility because of environmental concerns was preempted, because “state and local permitting and preclearance requirements . . . are preempted because by their nature they unduly interfere with interstate commerce by giving the local body the ability to deny *the carrier* the right to construct facilities or conduct operations.” *Florida*

East Coast, supra. at 1332, fn.5, quoting *Joint Petition for Declaratory Order—Boston and Maine Corp. and Town of Ayer, Mass.*, STB Finance Docket No. 33971, 2001 WL 458685 (STB Apr. 30, 2001).

The Court then addressed the fact that the definition of “transportation” in the ICCTA included “facility [ies] . . . related to the movement of . . . property . . . by rail, regardless of ownership or an agreement concerning same.” 49 U.S.C. § 10102(9)(A). FEC claimed that for preemption analysis it mattered not whether the activities taking place at the 15th Street yard were carried out by FEC or some other entity.

As a preliminary matter, we note that the statute ignores “ownership or agreement concerning use” solely with respect to any “facility, instrumentality, or equipment of any kind related to the movement of . . . property.” *Id.* In contrast, the statute imposes no such limitation on “services related to [the movement of property].” § 10102(9)(B) (emphasis added). Therefore, to the extent that the language relied upon by FEC prevents us from interpreting the scope of the pre-emption provision based on whether FEC or Rinker controls the property at the 15th Street yard, the statutory definition of “transportation” does not prohibit our relying upon such a distinction when evaluating the “services” performed at the property.

FN6. The full definition of “transportation” under the ICCTA is as follows:

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property....

49 U.S.C. § 10102(9) (1994 & Supp.1998).

Our review of the record indicates that we are, indeed, evaluating “services” performed at the property.

When the aggregate reached the 15th Street yard, it was unloaded, stockpiled on the ground, organized by type and grade, and reloaded onto trucks owned or hired by Rinker. Rinker employees then weighed and dispatched the trucks to various destinations. These activities fall under the "services" provision of the statutory definition of "transportation," as Rinker's activities involved the "receipt, ... storage, handling, and interchange of ... property...." 49 U.S.C. § 10102(9). Thus, the statutory language indicates that ownership or control of the property is a factor that we may consider in determining whether Rinker's activities are "rail transportation," and in ultimately deciding whether federal law pre-empts the City's zoning regulations in this case.

In addition to the statutory language, an analysis of the phrase "regardless of ownership or an agreement concerning use" in its historical context also supports the conclusion that the provision cannot bear the broad interpretation urged by FEC. The phrase originated in language found in the Hepburn Act of 1906, which amended significantly the Interstate Commerce Act of 1887 ("ICA"). The Hepburn Act amended the definition of transportation to "include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, *irrespective of ownership or of any contract, express or implied, for the use thereof*" Ch. 3591, § 1, 34 Stat. 584 (1906) (emphasis added). This language was not amended until 1978, when Congress reworded the definition to include such facilities related to the movement of property, "regardless of ownership or an agreement concerning use." Ch. 101, 92 Stat. 1337, 1339 (1978). As the 1978 legislative history indicates, however, these changes were adopted for "clarity and consistency," H.R. Rep. 95-1395, at 21, *reprinted in* 1978 U.S.C.C.A.N. 3009, 3030, and therefore, did not alter the meaning of the original phrase. Congress again ratified this understanding when adopting the same definition of transportation in the ICCTA. *See* ICCTA, Pub.L. No. 104-88, 109 Stat. 803, 806 (1995). We thus consider the language and history of the provision adopted by Congress in the 1906 Hepburn Act to ascertain Congressional intent behind the scope of the phrase "regardless of ownership or agreement concerning use." *See Lorillard*, 533 U.S. at ---, 121 S.Ct. at 2415 (majority opinion) ("We are aided in our interpretation by considering the predecessor pre-emption provision and the circumstances in which the current language was adopted.").

The "evil of discrimination was the principal thing aimed at" in the passage of the Interstate Commerce Act. *Louisville & N.R. Co. v. United States*, 282 U.S. 740, 749, 51 S.Ct. 297, 75 L.Ed. 672 (1931) (citations omitted). See also *George N. Pierce Co. v. Wells, Fargo & Co.*, 236 U.S. 278, 284-85, 35 S.Ct. 351, 59 L.Ed. 576 (1915); *ICC v. Baltimore & O.R. Co.*, 145 U.S. 263, 275-77, 12 S.Ct. 844, 36 L.Ed. 699 (1892). In particular, Congress sought to eliminate the preferential rates given by railroad companies to certain shippers by declaring such discrimination unlawful and requiring railroads to publish their tariffs. ICA, Ch. 104, § § 2 & 6, 24 Stat. 379, 379-82 (1887). The publication of tariffs prohibited railroads from the blatantly discriminatory practice of charging different rates to two similarly situated shippers through "secret agreements" favoring certain customers. Clyde B. Atchison, *The Evolution of the Interstate Commerce Act: 1887-1937*, 5 *Geo. Wash. L.Rev.* 289, 313-14 (1937). In 1903, the Elkins Act provided the ICC with enhanced powers to promote compliance with the Interstate Commerce Act's anti-discrimination provisions and to impose greater penalties for behaviors facilitating the unequal treatment of shippers. See Elkins Act, Ch. 708, § § 1- 3, 32 Stat. 847, 847-49. See also Atchison, *supra*, at 324-25 & n. 95.

Notwithstanding these initial attempts to ensure equal access to railroad facilities for all shippers, discrimination persisted in the railroad industry primarily because of a continuing lack of transparency in rate formulation. On the one hand, a private car company [FN7] could charge a shipper unlimited rates for the use of a private vehicle (such as a refrigeration car), and the shipper would have no recourse against such unregulated and unpredictable charges, as the private car line was not operated by the railroad and thereby not subject to provisions of the Interstate Commerce Act. On the other hand, in lieu of their earlier facially- discriminatory pricing policies, certain railroad companies began offering "discounts" on tariffs in exchange for the use of private cars, individual railroad switches, and other rail equipment owned by economically powerful shippers or private car companies. Such discounts were in excess of the true market value of the equipment temporarily used by the railroad. By thus "leasing" their equipment to the railroads or smaller shippers at inordinate rates that were not subject to public notice, these groups often received transportation services at prices below the levels of the published tariffs. Such favoritism resurrected the discriminatory treatment of smaller shippers. See generally 2 I.L. Sharfman, *The*

Interstate Commerce Commission: A Study in Administrative Law and Procedure 120-23 (1931); 1 *The Economic Regulation of Business and Industry: A Legislative History of U.S. Regulatory Agencies* 721- 27 (Bernard Schwartz, ed.1973) [hereinafter *Economic Regulation*] (statement of Rep. Esch). The situation regarding this discrimination was summed up thus by one contemporaneous commentator: "The shippers were beyond the Commission's control; the private-car lines, as such, were not embraced within the Commission's jurisdiction; and there was serious question as to whether the special services rendered in connection with the use of private cars were subject to its regulation." *Sharfman, supra*, at 122.

FN7. Private car lines did not transport passengers or property along railroad routes. They were companies, separate from rail carriers, that owned certain transportation equipment (e.g., different types of railroad cars) and, like some of the larger shippers, rented that equipment to shippers and railroad companies.

Legislators referred to these continuing evils of discrimination throughout the hearings and debates as the basis for expanding the definition of "transportation." See, e.g., 2 *Economic Regulation*, at 897 (statement of Rep. La Follette); 40 Cong. Rec. 8343 (1906) (statement of Rep. Townsend); 40 Cong. Rec. 6438-40 (1906) (statements of Sens. Tillman and Lodge); 40 Cong. Rec. 6374-77 (1906) (statements of Sens. Dolliver, McCumber and Kittredge). That such a view was commonly held among Members of Congress is evidenced by its explication in the committee reports of each chamber. See 2 *Economic Regulation*, at 820, 822 (Report of Sen. Tillman) [FN8]; 1 *Economic Regulation*, at 618, 619-20 (House Report).

FN8. Although the Report of Senator Tillman cited herein is not technically a committee report of the Senate, Professor Schwartz explains that the Senate Commerce Committee could not produce a single report because the Senators in favor of the bill (i.e., the majority) could not agree on proposed amendments to the House bill and therefore could not produce a committee

report. *See* 1 Economic Regulation, at 610. Only Senator Tillman submitted a report, and he became the floor leader for the bill. *See id.* Thus, the Tillman Report "is the nearest thing to a Senate committee report available...." *Id.* The Tillman Report is particularly reflective of Senate views with regard to the issue of defining "transportation," for the Senate eventually retained the House amended definition, which became law. *Compare* 1 Economic Regulation, at 723 (statement of Rep. Esch, quoting proposed definition of "transportation" in House bill) *with* Hepburn Act, Ch. 3591, § 1, 34 Stat. 584 (definition of "transportation").

The Interstate Commerce Commission (ICC), as the agency responsible for oversight of the railroad industry pursuant to the Interstate Commerce Act, was well aware of the discrimination perpetrated by backdoor dealings between railroad companies and large shippers or private car lines. *See* Sharfman, *supra*, at 122-23 (citing ICC Annual reports of 1889, 1893, 1903, and 1904). When proposing to Congress the legislation that would become the Hepburn Act, and particularly the expanded statutory definition of "transportation," the Interstate Commerce Commission noted the following:

It will be seen that the changes proposed in the first section [of the Interstate Commerce Act] are designated (a) to somewhat increase the jurisdiction of the law as to the carriers subject to its provisions and (b) to bring within the scope of the law certain charges and practices which are not now subject to regulation, or respecting which there is dispute as to the power of the Commission.... The second purpose is sought to be accomplished by enlarging the definition of the term "transportation," so as to include the charges for various services, such as refrigeration and the like, which are now claimed to be beyond our authority.... [W]e do recommend that these [private car] charges should be put on the same basis as all other freight charges. They should be published and maintained the same as the

transportation charge, and be subject to the same supervision and control.... In brief, the proposed measure amends certain sections of the act to regulate commerce and is confined to such recommendations as are deemed necessary to effect its intended purpose, and thereby furnish adequate protection against excessive and discriminating charges.

United States v. Pa. R.R. Co., 242 U.S. 208, 223-25, 37 S.Ct. 95, 61 L.Ed. 251 (1916) (quoting ICC's proposed bill and explanations before Senate Commerce Committee). The revised definition of "transportation" adopted by Congress in the Hepburn Act of 1906, including the language "irrespective of ownership or of any contract, express or implied, for the use thereof," was the exact language proposed by the ICC to provide it with the powers described above. *See id.* at 223, 37 S.Ct. 95.

The revised definition of "transportation" successfully addressed the hidden charges imposed on shippers by private car lines and larger shippers, thus furthering the original goal of the Interstate Commerce Act to eliminate discrimination in the railroad services provided to shippers. As described by one commentator,

The amended statute ... defined "transportation" as to embrace cars, vehicles, and all other instrumentalities of shipment or carriage, irrespective of ownership or contract, and all services rendered in connection with the property transported--thereby endowing the [ICC] with regulatory power over private cars and incidental services.... It [was] the instrumentalities and services of rail carriage which [had] been brought under the [ICC's] full sway; and it [was] through the control of these instrumentalities and services that the use of private cars and the operation of private-car lines [were] encompassed by the [ICC's] jurisdiction. *The [ICC's] powers spring from the carriers' utilization of privately-owned equipment.*

Sharfman, *supra*, at 124, 126 (emphasis added). That the addition of the phrase regarding ownership and contractual arrangements to the definition of "transportation" was intended to cover discrimination also seems to be the understanding of the ICC in the years shortly after the Hepburn Act went into effect.

Under the law as construed by the courts, car lines and others engaged in leasing cars to shippers are not common carriers and thus do not come under direct control by the [ICC]. When a car, regardless of ownership, is being moved in interstate commerce by a common carrier subject to the act, there is no doubt of our power to control the carrier's operation of the car *so that there shall result no undue preference to any shipper.*

In the Matter of Private Cars, 50 I.C.C. 652, 677 (1918) (emphasis added). Thus, even after the definition of "transportation" had been amended under the Hepburn Act to include equipment not owned by the railroads, the ICC recognized that its jurisdiction, while expanded, was still limited to those activities that served the railroads in fulfilling their tasks as common carriers, or that affected the general public through concerns of possible discrimination. *See also Growers Marketing Co. v. Pere Marquette Ry.*, 248 I.C.C. 215, 226-27 (1941); *In the Matter of Contracts of Express Companies for Free Transportation of Their Men and Material Over Railroads*, 16 I.C.C. 246, 250-51 (1909).

Given this statutory history, we reject FEC's reading of the phrase "regardless of ownership or agreement concerning use" found in the ICCTA's definition of "transportation." Congress employed this language specifically to grant the ICC jurisdiction over those facilities that, while not owned by the railroad companies, were nevertheless used in interstate commerce for the benefit of either the shipping public or the railroad companies themselves. Furthermore, even where the railroads owned the property in question, Congress explicitly intended that the leasing cost of equipment that constitutes "transportation" would be incorporated into the railroads' published tariffs so as to protect the public from the invidious discrimination characteristic of the era before the Hepburn Act. In this regard, the Supreme Court consistently has recognized the focus of the ICC's jurisdiction to be the protection of the general public rather than individual private entities. *See, e.g., R.R. Ret. Bd. v. Duquesne Warehouse Co.*, 326 U.S. 446, 453-54, 66 S.Ct. 238, 90 L.Ed. 192 (1946); *Merchants' Warehouse Co. v. United States*, 283 U.S. 501, 507-11, 51 S.Ct. 505, 75 L.Ed. 1227 (1931); *United States v. Union Stock Yard & Transit Co.*, 226 U.S. 286, 304-06, 33 S.Ct. 83, 57 L.Ed. 226 (1912).

In this case, Rinker's use of the property at the 15th Street yard and the activities there performed by Rinker serve no public function and provide no valuable service to FEC; rather, the arrangement between FEC and Rinker merely facilitates Rinker's operation of a private distribution facility on FEC-owned premises. Furthermore, record evidence, such as Rinker's being the sole FEC customer to use the 15th Street yard, Rinker's taking responsibility for its utility expenses on the property, and a sign on the property reading "CSR Rinker--West Palm Beach--Aggregate Distribution," indicates that Rinker's operation served a purely private function. As stated by the district court, "Rinker effectively ran a Rinker operation on FEC property." *110 F.Supp.2d* at 1371. The factual findings supporting the district court's conclusion are not clearly erroneous. We also find that the district court properly applied the law to these facts in concluding that Rinker's activities at the 15th Street yard were not "rail transportation." Contrary to FEC's suggestion, therefore, the ICCTA's pre-emption of state regulation of rail "transportation" does not preclude a determination that certain actions taken by West Palm Beach, which might or might not be pre-empted if taken against FEC, do not violate the Supremacy Clause when applied against Rinker in its operations on FEC property. [FN9]

The Eleventh Circuit's analysis of Rinker's status *vis a vis* preemption must now be applied to the somewhat different facts in this case. Rinker's operation at the 15th Street yard can most easily be understood as that of an end customer of FEC. It sent its aggregate from Miami-Dade quarries over FEC's rails to its plant in the yard. FEC's involvement ended when the cars reached the leased property. The cars were simply unloaded and from that point, all of Rinker's operation at the site was no different than that of any other end customer of the railroad. FEC delivered the aggregate to its customer, which then went about its business distributing to its own plants and its own customers. As the Court seems to have concluded, the activities at the yard were not in any sense an integral part of the railroad's operations. Instead, they simply "facilitated Rinker's operation of its own private distribution facility." Indeed, it might well be that, given the facts in *FEC*, the courts could have simply held that Rinker's operation at 15th Street was clearly not a facility or a "service" related to the movement of property any more than any end customer of a railroad is, regardless of location in or outside railroad-owned property, and that, as such, it could not qualify as "transportation" and thus Rinker could not qualify as a

“rail carrier,” even given the expanded meaning of “transportation” in the Act. Such a determination might have precluded the necessity of the Circuit Court’s “ownership” analysis.

In the present case, Hi Tech’s solid waste transfer station in the Oak Island Rail Yard, while assuredly meant to assist Hi Tech in a profitable private enterprise, seems to be located in such a place as to readily effectuate the transfer of the solid waste materials from multiple haulers to the railroad through the conduit of the transfer station. It seems apparent that some method of transporting the waste to the railroad and then transferring it from trucks to rail cars is necessary if the railroad is to obtain this business, for if none were in existence, the railroad would be frustrated in its ability to ship this sort of material and thereby compete in the marketplace with other modes of transportation, most likely motor carriers, causing a possible impediment to the very competition and revived economic activity that the deregulation under the ICCTA was meant to advance. *Ridgefield Park, supra.* at 318 *N.J. Super.* 398-400. While clearly Hi Tech was established with the intention of benefiting financially from the activities it carries out in the yard, and it pays CPR use and access fees to operate on its property, if CPR owned the transfer station outright it seems apparent that preemption would apply, at least as far as to prohibit the State from requiring permits and certificates of public necessity, but certainly not to the extent of prohibiting all application of environmental and health laws. *Stampede Pass, supra.* Whereas Rinker’s distribution facility was located at the end destination of the rail traffic, Hi Tech’s is located at the very starting point for the railroad’s transportation of C&D waste to points located in other states. If, as the Eleventh Circuit determined, FEC merely facilitated the operation of Rinker’s private distribution facility, here it is equally true that Hi Tech’s operation directly facilitates CPR’s transportation of materials brought to the railroad for shipment. It is unclear what other purpose a transfer station at this location could serve. However, lest there be any doubt, if the facility located on leased railroad property included operations in which hauled-in C&D waste was transferred not to railroad cars but instead to other motor carrier haulers for transport to landfills or other disposal sites, ICCTA would offer that aspect of the operation no shelter from the full range of state and local regulation, including no doubt permit and certification requirements. However, on the record here, in essence the Hi Tech operation is a transloading operation for the railroad, where the transfer of C&D waste from haulers to the railroad’s rolling stock is accomplished.

In *Riverdale, supra.*, the STB hinted at the importance of the distinction between a “manufacturing” facility and a “transloading operation.” It found that the record in that case was insufficient for it to determine what the NYSW’s corn processing plant in Riverdale was. It could not therefore decide whether it was a “manufacturing activit[y] and facilit[y] not integrally related to the provision of interstate rail service” (thus a facility akin to Rinker’s 15th Street facility) and thus not subject to our jurisdiction or subject to federal preemption,” or “some sort of transloading operation (for the transfer of corn syrup, for example) that is related to transportation services,” (akin to a transloading or transfer operation, perhaps such as the facility that Hi Tech operates). *Riverdale*, at 12. While of course in *Riverdale* the NYSW was the owner of the corn processing plant and here the CPR does not own the transfer station, even the Eleventh Circuit opinion in *FEC, supra.* appears to recognize that, while it found that the “ownership” criteria was eliminated in 49 U.S.C. 10102(9)(A), but not for the “services related to” the “movement of passengers and property” addressed in (9)(B), it nevertheless understood that the ICC had understood its jurisdiction to extend to “those activities that served the railroads in fulfilling their tasks as common carriers or that affected the general public through concerns of possible discrimination.” (emphasis on the disjunctive added). *FEC, supra.* at 1336. That transfer stations or transloading facilities are activities that are “related to transportation services,” *Riverdale, supra.* at 12, has been shown in such cases as *Riverdale* (although there of course only in a hypothetical context), and *Norfolk Southern Ry. V. City of Austell*, 1997 1113647 (N.D. Ga. 1997) (intermodal facility); See also *Boston and Maine Corporation and Town of Ayer, supra.* (facility for unloading automobiles from railroad cars, temporary storage and transfer to motor carriers).

I **FIND** that the transfer station located within the rail yard does serve the railroad in fulfilling its task as a common carrier. Its activities in receiving truckloads of C&D waste products and effectuating their transfer into rail cars for transport by CPR constitute an integral part and indeed a necessary “last step” vital to the ability of the railroad to effectuate the movement of the material over the interstate rail system. Thus, while the “services” definition at 49 U.S.C. 10102(9)(B) may indeed not include the provision found in subsection (A) removing “ownership” as a consideration, where the “service” indeed is “related to that movement,” and serves the railroad “in fulfilling [its] tasks as [a] common carrier,” thereby enhancing the CPR’s ability to compete in interstate commerce, federal preemption would clearly apply to such a service conducted by the railroad itself and there appears to be no reason, or any restriction, that

would prevent preemption from also applying to a third-party whose facility provides that “service” as an aide to the railroad’s rail operations. As “transportation” is defined to include the “services” falling within subsection (9)(B), and a “rail carrier” includes a person providing such “transportation” by common carrier, I **CONCLUDE** that Hi Tech’s facility meets the definitions that could bring it under the shelter that federal preemption creates from at least such state and local laws as require permits. Nevertheless, there is still one more issue that must be considered before Hi Tech is clear of such requirements. That issue arises from the nature of the material that Hi Tech deals in, solid waste products. For, as the case law recognizes, the management of “garbage” has always been understood to be a local matter, a concern of the states, and an area left to local control. As the Ninth Circuit Court of Appeals put it in *AGG Enterprises v. Washington County*, 281 F.3d 1324 (9th Cir. 2002),

Congress has recognized that waste hauling is a traditional state and local function subject to state regulation. See 42 U.S.C. § 6901(a)(4) (stating that “collection and disposal of solid waste should continue to be primarily the function of State, Regional and local agencies”). Our precedent has recognized the strong local interest in regulating garbage collection. . . One could hardly imagine an area of regulation that has been considered to be more intrinsically local in nature than collection of garbage and refuse, upon which may rest the health, safety, and aesthetic well-being of the community. . . The historic responsibility of local governments to ensure safe and comprehensive garbage collection posts a strong caution against the possibility that Congress lightly would preempt local regulation in this field. *Id.* at 1328. (Citations omitted).

The Attorney General cites *AGG*, arguing that “Hi Tech’s strained attempt to construe federal preemption of “transportation by rail carriers” in order to shield highly regulated activities such as solid waste collection and disposal that historically have been subject to state and local regulation” should not be given credence. Yet, while this case and others do support recognition of this historic and important role, to suggest that they completely eliminate any federal preemption regarding any aspect of the transportation of solid waste goes too far, just as the suggestion that a finding of federal preemption applying to some aspects of the operations of “rail carriers” forecloses the enforcement of any “non-discriminatory” state or local statutes, regulations or ordinances regarding such matters as construction, fire, safety, health and the

environment also goes too far. *Ridgefield Park*, *supra*. at 459. Indeed, the STB's decision that the operation over the roads of the haulers and collectors of the waste bound for Hi Tech by the HCIA under the Waste Management Plan was not preempted involves not only a careful application of the definitions governing such coverage, but also a recognition that indeed, collection and haulage waste is a serious concern of and legitimate subject of control for state and local government. The existence of federal preemption under the Supremacy Clause does not prevent the federal and state governments from working with mutual respect and in harmony to address mutual concerns. As the *Stampede Pass* case emphasizes, railroads and rail carriers can be punished for the violation of state and local environmental laws and made to comply with them, although there may at times be limitations on the exact manner in which such compliance can be effectuated. What the several cases that are reviewed herein establish, most notably from the perspective of New Jersey law *Ridgefield Park* and its discussion of the STB decision in *Riverdale*, is that a requirement that an entity meeting the relevant definitions under the ICCTA obtain a permit or a certificate of public necessity is barred by preemption. The DEP, and to the extent warranted, local authorities, can still address the environmental and health concerns at the Hi Tech site through other applicable statutes, regulations and ordinances. Indeed, they should no doubt do so aggressively. However as for requiring a permit or a Certificate of Public Convenience and Necessity, the law simply does not allow the state agency to enforce these provisions of law in this circumstance against this respondent.

For the reasons expressed, it is **ORDERED** that the Administrative Order is **DISMISSED**.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

OAL DKT. NO. ESW 05815-03

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, PO Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DATE

JEFF S. MASIN, ACTING CHIEF ALJ

E-mail Receipt of Initial Decision Confirmed by Department of Environmental Protection
on:

DATE

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

- Exhibit A Decision dated 11/19/02 by Surface Transportation Board in *Hi Tech Trans, LLC- Petition for Declaratory Order* (Dkt. No. 34192)
- Exhibit B Opinion and Order dated 4/1/03 by Faith S. Hochberg, U.S.D.J., in *Hi Tech Trans LLC v. Hudson Co. Improvement Auth, et al*, Civil Action No. 02-3781(D.N.J.)
- Exhibit C Order dated 6/30/03 by Faith S. Hochberg, U.S.D.J., in *Hi Tech Trans LLC v. Hudson Co. Improvement Auth, et al* Civil No. Civil Action No. 02-3781 (FSH)
- Exhibit D Order dated 6/16/03 by Faith S. Hochberg, U.S.D.J., in *Hi Tech Trans LLC v. Hudson Co. Improvement Auth, et al*, Civil No. 03-2751 (FSH)
- Exhibit E Order dated 6/20/03 by Faith S. Hochberg, U.S.D.J., in *Hi Tech Trans LLC v. Hudson Co. Improvement Auth, et al*, Civil No. 03-2751 (FSH)
- Exhibit F Order denying emergency motion for a stay, dated 6/18/03, in *Hi Tech Trans, LLC v. State of N.J., Dept. of Environmental Protection*, No. 03-2773
- Exhibit G Transportation Agreement dated 11/6/00
- Exhibit H Verified Statement of David C. Stoller, dated 6/16/03
- Exhibit I Verified Statement of Steven Lawrance dated 6/16/03

FOR THE RESPONDENT:

- Exhibit A Civil Action Verified Complaint & Jury Demand dated 6/6/03
- Exhibit B Letter from David R. Marsh to John A. Castner dated 3/6/02
- Exhibit C Operational License Agreement dated 11/6/00
- Exhibit D Letter from Vernon A. Williams to Ronald Klempner dated 5/3/00
- Exhibit E Letter from Vernon A. Williams to Ronald Klempner dated 10/19/00 and letter from Ronald Klempner to Vernon Williams dated 9/29/00
- Exhibit F Letter from Vernon A. Williams to Ronald Klempner dated 10/3/01
- Exhibit G Letter from Vernon A. Williams to Ronald Klempner dated 11/15/01
- Exhibit H Letter from John A. Castner dated 2/21/03 Re: Railroad Proposal Stakeholder Meeting with attached draft regulatory proposal
- Exhibit I Letter from Wolfgang Skacel to Hi Tech Trans, LLC, dated 5/28/03

Exhibit From Reply Brief dated 7/25/03:

Exhibit A Hi Tech Trans, LLC—Petition for Declaratory Order—Hudson Co., NJ, decided
6/27/03

FOR THE INTERVENORS:

Exhibit A Hi Tech's initial Operating Agreement dated 5/22/00

Exhibit B1 Operational License Agreement dated 11/6/00 between Hi Tech and the Delaware
and Hudson Railroad d/b/a Canadian Pacific Railroad

Exhibit B2 Transportation Agreement dated 11/6/00 between Hi Tech and the Delaware and
Hudson Railroad d/b/a Canadian Pacific Railroad

Exhibit C1 Hi Tech's initial petition seeking a declaratory order from the Surface
Transportation Board dated 4/2/02

Exhibit C2 Hi Tech's amended petition removing CP as a listed co-party, dated 5/2/02

Exhibit C3 Reply to amended petition for declaratory order by the Department of
Environmental Protection, dated 6/6/02

Exhibit C4 Reply to amended petition for declaratory order by Hudson Co. Improvement
Auth. and Essex Co. Utilities Auth., dated 6/5/02

Exhibit D Decision rendered by the Surface Transportation Board dated 11/19/02

Exhibit E1 Verified Complaint of Hi Tech's, Civil Action No. 02-3781 (FSH)

Exhibit E2 Notice of Motion for Amended Complaint of Hi Tech's dated 2/18/03

Exhibit F1 Order dated 4/1/03 denying Hi Tech's motion for leave to amend its complaint

Exhibit F2 Order dated 6/30/03 dismissing the remaining counts of Hi Tech's federal
complaint

Exhibit G Page 16 from transcript of deposition of David Stoller taken 3/25/03

Exhibit H1 Group of records relating to shipments of hazardous waste in 2000-2001

Exhibit H2 Two pages of transcript of deposition of Ronald Klemptner on 3/20/03

Exhibit I Letter from Benjamin Clarke to William M. Tuttle, Esq., dated 6/30/03 with
attachments

Exhibit J Photographs of Hi Tech's facility

CERTIFICATE OF SERVICE

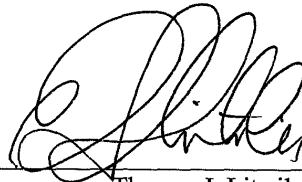
I hereby certify that on this 23rd day of August, 2003, a copy of the foregoing **Appeal of Hi Tech Trans, LLC Pursuant to 49 C.F.R. § 1011.2(a)(7)**, was served by overnight delivery upon:

Edward D. Greenberg, Esq.
Galland, Kharasch, Greenberg, Fellman & Swirsky, P.C.
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Washington, DC 20007-4492

Benjamin Clarke, Esq.
DeCotiis, Fitzpatrick, Cole & Wisler, LLP
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Teaneck, NJ 07666

and by first class mail, postage prepaid, upon:

Carolyn V. Wolski, Esq.
Leonard, Street & Deinard, P.A.
150 South Fifth Street
Suite 2300
Minneapolis, MN 55402

A handwritten signature in black ink, appearing to read 'T. Litwiler', is written over a horizontal line.

Thomas J. Litwiler