

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34192

HI TECH TRANS, LLC
-PETITION FOR DECLARATORY ORDER-
HUDSON COUNTY, NJ

Decided: November 19, 2002

Hi Tech Trans, LLC (Hi Tech) filed an amended petition for a declaratory order on May 3, 2002,¹ seeking a finding that the Board has exclusive jurisdiction over Hi Tech's activities and those of its customers relating to the transportation of construction and demolition debris (C&D debris) from construction sites to a truck-to-rail transloading facility in the State of New Jersey, and that the Board's jurisdiction preempts New Jersey state and local laws requiring trucks carrying C&D debris to process their shipments at a single, designated truck-to-truck solid waste management facility.² The Hudson County Improvement Authority (HCIA), joined by the Essex County Utilities Authority (together, the Authorities), and New Jersey Department of Environmental Protection (NJDEP) filed replies on June 6, 2002.³ The petition for declaratory order will be denied for the reasons discussed below.

MOTION TO STRIKE

On June 19, 2002, Hi Tech filed a motion to strike certain arguments raised by the Authorities and NJDEP in their June 6, 2002 replies. In a June 27, 2002 reply to Hi Tech's motion to strike, NJDEP argues that Hi Tech's motion should be rejected as an impermissible reply to a reply under 49 CFR 1104.13(c). Nevertheless, NJDEP fully responds to Hi Tech's additional arguments and, thus, will not be prejudiced by consideration of Hi Tech's motion. In a separate reply to Hi Tech's motion to strike, filed on June 28, 2002, the Authorities respond to Hi Tech's additional arguments and

¹ Included with the amended petition was Hi Tech's request for permission to amend its original petition for declaratory order, filed on April 4, 2002, which was granted in a decision served on May 17, 2002 (May 17 decision).

² Hi Tech also has filed a complaint in a Federal district court seeking similar relief. Hi Tech Trans, LLC v. Hudson County Improvement Auth. et al., No. 02-3781 (D.N.J. filed Aug. 7, 2002).

³ The May 17 decision extended the due date for replies to 20 days after the service date, or until June 6, 2002.

request that Hi Tech's petition for declaratory order be dismissed. Hi Tech's motion to strike states no reason to strike the challenged arguments made by the Authorities and NJDEP, except that Hi Tech disagrees with them. The motion goes more to the weight to be accorded the arguments than to their admissibility. Therefore, Hi Tech's motion to strike will be denied.

BACKGROUND

Hi Tech operates a truck-to-rail transload facility on the property of Delaware and Hudson Railway Company, Inc., d/b/a Canadian Pacific Railway (CP). According to CP,⁴ Hi Tech is a licensee of CP. CP states that, pursuant to agreements between Hi Tech and CP, Hi Tech obtains C&D debris, transfers it from trucks to rail cars at CP's transload facility, and then ships the C&D debris in interstate commerce on CP's lines. According to CP, Hi Tech is an integral component of CP's movement of this particular type of freight by rail, and it relies heavily on Hi Tech to perform duties that are essential to the successful marketing of its rail services.

Hi Tech describes its own operations as "handling freight in a continuous intermodal rail move." According to Hi Tech, it contracts with shippers of C&D debris and with truckers licensed by the State of New Jersey to transport the C&D debris from the shippers' sites (usually construction sites) to the CP transload facility, where the C&D debris is transferred in bulk from trucks to rail cars. Hi Tech states that it inspects all C&D debris moving through the transload facility to ensure compliance with federal regulations. Hi Tech also states that no hazardous materials are transferred, and no materials are held at the loading facility, except in rail cars.

Pursuant to the Hudson County solid waste management plan, HCIA, the agency responsible for implementing the plan, has designated a single, truck-to-truck facility to receive all C&D debris originating in Hudson County. New Jersey state laws impose fines and penalties on transporters delivering C&D debris to a facility not designed by HCIA to receive such waste. According to Hi Tech, HCIA has demanded that Hi Tech provide it with the identities of transporters who have delivered waste to the CP transload facility and the origins of all shipments it has handled, so that violators may be fined or penalized.

Hi Tech contends that requiring all trucks to process their shipments of C&D debris at a single, truck-to-truck facility adds an unnecessary and burdensome cost to the transportation of these materials and thereby renders the rail mode of transportation either illegal or noncompetitive with other modes. Hi Tech alleges that HCIA is thus attempting to regulate Hi Tech's intermodal rail-related activities and thereby invading the jurisdiction of the Board, while serving no purpose and burdening interstate commerce. The Authorities and NJDEP respond that HCIA is only regulating solid waste

⁴ CP filed a statement in support of the petition on June 6, 2002.

collection and disposal activities, such as the local transportation of solid waste by trucks, and not rail transportation in interstate commerce.

DISCUSSION AND CONCLUSIONS

Under 5 U.S.C. 554(e) and 49 U.S.C. 721, the Board may issue a declaratory order to terminate a controversy or remove uncertainty. However, it will not be necessary for the Board to institute a declaratory order proceeding here, because it is clear that the Board does not have jurisdiction over those activities described here that extend beyond the rail-related activities at the CP transloading facility.

The Board has jurisdiction over “transportation by rail carrier.”⁵ 49 U.S.C. 10501(a). The term “transportation” is defined to include a “facility” related to the movement of property by rail and “services” related to that movement by rail, including receipt, delivery, transfer, and handling of property. 49 U.S.C. 10102(9)(A), (B). Where the Board has jurisdiction over rail transportation, that jurisdiction is “exclusive,” 49 U.S.C. 10501(b), and state and local laws and regulations are generally preempted.⁶ To come within the preemptive scope of 49 U.S.C. 10501(b), however, these activities must be integrally related to the railroad’s ability to provide rail transportation services. Borough of Riverdale – Petition for Declaratory Order — The New York Susquehanna and Western Railway Corporation, STB Finance Docket No. 33466, slip op. at 9 (STB served Sept. 10, 1999), citing Growers Marketing Co. v. Pere Marquette Ry., 248 I.C.C. 215, 227 (1941) (Growers).

The particular activities at issue here are not integrally related to rail transportation services. To the contrary, the impact of HCIA’s single, truck-to-truck facility designation for the processing of C&D debris is on truck shipments within the state, not on interstate rail shipments. Hi Tech’s attempt to link these activities as one continuous intermodal rail movement must fail. As NJDEP points out, under Hi Tech’s theory, all state and local regulation of activities that occur before a product is delivered to a rail carrier for transportation would be preempted. Preemption clearly does not go that far; nor does the Board’s jurisdiction.

⁵ Section 10501(a) grants the Board jurisdiction over “transportation by rail carrier that is— (A) only by railroad; or (B) by railroad and water”

⁶ This preemption, however, does not prevent state and local governments from imposing appropriate health and safety regulations and exercising their police powers. But state and local laws and regulations are preempted when the challenged statute or regulation stands as an obstacle to authorized rail transportation. City of Auburn v. United States, 154 F.3d 1025 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999).

Preemption under section 10501(b) hinges on what can reasonably be considered to be part of “transportation by rail carrier” under section 10501(a). The Board and its predecessor, the Interstate Commerce Commission, have indicated that the jurisdiction of the agency may extend to certain activities and facets of rail transloading facilities, but that any such activities or facilities must be closely related to providing direct rail service. See Growers, 248 I.C.C. at 227. Courts have agreed that the section 10501(b) preemption applies to a rail intermodal transfer facility. See Norfolk S. Ry. v. City of Austell, No. 1:97-CV-1081-RLV, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. Aug. 18, 1997). The only Hi Tech activity that might be considered integral to the rail transportation of C&D debris would be the transfer of C&D debris from trucks to rail cars at the CP transload facility itself. Therefore, the Board’s jurisdiction, and preemption under section 10501(b), would not reach movements of C&D debris haulers on public roads en route to the CP transload facility.⁷

Hi Tech’s discrimination argument is also unavailing. Hi Tech fails to show how the requirement that all solid waste move through a single, designated truck-to-truck facility discriminates against the rail mode, as it also prohibits movement to other (non-designated) non-rail destinations.⁸

⁷ By a letter dated October 18, 2001, Hi Tech sought an informal opinion of the Board’s Secretary based on a description that closely matches the facts presented in the petition. In that letter, Hi Tech asked:

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

Consistent with the discussion here, the Secretary’s response, dated November 15, 2001, explained:

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 Based on the information you have provided, it would seem that the movement of trucks operated by [C&D debris] 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.

⁸ Hi Tech further argues that the burden of HCIA’s regulations on interstate commerce outweighs state and local benefits, citing U & I Sanitation v. City of Columbus, 205 F.3d 1063

(continued...)

Finally, Hi Tech's argument that the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. 5125, specifically preempts state laws and regulations in determining which materials are hazardous and require special handling is a matter involving the expertise of the United States Department of Transportation (DOT), not the Board. Indeed, in comments filed June 6, 2002, DOT urges the Board to avoid reaching any conclusion premised on HMTA. Any arguments regarding HMTA should therefore be addressed to DOT or an appropriate court.⁹

In sum, movement of trucks carrying C&D debris over New Jersey roads to reach the CP transload facility that Hi Tech operates is not part of "transportation by rail carrier" as defined in section 10501(a).¹⁰ Thus, the Board does not have jurisdiction over those activities, so section 10501(b) preemption does not apply to the state and local regulations at issue here. Therefore, Hi Tech's petition for institution of a declaratory order proceeding will be denied.

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

⁸(...continued)

(8th Cir. 2000). Specifically, it argues that the permit requirements and fines imposed are purely for local financial purposes and insufficient to justify any burden on interstate commerce. Based on these arguments, Hi Tech appears to be making a claim under the commerce clause of the United States Constitution, art. I, §8, cl. 3, which contains broad, overarching protection of interstate commerce from state or local interference and discrimination. The "dormant commerce clause," as it is referred to, protects against state barriers to interstate commerce when Congress has not affirmatively acted to authorize or forbid the challenged state activity. See Norfolk S. Corp. v. Oberly, 822 F.2d 388, 392-93 (3d Cir. 1987); Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 35-36 (1980). Such a claim must be brought in an appropriate court.

⁹ Hi Tech also argues that the Board should consider whether the state and local regulations violate certain environmental mandates it alleges the Board is charged with enforcing, citing the National Environmental Policy Act, 42 U.S.C. 4331 et seq., and 42 U.S.C. 7506(d) of the Clean Air Act. Because the Board does not have jurisdiction over the activities involved here, to which the state and local regulations apply, it has no authority to determine whether they conflict with other Federal statutes.

¹⁰ NJDEP also argues that the Eleventh Amendment to the United States Constitution bars the Board from ordering relief from the state in this proceeding, citing the recent U. S. Supreme Court decision in FMC v. South Carolina State Ports Auth., ___ U.S. ___, 122 S. Ct. 1864, 2002 U.S. LEXIS 3794 (2002). It is not necessary to reach this argument, however, because a proceeding will not be instituted in this matter.

It is ordered:

1. NJDEP's request that Hi Tech's motion to strike be rejected is denied.
2. The Authorities' request that Hi Tech's petition for declaratory order be dismissed is denied.
3. Hi Tech's motion to strike is denied.
4. Petitioner's request for a declaratory order proceeding is denied and this proceeding is terminated.
5. This decision is effective on the date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary