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SERVICE DATE – OCTOBER 16, 2009

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35057

TOWN OF BABYLON AND PINELAWN CEMETERY—PETITION FOR DECLARATORY
ORDER

Decided: October 15, 2009

By joint petition filed on December 18, 2008, the Town of Babylon, NY (Babylon) and Pinelawn Cemetery (Pinelawn) (collectively, Petitioners) ask the Board to reopen this docket and issue a declaratory order finding that the Board's prior decisions in this proceeding served on February 1, 2008 (February 2008 Decision), and September 26, 2008 (September 2008 Decision), remain valid after passage of the Clean Railroads Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (CRA). Petitioners also request that the Board find that a new agreement between the New York and Atlantic Railway Company (NYAR) and Coastal Distribution LLC (Coastal) (collectively, Respondents) has not materially changed their relationship. We will grant the petition to reopen and will also grant the request for a declaratory order.

BACKGROUND

This petition for declaratory order, the second in these proceedings, concerns the Farmingdale Yard transload facility, which is located in Babylon and owned by Pinelawn. In 1997, NYAR acquired a leasehold interest in Farmingdale Yard.¹ On March 22, 2002, NYAR entered into a sublease arrangement with Coastal. After the agreement was in place, Coastal began constructing a three-sided structure for the purpose of transloading construction and demolition debris. On March 29, 2004, Babylon issued a stop work order to Coastal because it failed to obtain a construction permit.

NYAR and Coastal sought a preliminary injunction from the United States District Court for the Eastern District of New York barring Babylon from enforcing the stop work order. The district court granted the preliminary injunction, finding that NYAR and Coastal had shown a greater than 50 percent chance of prevailing in their claims that Coastal's transloading services are rail transportation entitled to federal preemption under 49 U.S.C. 10501(b) and that Coastal is likely a rail carrier.² Babylon and Pinelawn appealed the district court's decision to the United

¹ New York & Atlantic Railway Company—Operation Exemption—The Long Island Rail Road Company, STB Finance Docket No. 33300 (STB served Jan. 10, 1997).

² Coastal Distrib., LLC v. Town of Babylon, No. 05-CV-2032 (E.D.N.Y. Jan. 31, 2006).

States Court of Appeals for the Second Circuit, which modified the injunction to permit the parties to seek a declaratory order from the Board on the scope of the Board's jurisdiction.³

On July 5, 2007, Babylon and Pinelawn filed a petition for a declaratory order asking the Board to determine whether Coastal's operation was subject to the agency's jurisdiction as rail transportation by a rail carrier. In the February 2008 Decision, the Board granted the petition for declaratory order. The Board found that Coastal's plans to build and operate Farmingdale Yard for transloading construction and demolition debris did not qualify for Federal preemption under 49 U.S.C. 10501(b) and, therefore, were fully subject to state and local regulation. The Board rejected the argument that Coastal's activities were preempted because Coastal was acting as the agent of a rail carrier—i.e., NYAR. After the Board's ruling, Coastal and NYAR filed petitions for judicial review with the U.S. Court of Appeals for the District of Columbia Circuit. Those petitions were dismissed for lack of jurisdiction⁴ because Coastal and NYAR had filed timely petitions for reconsideration of the Board's decision. Babylon and Pinelawn replied to these petitions on March 24, 2008. In the September 2008 Decision, the Board denied Respondents' various requests for relief. NYAR and Coastal appealed the Board's February 2008 Decision and September 2008 Decision to the D.C. Circuit on October 20, 2008.

On October 10, 2008, Petitioners also returned to the New York district court and filed a motion to vacate the preliminary injunction. In response, through a reply filed November 14, 2008 with the district court, NYAR and Coastal argued that they are now in an agent-principal relationship as a result of an amended Transload Facility Operations Agreement (Amended Agreement), which became effective October 1, 2008.

On December 18, 2008, Petitioners filed the instant petition to reopen this docket and for a declaratory order confirming that the February 2008 Decision and September 2008 Decision remain valid and that, under the CRA, Respondents' Farmingdale Yard is a non-rail facility and thus subject to local regulation.⁵ Respondents filed a reply on January 7, 2009. On January 21, 2009, Petitioners filed a letter with the Board. In a response filed on February 9, 2009, NYAR asked the Board to strike Petitioners' letter as an impermissible reply to a reply or, alternatively, to accept their substantive response to the letter.⁶

³ Coastal Distrib., LLC v. Town of Babylon, 216 F. App'x 97, 100, 103 (2d Cir. 2007).

⁴ N.Y. & Atl. Ry. v. STB, No. 08-1048 (D.C. Cir. May 9, 2008).

⁵ As a result, the D.C. Circuit granted the Board's unopposed motion to hold the case in abeyance pending the Board's review of the petition to reopen. N.Y. & Atl. Ry. v. STB, No. 08-1335 (D.C. Cir. filed Feb. 6, 2009).

⁶ Because the initial round of pleadings by both the petitioner and the respondent provided a rather limited statement of the issues and arguments relevant to the sought petition, and because the subsequent pleadings helped to remedy those deficiencies, we will deny NYAR's motion to strike Petitioners' January 21, 2009 letter. Included with NYAR's

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DISCUSSION AND CONCLUSIONS

Petition to Reopen

Pursuant to 49 U.S.C. 722 and 49 CFR 1115.4, we will grant a petition to reopen upon a showing that the proceeding involves material error, new evidence, or substantially changed circumstances. This petition addresses two issues involving changed circumstances. First, the petition raises an issue about the Amended Agreement between Respondents, which became effective after the September 2008 Decision. Second, the petition requests clarification of our prior decisions because of subsequent new federal legislation—the CRA. We agree with Petitioners that these two intervening events amount to substantially changed circumstances. To address these events, we will therefore grant the petition to reopen this docket.

Request for Declaratory Order

Jurisdiction. 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. The Board has broad discretion in determining whether to issue a declaratory order. See InterCity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984); Delegation of Authority—Declaratory Order Proceedings, 5 I.C.C.2d 675 (1989). Here, the changed circumstances discussed above have raised uncertainty about our prior decisions in this docket. It is therefore appropriate for the Board to issue a declaratory order.

In doing so, we reject Respondents' argument that we lack jurisdiction to act here because we have already ruled that Farmingdale Yard is not subject to our jurisdiction or because the CRA has removed the facility from our jurisdiction. Respondents appear to believe that our lack of jurisdiction to regulate the Farmingdale Yard somehow limits our authority to clarify our earlier decisions. However, we have continuing authority to issue decisions addressing the extent of our jurisdiction. See, e.g., N&W Ry.—Lease of Line in Cook and Will Count., IL, 9 I.C.C.2d 1155 (1993) (affirming an earlier order declaring that the ICC lacked jurisdiction over the lease in question) vacated, United Transp. Union-Illinois Legislative Bd. v. ICC, 52 F.3d 1074, (D.C. Cir. 1995) (remanding with instructions for the ICC to explain its determination of jurisdiction).

Respondents also assert that we cannot address our own jurisdiction because of the pending action in federal district court. But, as the courts have found, the Board has primary jurisdiction to determine its own jurisdiction. Burlington N. Inc. v. Chicago & N.W. Transp. Co., 649 F.2d 556, 558 (8th Cir. 1981). That is particularly true here where the legitimacy of our

(. . . continued)

February 9, 2009 response to Petitioners' letter is a pleading opposing the merits of that letter; we will also consider the substantive arguments contained in NYAR's response.

prior decisions has been challenged. Accordingly, it is entirely appropriate for us to clarify our earlier decisions that explain the extent of our jurisdiction over the Farmingdale Yard transload facility. The fact that the district court is also addressing issues related to the facility does not preclude us from doing so.

Finally, Respondents argue that we should deny or dismiss the petition because they have filed an appeal with the D.C. Circuit of the Board's prior decisions in this docket. But, the D.C. Circuit is aware of this petition and has granted our motion to hold the D.C. Circuit case in abeyance pending our review of this petition to reopen. N.Y. & Atl. Ry. v. STB, No. 08-1335 (D.C. Cir. filed Feb. 6, 2009).

Amended Agreement. In the February 2008 Decision, we found that the Board does not have jurisdiction over Coastal's activities and federal preemption does not apply.⁷ We subsequently affirmed that finding in the September 2008 Decision, at 5-6.

Petitioners ask us again to declare that federal preemption does not apply to Farmingdale Yard. They argue that the Amended Agreement does not establish an agent-principal relationship.⁸ Respondents assert that their Amended Agreement creates such a relationship between them, which, under Board precedent, entitles them to federal preemption from state and local law. We conclude that the Amended Agreement does not materially alter the relationship between Coastal and NYAR. Coastal continues to have the right to conduct an independent transloading business on NYAR's property under a long-term (10-year) agreement, for which it pays fees to NYAR.

In the February 2008 Decision, we observed that Coastal exercised control over fees, operations, and maintenance at Farmingdale Yard, and was solely responsible and liable for its own actions. Based on that evidence, we concluded that Coastal is not the agent of NYAR. Further, we found that Coastal is offering its own services to customers directly, and NYAR's involvement is essentially limited to transporting cars to and from the yard. Because Coastal is the only party that operates the yard and is responsible for it, and because NYAR had not assumed liability for Coastal's activities, we concluded that Coastal's activities are not an integral part of NYAR's provision of transportation by a "rail carrier." Although the Respondents apparently drafted the Amended Agreement to respond to our prior decisions, we do not find the changes sufficient to make Coastal NYAR's agent. Nor are Coastal's activities under the Amended Agreement an integral part of NYAR's operation as a rail carrier.

⁷ See the February 2008 Decision, at 4-6, for a detailed discussion of Board jurisdiction, federal preemption, and relevant agency and court precedent.

⁸ Petitioners request a declaration concerning the Amended Agreement because Respondents raised the new agreement in its current arguments before the Eastern District of New York. Petitioners' Petition to Reopen and Petition for Declaratory Order, Ex. A; Coastal Distrib. LLC & N.Y. & Atl. Ry. v. Town of Babylon & Pinelawn Cemetery Corp., No. 05-2032 (E.D.N.Y. filed Nov. 11, 2008).

While Respondents have represented to the New York district court that, under the Amended Agreement, NYAR sets transloading fees and assumes a greater role in the operation of the yard, the actual terms of the agreement do not support such claims. First, the Amended Agreement authorizes NYAR to adjust the transloading fee; however, it is “at Coastal’s request or with Coastal’s consent.” Petitioners’ Petition to Reopen and Petition for Declaratory Order, Ex. F, ¶ 3.01. Also, the fee must be sufficient to pay all operating expenses, a reasonable return on Coastal’s investment, and a reasonable profit margin. *Id.* Thus, NYAR continues to have only limited influence over transloading fees. Accordingly, the Amended Agreement does not effectively change the setting of transloading fees by Coastal from the earlier agreement, for purposes of establishing an agency relationship or integration of operations as a railroad carrier.

Second, the Amended Agreement does not give NYAR control over the operation of Farmingdale Yard. While NYAR is responsible for inspection and maintenance of all tracks within the yard, Coastal remains “solely responsible for all necessary repairs, maintenance and upkeep of the facility.” *Id.*, ¶¶ 1.07, 4.02(b). While NYAR becomes the owner of any improvements to the yard that Coastal makes—including the transloading structure at issue here—NYAR is under no obligation to pay or repay Coastal for improvements.

Finally, Coastal alone continues to provide transloading services. Coastal alone loads and unloads commodities. And Coastal alone bills customers for its loading services. *Id.*, ¶¶ 1.02, 1.05(a), 2.02.

The agreement contains two provisions that purport to vest authority in NYAR. But when read in the context of the overall agreement conferring specific powers on Coastal, these provisions have no effect. First, the amended agreement requires that all documents produced by Coastal recite that it is acting as NYAR’s agent. But a requirement that Coastal merely offer such a recitation does not divest it of any of the powers vested in it by the agreement and vests no powers at all in NYAR. Second, the agreement recites that NYAR “shall control all aspects of the Facility’s transload operations. . . .” *Id.*, ¶ 1.03. But, likewise, this general statement does not deprive Coastal of any of the specific powers vested in it by the agreement and grants no specific authority to NYAR.

This case is distinguishable from The City of Alexandria, Virginia—Petition for a Declaratory Order, STB Finance Docket No. 35157 (STB served Feb. 17, 2009). There, the Board found that a transloading company was an integral part of the railroad’s operation and that the contract operator’s services were bundled into the transportation services of the carrier. The record in that proceeding showed that the rail carrier built the facility with its own funds, paid the third-party transload operator a fee for performing transloading service rather than receiving rent from the operator, and could remove the operator on short notice without cause. Further, the transload operator was expressly prohibited from marketing the transload facility; it did not hold itself out as offering transloading services; and it did not set, invoice for, or collect transloading fees. Here, in contrast, Coastal’s transload services are separate from, and distinguishable from, NYAR’s freight rail service offerings. Coastal built the Farmingdale Yard, not NYAR; Coastal has the exclusive right to conduct the transloading operations under a long-term lease; Coastal

collects its transload fees from its customers directly; Coastal pays fees to NYAR in the nature of rent; and Coastal can only be removed during the term of the agreement for cause.

In sum, after reviewing the Amended Agreement, it is apparent that Coastal still operates Farmingdale Yard with a high degree of autonomy, independent of NYAR. The level of involvement of NYAR remains insufficient to establish it either as the operator of the facility or as the principal of Coastal. Nor are Coastal's activities integral to NYAR's provision of transportation as a "rail carrier." Because Coastal is not a rail carrier, the agent of a carrier, or an integral part of NYAR's rail operation, we lack jurisdiction to regulate Farmingdale Yard, federal preemption does not apply, and the facility remains subject to state and local regulation. See Hi Tech, LLC v. New Jersey, 382 F.3d 295, 308 (3d Cir. 2004).

The CRA. Respondents assert that Farmingdale Yard, as an existing solid waste rail transfer facility, is now subject to the CRA. As such, they argue, only the State of New York has jurisdiction over the facility's operation—not the Board or a local government like Babylon. Respondents also argue that, post-CRA, no state or local siting or other land use restrictions can be applied unless the state governor petitions the Board for relief, which has not occurred here.

The purpose of the CRA is to establish that solid waste rail transfer facilities, which, in the absence of the CRA were, or would have been, subject to the Board's jurisdiction and thus shielded from state and local regulation by federal preemption, must now comply with certain types of federal and state requirements in the same manner as non-rail solid waste management facilities that do not fall within the Board's jurisdiction or qualify for federal preemption under 49 U.S.C. 10501(b). The CRA removes from the Board's jurisdiction the regulation of solid waste rail transfer facilities that are part of the national rail system except as provided for in that Act. Under the CRA, the Board's authority with regard to solid waste rail transfer facilities is limited to the issuance of land-use-exemption permits. A Board-issued land-use-exemption permit preempts state and local laws and regulations affecting the siting of a facility.

Respondents essentially argue that the CRA's definition of "solid waste rail transfer facility" at 49 U.S.C. 10908(e)(1)(H), which is limited to facilities "owned or operated by or on behalf of a rail carrier," broadly includes any facility transferring solid waste for a railroad, in whatever capacity, regardless of whether the operator is or is not a railroad or an agent of a railroad. Respondents' Response, at 5. Respondents expand upon this argument in their motion to strike Petitioners' January 20, 2009 letter, claiming that Congress intended the term "operated on behalf of a rail carrier" to be a broad category that encompasses more than "agents" or those "acting under the auspices of" a rail carrier—in other words, to encompass not just facilities that would have been under the Board's jurisdiction prior to the CRA, but also those that would have been outside the Board's jurisdiction and thus already subject to full state and local regulation without the CRA.

Respondents' arguments are unconvincing and, indeed, would turn on its head Congress' intent in enacting the CRA. The legislative history shows that Congress meant the CRA to apply to "facilities on property owned or *controlled* by railroads," because, prior to the CRA, federal

preemption “prevent[ed] state or local law from regulating” those facilities. 153 Cong. Rec. S2371 (daily ed. Feb. 28, 2007) (statement of Sen. Lautenberg) (emphasis added). Because “control” is a key element of a principal-agent relationship, the phrase “on behalf of a rail carrier” imputes such a relationship, and thus a more limited category of facilities than Respondents claim. In short, the history indicates that in limiting the CRA to facilities “owned or operated by or on behalf of a railroad,” Congress intended to reach those facilities that, in the absence of the CRA, would have been subject to the Board’s jurisdiction and thus federal preemption—not expand the Board’s jurisdiction over facilities to which it would not have applied before, as Respondents suggest.

Here, the Farmingdale Yard facility is not (and never was) part of “transportation by rail carrier” within the Board’s jurisdiction, and thus does not raise the issue that the CRA was intended to address. Even before the CRA, the facility was fully subject to state and local regulation, and remains so today. Because Farmingdale Yard is not owned or operated by or on behalf of a rail carrier, the CRA does not apply to that facility. Finally, because the CRA does not apply to this case, it is unnecessary for the Board to address the need for federal siting permits and the lack of any petition from the governor.

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

It is ordered:

1. The motion to strike Petitioners’ January 21, 2009 letter is denied.
2. The petition to reopen this docket is granted.
3. The petition for a declaratory order is granted as discussed herein.
4. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Nottingham, and Commissioner Mulvey. Commissioner Mulvey concurred in part and dissented in part with a separate expression.

Anne K. Quinlan
Acting Secretary

COMMISSIONER MULVEY, concurring in part and dissenting in part:

I concur with the finding that the Amended Agreement between NYAR and Coastal is a changed circumstance furnishing grounds on which to grant the petition to reopen and request for declaratory order. However, I do not think the Board needed to reach the question of whether enactment of the Clean Railroads Act is also a changed circumstance, and, therefore, I do not join in that part of the decision. To find that the enactment of that legislation is a changed circumstance in this context opens the door to similar challenges based on this or other legislation that might be enacted in the future.