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Via UPS

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June 5, 2002

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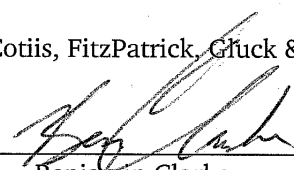
Re: Petition for a Declaratory Order by Hi-Tech Trans, LLC
Finance Docket No. FD34192

Dear Mr. Williams:

On behalf of the Hudson County Improvement Authority ("HCIA") and the Essex County Utilities Authority ("ECUA"), enclosed please find an original and eleven copies of a reply to amended petition for declaratory order in the above-referenced matter. Kindly return a copy marked "received" for our files in the envelope provided. Thank you.

Very truly yours,

DeCotiis, FitzPatrick, Gluck & Cole, LLP

By: 

Benjamin Clarke

Enclosures

**LAW OFFICES
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June 5, 2002

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205556

BEFORE THE
SURFACE TRANSPORTATION BOARD
FINANCE DOCKET 34192



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

REPLY ON BEHALF OF HUDSON COUNTY IMPROVEMENT
AUTHORITY AND ESSEX COUNTY UTILITIES AUTHORITY
TO AMENDED PETITION FOR DECLARATORY ORDER

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Attorneys for Hudson County Improvement Authority and
Essex County Utilities Authority

Dated: June 5, 2002

BEFORE THE
SURFACE TRANSPORTATION BOARD
FINANCE DOCKET 34192

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

REPLY ON BEHALF OF RESPONDENTS HUDSON COUNTY
IMPROVEMENT AUTHORITY AND ESSEX COUNTY
UTILITIES AUTHORITY TO AMENDED PETITION

Pursuant to 49 C.F.R. §§1104.13 and 1111.5, respondents Hudson County Improvement Authority and Essex County Utilities Authority hereby submit the following reply to the Amended Petition for a Declaratory Order filed on behalf of Hi-Tech Trans LLC ("Hi-Tech") in the above-captioned matter, and respectfully request the Surface Transportation Board ("STB" or "Board") to deny Hi-Tech's request for a declaratory order proceeding.

INTRODUCTION

Respondents Hudson County Improvement Authority ("HCIA") and Essex County Utilities Authority ("ECUA") are public agencies responsible under the laws of New Jersey for implementing the solid waste management plans of the County of Hudson and the County of Essex, respectively. See N.J. Stat. Ann. 13:1E-21(b)(1). HCIA and ECUA are in receipt of an amended petition for a declaratory order filed by Hi-Tech Trans, LLC, effective May 17, 2002. One of the principal amendments made by Hi-Tech to its original petition was to remove Canadian Pacific Railway as a co-petitioner.

For the reasons set forth hereafter, respondents respectfully submit that the Board lacks jurisdiction over the subject matter of Hi-Tech's petition.

STATEMENT OF FACTS

Hi-Tech alleges in its amended petition that it is a "company organized under the laws of the State of New Jersey which operates a facility on property of Delaware and Hudson Railway Company, Inc., d/b/a Canadian Pacific Railway ('CPR') in Newark, N.J." (Amended Petition at 1.) More specifically, Hi-Tech alleges that it

contracts for cargos to be shipped by rail, gathers those cargos by truck and then loads those cargos, all construction and demolition debris and contaminated soils, onto railway cars for transport in interstate commerce. [Id.; emphasis added.]

In common parlance, Hi-Tech operates a solid waste transfer station on property that it allegedly leases from CPR, and allegedly uses CPR's rail line to transport solid waste that is dumped and temporarily stored at the site to out-of-state landfills. That is the entire sum and substance of the relationship between Hi-Tech and CPR.

Based on that alleged relationship with CPR, Hi-Tech petitions the Board for an order declaring that it has "exclusive jurisdiction over [Hi-Tech's] activities and those of its customers." (Amended Petition at 1.) Hi-Tech does not identify the "customers" on whose behalf it purports to act, but they are presumably persons or entities with "construction and demolition debris and contaminated soils" needing disposal. They might include (for example) general contractors performing construction work, corporations undertaking construction projects, or independent truckers and haulers engaged in the transport and

disposal of solid waste. Hi-Tech makes no allegation that it has legal authority or license to represent or speak for any of its customers before the Board.

Hi-Tech's petition thus raises two separate issues: 1) whether the Board has exclusive jurisdiction over Hi-Tech's solid waste transfer station facility, and 2) whether the Board has exclusive jurisdiction over the activities of Hi-Tech's customers. The clear legal answer to both questions is no. Hi-Tech has mis-invoked the jurisdiction of the Board, and seeks to draw the Board into a field -- solid waste regulation -- that is well outside the Board's legal and historic province. Accordingly, Hi-Tech's petition should be dismissed.

ARGUMENT

POINT I

THE BOARD HAS NO JURISDICTION OVER HI-TECH'S UNIDENTIFIED CUSTOMERS AND HI-TECH HAS NO STANDING TO SEEK RELIEF ON THEIR BEHALF.

Hi-Tech asserts that the Board has exclusive jurisdiction over the activities of its customers because the customers allegedly "seek to utilize rail services" to dispose of solid waste. (Amended Petition at 1.) As is clear on a moment's reflection, this bare assertion does not suffice to give the Board jurisdiction over the waste disposal activities of Hi-Tech's customers -- activities that are subject to comprehensive regulation under state law. See generally, N.J. Stat. Ann. 13:1E-1 et seq. (Solid Waste Management Act). While the ICC Termination Act provides for federal preemption of state laws relating to transportation by rail carriers, see 49 U.S.C. §10501, the preemptive scope of the Act has never been construed to extend to, e.g., trucks engaged in the transport of solid waste over the

highways and roads of a State or locality, or to the generators of such solid waste. To state the notion is to reject it.

Hi-Tech does not cite and cannot cite any case, statute or regulation that gives waste generators or haulers a portable, fissionable federal exemption from state solid waste laws. The Board is surely familiar enough with the limits of its own powers to recognize that Hi-Tech's assertion of such a remarkable federal immunity lacks any foundation in law. In King County, WA, STB Finance Docket No. 32974, 1996 WL 545598 at *4 (I.C.C.) (Sept. 25, 1996), for instance, the Board noted, "The ICCTA does not usurp the right of state and local entities to impose public health and safety regulation on interstate railroads." Much less, then, does it preempt state and local laws regulating the handling of solid waste by non-rail entities. See Florida East Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324, 1336-37 (11th Cir. 2001) (lessee of a rail carrier engaged in an aggregate distribution business was not exempt from local regulation under ICC Termination Act because it was not in the railroad business but rather in the business of distributing its own product).

Hi-Tech's attempt to assert federal preemption on behalf of its customers should also be rejected for lack of standing. Hi-Tech's customers are independent actors, and have not appointed Hi-Tech to serve as their legal spokesperson or representative. Given the outlandishness of the position that Hi-Tech espouses on behalf of its unidentified customers, it seems unlikely that they would adopt that position as their own; certainly, CPR's insistence that it be removed from the petition supports that negative inference. See, e.g., Powers v. Ohio, 499 U.S. 400, 410 (1991) (under basic requirements of standing, a "litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the

legal rights or interests of third parties"); cf. Singleton v. Wulff, 428 U.S. 106, 113 (1976) (the prohibition against third-party standing is based on the principle that courts should not adjudicate third-party rights unnecessarily, and third-parties will typically be the best proponents of their own rights).

For both of these reasons, lack of jurisdiction and lack of standing, Hi-Tech's petition should be dismissed insofar as it purports to seek a declaratory order on behalf of Hi-Tech's customers.

POINT II

HI-TECH IS NOT A RAIL CARRIER, AND THE PRIVATE OPERATION OF A SOLID WASTE TRANSFER STATION DOES NOT CONSTITUTE "TRANSPORTATION BY A RAIL CARRIER."

The ICC Termination Act grants the Board exclusive jurisdiction over "transportation by rail carriers and their practices, routes, services, and facilities of such carriers." 49 U.S.C. §10501(b). Here, Hi-Tech does not contend, and cannot in good faith contend, that it is a "rail carrier," which is defined as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. §10102(5). Consequently, under a plain language reading of the Act, the Board does not have "exclusive jurisdiction" over Hi-Tech's activities.

Hi-Tech's assertion that the Board has exclusive jurisdiction over its operation of a solid waste transfer station also runs contrary to established case law. In People v. Conrail Corp., 613 N.E.2d 784 (Ill. App. Ct. 1993), the Illinois Court of Appeals addressed the question of whether the Interstate Commerce Act, formerly 49 U.S.C. §10101 et seq., preempted the Illinois Environmental Protection Act, which prohibited the siting of solid

waste transfer stations within 1,000 feet of residences. The court answered this question in the negative, and held that the State retained authority to regulate solid waste transfer stations. The court noted, "No provision of the Commerce Act exclusively grants jurisdiction over the transportation of waste from inception to disposal." 613 N.E.2d at 182. See also Florida East Coast Ry. Co., supra, 266 F.3d at 1336-39 (discussing history and purpose of ICC Termination Act, and concluding that it does not preempt state and local laws that have "incidental effects" on rail operations).

More generally and recently, the Board has recognized in its own decisions that the preemptive scope of §10501 is limited to railroad activities that are "integrally related to providing transportation services." Borough of Riverdale - Petition for Declaratory Order, STB Finance Docket No. 33466 (Sept. 9, 1999), at 9. In Riverdale, where a railroad proposed to construct a truck terminal and corn processing plant in a residential zone, the STB stated that, if the proposed project

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. [STB] jurisdiction, like that of the former ICC, is limited to those facilities that are part of a railroad's ability to provide transportation services[.] [*Id.*]

Similarly, in 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), the Board noted:

[T]here are areas with respect to railroad activity that are reasonably within the local authorities' jurisdiction under the Constitution. For example, even in cases where we approve a construction or abandonment project, a local law prohibiting a

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. We know of no court or agency ruling that such a requirement would constitute an unreasonable burden on, or interfere with, interstate commerce. Therefore, such requirements are not preempted. [*Id.* at p. 9-10 (emphasis added).]

See also In re Vermont Ry., 769 A.2d 648, 651-52 (Vt. 2001) (discussing legislative history of ICC Termination Act, and finding that the Act did not preempt local regulation of railroad's salt shed facility); Oklahoma Corp. Comm'n v. Burlington Northern Santa Fe Ry. Co., 24 P.3d 365 (Ok. Civ. App. 2000) (discussing legislative history of the ICC Termination Act, and finding no preemption of state's right to ensure safety of its citizens by directing railroad to repair or replace fence located along right of way).

As the above cases show, the regulation of solid waste has never been viewed to fall within the jurisdiction of the ICC or STB, and solid waste transfer stations have never been viewed to enjoy a federal exemption from state and local laws. In this regard, the Ninth Circuit recently rejected a preemption argument raised by a trash hauler under the Federal Aviation Administration Act ("FAAA") of 1994, 49 U.S.C. §14501(c), and stated:

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 "the 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 governmental interest in regulating garbage

collection. Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson, 48 F.3d 391, 398 (9th Cir. 1995). 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.

AGG Enterprises v. Washington County, 281 F.3d 1324, 1328 (9th Cir. 2002).

In AGG, the Court held that solid waste did not constitute "property" within the meaning of the FAAA. No reason exists to construe "property" differently under the ICC Termination Act. See 49 U.S.C. §10102(a) ("transportation" includes services related to the movement of "passengers and property.") See also Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc., 110 Cal. Repr.2d 708, 91 Cal. App. 4th 678, 690, 695 (Ct. App. 2001)(finding that it would be "inconceivable" that Congress intended to preempt local solid waste regulations; rejecting preemption defense asserted by haulers in violation of local regulations).

In New Jersey, with its high population density and small land mass, the collection, handling and disposal of solid waste are matters of "grave concern," and are "thoroughly affected with the public interest." See N.J. Stat. Ann. 13:1E-2 (describing solid waste matters as a local health, safety and welfare concern). In light of that strong public policy, the ICC Termination Act should not be interpreted to oust local bodies of their authority to adopt and enforce laws and regulations regarding the handling of solid waste. See Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (discussing the general presumption

against preemption of local police powers; that presumption, the Court noted, is “consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety”); see also New York Blue Cross v. Travelers Ins., 514 U.S. 645, 654 (1995) (exercise by local authority of historic police power is not to be “superseded by the Federal Act unless that was the clear and manifest purpose of Congress”). While it is conceivable that on some future occasion, the Board may have a reason or need to address the interaction between New Jersey’s Solid Waste Management Act and the ICC Termination Act, Hi-Tech’s apparent desire to operate a solid waste transfer station in disregard of state environmental laws and regulations provides no valid basis for the Board to address that issue now.

Hi-Tech’s attempted invocation of 49 U.S.C. § 11321(a), and the National Environmental Policy Act, 42 U.S.C. § 4331 et seq., and the Clean Air Act, 42 U.S.C. § 7506(d), see Amended Petition at 6 and 10-11, merely highlights the misdirected nature of its arguments. Section 11321, by its express terms, applies to rail carriers; Hi-Tech is not a rail carrier, but a private operator of a solid waste transfer station. With respect to NEPA and the Clean Air Act, the Board has no special expertise regarding the applicability of those Acts to the operation of private solid waste transfer stations. Thus, it would be a most improvident exercise of the Board’s discretion to open a proceeding at Hi-Tech’s request to address an asserted (and, in truth, non-existent) conflict between those Acts and New Jersey’s solid waste laws. If Hi-Tech believes such a conflict exists, it should be directed to proceed in a court of proper jurisdiction, and not in this administrative forum. See, Intercity Transportation Co. v. United States, 737 F.2d 103,109 (D.C. Cir. 1984)(affirming ICC

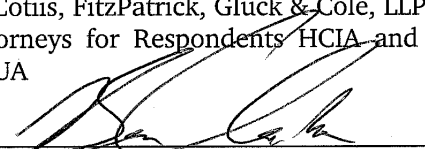
decision not to issue declaratory order where the agency reasonably concluded that initiation of a proceeding would represent "an imprudent and inefficient allocation of agency resources").

CONCLUSION

For the foregoing reasons, Hi-Tech's request for initiation of a declaratory order proceeding should be denied, and its petition should be dismissed.

Respectfully submitted,

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Attorneys for Respondents HCIA and
ECUA

By: 

Benjamin Clarke

Dated: June 5, 2002