

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

Digest:<sup>1</sup> This decision denies a request filed by seven residents of the town of Upton, Mass., for reconsideration of the Board’s decision to deny discovery in this proceeding.

Decided: May 7, 2013

On January 24, 2013, the Board, by decision of the Director of the Office of Proceedings (Director), instituted a proceeding to resolve a controversy between seven residents of the town of Upton, Mass. (Town)—Diana Del Grosso, Ray Smith, Joseph Hatch, Cheryl Hatch, Kathleen Kelley, Andrew Wilklund, and Richard Kosiba (Petitioners) and the Grafton & Upton Railroad Company (G&U). The Board instituted this proceeding to determine whether specific operations conducted in Upton at a bulk transloading facility constitute “transportation by a rail carrier,” and whether the Town’s zoning and other regulations are preempted under 49 U.S.C. § 10501(b). That decision also adopted a procedural schedule and denied the parties’ requests for discovery. Petitioners have now filed a petition for reconsideration of the Board’s decision to deny discovery. As addressed below, we are denying the petition.

BACKGROUND

On August 1, 2012, Petitioners filed a petition for declaratory order requesting 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 an Upton bulk transloading facility (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 also asserted 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.” In their filing, Petitioners sought discovery to obtain, among other things, the contractual agreements

---

<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

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.

G&U filed a reply in opposition to the petition for declaratory order on August 21, 2012, asserting that there is no controversy or dispute to be resolved, that preemption applies here, and that there is no need to institute a declaratory order proceeding. Should the Board institute such a proceeding, however, G&U requested an opportunity to conduct discovery.

By decision of the Director served on January 24, 2013 (January 24 Decision), the Board instituted a proceeding to resolve the controversy at issue and adopted a procedural schedule for subsequent filings by the parties. According to that schedule, G&U's reply and comments of interested persons were due by February 25, 2013, and Petitioners' response was to be due by March 11, 2013.<sup>2</sup> The January 24 Decision, however, denied the parties' requests for discovery. The Board reasoned, among other things, that Petitioners would have access to G&U's Terminal Transloading Agreement with GU Railcare and the Lease Agreement between G&U and UDG pursuant to a protective order issued by the Board in this proceeding, and also noted that G&U had failed to explain why any discovery would be needed.

On February 13, 2013, Petitioners filed a petition for reconsideration of the Board's decision to deny discovery on grounds of material error and new evidence. On February 28, 2013, Petitioners filed a petition seeking postponement of the March 11, 2013 due date for the filing of their response to G&U's reply because the Board had not yet ruled on their appeal of the agency's decision to deny discovery.<sup>3</sup> On March 1, 2013, G&U filed a reply in opposition to the request for a postponement, and subsequently filed a reply in opposition to Petitioners' reconsideration request on March 5, 2013.

By decision served on March 7, 2013, the Board found that good cause existed to grant Petitioners' request for postponement of their March 11, 2013 filing and suspended the procedural schedule, pending further Board order. The Board reasoned that suspension of the procedural schedule would avoid unnecessary filings and would allow the Board to fully consider Petitioners' reconsideration request and G&U's reply. We are resolving the parties' discovery dispute here and restarting the procedural schedule.<sup>4</sup>

---

<sup>2</sup> Pursuant to the procedural schedule established in the January 24 Decision, G&U filed its reply on February 25, 2013. No other interested person filed comments.

<sup>3</sup> Petitioners asked that, should the Board deny their petition for reconsideration, their rebuttal be due 10 days after that ruling; if the Board granted reconsideration, Petitioners requested a reasonable period of time after the ruling to complete discovery and submit their response.

<sup>4</sup> The Town of Upton Planning Board (Planning Board) filed a letter in this proceeding on April 15, 2013. On April 22, 2013, G&U filed a motion to strike the Planning Board's letter as late-filed. We will not consider the Planning Board's late-filed letter. Any comments from interested persons were due by February 25, 2013, and responses to Petitioners' request for reconsideration were due by March 5, 2013. Further, the Planning Board failed to serve its letter

(continued . . . )

## DISCUSSION AND CONCLUSIONS

The Board's January 24 Decision instituting a declaratory order proceeding and denying discovery was issued by the Director of the Office of Proceedings.<sup>5</sup> Petitioners have appealed that decision, seeking reconsideration on grounds of material error on the agency's part and purported new evidence. However, Petitioners have failed to demonstrate that reconsideration of the Director's discovery ruling is warranted under either ground.

Petitioners argue that the Board committed material error by stating in the January 24 Decision that the "Board does not typically order discovery in declaratory order proceedings." According to Petitioners, the Board has routinely allowed for discovery in other declaratory order proceedings.<sup>6</sup> Petitioners also argue that the Board's regulation at 49 C.F.R. § 1114.21 permits discovery in all Board proceedings, other than informal proceedings.

G&U responds that none of the cases cited by Petitioners support the proposition that discovery is routinely allowed in declaratory order proceedings and that, at the time of Petitioners' request for a declaratory order and discovery, there was no proceeding within the meaning of 49 C.F.R. § 1114.21 that was before the Board prior to January 24, 2013.

In the January 24 Decision, the Director, in denying the parties' requests for discovery, correctly stated that the Board does not typically order discovery in declaratory order proceedings.<sup>7</sup> The agency has explained in a number of decisions in the past that discovery

---

( . . . continued)

on all parties of record. In light of our action here, G&U's motion to strike will be denied as moot.

<sup>5</sup> The Board's rules at 49 C.F.R. § 1011.2(a)(7) provide that appeals of initial decisions by the Director instituting a declaratory order proceeding must be filed within 10 days. Although late-filed under these rules, we will consider the petition and G&U's reply in the interest of ensuring a full and fair process.

<sup>6</sup> Petitioners cite Springfield Terminal Ry.—Petition for Declaratory Order—Reasonableness of Demurrage Charges, NOR 42108 (STB served June 16, 2010); Denver & Rio Grande Ry. Historical Found. d/b/a Denver & Rio Grande R.R.—Petition for Declaratory Order, FD 35496 (STB served Apr. 30, 2012); N. San Diego Cnty. Transit Dev. Bd.—Petition for Declaratory Order, FD 34111 (STB served Aug. 21, 2002); E. W. Resort Transp. & TMS. LLC d/b/a Colo. Mountain Express—Petition for Declaratory Order—Motor Carrier Transp. of Passengers in Colo., MCF 21008 (STB served Mar. 21, 2005).

<sup>7</sup> Petitioners are correct that 49 C.F.R. § 1114.21 permits a party to obtain discovery in formal proceedings for any matter, not privileged, that is relevant to the subject matter involved in a proceeding. But here, the Board did not initiate a proceeding until the January 24 Decision, and discovery was addressed at that time. In any proceeding, the Board may determine the proper scope of discovery. Here, the Board properly concluded that no discovery is needed to resolve the dispute at issue.

normally will not be ordered in declaratory order proceedings where the dispute involves a legal issue and where the record is sufficient to resolve the controversy without discovery. See Md. Transit Admin.—Petition for Declaratory Order, FD 34975 (STB served Sept. 19, 2008); Town of Babylon and Pinelawn Cemetery—Petition for Declaratory Order, FD 35057 (STB served Feb. 1, 2008).

This proceeding involves a challenge by Petitioners as to whether the screening, vacuuming, and bagging of wood pellets, and the trucking and storage of bulk goods, at the Upton Facility are preempted from certain local zoning and other regulations. Petitioners have also alleged 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.” The Board has jurisdiction over “transportation by rail carrier” under 49 U.S.C. § 10501. Accordingly, to qualify for federal preemption under § 10501(b), the activities at issue must constitute “transportation,” and must be performed by, or under the auspices of, a “rail carrier.” See 49 U.S.C. § 10501(a)(1); Hi Tech Trans, LLC v. New Jersey, 382 F.3d 295 (3d Cir. 2004).

In resolving the type of issue presented here, the Board is guided by the terms of the agreements between the railroad and the transloader.<sup>8</sup> Petitioners now have access not only to public versions of the Terminal Transloading Agreement and the Lease Agreement, but also to unredacted versions of both agreements pursuant to a signed protective order required by the Board.<sup>9</sup> In addition, as noted by G&U, Petitioners have access to numerous documents submitted to the Town as part of its inquiry as to whether it could regulate activities at the Upton Facility. Also, G&U has submitted the latest tariff governing transloading activities at the Upton Facility.<sup>10</sup> These documents should be sufficient for Petitioners to submit a complete, well-reasoned response to G&U’s reply and for the Board to resolve the largely legal controversy that is in dispute here, i.e., whether certain operations at the Upton Facility constitute “transportation by a rail carrier.” Accordingly, we reject Petitioners’ claim that the Director’s decision to deny discovery in this matter constituted material error.

Petitioners also argue that recent litigation in the United States District Court, District of Massachusetts between G&U and the adjacent town of Grafton, Mass. (Grafton) raises significant questions with respect to G&U’s operations at the Upton Facility. According to Petitioners, the litigation in Grafton stems from a set of facts and circumstances that are

---

<sup>8</sup> See Borough of Riverdale—Petition for Declaratory Order, FD 35299, slip op. at 5 (STB served Aug. 5, 2010); City of Alexandria—Petition for Declaratory Order, FD 35157, slip op. at 2-3 (STB served Feb. 17, 2009).

<sup>9</sup> At the time of Petitioners’ request for reconsideration, they only had access to public versions of the agreements and raised a number of questions about those agreements. Because Petitioners have since gained access to unredacted versions of the agreements pursuant to a signed protective order, they already have the information needed to present whatever arguments based on the language of the agreements that they might wish to make.

<sup>10</sup> See G&U Tariff 5000-A, effective January 1, 2013. The Board will review that tariff in resolving this dispute.

strikingly similar to this proceeding. Petitioners assert that the federal court in the pending litigation between Grafton and G&U has permitted discovery, which has led to the production of several documents detailing the formation of a transloading facility in Grafton and supporting the claim, in that proceeding, that G&U does not control the transloading facility there.

Petitioners contend that the documents produced from discovery in the Grafton litigation now raise the question of whether there are other agreements or documents that relate to the formation and construction of the Upton Facility that have not yet been identified or submitted into evidence and that could bear heavily on whether the activities at the Upton Facility constitute “transportation by a rail carrier.” Petitioners maintain that documents obtained through the Grafton litigation constitute “new evidence” warranting reconsideration of the Board’s previous decision not to allow discovery.

In response, G&U argues that the litigation between G&U and Grafton involves a different transload facility and different parties (with the exception of G&U) and that the pleadings and exhibits in the Grafton action do not constitute new evidence, nor are they probative of, or relevant to, any of the issues in this proceeding. G&U also argues that because Petitioners have access to unredacted versions of all relevant agreements, as well as to verified statements supplied by G&U, no other evidence from any other source needs to be discovered in this proceeding.

We reject Petitioners’ claim that documents related to the Grafton court litigation amount to new evidence and should be discoverable on that basis. In a Board proceeding, any evidence subject to discovery, whether new or not, must be relevant to the subject matter of that proceeding. 49 C.F.R. § 1114.21. Because the documents from the Grafton court litigation relate to a different transload facility and different parties, such evidence is immaterial to this proceeding. Therefore, Petitioners’ request to conduct discovery based on that evidence is not a sufficient basis for reconsidering the Director’s decision. Further, we note G&U’s assertion that it has given Petitioners all documents relevant to determining whether G&U has sufficient control over the Upton Facility, and we also note that Petitioners have only alluded to the possibility of other documents relevant to determining whether the activities at the Upton facility constitute “transportation by a rail carrier.” Given the state of the record in this proceeding, discovery in these circumstances would not be justified.

For the reasons described above, we find that Petitioners have failed to demonstrate that the Board’s January 24 Decision involved material error, or that alleged new evidence warrants discovery. As such, we will deny the petition for reconsideration.

In light of our ruling here, the procedural schedule in this matter will be restarted and Petitioners’ response will be due 10 days from the service date of this decision.

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

It is ordered:

1. The petition for reconsideration is denied.
2. Petitioners' response is due on May 20, 2013.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.