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SERVICE DATE – JANUARY 24, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35652

DIANA DEL GROSSO, RAY SMITH, JOSEPH HATCH, CHERYL HATCH, KATHLEEN  
KELLEY, ANDREW WILKLUND, AND RICHARD KOSIBA—PETITION FOR  
DECLARATORY ORDER

Decided: January 23, 2013

On August 1, 2012, Diana Del Grosso, Ray Smith, Joseph Hatch, Cheryl Hatch, Kathleen Kelley, Andrew Wilklund, and Richard Kosiba (Petitioners) filed a petition for declaratory order, requesting that the Board declare that specific operations conducted in the town of Upton, Mass. (Town) at a bulk transloading facility (Upton Facility), claimed to be performed by the Grafton and Upton Railroad (G&U), do not constitute “transportation by a rail carrier,” and that the Town’s zoning and other regulations are therefore not preempted under 49 U.S.C. § 10501(b). For the reasons discussed below, the Board will institute a declaratory order proceeding to resolve this matter.

BACKGROUND

On August 1, 2012, Petitioners, seven residents of the Town, filed a petition for declaratory order. The petition requests that the Board find that certain transloading services (i.e., the screening, vacuuming, and bagging of wood pellets, and the trucking and storage of bulk goods) at the Upton Facility, on property owned by Upton Development Group, LLC (UDG) and operated by Grafton Upton Railcare, LLC (GU Railcare) allegedly on behalf of G&U, are not preempted from certain local zoning and other regulations. Petitioners further assert that the wood pellet packaging services provided at the facility are not integrally related to “rail transportation,” and that the bulk transfer terminal activities are not being conducted by a “rail carrier.” Petitioners request discovery to obtain, among other things, the contractual agreements G&U has with its customers and any other documents that would help to ascertain the degree of control G&U has over the transloader performing services at the Upton Facility.

On August 21, 2012, G&U filed a reply in opposition to the petition. G&U argues that there is no controversy or dispute to be resolved because preemption applies in these circumstances. As such, G&U asserts that there is no need to institute a declaratory order proceeding. G&U requests, however, that, in the event the Board institutes such a proceeding,

the Board afford it an opportunity to conduct discovery and set an appropriate schedule for supplementing the record.<sup>1</sup>

## DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721 to issue a declaratory order to eliminate a controversy or remove uncertainty in a matter related to the Board's subject matter jurisdiction.<sup>2</sup> Questions of preemption are often fact-specific determinations, particularly when addressing whether land use restrictions interfere with railroad operations.<sup>3</sup>

The Interstate Commerce Act, as revised by the ICC Termination Act of 1995, vests in the Board broad jurisdiction over "transportation by rail carrier," 49 U.S.C. § 10501(a)(1), which extends to property, facilities, instrumentalities, or equipment of any kind related to that transportation, 49 U.S.C. § 10102(9). The preemption provision in the Board's governing statute states that "the remedies provided under [49 U.S.C. § 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b).

The Board will institute a declaratory order proceeding and establish a procedural schedule for the filing of additional pleadings. This will ensure that the record is complete on the

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<sup>1</sup> Concurrently with the filing of its reply, G&U filed a motion for protective order to protect "highly confidential" information contained in an unredacted Terminal Transloading Agreement between G&U and GU Railcare, and an unredacted Lease Agreement between G&U and UDG (the Agreements) filed under seal in this proceeding. G&U, however, failed to submit unredacted versions of the Agreements simultaneously, as required by the Board. Because all parties must simultaneously file a public version of any confidential or highly confidential submission filed with the Board, G&U is being directed, in a decision also being served today adopting a protective order for this proceeding, to submit public versions of the Agreements by January 31, 2013. In that same decision, the Board has indicated that it would consider the Agreements submitted under seal to be "confidential," in that G&U has not justified a "highly confidential" designation for them.

<sup>2</sup> See Bos. & Me. Corp. v. Town of Ayer, 330 F.3d 12, 14 n.2 (1st Cir. 2003); see also Intercity Transp. Co. v. United States, 737 F.2d 103, 106-07 (D.C. Cir. 1984); Delegation of Auth.—Declaratory Order Proceedings, 5 I.C.C. 2d 675, 675 (1989).

<sup>3</sup> See Borough of Riverdale—Petition for Declaratory Order—The N.Y. Susquehanna & W. Ry., FD 33466, slip op. at 2 (STB served Feb. 27, 2001); Borough of Riverdale—Petition for Declaratory Order—The N.Y. Susquehanna & W. Ry., 4 S.T.B. 380, 387 (1999) ("whether a particular land use restriction interferes with interstate commerce is a fact-bound question").

issue of whether the activities occurring at the Upton Facility are part of “transportation” by a “rail carrier,” and therefore could be preempted by § 10501(b).

The Board will consider this matter under the modified procedure rules at 49 C.F.R. pt. 1112. The petition will serve as Petitioners’ opening statement.<sup>4</sup> G&U’s reply and comments from other interested persons will be due 30 days from the service date of this decision and Petitioners’ response will be due 45 days from the service date.

The parties’ requests for discovery in this matter will be denied. Pursuant to the protective order issued in this proceeding, Petitioners will have access to the public versions of G&U’s Terminal Transloading Agreement with GU Railcare and the Lease Agreement between G&U and UDG. Moreover, should Petitioners execute the proper undertaking, they may also gain access to the confidential versions of those agreements. Further, although G&U seeks leave to conduct discovery in the event that a declaratory order proceeding is instituted, the Board does not typically order discovery in declaratory order proceedings,<sup>5</sup> and G&U has not explained, nor is it apparent, why discovery is needed here. For those reasons, there is no need for the Board to order additional discovery at this time.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. A declaratory order proceeding is instituted.
2. G&U’s reply and comments from other interested persons are due by February 25, 2013.

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<sup>4</sup> On September 10, 2012, Petitioners filed a pleading in opposition to G&U’s reply, and on September 13, 2012, G&U filed a motion to strike that filing, asserting that it was an improper “reply to reply.” On September 17, 2012, Petitioners filed a motion for leave to file their September 10, 2012 “reply to reply.” The Board will grant Petitioners’ motion for leave to file their September 10 pleading and will consider the filing in the interest of compiling a more complete record. See City of Alexandria, Va.—Petition for Declaratory Order, FD 35157 (STB served Nov. 6, 2008) (allowing reply to reply “[i]n the interest of compiling a full record); Denver & Rio Grande Ry. Historical Found. d/b/a Denver & Rio Grande R.R.—Petition for Declaratory Order, FD 35496, slip op. at 3 (STB served Feb. 23, 2012).

<sup>5</sup> See CSX Transp. Inc.—Petition for Declaratory Order, FD 33388 (Sub-No. 101), slip op. at 5 (STB served Aug. 27, 2008).

3. Petitioners' response is due by March 11, 2013.
4. The parties' requests to conduct discovery in this matter are denied.
5. G&U's motion to strike Petitioners' reply to reply is denied.
6. Petitioners' motion for leave to file a reply to reply is granted, and that pleading is accepted.
7. Notice of this action will be published in the Federal Register on January 29, 2013.
8. This decision is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.