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SERVICE DATE – DECEMBER 11, 2007

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34824

TRI-STATE BRICK AND STONE OF NEW YORK, INC. AND TRI-STATE
TRANSPORTATION, INC.—PETITION FOR DECLARATORY ORDER

Decided: December 10, 2007

In a decision served on August 11, 2006 (August 2006 decision),¹ the Board concluded that it did not have jurisdiction over the transloading activities of Tri-State Transportation, Inc. (Tri-State Transportation) within the City of New York’s 65th Street Rail Yard located in Brooklyn (65th Street Yard or Yard). Accordingly, the Board denied the petition for a declaratory order, jointly filed by Tri-State Transportation and Tri-State Brick and Stone of New York, Inc. (jointly, Petitioners), seeking a determination that Tri-State Transportation was entitled to receive rail service at the 65th Street Yard. In this decision, we deny Petitioners’ request for reopening of that decision.

BACKGROUND

This case involves what is essentially a landlord-tenant dispute between Petitioners (the tenants) and the City of New York (the landlord). Tri-State Transportation operates a facility at the 65th Street Yard, at which it “transloads” materials used by its sister company, Tri-State Brick and Stone, from truck to rail service. The 65th Street Yard is owned by the City of New York, managed by Apple Industrial Development Corp., as administrator for the New York City Economic Development Corporation (collectively, the City), and served by the New York and Atlantic Railroad (NY&A).

Petitioners must pay the City for the use of the City’s property. When the City indicated that it would evict Petitioners unless they paid substantially higher fees for using the property, Petitioners sought Board intervention. They asked the Board to issue a declaratory order ruling that the Board has jurisdiction over their activities at the Yard; that the City’s application of state or local laws is preempted by the Interstate Commerce Act; and that charging higher rentals, or forcing them out of the Yard, would unlawfully interfere with Tri-State Transportation’s operations.

¹ A petition for judicial review of the August 2006 decision is being held in abeyance in Tri-State v. STB, No. 06-1334 (D.C. Cir. filed Sept. 22, 2006).

In the August 2006 decision, the Board denied the request for declaratory order. The Board found that, while Tri-State Transportation's transloading activities come within the broad definition of the term "transportation," the City's application of state or local laws is not preempted because Tri-State Transportation is not a rail carrier. As the Board explained, to come within the Board's jurisdiction (and the scope of federal preemption), an activity must not only be "transportation," but it must also be provided by, or under the auspices of, a rail carrier. See August 2006 decision at 1, 3-5.

On November 3, 2006, Petitioners filed a petition to reopen the August 2006 decision under 49 CFR 1115.4, to which the City replied on November 22, 2006. On December 1, 2006, United States Representative Jerrold Nadler filed comments supporting the petition to reopen.² Petitioners base their petition on claims of material error in the prior decision and changed circumstances, but, as discussed below, they have not shown a material error, nor are the changed circumstances they allege sufficient to warrant reopening. Therefore, the petition to reopen will be denied.

PRELIMINARY MATTER

On December 13, 2006, the City filed a request for leave to file a reply to Congressman Nadler's comments, and concurrently filed its reply. On December 22, 2006, Congressman Nadler filed comments opposing the City's request. The City should have an opportunity to respond to Congressman Nadler's comments in support of Petitioners. Accordingly, we will accept the City's reply.

DISCUSSION AND CONCLUSIONS

Under 49 CFR 1115.4, petitions to reopen administratively final actions may be filed at any time. Such petitions must state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances.

Petitioners make three broad claims in their petition to reopen. First, they allege that, in the August 2006 decision, the Board ignored their argument that the City is a common carrier. Second, Petitioners maintain that, in the decision, the Board failed to prevent interference with common carrier rail service and provide a remedy for that interference. Finally, Petitioners argue that the appointment of Chairman Nottingham to the Board presents a changed circumstance sufficient to merit a "fresh look" at the case. We will address each argument in turn.

Petitioners and Congressman Nadler argue that it was material error for the Board's prior decision not to find that the City should be considered to be a common carrier. However, as

² On October 22, 2007, New York Mayor Michael R. Bloomberg filed a letter urging the Board to act expeditiously in this matter.

explained in the August 6 decision, at 6, whether the City is a common carrier, or not, is not relevant to the issues that are properly before the Board in this case.

Petitioners argue that the fees the City, Tri-State's landlord, charges Tri-State are so high that Tri-State cannot accept delivery of the shipments consigned to it at the 65th Street yard. While Petitioners recognize that the Interstate Commerce Act (ICA) does not contain a specific remedy for this situation, they contend that the Board nevertheless should take action here to prevent what, in their view, effectively constitutes an unauthorized de facto abandonment of the NY&A line. However, the facts presented here do not support a de facto abandonment claim. The City does not provide rail transportation to Tri-State: NY&A does. And no concerns about NY&A's rates, charges, or services have been raised.

In some situations, an entity, including a governmental entity that does not itself provide rail service, can be found to have a residual common carrier obligation. See Maine DOT-Acq. Exempt, Me. Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine). But the residual common carrier obligation in the State of Maine context is limited to situations where the government entity has the right to obstruct or unreasonably interfere with the ability of the rail carrier to serve the shippers. Id. There is nothing in the record to suggest that the City has interfered, or could interfere, with NY&A's operations. Tri-State complains about actions of its landlord, the City, not NY&A, the serving carrier. Landlord-tenant disputes of this nature are not covered by the ICA.

Second, Petitioners contend that the Board erred in the August 2006 decision by not setting the land use charges for their use of the City's property. Petitioners contend that the City has extensive control over rail operations at the Yard and has attempted to erect economic barriers that are so high as to discourage customers from using Tri-State Transportation's services. Pet. at 12. Accordingly, they argue that the Board should have taken action to prevent the City from interfering with Tri-State Transportation's activities. Petitioners further argue that the activities of Tri-State Transportation are encompassed within the term "transportation" and, accordingly, should be protected by the Board. Pet. at 11-15.

However, the August 2006 decision expressly addressed the relationship between Tri-State Transportation's transloading activities and NY&A's common carrier rail service. Id. at 3-5. The Board correctly found that the City was not interfering with NY&A's rail service. Id. at 5. The Board also considered whether Petitioners might have the status of a rail carrier, in which case the Board would also have jurisdiction over them and the transportation services they provide. However, as the Board explained in the August 2006 decision, while Tri-State Transportation's transloading activities constitute "transportation" as broadly defined in 49 U.S.C. 10102(9)(B), those activities do not bring Petitioners under the Board's jurisdiction because they are simply rail customers using the City's property to transload cargo. The Board has consistently held that it lacks jurisdiction over noncarriers like Tri-State Transportation operating transloading facilities within rail yards. See, e.g., Town of Milford, MA—Petition for Declaratory Order, STB Finance Docket No. 34444 (STB served Aug. 12, 2004) (Board lacked jurisdiction over a noncarrier operating a transloading facility within a rail yard, where it

unloaded steel from rail cars and loaded it onto trucks for delivery to its customers pursuant to an agreement with the rail carrier for non-exclusive use of the rail yard); see also Hi Tech Trans, LLC—Petition for Declaratory Order—Newark, NJ, STB Finance Docket No. 34192 (Sub-No. 1), slip op. at 6-7 (STB served Aug. 14, 2003) (Board did not have jurisdiction over the activities of a noncarrier operating a transloading facility loading construction debris from trucks into rail cars, via a licensing agreement with the railroad).³

Petitioners suggest that the Board's prior decision mistakenly assumed that Tri-State Transportation claimed to be a "rail carrier." Pet. at 5. However, the August 2006 decision specifically acknowledged that Petitioners do not argue that Tri-State Transportation is a rail carrier, but instead argue that its transloading activities at the 65th Street Yard are integrally related to the line-haul service of NY&A. The Board has good reasons for rejecting that claim. As the record here shows, there is no agreement between Tri-State Transportation and any line-haul carrier for the provision of transloading service. NY&A has avoided liability or responsibility for Tri-State Transportation's activities. Tri-State Transportation is the only party that operates the transloading facility and is responsible for it. Further, there is no evidence that any line-haul carrier has ever quoted rates or charged compensation for Tri-State Transportation's transloading service, or held out that service as part of the line-haul rail transportation offered by either railroad. In short, the facts of this proceeding, as previously discussed in the August 2006 decision, establish that NY&A's level of involvement with Tri-State Transportation's transloading operation is insufficient to make Tri-State Transportation's activities an integral part of NY&A's rail service. Accordingly, it was not material error for the Board to conclude that it does not have jurisdiction over Tri-State Transportation's activities at the 65th Street Yard.

Even if the Board had jurisdiction over Tri-State Transportation's activities, the City has not prevented common carrier service to Petitioners. There is no evidence that the City has interrupted NY&A's rail service to the 65th Street Yard. To the contrary, the City has issued a Request for Proposals seeking an occupant for the intermodal portion of the Yard. City Reply to Tri-State Pet. at 8. The president of NY&A has stated that NY&A has no intention of abandoning service to the Yard, further indicating that the City intends that rail service to the Yard continue. August 2006 decision at 5. The City's increase in user fees charged to Petitioners has thus not affected NY&A's ability or willingness to provide rail common carrier service to the Yard. Based on the record before us, even if the City has a common carrier obligation, we cannot conclude that it intends to drive out all rail customers and effect an unauthorized, de facto abandonment of this railroad line, as Petitioners contend.

³ Federal courts have also found that noncarrier transloading activities fall outside the Board's jurisdiction. See Hi Tech Trans, LLC et al. v. State of New Jersey et al., 382 F.3d 295, 306-09 (3d Cir. 2004); see also Florida E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324 (11th Cir. 2001) (transloading of cement within rail yard not within Board jurisdiction).

Although Petitioners claim that the City has prevented them from accepting delivery of shipments consigned to them (Pet. At 14), the City has done nothing to stop NY&A from delivering those shipments. Nothing is preventing Petitioners from accepting delivery of those shipments except for their inability—or unwillingness—to pay the increased user fees. Petitioners’ reliance on United States v. Baltimore & Ohio R.R. Co. et al., 333 U.S. 169 (1948) (B&O), also is misplaced. In that case, the United States Supreme Court held that the Interstate Commerce Commission could forbid a noncarrier owner of an active rail line from effectively regulating the commodities the railroad operating over that line transported by charging the carrier an exorbitant amount for use of that line. B&O, 333 U.S. at 176. Here, in contrast, the dispute does not involve fees imposed by the City on the regulated entity, NY&A. NY&A’s service to Petitioners, and the amount it charges them, are not related to the fees that the City seeks to charge Petitioners for the right to use the property, and NY&A’s ability to provide rail common carrier service to the Yard does not hinge on the presence of Petitioners, or any other particular tenant; NY&A intends to continue to serve the Yard no matter what tenants are located there and what rent the City charges them. In effect, this case is merely a rent dispute between a landlord (the City) and its tenant (Tri-State Transportation). Thus, the Board did not commit material error when it determined in the prior decision that the City has not interfered with common carrier rail service to the Yard.

Finally, Petitioners argue that, because the August 2006 decision was decided by a two-member Board, and the proceeding presents significant and controversial issues, the appointment of Charles D. Nottingham as Chairman constitutes a changed circumstance sufficient to warrant a fresh look at the case. Pet. at 15-16. Our governing statute provides that, “A vacancy in the membership of the Board does not impair the right of the remaining members to exercise all of the powers of the Board.” 49 U.S.C. 701(7). The Board therefore had the authority to issue the August 2006 decision, and the appointment of a new Board member does not create a changed circumstance sufficient to reopen this matter.

For all of these reasons, Petitioners and Congressman Nadler have failed to show that there was material error, new evidence, or substantially changed circumstances to justify a reopening and reconsideration of the August 2006 decision. Accordingly, the petition to reopen will be denied.

It is ordered:

1. The City's request to file a reply to the comments filed by Congressman Nadler is granted.
2. The petition to reopen is denied.
3. This decision is effective on its date of service.

By the Board, Chairman Nottingham, Vice Chairman Buttrey, and Commissioner Mulvey.

Vernon A. Williams
Secretary