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Vernon A. Williams, Secretary
Office of the Secretary
Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, D.C. 20423-0001

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

Dear Secretary Williams:

On behalf of respondents Hudson County Improvement Authority and the Essex County Utilities Authority, enclosed please find an original and eleven copies of respondents' reply to the petitions filed by Hi Tech and a supporting affidavit. Kindly return a copy marked "filed" in the envelope provided. Also enclosed is a CD-Rom that contains a copy of respondents' papers.

ENTERED
Office of Proceedings

JUL 07 2003

Part of
Public Record

c: Edward D. Greenberg, Esq.
James Martin, DAG
Thomas J. Litwiler, Esq.
Dante DiPirro, Esq.

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July 3, 2003

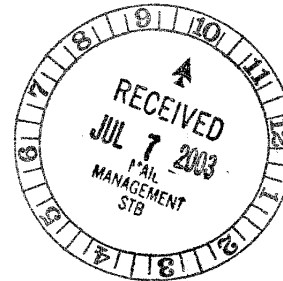
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♦ Also Admitted in NY
♦ Also Admitted in PA



Respectfully yours,

DeCotiis, FitzPatrick, Cole & Wisler, LLP

By: 
Victoria A. Flynn

—LAW OFFICES—
DeCOTIIS, FITZPATRICK,
COLE & WISLER, LLP

July 3, 2003

Page 2

Andrew Indeck, Esq.

BEFORE THE
SURFACE TRANSPORTATION BOARD

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

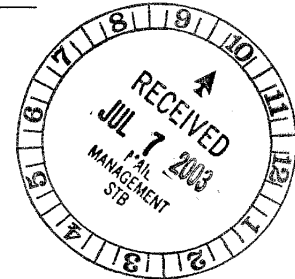
HI TECH TRANS, LLC – PETITION FOR DECLARATORY ORDER
HUDSON COUNTY, NEW JERSEY

ENTERED
Office of Proceedings

JUL 07 2003

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Public Record

AFFIDAVIT OF BENJAMIN CLARKE



STATE OF NEW JERSEY)
 : ss
COUNTY OF BERGEN)

BENJAMIN CLARKE, being duly sworn, hereby deposes and says:

1. I am a member of the law firm of DeCotiis, FitzPatrick, Cole & Wisler, LLP, attorneys for respondents Essex County Utilities Authority ("ECUA") and Hudson County Improvement Authority ("HCIA") in the above-captioned matter. I submit this affidavit to provide the Board with documentary materials relevant to the two petitions filed by Hi Tech Trans, LLC.

2. Attached hereto as Exhibit A are photographs taken this year of Hi Tech's "facility."

3. Attached hereto as group Exhibit B(1) – B(4) are four letters from Ronald Klempner of Hi Tech to Board Secretary Vernon Williams, dated April 24, 2000, September 29, 2000, September 10, 2001, and October 18, 2001, requesting informal opinions from the Secretary.

4. Attached hereto as group Exhibit C(1) – C(4) are four corresponding

informal opinion letters issued by Board Secretary Williams, dated May 3, 2000, October 19, 2000, October 3, 2001, and November 15, 2001. (Note, the handwritten interlineations are Hi Tech's.)

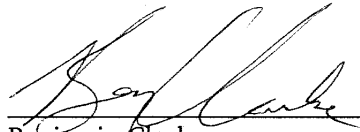
5. In the last-issued informal opinion letter of November 15, 2001 (Exhibit C(4), Board Secretary Williams advised Hi Tech as follows: "Based on the information you have provided it would seem that the movement of trucks operated by CDD haulers over public roads en route to the Facility is sufficiently separate from the rail activity at the Facility that it falls outside the definition [of "transportation by rail carriers"]. Therefore the Section 10501(b) preemption would not appear to apply to the truck movements."

6. Attached hereto as group Exhibit D(1) and D(2) are two form letters that Hi Tech sent to its customers, i.e. local solid waste truckers, dated August 12, 2002, and October 18, 2002. In the August 12 letter, Hi Tech advised its customers as follows:

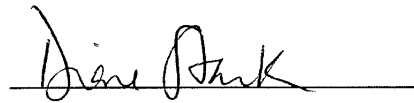
HI TECH TRANS IS LEGALLY OPERATING WITH THE
AUTHORITY OF THE UNITED STATES SURFACE
TRANSPORATION BOARD. UNDER THIS FEDERAL
EXEMPTION, WE AND YOU ARE ENTITLED TO FREE
ACCESS OF INTERSTATE COMMERCE AS AUTHORIZED
BY CONGRESS.

In the October 18 letter Hi Tech provided its customers with copies of the first three informal opinion letters that it had obtained from the Board secretary (i.e., the ones dated May 3, 2000, October 19, 2000, and October 3, 2001), but not the last one (i.e., the one dated November 15, 2001).

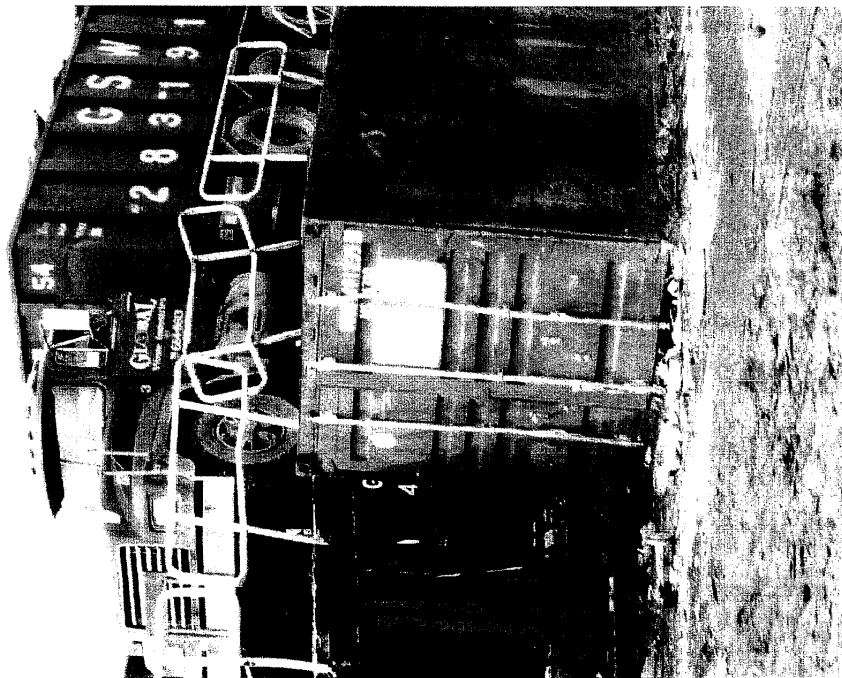
7. Both of the attached form letters to customers (Exhibit D) post-date, by nearly a year, the informal opinion letter of November 15, 2001 (Exhibit C(4)).

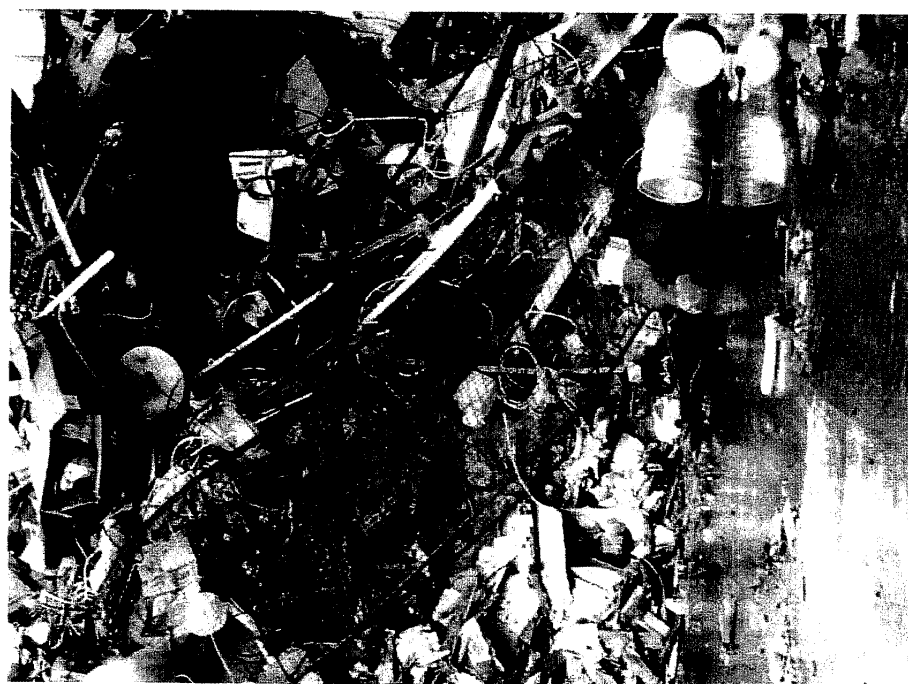

Benjamin Clarke

Sworn and subscribed to before
me this 2nd day of July, 2003.



DIANE STARK
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Oct. 6, 2007







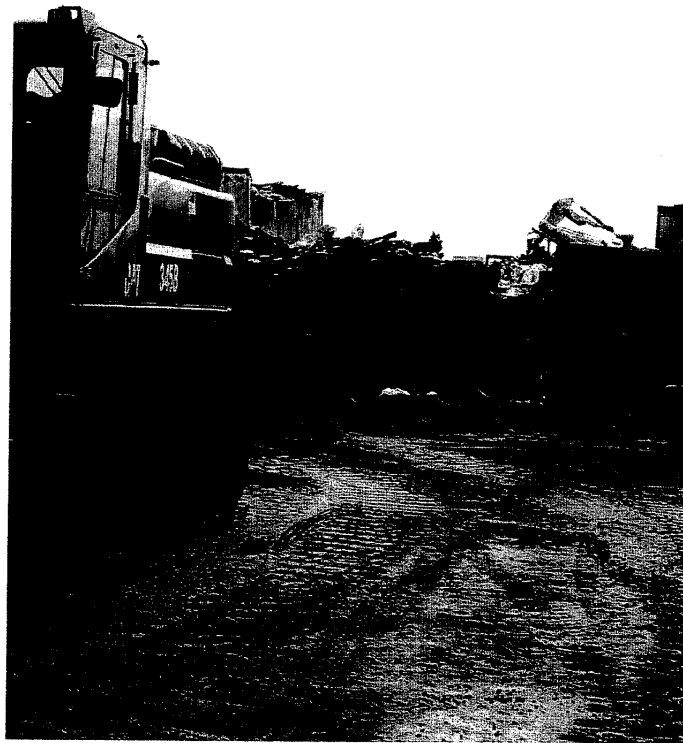












Exhibit B

EXHIBIT B(1)

HI TECH TRANS, LLC

843 Red Road, Teaneck 07666

(201) 692-0826

Fax (201) 287-0886

e-mail: ronklem@erols.com

April 24, 2000

Mr. Vernon Williams
Secretary of the Surface Transportation Board
Surface Transportation Board
Mercury Building
1925 K Street, NW
Washington, DC 20423-0001

Re: Transshipment Facility--STB Jurisdiction and Federal Pre-Emption

Dear Mr. Williams:

We request an opinion from your office on two questions regarding a proposed truck-to-rail transshipment facility within the Oak Island Rail Yard, Newark, NJ in light of recent decisions in Borough of Riverdale and Stampede Pass. Enclosed is two checks each in the amount of \$150.00 as the processing fee for these inquiries. If this request is deemed to be only for one inquiry, please return one of the checks. Because of the need to coordinate with City of Newark officials which we discuss at the end of this request, we would appreciate a response by May 5, 2000. Thank you for your prompt attention to this matter.

First, is the construction and operations of the proposed transshipment facility subject to Section 49 U.S.C. 10906?

Second, are state and local environmental and zoning permitting requirements pre-empted under the ICC Termination Act by the federal scheme of regulations affecting this transshipment facility?

Facts

Consolidated Railroad Corporation ("Conrail") is the owner of the Oak Island Rail Yard, Newark, NJ ("OIRY"). Canadian Pacific Railway's ("CP") wholly owned subsidiary, Delaware & Hudson Railway ("DHRR"), subleases land and trackage at the OIRY from Conrail (See Area Map as Attachment A). Conrail and DHRR are both Class A railroads registered under the jurisdiction of the United States Surface Transportation Board ("STB") (successor to the United States Interstate Commerce Commission). Conrail and DHRR historically and currently have used the OIRY for rail storage, transfer and transport, including the loading of containers and bulk materials from trucks to rail cars.

DHRR proposes to enter into a sublease and/or license agreement and transportation agreement with Hi Tech Trans, LLC ("HTT"), an affiliate of the American Marine Rail Group, whereby HTT will develop and operate a truck-to-rail transshipment facility for C&D and Soils at a portion of the

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OIRY (See Site Plan as Attachment B). HTT plans to file with the STB for status as a short-line railroad within the next 30 days.

The transshipment operations will be as follows:

- (1) trucks with trailers carrying C&D and Soils will drive into the OIRY and pass an existing truck scale operated by DHRR;
- (2) trucks will drive onto a moveable loading ramp ("Loading Ramp") located on a set of tracks ("Transfer Tracks") adjacent and parallel to a set of tracks ("Loading Tracks") on which empty gondola cars will be located;
- (3) the truck will tip its trailer up to a 45 degree angle to unload its materials directly into a hopper to be transferred by conveyor directly into the gondola car. Approximately 4 to 5 truck loads will fill each gondola car;
- (4) as gondola cars become filled, they will be covered and the Loading Ramp will move along the Transfer Tracks to the next empty gondola car along the Loading Tracks;
- (5) a mobile, rigid-ribbed canvass cover will span the Loading Ramp with one entrance for truck entry (see copy of rendering attached), which cover will prevent visual impacts from the operations and limit impacts from dust during the operations. The mobile cover will move along its own set of tracks, one on each side of the Transfer Tracks and Loading Tracks, as the Loading Ramp moves; and
- (6) DHRR will then transport the full gondola cars to licensed disposal sites as directed by HTT and replace them with a set of empty gondola cars.

There will be no structures built on the site. The loading ramp (Item 2, above), and the cover (Item 5 above) are the only equipment on the site, which will be portable and leased, and both will be mobile moving along their own sets of tracks (See Rendering Attachment C--Note: a color version of the Rendering is being sent via e-mail).

The only site work will be laying of rail for these mobile pieces of equipment and asphalt to limit dust from trucks visiting the site. Part of the area of the site where these activities are taking place currently has a track which will be rebuilt, and other parts of the area formerly had tracks which will now be restored, although not necessarily in the exact configuration as the previous tracks (See Valuation Map Attachment D). In addition, switches and connecting tracks will be installed to facilitate movement of rail cars around the site.

The total investment for the transshipment facility, including site work and equipment (but excluding rolling stock, which we will own or lease), will be approximately \$ 3 million.

Access to the site is along Interstate 95 (the NJ Turnpike); Interstate 78; and U.S. Route 1 & 9 (a major trucking route from New York City and Hudson County to Newark Airport and points South

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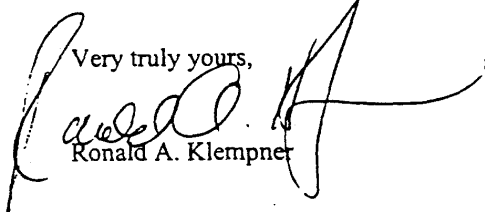
and West). All of these routes exit onto Delancy Street, Newark, NJ. The exit on Delancy Street is approximately 600 yards from the site. Delancy Street is a major truck route leading from the west to the heavy industrial/chemical/petroleum section of the Ironbound District of Newark, NJ. It is one of two major access roads to this District and the only one leading from the West.

Currently, these materials are transported long distances to Pennsylvania from New Jersey and New York City by diesel trucks. The area is a US EPA designated non-attainment area, particularly for several of the criteria pollutants associated with diesel truck emissions. The proposed HTT transshipment facility will divert these long distance diesel trucks to rail. HTT's business plan projects a volume of 302,000 tons per year for an average of 1,000 tons per day. At an average of 23 tons per truck, HTT will be able to prevent approximately 13,130 long haul diesel truck round-trips per year-- or an average of 43 1/2 long haul diesel truck round-trips per day. Similarly, HTT will receive on average approximately 43 1/2 trucks per day to the proposed transshipment facility.

HTT principals have met City of Newark officials who are favorably disposed towards the proposed facility because it will result in an overall reduction of diesel trucking, while avoiding other local impacts.

A sports and entertainment complex is planned as part of a major urban renewal and revitalization project for downtown Newark, which would require demolition of up to a dozen blocks in downtown Newark. In planning this project, Newark officials would like to maximize use of rail (and minimize use of truck) transport for the C&D generated at this urban renewal site, as well as from their other municipally generated activities. Consequently, we would appreciate a response as soon as possible so that the City of Newark can include rail transport of the C&D in their planning.

Very truly yours,


Ronald A. Klempner

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EXHIBIT B(2)

HI TECH TRANS, LLC

843 Red Road, Teaneck 07666

(201) 692-0826

Fax (201) 287-0886

e-mail:ronklem@erols.com

September 29, 2000

Mr. Vernon Williams
Secretary of the Surface Transportation Board
Surface Transportation Board
Mercury Building
1925 K Street, NW
Washington, DC 20423-0001

Re: Intermodal Transloading Facility--STB Jurisdiction and Federal Pre-Emption

Dear Mr. Williams:

We request an opinion from your office on two questions regarding a proposed truck-to-rail intermodal transloading facility (the "Facility") within the Oak Island Rail Yard, Newark, NJ in light of recent decisions in Borough of Riverdale and Stampede Pass. Enclosed is a check in the amount of \$950 as the processing fee for these inquiries. Because we desire to commence operations in October, 2000, we would appreciate a response by October 21, 2000. Thank you for your prompt attention to this matter.

First, is the operations of the proposed transloading Facility subject to Section 49 U.S.C. 10906?

Second, are New Jersey state permitting requirements set for in statute (P.L. 1983, c.392 [Title 13 of N.J.S.A. 13:1E-126 et. seq.]), and in regulations of the New Jersey Department of Environmental Protection (N.J.A.C. 7:26-3.6) pre-empted under the ICC Termination Act by the federal scheme of regulations affecting this facility, which allows this facility to commence operations without first obtaining approvals or permits from the State of New Jersey?

Facts

Consolidated Railroad Corporation ("Conrail") is the owner of the Oak Island Rail Yard, Newark, NJ ("OIRY"). Canadian Pacific Railway's ("CP") wholly owned subsidiary, Delaware & Hudson Railway ("DHRR"), subleases land and trackage at the OIRY from Conrail. Conrail and DHRR are both Class A railroads registered under the jurisdiction of the United States Surface Transportation Board ("STB") (successor to the United States Interstate Commerce Commission). Conrail and DHRR historically and currently have used the OIRY for rail storage, transfer and transport, including the intermodal loading of containers and bulk materials from trucks to rail cars. It is DHRR's practice to contract out the lift operations at OIRY and its other intermodal yards to a local company experienced in operating and maintaining the lift equipment, and DHRR will continue to contract the operations at the OIRY to this company and/or others, including Hi Tech Trans, LLC.

The OIRY is located in an area zoned for heavy industry.

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DHRR's intermodal transloading operations will involve sludges and solid waste and will be conducted as follows:

- (1) trucks with trailers carrying sealed intermodal containers will drive next to a flat-bed rail car;
- (2) a container lifting device will lift the container from the truck trailer onto a flat-bed rail car;
- (3) DHRR will then transport the flat-bed rail car to licensed disposal or treatment sites as directed by its customers and replace them with a set of flat-bed rail cars containing empty containers to be returned to the customer.

The Facility is presently planning to transport intermodal containers filled with materials originating outside of the state of New Jersey and brought to the Facility by truck, and will transport the containers by rail to disposal or treatment sites outside the state of New Jersey. In the future, the Facility may transport materials brought by truck and originating within the state of New Jersey for transport by rail outside the state of New Jersey. The above described operations will be open to any generators or haulers of properly containerized sludges and solid waste and title thereto will remain with the generator or hauler who brings it to the Facility until such time as the sludges or solid waste are delivered by rail to the treatment or disposal site identified by the generator or hauler thereof.

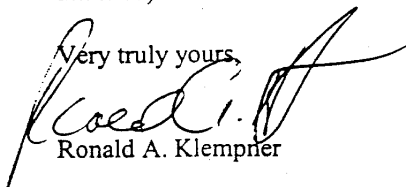
The Facility will operate in conformity with all regulations bearing on health and safety issues which have been established by the New Jersey Department of Environmental Protection applicable to the handling of such materials in similar situations in a non-discriminatory manner.

There will be no structures built on the site for the Intermodal activities which will utilize existing rail.

Access to the site is along Interstate 95 (the NJ Turnpike); Interstate 78; and U.S. Route 1 & 9 (a major trucking route from New York City and Hudson County to Newark Airport and points South and West). All of these routes exit onto Delancy Street, Newark, NJ. The exit on Delancy Street is approximately 600 yards from the site. Delancy Street is a major truck route leading from the west to the heavy industrial/chemical/petroleum section of the Ironbound District of Newark, NJ. It is one of two major access roads to this District and the only one leading from the West.

New Jersey Department of Environmental Protection statute and regulations currently require that the operator of an intermodal rail facility to transport sludges or solid waste in intermodal containers receive a permit from the NJ DEP before commencing operations (a copy of the regulations are attached).

Very truly yours,



Ronald A. Klempner

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EXHIBIT B(3)

Jun 18 20 10:36a



843 Red Road, Teaneck, NJ 07666

(201) 692-0826; Fax (201) 287-0886; e-mail:ronklem@erols.com

September 10, 2001

Mr. Vernon Williams
Secretary of the Surface Transportation Board
Surface Transportation Board
Mercury Building
1925 K Street, NW
Washington, DC 20423-0001

Re: Intermodal Transloading Facility--STB Jurisdiction and Federal Pre-Emption

Dear Mr. Williams:

We request an opinion from your office on two questions regarding our truck-to-rail transloading facility (the "Facility") within the Oak Island Rail Yard, Newark, NJ in light of recent decisions in Borough of Riverdale and Stampede Pass. Enclosed is a check in the amount of \$950 as the processing fee for these inquiries. The bulk transloading portion of our operations will commence September 26, 2001, so a response prior to that date would be appreciated. Thank you for your prompt attention to this matter.

In your letters dated May 3, 2000 and October 19, 2000 you already responded affirmatively to the following two questions:

- 1- Is the proposed transloading Facility subject to Section 49 U.S.C. 10906?
- 2- Are New Jersey state permitting requirements set for in statute (P.L. 1983, c.392 [Title 13 of N.J.S.A. 13:1E-126 et. seq.]), and in regulations of the New Jersey Department of Environmental Protection (N.J.A.C. 7:26-3.6) pre-empted under the ICC Termination Act by the federal scheme of regulations affecting this facility, which allows this facility to commence operations without first obtaining approvals or permits from the State of New Jersey?

Attached are copies of those requests for letters and your responses.

The current two questions are:

First, can the New Jersey Department of Environmental Protection ("NJDEP") require that gondola rail cars which are transporting non-hazardous waste materials be granted a permit or license from the NJDEP and pay a fee to the NJDEP in connection with such licensing?

Second, can the NJDEP set up a check point outside the Facility to stop and delay trucks which are utilizing the Facility in order to check on the truck's compliance with

the NJDEP's A-901 program, which is labelled by the NJDEP as a form of economic regulation, when the NJDEP does not, and historically has not, set up similar check points outside truck-to-truck transfer stations which do not involve rail movements.

Facts

The basic facts remain the same as those set forth in the attached letters dated May 3, 2000 and October 19, 2000.

The NJDEP has acknowledged that the Facility does not require to be permitted by the NJDEP.

The NJDEP has promulgated a program to allow certain jurisdictions within the state to control the flow of waste materials generated in that jurisdiction ("Flow Control Regulations"). Most of these jurisdictions are co-existing with the county jurisdiction in which they are located. While the predecessor to the current regulations were ruled unconstitutional in Atlantic Coast Demolition and Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County (118 S. Ct. 413) as being in violation of the Commerce Clause of the United States Constitution, the current regulations have yet to be challenged. Although the current regulations are administered by the NJDEP, they are clearly economic in nature to "ensure the payment of outstanding debt and other obligations" for the jurisdiction N.J.A.C. 7:26-6.10(b)6, and up until July of this year were labelled as "Economic Flow Control Regulations".

Although the NJDEP cannot force the Facility to come under its jurisdiction and obtain a permit for its transloading facility, sources within NJDEP have stated that in order to impede the Facility's ability to attract our customers, who are in the process of transporting waste from the generator to our Facility to be transported out-of-state by rail, the NJDEP will set up a check point outside the Facility and stop every customer entering the Facility to check on whether that customer is complying with the NJDEP Flow Control Regulations.

The NJDEP has not set up a similar check point outside any other truck-to-truck facility serving similar customers and does not plan to set up such a check point outside of any other truck-to-truck facility.

Very truly yours,

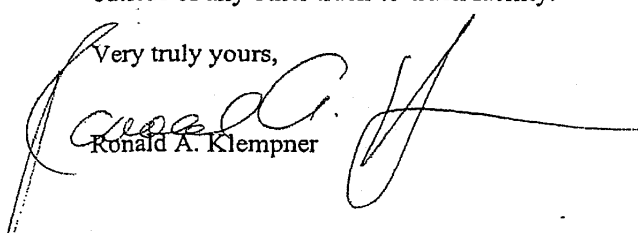

Ronald A. Klemper

EXHIBIT B(4)



843 Red Road, Teaneck, NJ 07666

(201) 692-0826; Fax (201) 287-0886; e-mail:ronklem@erols.com

October 18, 2001

Mr. Vernon Williams
Secretary of the Surface Transportation Board
Surface Transportation Board
Mercury Building
1925 K Street, NW
Washington, DC 20423-0001

Re: Intermodal Transloading Facility--STB Jurisdiction and Federal
Pre-Emption over local Flow Control

Dear Mr. Williams:

We thank you for your prior opinions regarding the ability of construction and demolition debris ("CDD") haulers to use our truck-to-rail transloading facility within the Oak Island Rail Yard, Newark, NJ (the "Facility"). A number of potential customers who desire to use our Facility have requested an answer to an additional question. Therefore, we request an additional opinion from your office regarding the ability of a local governmental entity from impeding access of truckers to the Facility. Enclosed is a check in the amount of \$1,000 as the processing fee for this inquiry.

Because the answer to this questions should be an extrapolation of your favorable responses to our previous inquiries, and potential customers are desiring to utilize our Facility pending your answer, your expedited attention to this matter would be greatly appreciated.

Background

Union County in New Jersey has adopted a Solid Waste Management Plan, as approved by the State of New Jersey Department of Environmental Protection, whereby all CDD which is picked up in the County is directed to a privately operated truck-to-truck transfer station. From that transfer station the debris is reloaded into long haul trucks and taken to out-of-state disposal sites. Neither Union County nor the Department of Environmental Protection directs the transfer station regarding the final disposal destination for the material. The transfer station was selected as part of a public bid process because it agreed to provide the best economic deal to Union County although not necessarily to those who Union County directs to use that facility.

Neighboring Hudson County in New Jersey has adopted a Solid Waste Management Plan, as approved by the State of New Jersey Department of Environmental Protection, whereby all CDD which is picked up in the County is directed to a landfill owned by another governmental authority.

Our Facility which is not part of either Union County's or Hudson County's Solid Waste Management Plan transloads CDD directly into rail cars to be transported to properly licensed

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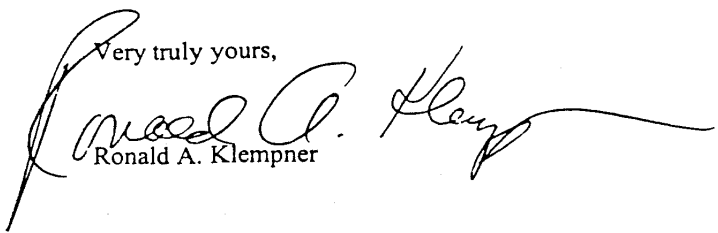
out of state disposal sites. Our clients are private hauling companies licensed by the State of New Jersey Department of Environmental Protection to collect waste throughout the State. They desire to transport CDD which they pick up in each of these counties to our Facility for transloading and shipment by rail to our out of State disposal sites.

Question

Can either Hudson or Union Counties or the State of New Jersey interfere with our ability to transload CDD onto rail cars as part of an interstate rail transportation movement by prohibiting local licensed CDD haulers from transporting CDD to our Facility and directing them, instead, to a truck-to-truck transfer site or landfill selected by those Counties?

Thank you.

Very truly yours,


Ronald A. Klemper

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Exhibit C

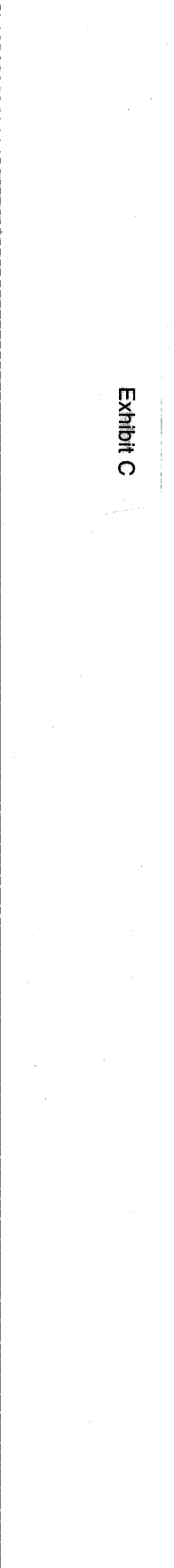


EXHIBIT C(1)



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

May 3, 2000

Office of the Secretary

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

Dear Mr. Klempner:

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

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

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

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

Section 10501(b) states:

"The jurisdiction of the Board over-

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

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

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

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

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

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

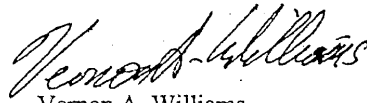
You also ask if the proposed project is exempt from the Board's regulation under 49 U.S.C. 10906. In my informal opinion the operation of a transloading facility by a rail carrier falls within that exemption. I have said that the operation of HTT's proposed project falls clearly within the Board's jurisdiction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

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

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

Sincerely,



Vernon A. Williams
Secretary

Enclosures

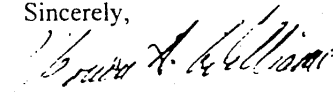
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EXHIBIT C(2)

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

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

Sincerely,

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

Vernon A. Williams
Secretary

004723

EXHIBIT C(3)



Office of the Secretary

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

October 3, 2001

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

Dear Mr. Klempner:

This responds to your most recent letter requesting an informal opinion on questions regarding your truck-to-rail transloading facility (Facility) within the Oak Island Rail Yard in Newark, New Jersey. This request follows your two previous requests for informal opinions and my responses in letters dated October 19, 2000 and May 3, 2000.

The two questions which you have asked in your most recent letter are:

1. Can the New Jersey Department of Environmental Protection (NJDEP) require that gondola rail cars which are transporting non-hazardous waste materials be granted a permit or license from the NJDEP and pay a fee to the NJDEP in connection with such licensing?
2. Can the NJDEP set up a check point outside the Facility to stop and delay trucks which are utilizing the Facility in order to check on the trucks' compliance with the NJDEP's A-901 program, which is labeled by the NJDEP as a form of economic regulation, when the NJDEP does not, and historically has not, set up similar check points outside truck-to-truck transfer stations which do not involve rail movements?

Your first question refers, first, to a permit or license requirement and payment of a fee to NJDEP for gondola rail cars transporting non-hazardous waste materials. As discussed more fully in my letter to you dated May 3, 2000, state or local permitting requirements are generally preempted where they interfere with interstate commerce by giving the state or local body the authority to deny the carrier the right to construct facilities or conduct operations. If the failure to obtain a permit from the NJDEP might prevent the gondola cars from being transported at all,

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then, in my informal opinion, the statute would be preempted. Under 49 U.S.C. 10501(b), the Board's jurisdiction over rail transportation is exclusive and state laws and regulations are generally preempted. This preemption, of course, does not remove the ability of state and local governments to impose appropriate health and safety regulations and exercise their Constitutionally-protected police powers. But state or local law or regulation is preempted when the challenged statute or regulation stands as an obstacle to authorized interstate rail transportation. City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999). It must be remembered, however, that only a court can make a dispositive determination as to whether a particular state activity is preempted.

In addition, the New Jersey statute apparently contemplates the paying of a fee in connection with the licensing. If the "fee" imposed by state regulation on gondola rail cars transporting non-hazardous waste material is interpreted by a court to be a "tax" on rail property or operations, the fee could run afoul of 49 U.S.C. 11501(b), which provides:

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

- (1) Assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
- (2) Levy or collect a tax on an assessment that may not be made under paragraph (1) of this subsection.
- (3) Levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.
- (4) Impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Board under this part.

The purpose of this statutory section is to eliminate state or local government taxation practices that discriminate against railroads. Clinchfield R.R. v. Lynch, 784 F.2d 545 (4th Cir. 1986). Further analysis by an experienced tax practitioner would be required to determine whether this provision, particularly section 11501(b)(4), would have any application to the fee you describe.

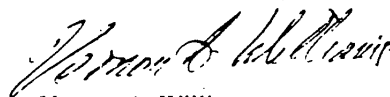
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Mr. Ronald A. Klempner
Page 3

Your second question concerns the possibility that the state agency would apply another state program ("the A-901 Program") in such a way as to hinder truck traffic moving over public roads into the Facility. I am not familiar with this state program. Further, it is not clear from your letter that the State of New Jersey has begun any such effort, so your question may still be hypothetical at this point. Should such a situation arise, it would likely be analyzed by a court under the framework which I have described in my previous letters: A state or local law or regulation, if applied in such a way as to unduly interfere with interstate commerce, is preempted under 49 U.S.C. 10501(b).

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

Sincerely,



Vernon A. Williams
Secretary

004742

EXHIBIT C(4)



Office of the Secretary

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

November 15, 2001

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

Dear Mr. Klempner:

This responds to your letter dated October 18, 2001, requesting my informal opinion regarding access of trucks hauling construction and demolition debris (CDD) to your truck-to-rail transloading facility (Facility) within the Oak Island Rail Yard in Newark, New Jersey. This request follows your three previous requests for informal opinions, to which I responded in letters dated May 3, 2000, October 19, 2000, and October 3, 2001.

In your most recent letter, you request my opinion regarding the following question:

Can either Hudson or Union Counties or the State of New Jersey interfere with [your] ability to transload CDD onto rail cars as part of an interstate rail transportation movement by prohibiting local licensed CDD haulers from transporting CDD to [your] Facility and directing them, instead, to a truck-to-truck transfer site or landfill selected by those Counties?

This question, regarding access to the Facility by trucks, raises a different issue than your earlier questions that dealt with the construction and operation of the Facility itself. The Board's exclusive jurisdiction and preemption under 49 U.S.C. 10501(b) applies to "transportation by rail carriers." As discussed in my previous letters, the construction and operation of a rail intermodal facility that transfers cargo from trucks to rail cars so that the cargo may be shipped by rail is treated as part of "transportation by rail carriers."¹ Accordingly, I have previously given you my view that the preemption of section 10501(b) applies to the Oak Island Facility, and state and/or

¹ Congress defines the term "transportation" as it is used in section 10501(b) very broadly. Its definition 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)(A), (B).

The term "rail carrier" is defined as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. 10102(5).

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local regulations or rules that prevent or unreasonably interfere with construction or operation of the Facility are preempted. See Norfolk S. Ry. v. City of Austell, No. 1:97-cv-1018-RLV (N.D. Ga. Aug. 18, 1997) (preemption applies to a rail intermodal facility).

On the other hand, facilities and activities that are not part of "transportation by rail carriers" would not be embraced within the section 10501(b) preemption. See Borough of Riverdale — Petition for Declaratory Order — The New York Susquehanna and Western Railway Corporation, STB Finance Docket No. 33466 (STB served Sept. 10, 1999) at 7, citing Growers Marketing Co. v. Pere Marquette Ry., 248 I.C.C. 215 (1941).² Therefore, those facilities, like any other non-rail property, would be subject to applicable state or local regulation.

The reach of the section 10501(b) preemption hinges on what can reasonably be considered to be part of "transportation by rail carriers" under the statutory definition (see n.1, supra). Based on the information you have provided, it would seem that the movement of trucks operated by CDD haulers over public roads en route to the Facility is sufficiently separate from the rail activity at the Facility that it falls outside the definition. Therefore, the section 10501(b) preemption would not appear to apply to the truck movements.

Even a finding that section 10501(b) does not apply would not leave you and your customers without a possible remedy, however. The Commerce Clause of the United States Constitution³ contains broad, overarching protection of interstate commerce from state or local interference and discrimination. This constitutional protection applies to all interstate commerce, not just rail transportation, and prevents states from erecting barriers to interstate trade. See Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 35-36 (1980). This constitutional

² In Growers Marketing, the Board's predecessor, the Interstate Commerce Commission (ICC), analyzed a situation involving delivery by rail of perishable produce to a terminal in Detroit, MI. The movement by rail and delivery to the terminal area was part of common carrier rail transportation, and therefore within the regulatory reach of the ICC. However, the ICC found that facilities for display and sale of the produce after it had been delivered to the terminal were not part of the rail transportation, and therefore fell outside the scope of the agency's regulatory authority. 248 I.C.C. at 227.

³ U.S. CONST. art. I, §8, cl. 3.

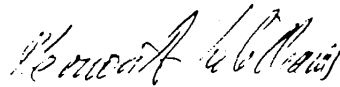
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Mr. Ronald A. Klempner
Page 3

protection against state barriers to interstate commerce applies whenever the United States Congress has not affirmatively acted to either specifically authorize or specifically forbid the challenged state activity. See Norfolk S. Corp. v. Oberly, 822 F.2d 388, 392-93 (3rd Cir. 1987). The type of interference described in your question might be found to fall afoul of this constitutional provision. However, that determination must be sought in the courts, not from the Board.

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

Sincerely,



Vernon A. Williams
Secretary

005074



91A Bay Avenue, Newark, NJ 07105

(201) 692-0826; Fax (201) 287-0886; e-mail:ronklem@erols.com

August 12, 2002

Dear Customer:

John Gonnella, an attorney, who resides in Caldwell, New Jersey, has distributed a memo that is totally misleading and false. It is clear that Mr. Gonnella has been working for the benefit of Hi Tech Trans' competitors to try and derail Hi Tech Trans' business.

Attached please review John McHugh's response to Mr. Gonnella's misleading letter. His response clearly demonstrates that all of Mr. Gonnella's assumptions are completely wrong-- and believe me, everything Mr. Gonnella says is based on only rumors or erroneous assumptions.

IN SUMMARY, HI TECH TRANS IS LEGALLY OPERATING WITH THE AUTHORITY OF THE UNITED STATES SURFACE TRANSPORTATION BOARD. UNDER THIS FEDERAL EXEMPTION WE AND YOU ARE ENTITLED TO FREE ACCESS OF INTERSTATE COMMERCE AS AUTHORIZED BY CONGRESS.

Hi Tech Trans has discussed the operations with the Commissioner's office itself himself last year, and over the year of operations has never received a complaint or NOV from the NJ DEP.

Hi Tech has done an excellent job in Northern New Jersey. The operation is improving all the time. In the next few weeks we will have two tipping areas that will allow four trucks to tip at any given time. We have just installed another scale so we have an in-scale and an out-scale that will minimize traffic tie ups. Besides having a very competitive price, Hi Tech Trans intends to address its customers issues in order to become more customer oriented and provide excellent service, minimize rejections, eliminate traffic jams-- all so you can make more pick ups per day. Also, we are taking steps to improve accounting and billing systems that will minimize any confusion or problems in that area.

As many of you in the New Jersey solid waste industry will recall, there is a long history in this State of counties attempting wrongfully to maintain their economic monopolies over solid waste collection and disposal. In certain ways, this is yet another chapter in that same process. Like the plaintiffs in C&A Carbone and Atlantic Coast, Hi Tech Trans will persevere to assure its constitutional rights are protected, and we will pursue these efforts in any and all courts appropriate to assure that these rights are protected.

Very truly yours,

Ronald A. Klempner



91A Bay Avenue, Newark, NJ 07105

(201) 692-0826; Fax (201) 287-0886; e-mail:ronklem@erols.com

October 18, 2002

Dear Customer:

Attached are three opinion letters we have received from the Office of the Secretary of the United States Surface Transportation Board regarding our authority and rights to operate our truck-to-rail transloading facility in Newark, New Jersey under federal law notwithstanding the fact that we are exempt from obtaining a permit from the New Jersey Department of Environmental Protection.

The following are pertinent excerpts from each of the letters, which you can read in full:

May 3, 2000:

"... the operation of a transloading facility by a rail carrier fall within that exemption [i.e. exemption from State or County permitting or approvals]. I have said that the operation of HTT's proposed project falls clearly within the Board's jurisdiction under 49 U.S.C. 10501(b)(2). 49 U.S.C. 10906 provides a statutory exemption from the licensing requirements of part 109 for the "construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching or side tracks." Tracks used to enable transloading operations fall within that category."

October 19, 2000

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

"You also ask if New Jersey state permitting requirements set forth in title 13 of N.J.S.A. 13:1E-126 et seq. and in the regulations contained in N.J.A.C. 7:2-3.6 are pre-empted under the ICC Termination Act. It is my informal opinion that they are preempted by that Act."

October 3, 2001

"Your second question concerns the possibility that the state agency would apply another state program ("the A-901 Program") in such a way as to hinder truck traffic moving over public roads into the Facility. ... Should such a situation arise, it would likely be analyzed by a court under the framework which I have described in my previous letters: A state or local law or regulation, if applied in such a way as to unduly interfere with interstate commerce, is preempted under 49 U.S.C. 10501(b)."

Very truly yours,

Ronald A. Klempner