

## MEMORANDUM

**TO:** Members, Subcommittee on Railroads, Pipelines & Hazardous Materials

**FROM:** Hon. Bill Shuster, Ranking Member

**SUBJECT:** Hearing on Railroad Transportation of Waste

Thursday, October 16, 2007, 10:00 a.m.  
Room 2167, Rayburn House Office Building

### **PURPOSE**

The purpose of this hearing is to evaluate the effects of railroad-owned waste transload facilities. These facilities are protected from certain forms of state and local regulation by the preemptive federal jurisdiction of the Surface Transportation Board.

### **BACKGROUND**

Railroad “facilities”—as distinct from railroad rates, practices, and certain types of railroad track—were added to the exclusive federal jurisdiction of the Surface Transportation Board (STB) when that agency was created to replace the Interstate Commerce Commission in the ICC Termination Act of 1995 (ICCTA) (Public Law 104-88, 109 Stat. 803, Dec. 29, 1995).

As amended by the ICCTA, Section 10501(b)(2) of Title 49, U.S. Code, now reads in relevant part as follows: “The jurisdiction of the Board over. . . transportation by rail carriers, and the remedies provided in this part with respect to . . . facilities of such carriers. . . is exclusive.” The House report explained that the ICCTA changes were intended to reflect the “Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system.” [H. Rep. No. 104-311, pp. 95-96] The report also acknowledged that states retained their constitutional police powers. [*Id.*, p. 96] The conference report on the final version of the ICCTA [H. Rep. No. 104-422, p. 167], while confirming “exclusive federal jurisdiction over auxiliary tracks and facilities,” stated that the “exclusivity is limited to remedies with respect to rail regulation—not State and Federal law generally.”

Since 1995, a number of disputes concerning the scope of the STB’s “facilities” jurisdiction have been brought to the courts and to the agency. An outline summarizing these legal developments, prepared by the STB General Counsel’s Office, is attached.

Most of the post-1995 “facilities” disputes have centered on construction or expansion of railroad yards. Some, however, have involved railroad-owned waste facilities, usually those processing trash or demolition debris. In at least some of these cases, an obvious

threshold legal issue has been posed: is, or is not, the entity claiming the protection of preemptive federal jurisdiction a “rail carrier” subject to STB regulation? If not, then no preemption of even economic regulation by state or local governments enters the picture.

Some states, particularly in the Northeast, have extremely complicated, overlapping and burdensome regulatory regimes. These regulations are sometimes used by project opponents to stall, delay and prevent the construction or expansion of commercial buildings, private residences, roads, and transportation facilities.

A good example of this is the case of *Boston & Maine Corp. v. Town of Ayer*, 330 F.3d 12 (1st Cir. 2003) In that case, the railroad voluntarily sought town permits for an automobile transload facility on the site of a former concrete plant. The proposed operation involved unloading new automobiles from trains for distribution to car dealerships. In response, “the town Planning Board imposed thirty-six conditions on issuance of any permit and another town body, the Board of Health, declared the proposed plan to be a noisome trade, allowing Guilford's activities to be banned outright.”

(The term “noisome trade” has traditionally been applied to facilities generating offensive odors and endangering the public health, such as slaughterhouses, facilities for rendering dead horses, piggeries, and refuse dumps.)

After extensive litigation before both the STB and federal court, the court held for the railroad, saying:

It [STB] held that "preclearance requirements (including environmental 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." The STB viewed pre-construction approval requirements as giving local authorities impermissible veto power over rail transportation issues.

Nonetheless, **the STB found state and local regulation to be permissible "where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety."**

**...Non-discriminatory enforcement of requirements such as building and electrical codes (other than pre-construction requirements) generally are not preempted...**

**...Communities also can enforce their local codes for electrical, building, fire, and plumbing, unless the codes are applied in a discriminatory manner, unreasonably restrict the railroad from conducting its operations, or unnecessarily burden interstate commerce.** Moreover, railroads may not deny towns access in

emergencies and for reasonable inspection of the railroad facilities. And to the extent a railroad is willing to undertake an activity or restriction, the activity or restriction generally should be seen as reflecting the carrier's own determination that the condition is reasonable and will not unduly burden interstate commerce.

The same legal standards applied in *Town of Ayer* are applicable to railroad-owned waste facilities. States and local municipalities are clearly allowed to enforce their own local codes and environmental rules. Legitimate state and local laws regarding odors, dust, rodent control and groundwater protection are not preempted by federal law.

At our hearing, witnesses will likely tell of waste handlers who flout local law by claiming federal preemption. Testimony is anticipated to include stories of waste facility operators who refuse to comply with even minimal local regulations. Witnesses will probably also give testimony about sham companies who claim to be rail carriers, but do not own a single engine or track. (Federal preemption applies only to rail carriers, not other companies.)

Some unscrupulous operators have used frivolous claims of federal preemption as cover for unlawful activities. When challenged by state or local authorities, these companies have exploited the slow pace of our nation's court system and continued their improper operations. Apparently, the high profits of trash hauling more than offset the legal expense of fighting vexatious lawsuits.

One cautionary note is necessary: some of the invited witnesses have current or anticipated litigation before the STB or federal courts. This has two consequences. First, STB representatives are precluded by law from discussing the merits of pending matters, because to do so might constitute "prejudgment" of the issues that could lead to reversal of the decision on judicial review. Second, Members' questions or remarks to the agency about a pending matter could either constitute *ex parte* communications to the agency outside the record of the administrative proceeding, leading to possible reversal, or if sufficiently hostile, could be a ground for a later court finding that the agency's deliberations had been prejudiced by undue Congressional influence pursuant to the "*Pillsbury doctrine*" (so named from *Pillsbury Co. v. FTC*, 354 F2d. 962 (5<sup>th</sup> Cir. 1966)). With respect to the *ex parte* problem, Members can (and do) file comments directly in the agency record in various STB proceedings, and that option exists here as well.

## **EXPECTED WITNESSES**

### **Panel I**

Charles D. "Chip" Nottingham  
Chairman  
Surface Transportation Board

W. Douglas Buttrey  
Vice Chairman  
Surface Transportation Board

Francis P. Mulvey  
Commissioner  
Surface Transportation Board

**Panel II**

Gregory Schmidt  
Mayor  
Village of Croton-On-Hudson, New York

Joseph DiGirolamo  
Mayor  
Township of Bensalem, Pennsylvania

Kathy Chasey  
Mayor  
Mullica Township, New Jersey

Brian X. Foley  
Town Supervisor  
Brookhaven, New York

Barbara McMorro  
Freeholder  
Freehold, New Jersey

**Panel III**

Rob Jones  
Managing Principal  
New England Transrail, LLC

Thomas Marturano  
Director of Natural Resources and Solid Waste  
New Jersey Meadowlands Commission

Wolfgang Skacel  
Assistant Commissioner  
New Jersey Department of Environmental Protection