

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35299

BOROUGH OF RIVERDALE–PETITION FOR DECLARATORY ORDER

Decided: August 3, 2010

On September 22, 2009, the Borough of Riverdale, N.J. (the Borough) filed a petition for declaratory order seeking a determination that the Board does not have jurisdiction pursuant to 49 U.S.C. § 10501 over proposed bulk transloading and storage activities at a facility in the Borough owned by The New York Susquehanna & Western Railway Corporation (NYSW) and that such activities are not preempted from local zoning laws. The Borough also requested a “stay,” essentially asking the Board to enjoin the operation of the proposed transloading and storage activities pending Board review of the petition. On October 7, 2009, NYSW filed a reply. The petition for declaratory order will be granted in order to clarify the scope of federal preemption in this case, and the Board finds that the proposed transloading operation qualifies for federal preemption. The petition for stay will be denied.

BACKGROUND

A. Preemption. This case involves the reach of the preemption provisions of the Interstate Commerce Act. In 49 U.S.C. § 10501(a), Congress has given the Board jurisdiction over “transportation by rail carrier,” which includes the carrier’s rail facilities.<sup>1</sup> Section 10501(b), as modified by the ICC Termination Act of 1995 (ICCTA),<sup>2</sup> expressly provides that, where the Board has such jurisdiction, that jurisdiction is “exclusive,” and state and local laws – including local zoning and permitting laws and laws that have the effect of managing or governing rail transportation – are generally preempted.<sup>3</sup>

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<sup>1</sup> The term “transportation” is broadly defined at 49 U.S.C. § 10102(9) to include, in relevant part, a “yard, property, [or] facility. . . related to the movement of . . . property. . . by rail, regardless of ownership or an agreement concerning use[.]” along with “services related to that movement, including receipt, delivery, . . . transfer in transit, . . . storage, handling, and interchange of . . . property.”

<sup>2</sup> Pub. L. No. 104-88, 109 Stat. 803 (1995).

<sup>3</sup> See, e.g., Green Mountain R.R. v. Vermont (Green Mountain), 404 F.3d 638, 642 (2d Cir. 2005); N.Y. Susquehanna & W. Ry. v. Jackson (New York Susquehanna), 500 F.3d 238, 252-55 (3d Cir. 2007); New England Transrail, d/b/a Wilmington & Woburn Terminal Ry.—Construction, Acquis. and Operation Exemption—in Wilmington and Woburn, Mass.,

The purpose of the federal preemption – which applies without regard to whether the Board actively regulates the particular rail carrier transportation activity involved<sup>4</sup> – is to prevent a patchwork of local and state regulation from unreasonably interfering with interstate commerce.<sup>5</sup> Thus, when the Board has jurisdiction under § 10501(a), § 10501(b) preempts two broad categories of state regulation: (1) permitting or preclearance requirements (including environmental, zoning and other land use requirements) that by their nature could be used to deny a railroad the right to conduct rail operations or proceed with transportation activities the Board has authorized;<sup>6</sup> and (2) attempts to address transportation matters that are regulated by the Board. Other state actions may be preempted only if, as applied, they would unreasonably burden or interfere with transportation by the rail carrier.<sup>7</sup> Where, however, an activity, even though it is on rail property, is not considered “transportation by a rail carrier” under § 10501(a), no federal preemption applies, and states and localities are free to regulate the activity.<sup>8</sup>

B. This Case. In 1995-96, NYSW constructed a facility on property it owned in Riverdale and began operations at that facility for the transloading of corn syrup from rail cars to trucks for subsequent delivery to customers in the New York/New Jersey metropolitan area. NYSW contracted with a trucking and logistics firm to operate the transload facility. The Borough sought to block this activity after concluding that the facility was located in an area zoned for residential use. It filed a civil action against NYSW in the Superior Court of New Jersey seeking an injunction restraining further operation of the transload facility, arguing that the construction and operation of the facility without municipal approval violated local zoning ordinances. The New Jersey court, however – while recognizing the exception for local health,

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(continued . . .)

FD 34797, slip op. at 7-9 (STB served July 10, 2007); and The City of Alexandria, Va.—Petition for Declaratory Order (City of Alexandria), FD 35157, slip op. at 2 (STB served Feb. 17, 2009), for a discussion of the scope of federal preemption under § 10501(b).

<sup>4</sup> See Green Mountain, 404 F.3d at 642.

<sup>5</sup> See H.R. Rep. No. 104-311 at 95-96 (1995), reprinted in 1995 U.S.C.C.A.N. at 807-08.

<sup>6</sup> See Green Mountain, 404 F.3d at 642-43; City of Auburn v. United States, 154 F.3d 1025, 1030-31 (9th Cir. 1998).

<sup>7</sup> Thus, state or local governments may exercise their police powers, provided they do not unreasonably burden interstate commerce or interfere with railroad operations. See Green Mountain, 404 F.3d at 643; New York Susquehanna, 500 F.3d at 252.

<sup>8</sup> See Fla. E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324, 1336-37 (11th Cir. 2001) (city zoning and licensing ordinances applied to an aggregate distribution plant located on railroad-owned property but operated by a non-railroad entity; because the rail carrier’s involvement ended with the delivery to the shipper’s plant, the plant itself was not part of rail transportation).

safety, and environmental regulations – held that the Borough’s application of local zoning regulations was federally preempted.<sup>9</sup>

On September 8, 1997, in Borough of Riverdale–Petition for Declaratory Order–The New York Susquehanna and W. Ry., FD 33466, the Borough filed a petition for declaratory order seeking a Board determination regarding whether and to what extent the facility was covered by the federal preemption contained in 49 U.S.C. § 10501(b). Sometime thereafter, unbeknownst to the Board, the Borough and NYSW negotiated an agreement that was incorporated in a consent order entered by the state court on July 22, 1998. That consent order provided that NYSW could continue its transload operations for food grade products, but that if NYSW wished to change the use of the facility, it would have to apply to the Borough’s planning board for approval on health and safety matters. Unaware of the state court’s consent order, the Board issued a decision on September 9, 1999, instituting a proceeding, summarizing relevant recent agency and court decisions, and requesting comments on certain issues.<sup>10</sup> However, upon subsequently learning of the existence of the consent order, the Board terminated the declaratory order proceeding, in a decision served on February 27, 2001, on the ground that the consent order had resolved the dispute.

In early 2009, NYSW was approached by Tri-State Brick, Inc. (Tri-State), about using the Riverdale facility for the transloading of custom-ordered bricks. In accordance with the 1998 consent order, NYSW filed a site-plan application with the Borough’s planning board. The application included an operating agreement dated March 8, 2009 (March 2009 Agreement). The March 2009 Agreement envisioned a lease arrangement whereby Tri-State would be responsible for the transloading operations. The planning board held a series of meetings on that proposed plan, withheld approval, and resolved to petition the Board for confirmation that the proposed brick transloading operation did not qualify for federal preemption. Meanwhile, in response to concerns raised during the planning board’s meetings about the lack of control by NYSW over the transloading operation, on July 31, 2009, NYSW and Tri-State entered into a new rail car transloading contract (July 2009 Agreement). This agreement provided that NYSW itself, or its contract loader, would conduct transloading and storage activities at the facility.

The parties then took different tacks in seeking to resolve whether the brick transloading operation was subject to federal preemption. NYSW pursued the issue in the Borough’s then-pending New Jersey Superior Court lawsuit. The Borough, in contrast, sought to put the state court proceeding on hold pending a determination by the Board regarding whether the proposed transloading operation qualifies for preemption. To obtain such a ruling, the Borough then filed this petition for declaratory order with the Board.

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<sup>9</sup> Borough of Riverdale v. New York Susquehanna & W. R.R., Docket No. MRS-L-2297-96 (Super. Ct. of N.J., Law Div., Morris County Aug. 21, 1996).

<sup>10</sup> Borough of Riverdale–Petition for Declaratory Order–The New York Susquehanna and W. Ry. Corp., 4 S.T.B. 380 (1999).

In a decision addressing the matters brought before it by the Borough and NYSW,<sup>11</sup> the state court found, as a general matter, that storage of goods in transit by a railroad on railroad property as part of a transloading operation constitutes transportation by a rail carrier, and that, in the particular matter before the court, NYSW had made a prima facie case that its proposed brick transloading operation constituted rail transportation subject to the preemption provisions of § 10501(b). The court also ruled that its determination was not “proof of preemption,” and that the Borough had the right to pursue jurisdictional questions before the Board. The court ordered the Borough’s planning board to conduct a hearing, but only as to the health and safety issues associated with the proposed transloading operation (which are generally not preempted, see Green Mountain). On February 8, 2010, the court issued a decision,<sup>12</sup> concluding that NYSW could begin operations, but that the Borough’s planning board could continue to examine health and safety issues related to the transloading facility.

#### DISCUSSION AND CONCLUSIONS

Petition for Declaratory Order. 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. Relying on the initial (March 2009) agreement and the testimony given before the Borough’s planning board, the Borough argues that the proposed operation is not within the Board’s jurisdiction. NYSW, for its part, argues: (1) that the preemption issue has already been decided by a court; (2) that, while the court allowed the Borough to seek a determination from the Board, the court had not asked for the Board’s assistance; and (3) that there is no uncertainty about the scope of the §10501(b) preemption that would necessitate the institution of a declaratory order proceeding.

The Board will institute a declaratory order proceeding. The current record is sufficient to issue a decision removing uncertainty about the scope of federal preemption. The Borough itself recognizes that preemption applies where a rail carrier provides a transload service through a third-party contractor.<sup>13</sup> Thus, the issue here is whether, under the governing (July 2009) agreement, it is NYSW, or its contract operator acting independently, that would be providing this transload service. To support its argument that NYSW is not providing the transloading service, the Borough challenges the bona fides of the new agreement and asserts that the July 2009 Agreement “does not clearly abrogate or modify the [earlier, March 2009] agreement” under which Tri-State leased property from NYSW to provide a transloading service. Pet. at 9. We conclude that the Borough is incorrect.

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<sup>11</sup> Borough of Riverdale v. The New York Susquehanna and W. Ry., Docket No. MRS-L-2297-96 (Super. Ct. of N.J., Law Div., Morris County Sept. 28, 2009).

<sup>12</sup> Borough of Riverdale v. The New York Susquehanna and W. Ry., Docket No. MRS-L-2297-96 (Super. Ct. of N.J., Law Div., Morris County Feb. 8, 2010).

<sup>13</sup> See Pet. at 11, citing City of Alexandria.

Whether a particular activity is considered part of transportation by rail carrier under § 10501 is a case-by-case, fact-specific determination. In determining whether transloading activities come within the Board's jurisdiction where a third party performs the physical transloading (transferring material to or from a rail carrier at a transloading facility), the Board has examined such factors as: whether the rail carrier owns the transloading facility; whether the rail carrier has paid for the construction and operation of the facility; whether the rail carrier holds out transloading as part of its service; whether the third-party loader is compensated by the carrier or the shipper; the degree of control retained by the carrier over the third party; and the other terms of the contract between the carrier and the third party. Compare City of Alexandria (transloading facility over which rail carrier exercised substantial control found to be part of rail transportation) with Town of Babylon and Pinelawn Cemetery—Petition for Declaratory Order (Town of Babylon), FD 35057 (STB served Feb. 1, 2008 & Sept. 26, 2008) (Board jurisdiction found not to extend to independent transload operator where it was the operator, not a rail carrier, that had an exclusive right to conduct transloading operation for construction and demolition debris and had exclusive responsibility to construct and maintain facilities and to market and bill the public for services).<sup>14</sup>

In City of Alexandria, the Board found that the rail carrier controlled the activities of a third-party transload operator who performed services for the rail carrier's customers. As the Board explained, the facility in that case was both constructed and owned by the railroad; the operator received a fee from the railroad; the rail carrier held itself out as offering the transloading service to its shippers as part of its common carrier service; the transloading service was bundled with the transportation service; the operator was contractually barred from marketing the facility; and the operator did not set, invoice for, or collect the transloading fees charged to the shipper. The Board determined that the transloading operation was part of the rail transportation and thus qualified for preemption.

In Town of Babylon, by contrast, the Board found that the provisions in a new operating agreement did not significantly alter the assignment of responsibility and control to Coastal Distribution LLC (Coastal), the transload operator, that pertained in the earlier lease agreement. In Town of Babylon, the property was exclusively leased for an initial period of 5 years to a waste disposal business (Coastal) that built, at its own expense, the transloading facility, paid rent to the rail carrier, and itself interfaced with the ultimate customers (for which it provided

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<sup>14</sup> See also Town of Milford, Mass.—Petition for Declaratory Order, FD 34444 (STB served Aug. 12, 2004) (Board lacked jurisdiction over noncarrier operating a rail yard where it transloaded steel pursuant to an agreement with the carrier but the transloading services were not being offered as part of common carrier services offered to the public); HiTech Trans, LLC—Petition for Declaratory Order—Newark, N.J., FD 34192 (STB served Aug. 14, 2003) (no STB jurisdiction over truck transportation conducted by non-rail carrier en route to transloading facility where the cargo is loaded into rail cars for further transportation by rail).

transload service using its own cars). Even after the parties changed their contractual arrangement from a lease to an operating agreement, Coastal continued to handle the marketing, billing and collecting, and loading of the construction and demolition debris using its own equipment with its own employees. The Board therefore found that the operation was not federally preempted.

The Borough's position is that the transloading operations involved here are more like those in Town of Babylon than those that the Board found preempted in City of Alexandria. Pet. at 11-12. Its principal support, however, is based on its review of the March 2009 Agreement and the testimony given regarding that agreement at hearings held by the Borough's planning board. The Borough appears to argue that the Board should be skeptical of the modification to the agreement encapsulated by the July 2009 Agreement because the change was perhaps motivated by the concerns raised by the planning board. Id. at 12.

The July 2009 Agreement appears to be a legitimate arrangement giving NYSW (or its third-party loader) transloading responsibilities and control. Unlike the situation in Town of Babylon, in which an agreement was modified, but only in superficial ways that did not give control to the carrier, here the modified July 2009 Agreement does place control in the hands of NYSW, a licensed rail carrier. Specifically:

- Paragraphs 1.1 and 1.2 provide that NYSW itself is responsible for making and paying for improvements to the facility, and that any necessary modifications to the facility will be made by contractors selected by NYSW.
- Paragraph 3.1 provides that the contemplated transportation/transloading services will be performed for Tri-State by NYSW itself or "an entity it engages," at (Paragraph 2) rates to be determined by NYSW. (NYSW stated in its reply to the Borough's petition for declaratory order that Susquehanna Bulk Systems, Inc. (Susquehanna), a wholly-owned subsidiary of NYSW, would conduct the transloading operations, as Susquehanna currently does for NYSW at other transload facilities.)
- Paragraph 5.3 provides that Tri-State is responsible for compensating NYSW for providing the service to Tri-State.
- Paragraphs 4.4 and 6 give NYSW control of operating procedures at the facility.
- Paragraph 7 provides that NYSW or its contract loader is independent of Tri-State, a point that "is paramount to this Agreement."

While provisions in the July 2009 Agreement (e.g., paragraph 4, which allows Tri-State representatives to be on site to observe operations) do give Tri-State a presence at the facility, it remains clear that this transload operation is held out and conducted by NYSW, a licensed rail

carrier, on behalf of Tri-State, which is a shipper vis-a-vis NYSW. NYSW holds out the operation as part of its services at the facility that it owns, and that it developed at its own expense. It exercises full control over the contract operator, and it, not Tri-State, pays the third-party operator. In short, this operation is substantially similar to that in City of Alexandria and unlike Town of Babylon. Thus the operations are part of rail transportation and qualify for preemption.

Petition for Stay. Because the Board has decided to issue a declaratory order finding that federal preemption applies to the proposed transloading operation, the Borough's request for stay will be denied as moot.

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

It is ordered:

1. The Borough's request for a declaratory order proceeding is granted as discussed in this decision.
2. The Borough's request for a stay is denied as moot.
3. This decision is effective on its date of service.

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