

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: June 20, 2016

The Board served a decision on December 5, 2014 (December 2014 Decision), responding to the Petition for Declaratory Order filed by Diana Del Grosso, Ray Smith, Joseph Hatch, Cheryl Hatch, Kathleen Kelley, Andrew Wilklund, and Richard Kosiba (Petitioners), seven residents of the town of Upton, Mass. The Board found that the activities performed at a bulk transloading facility (Upton Facility), on property owned by Upton Development Group, LLC, and operated by Grafton Upton Railcare, LLC (GU Railcare), on behalf of the Grafton and Upton Railroad (G&U), constituted services related to the movement of property by rail and thus fell within the statutory definition of “transportation” at 49 U.S.C. § 10102(9). Specifically, the Board found that the wood pellet packaging services performed at the Upton Facility were integrally related to rail transportation, and that the bulk transfer terminal activities performed by GU Railcare were conducted by a “rail carrier.” Therefore, the Board concluded that application of certain local zoning laws and other regulations was preempted under 49 U.S.C. § 10501(b).

Petitioners subsequently appealed the Board’s December 2014 Decision to the U.S. Court of Appeals for the First Circuit. In October 2015, the First Circuit affirmed the Board’s decision that the Upton Facility was operated by a “rail carrier.” Del Grosso v. STB, 804 F.3d 110 (1st Cir. 2015); reh’g denied, 811 F.3d 83 (2016). The court, however, determined that the Board relied on an erroneous standard in concluding that the activities at the facility were a part of “transportation.” Id. Thus, the December 2014 Decision was vacated and remanded to the Board for a determination of whether the screening, vacuuming, bagging, and palletization facilitated the transloading of the wood pellets from rail cars to trucks, or was done solely for another, unrelated purpose.¹

Petitioners and G&U are directed to confer and jointly submit, by July 21, 2016, a suitable procedural schedule to govern the proceeding before the Board on remand. Should the parties fail to agree on a procedural schedule, Petitioners (collectively) and G&U shall each

¹ The First Circuit took no view on Petitioners’ argument that the Board erred in not considering the facility’s “repelletization” process—a matter not raised before the Board—but concluded that it would not preclude the Board from considering this issue on remand.

propose one separately. In the alternative, the parties may also consider whether they wish to allow the record to stand as it is, in which case a procedural schedule would be unnecessary. The parties shall advise the Board by July 21, 2016 if this alternative is chosen.

It is ordered:

1. Petitioners and G&U are directed to confer and submit (jointly, if possible, or separately) a proposed procedural schedule by July 21, 2016. In the alternative, the parties shall advise the Board by July 21, 2016 if they wish to allow the record to stand as it is.

2. This decision is effective on its service date.

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