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SERVICE DATE – AUGUST 11, 2006

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: August 9, 2006

On January 17, 2006, Tri-State Brick and Stone of New York, Inc. (Tri-State Brick) and Tri-State Transportation Inc. (Tri-State Transportation) (jointly, Petitioners) filed a petition for a declaratory order seeking a determination that they are entitled to receive rail service at the 65th Street rail yard in Brooklyn, NY (65th Street Yard or Yard), a facility owned by the City of New York (NYC), managed by Apple Industrial Development Corp. (Apple), as administrator for the New York City Economic Development Corporation (NYCEDC), and served by the New York and Atlantic Railroad (NY&A). Additionally, Petitioners request that the Board set the terms and conditions of service, including any land use charges payable to the landowner. As a preliminary part of these claims, Petitioners are asking the Board to find that it has jurisdiction over their activities at the Yard, thereby preempting the City's application of state or local land use laws against them. On February 15, 2006, NYCEDC, NYC, and Apple (collectively, the City) filed a reply in opposition to Petitioners' request. The Petition for Declaratory Order will be denied for the reasons discussed below.

PRELIMINARY MATTERS

On March 3, 2006, Petitioners filed a request for leave to file a reply to a reply. On March 8, 2006, the City filed a reply opposing the Petitioners' request. A reply to a reply is not permitted by our rules. See 49 CFR 1104.13(c). Accordingly, we will deny Petitioners' request.

On April 12, 2006, the City filed a request for expedited consideration, claiming that Petitioners' refusal to vacate the Yard is preventing the City from using its property and making arrangements with others who seek to use the property to be closer to rail service. Petitioners and Congressman Jerrold Nadler filed replies in opposition to the request for expedited consideration on April 19 and 20, respectively. In Congressman Nadler's reply, he requests that the Board declare that the City is a common carrier at the Yard. On May 5, 2006, the City filed a reply in opposition to Congressman Nadler's request. We will consider the arguments raised below.

## BACKGROUND

NYC acquired title to the 65th Street Yard (approximately 33 acres) in fee simple, pursuant to a deed dated April 27, 1981, from the State of New York. In August 2000, NYCEDC, on behalf of NYC, and with Apple as the administrator, issued a Request for Proposals seeking an entity to operate the 65th Street Yard. In December 2001, Canadian Pacific Railroad (CP) and its subsidiary Delaware and Hudson Railway Company, Inc. were awarded the contract to operate the 65th Street Yard for a 3-year period, unless terminated earlier (Operating Agreement). The Operating Agreement gave CP the right to manage, direct and control the 65th Street Yard provided that CP did not enter into any contracts or other agreements that extended past the expiration date.

Under the Operating Agreement, CP began direct line haul rail services from the end of its trackage rights at Fresh Pond Junction, Queens County, NY, to the 65th Street Yard on the Brooklyn waterfront in Kings County, NY, a distance of approximately 9.5 miles.<sup>1</sup> At the time, CP also entered into a haulage agreement (Haulage Agreement) with NY&A. Under the Haulage Agreement, NY&A provided all services between Fresh Pond and the 65th Street Yard and operations into the Yard, as CP's agent.

On June 18, 2002, CP entered into an "Ancillary Agreement" with Tri-State Brick, granting Tri-State Brick the non-exclusive use of 4.1 acres within the 65th Street Yard to transload cargo and allowing it access to line haul rail service.<sup>2</sup> Tri-State Brick created Tri-State Transportation to operate a transloading facility at the Yard. Tri-State Transportation's transloading operation consists of unloading rail cars, the storage of brick and stone products on the ground, and the loading of those products on customer and common carrier trucks. Tri-State Brick customers account for 90% of the cargo handled by Tri-State Transportation and about 10% of the cargo is consigned to customers of other merchants or to other merchants themselves. Tri-State Transportation has stated to both CP and NY&A that its services are available for a reasonable fee to any customer.

Effective July 31, 2004, CP terminated its Operating Agreement and terminated its services to Brooklyn and the Yard. This left NY&A as the provider of rail service up to and into the 65th Street Yard. Immediately following termination of the Operating Agreement, the City demanded that Petitioners vacate the 65th Street Yard or agree to pay substantially increased user charges. Under the Ancillary Agreement, Petitioners paid a user fee of \$1,394 per month; NYCEDC would increase the user fee to \$44,921.25 per month. According to Petitioners, NYCEDC based its figure on a determination of the rental value of the land if it were used for non-rail services.

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<sup>1</sup> Prior to the Operating Agreement, CP provided service via trackage rights over Metro North and CSX Transportation, Inc. track between the NY&A and its own trackage in Mechanicville, NY.

<sup>2</sup> The Ancillary Agreement was co-terminus with CP's Operating Agreement.

The parties agree that the Ancillary Agreement, granting Petitioners the non-exclusive occupancy of 4.1 acres of the Yard, has terminated. Under the Ancillary Agreement, Tri-State Brick is obligated upon termination to remove all of its installations, alterations or additions, and equipment and surrender the land it had been using. In September 2005, Petitioners received notice from the City to quit the 65th Street Yard, but still have not vacated the 65th Street Yard and, according to the City, are now using an additional 1.4 acres to warehouse bricks and other materials. NY&A continues to provide rail service up to and into the 65th Street Yard.

Petitioners state that they have been seeking alternative locations for rail service since July 2004. Prior to coming to the Board, Petitioners sought a preliminary injunction in Federal court to prevent NYC from terminating or interfering with their use of the 65th Street Yard as a rail transloading facility. The court, however, denied the Petitioners' motion without prejudice to them refiling it after obtaining a ruling from the Board or should the City obtain an eviction order. Petitioners now seek to have the Board preempt any actions by the City to force Petitioners to vacate the City's property, the 65th Street Yard, under state or local law.

#### 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. 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 rail/truck transloading activities that are not performed by a rail carrier or under the auspices of a rail carrier holding itself out as providing those services. The broad Federal preemption of 49 U.S.C. 10501(b) does not apply to activities over which the Board does not have jurisdiction.

The Federal preemption provision contained in 49 U.S.C. 10501(b), as broadened by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, shields railroad operations that are subject to the Board's jurisdiction from application of state and local laws and regulation that would prevent or unreasonably interfere with railroad operations. See Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001) (Ayer). The Board has jurisdiction over "transportation by rail carrier." 49 U.S.C. 10501(b). To come within the Board's jurisdiction and the scope of Federal preemption, an activity must be both "transportation" and performed by, or under the auspices of, a rail carrier.

Whether a particular activity constitutes transportation by rail carrier under section 10501 is a fact-specific determination. There is no dispute that Tri-State Transportation's transloading activities come within the broad definition of transportation. See 49 U.S.C. 10102(9)(B). However, this is only part of the statutory equation. To be within the Board's jurisdiction, the transportation activities must be performed by a rail carrier (either directly or under its auspices). A rail carrier is a "person providing common carrier railroad transportation for compensation . . ." 49 U.S.C. 10102(5).

The City argues that Tri-State Transportation is not a rail carrier and that its activities are not part of NY&A's rail service. Petitioners do not claim that Tri-State Transportation is a rail carrier, and there is no evidence in the record that it has ever sought or obtained Board authority to act as a rail carrier. Instead, they argue that Tri-State Transportation's transloading activities at the 65th Street Yard are integrally related to the line haul service of NY&A, which they argue benefits from the transload facility, because without the transload facility, NY&A would have no one to serve at the Yard. Petitioners, however, fail to address the considerable body of law developed by the Board and courts that address the scope of federal preemption relating to just such transloading activities by noncarriers.

In Town of Milford, MA – Petition for Declaratory Order, STB Finance Docket No. 34444 (STB served Aug. 12, 2004) (Milford), the Board held that it 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. Id., slip op. at 3-4. Similarly, in 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) (Hi Tech), the Board's Director of the Office of Proceedings found that the 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 CP. The courts have likewise found that noncarrier transloading activities fall outside of 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) (on the same facts of the Board decision, finding that the Board lacked jurisdiction); Florida E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324 (11th Cir. 2001) (Florida East Coast) (transloading of cement within rail yard not within the Board's jurisdiction).

Moreover, where the Board has found jurisdiction over transportation activities or facilities, and preempted state and local laws, the activities or facilities have been operated or controlled by a rail carrier. See Green Mountain Railroad Corporation – Petition for Declaratory Order, STB Finance Docket No. 34052 (STB served May 28, 2002); Ayer; Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna and Western Railway Corporation, STB Finance Docket No. 33466 (STB served Sept. 10, 1999).

Petitioners' activities at the Yard are essentially indistinguishable from those in Board and court cases finding that the Board lacks jurisdiction over nearly identical noncarrier transportation activities as those provided by Tri-State Transportation. The facts of this proceeding establish that Petitioners' relationship with the rail carrier serving the Yard (CP through NY&A and now NY&A only) is that of a shipper and a carrier. There is no agreement between Tri-State Transportation and any line haul carrier for the provision of transloading service. And even under the now-expired Ancillary Agreement, CP merely agreed to provide Tri-State Brick line haul service into the 65th Street Yard and the non-exclusive use of 4.1 acres in the Yard to transload and store brick. The Ancillary Agreement did not make either Petitioner an agent of CP. In fact, both CP and NY&A have 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 CP or NY&A 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. CP's and now 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 (or CP's before it). Petitioners are merely using property owned by the City and occupied by Tri-State Transportation, under an expired agreement with CP, to transload cargo.<sup>3</sup>

Petitioners and Congressman Nadler offer additional arguments that the Board should take jurisdiction over this matter and allow Petitioners to continue to occupy facilities at the Yard and receive rail service there. These arguments do not support Petitioner's claims, however, because they do not help raise Petitioners' activities to that of an agent for a rail carrier.

Petitioners argue that the City devoted the 65th Street Yard to common carrier rail service and that once NY&A, through the Haulage Agreement, began serving the Yard, the 65th Street Yard became part of the national railway network. According to Petitioners, the 65th Street Yard is a common carrier railroad facility currently being used by a rail carrier and all issues related to its use are within the exclusive jurisdiction of the Board. They argue that the City, as the landowner, cannot interfere with the railroad's common carrier obligation to provide shipping services to the Petitioners and that, as a customer of a common carrier, they are entitled to service from the railroad.

While it is true that Petitioners have a right to demand service upon reasonable request, that is not the issue here. There is no evidence that the City is interrupting NY&A's rail service. The president of NY&A has stated that NY&A has no intention of abandoning service to Petitioners. Petitioners admit that they have continued to receive uninterrupted rail service, despite their holdover occupancy status with the City. Both the City and NY&A have stated that the City has not attempted to limit NY&A's ability to provide service to the 65th Street Yard or sought to abandon rail service at the Yard. Petitioners' concern is not that rail service at the Yard is being interrupted, but that their occupancy of the Yard, against the will of the owner, is being interrupted. In any case, the City is not interfering with rail service, directly or indirectly, by using state or local laws to evict a noncarrier occupant over whose activities the Board has no jurisdiction.

Both Petitioners and Congressman Nadler ask the Board to determine that the City is a common carrier subject to our jurisdiction. They maintain that the City, which built the rail facilities and added them to the nation's transportation system, controls access to the transportation services of a common carrier. Petitioners and Congressman Nadler contend that the City has sufficient power over operation of the Yard such that the City is effectively a common carrier and the Board should not relieve the City of its common carrier obligation.

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<sup>3</sup> That Tri-State Transportation has told NY&A (and CP) it would be willing to make its transloading services available to any rail customer, and that a small portion—less than 10%—of its transload services are rendered to customers other than Tri-State Brick, do not elevate Tri-State Transportation's status to that of a rail carrier. Rather, the issue is whether Tri-State Transportation's transloading activity is, in fact, an integral part of the rail service the carrier provides—which, for reasons discussed above, it is not.

We need not address whether the City has a common carrier obligation at the Yard because of its control over access to the Yard. Nor will this decision relieve the City of any obligation with respect to the Yard that it may have. Even assuming, for the sake of argument, that the City has a common carrier obligation to provide service at the Yard, that would not alter our analysis here. Indeed, even if a rail carrier owned the Yard, as was the case in Hi Tech and Milford, our analysis would remain the same.

Finally, Petitioners assert that CP's extension of service into the Yard places the 65th Street Yard within the Board's jurisdiction. The Operating Agreement and the Haulage Agreement extended CP's line haul services approximately 9.5 miles from the Fresh Pond Junction to the 65th Street Yard. The extension of service allowed CP to directly serve, through NY&A, the 65th Street Yard. Prior to the Haulage Agreement, NY&A had the right to use the line extending from Fresh Pond Junction to the 65th Street Yard, but not to enter the Yard. Again, this argument does not support Petitioners' claims because, while a facility may be subject to our jurisdiction, not all activities within that facility necessarily fall under our jurisdiction. See Florida East Coast, 266 F.3d at 1336-37. Moreover, even assuming that this arrangement was an extension of service that placed the 65th Street Yard under our jurisdiction, it would not give us authority over the relationship between the City and Petitioners.

Petitioners are merely using the City's property to transload cargo. They are simply rail customers. They have presented no argument or evidence that would justify treating them differently than any other non-rail carrier lessor or occupant of rail property, or anyone that desires rail service, for that matter. Indeed, Petitioners' reasoning would have us entitle any person to occupy property of another merely because that property has access to rail service. This we cannot do. As pertinent here, the Board's jurisdiction is limited by statute to "transportation by rail carrier." Tri-State Transportation's activities do not rise to the status of a rail carrier. Thus, the Board does not have jurisdiction over Tri-State Transportation's activities. Because we do not have jurisdiction over Tri-State Transportation's activities, we cannot set the terms and conditions, including land use charges, for Tri-State Transportation's use of the 65th Street Yard, or even insist that Petitioners' use of the Yard should continue. Those are issues for the courts to decide. Therefore, the petition to institute 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.

It is ordered:

1. Petitioners' request to file a reply to a reply is denied.
2. Petitioners' request for a declaratory order proceeding is denied and this proceeding is discontinued.

3. This decision is effective on the date of service.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams  
Secretary