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SERVICE DATE – FEBRUARY 1, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35057

TOWN OF BABYLON AND PINELAWN CEMETERY—
PETITION FOR DECLARATORY ORDER

Decided: January 31, 2008

By petition for declaratory order filed on July 5, 2007, the Town of Babylon, NY (Babylon) and Pinelawn Cemetery (Pinelawn) ask the Board to issue a declaratory order finding that, to the extent the New York and Atlantic Railway Company (NYAR) has authorized Coastal Distribution LLC (Coastal) to build and operate a transload facility for construction and demolition debris (C&D) on property owned by Pinelawn, such activities do not qualify for Federal preemption under 49 U.S.C. 10501(b) and are therefore fully subject to local regulation by Babylon. The request for a declaratory order will be granted, as discussed herein.

BACKGROUND

The petition for declaratory order concerns the Farmingdale Yard, which is located in Babylon, NY, and owned by Pinelawn. Pinelawn leased the Farmingdale Yard to the entity now known as the Metropolitan Transportation Authority, the parent of the Long Island Railroad (LIRR), in the early 1900s. NYAR acquired all of LIRR's freight operations, including its interest in the Farmingdale Yard, in 1997.¹ NYAR attempted to attract additional business to the Farmingdale Yard, but without success. On March 22, 2002, NYAR entered into a lease arrangement with Coastal with the goal of generating substantial additional bulk transload traffic for the railroad. The lease gave Coastal exclusive use of the property for a term of 5 years in exchange for monthly rent and permitted Coastal to make improvements to the property at its own expense. NYAR and Coastal originally intended for the facility to transload aggregates, but, when the aggregate market in Long Island did not support their plan, they decided to target the construction industry instead and Coastal began constructing a three-sided structure for the purpose of transloading C&D.

On March 29, 2004, after learning that Pinelawn, rather than LIRR, owned the Farmingdale Yard, Babylon issued a Stop Work Order to Coastal based on its failure to obtain a construction permit for the three-sided structure. On August 5, 2004, NYAR and Coastal replaced their lease agreement with a Transload Facility Operations Agreement (Operations

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

Agreement), which, they assert, did not change the daily operations at the Farmingdale Yard, but specified that NYAR was engaging Coastal as NYAR's "contractor" and that NYAR would control all aspects of the Farmingdale Yard's transloading operations. NYAR and Coastal appealed the Stop Work Order to Babylon's Zoning Board of Appeals, which upheld the order, finding that Coastal's use of the Farmingdale Yard did not constitute "transportation by a rail carrier" so as to come within the Board's jurisdiction.

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 section 10501(b) and that Coastal is likely a rail carrier.² Babylon and Pinelawn appealed the district court's decision to the United 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 (collectively, petitioners) filed the instant petition for a declaratory order to determine whether Coastal's operation is subject to the Board's jurisdiction as rail transportation by a rail carrier and also sought discovery regarding the relationship between NYAR and Coastal. NYAR and Coastal (respondents) filed a response to the petition on July 25, 2007.⁴

Petitioners argue that Coastal is neither a rail carrier nor an agent of NYAR and that its use of the Farmingdale Yard does not constitute railroad transportation. Petitioners maintain that the relationship between respondents is similar to that in Hi Tech Trans, LLC—Petition for Declaratory Order—Newark, NJ, STB Finance Docket No. 34192 (Sub-No. 1) (STB served Aug. 14, 2003) (Hi Tech), where the railroad did not have sufficient involvement in transloading

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

³ Coastal Distrib., LLC v. Town of Babylon, 216 Fed.Appx. 97, 100, 103 (2d Cir. 2007) (Coastal).

⁴ On August 8, 2007, respondents filed a motion for a protective order, asking the Board to relieve them of any obligation to respond to petitioners' discovery requests. Babylon and Pinelawn filed a response to the motion on August 21, 2007, and, on the same day, asked for additional time to file a reply in further support of their petition after the Board has ruled on the motion for a protective order. On September 26, 2007, petitioners filed a letter in support of their discovery requests, to which Coastal responded on October 9, 2007. Because the record is sufficient for us to determine whether Coastal's transloading operations are subject to our jurisdiction, discovery is unnecessary and both petitioners' request to submit additional evidence and respondents' motion for a protective order will be denied as moot.

operations to make Hi Tech’s activities an integral part of the railroad’s transportation service.⁵ Petitioners argue that Coastal is essentially a shipper of NYAR, and that Coastal should not be entitled, by virtue of its agreement with the railroad, to the preemption from most state and local regulation provided under 49 U.S.C. 10501(b).⁶

NYAR and Coastal maintain that the transloading operations conducted at the Farmingdale Yard constitute “rail transportation” within the meaning of 49 U.S.C. 10501(b). They state that the property has been devoted to rail service since 1904, and that NYAR’s decision to contract with Coastal to operate the Farmingdale Yard does not affect the applicability of the Federal preemption. They argue that this case is different from Hi Tech because Coastal is NYAR’s agent; Coastal’s use of the property is limited to transloading cars moved by NYAR; and NYAR is involved in several aspects of the operations at Farmingdale Yard.

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. 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). In this case, the Second Circuit has specifically suggested that the parties ask the Board to resolve the uncertainty regarding the scope of the Board’s jurisdiction over the Farmingdale Yard operations. It is therefore appropriate for the Board to issue a declaratory order here.

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 (1995) (ICCTA), shields railroad operations that are subject to the Board’s jurisdiction from the application of most state and local laws. Section 10501(b) expressly provides that the “jurisdiction of the Board over . . . transportation by rail carriers . . . is exclusive.” Section 10501(b) also expressly provides that “the remedies provided under [49 U.S.C. 10101-11908] are exclusive and preempt the remedies provided under Federal or State law.”⁷

⁵ See Hi Tech Trans LLC v. New Jersey, 382 F.3d 295, 308 (3d Cir. 2004).

⁶ Although Coastal and NYAR recently recast their original agreement, petitioners assert that the changes were purely cosmetic in nature.

⁷ Even where the section 10501(b) preemption applies, however, there are limits to its scope. Where there are overlapping Federal statutes, they are to be harmonized, with each statute given effect to the extent possible. Moreover, as the ICCTA legislative history makes clear, the states retain police powers to protect the public health and safety on railroad property so long as the state and local regulation does not unreasonably interfere with interstate commerce. See Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 643 (2d Cir. 2005) (Green Mountain).

As noted, the Board has jurisdiction over “transportation by rail carrier,” 49 U.S.C. 10501(a). Accordingly, to be subject to the Board’s jurisdiction and qualify for Federal preemption under section 10501(b), the activities at issue must be transportation,⁸ and that transportation must be performed by, or under the auspices of, a “rail carrier.”⁹ A “rail carrier” is defined as “a person providing common carrier railroad transportation for compensation” 49 U.S.C. 10102(5). Whether a particular activity constitutes transportation by rail carrier under section 10501(b) is a case-by-case, fact-specific determination.

The Interstate Commerce Commission (ICC), the Board’s predecessor, developed standards to determine whether terminal-type companies that are commonly owned by, or contract with, railroads to provide services are themselves rail carriers. See Lone Star Steel Co. v. McGee, 380 F.2d 640, 647 (5th Cir. 1967) (Lone Star); Assoc. of P&C Dock Longshoremen v. The Pitts. & Conneaut, 8 I.C.C.2d 280, 290-95 (1992) (P&C Dock). The Board’s jurisdiction extends to the rail-related activities that take place at transloading facilities if the activities are performed by a rail carrier or the rail carrier holds out its own service through the third party as an agent or exerts control over the third-party’s operations. Compare Green Mountain, 404 F.3d at 640, 642 (transloading and temporary storage of bulk salt, cement and non-bulk foods by a rail carrier preempted) and Lone Star and P&C Dock (so long as the questioned service is part of the total rail common carrier service that is publicly offered, then the agent providing it for the offering railroad is deemed to hold itself out to the public) with Town of Milford, MA—Petition for Declaratory Order, STB Finance Docket No. 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); and Hi Tech (no STB jurisdiction over truck-to-truck transloading prior to commodities being delivered to rail).

Here, petitioners argue that Coastal is not a rail carrier and that its activities do not constitute transportation. Respondents do not claim that Coastal is itself a rail carrier.¹⁰ Instead, they argue that Coastal is operating as NYAR’s “contractor” and that its operations are an

⁸ The term “transportation” has been defined expansively to include “a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail including “receipt, delivery,” transfer in transit, “storage,” and handling of property. 49 U.S.C. 10102(9).

⁹ See 49 U.S.C. 10501; Hi Tech, slip op. at 5.

¹⁰ Coastal is not a licensed rail carrier. There are formal procedures that must be followed to obtain authority as a rail carrier from the Board, see 49 U.S.C. 10901, and there is no evidence in the record that Coastal has ever sought or obtained Board authority to act as a rail carrier.

integral part of the transportation performed by NYAR, which is a licensed rail carrier. They contend that NYAR plays a significant role in Coastal's operations, as shown by the Operations Agreement, and that NYAR's involvement is sufficient to make Coastal's activities those of a rail carrier under cases such as P&C Dock.

Based on all of the information provided by the parties, we find that the facts of this case fail to establish that Coastal's activities are being offered by NYAR or through Coastal as NYAR's agent or contract operator. While the Operations Agreement includes a statement providing that NYAR "shall control all aspects of the Facility's transloading operations," the agreement, when considered in its entirety, shows that NYAR has essentially no involvement in the operations at the facility. Under the parties' agreement, NYAR's responsibility and liability for the cars ends when they are uncoupled at the Farmingdale Yard and resumes when they are coupled to NYAR's locomotive.¹¹ Coastal exercises almost total control over the activities of the facility. For example, Coastal has the exclusive right to conduct transloading operations on the property. Coastal built the facility and, pursuant to the Operations Agreement, is responsible for all track repairs and for all necessary repairs, maintenance, and upkeep of the facility. Coastal also performs the marketing activities for the operations at the facility and provides and maintains all rail cars. Coastal is entitled to charge a loading fee for its transloading services, a fee which is in addition to the rail freight transportation charge payable to the railroad and over which NYAR has no control. And for use of the facility, Coastal pays NYAR a usage fee of \$20 per loaded rail car (inbound or outbound).

Moreover, Coastal, not NYAR, conducts all customer negotiations and bills and collects the loading fee from customers separately from the transportation charges, which are collected by the connecting Class I carrier (CSX Transportation, Inc.). In fact, Coastal may enter into separate disposal agreements in its own name with customers for disposition of commodities after transportation, from which NYAR disclaims any liability. Finally, the parties' agreement provides that Coastal must maintain liability insurance executed in favor of NYAR and that Coastal agrees to indemnify NYAR for all claims and liability arising out of Coastal's use of the premises.

In sum, the record here, including in particular the parties' rights and obligations under their own agreement, does not establish that Coastal is acting as an agent or under the auspices of NYAR. This case differs from P&C Dock because there is no evidence that NYAR has ever quoted rates or charged compensation for use of Coastal's transloading facility or that NYAR is holding out Coastal's transloading services as part of the common carrier services that NYAR

¹¹ The agreement does provide that NYAR may use the tracks and yard facilities from time to time for railroad purposes, so long as that use does not unreasonably interfere with Coastal's operations. Moreover, NYAR may review and audit Coastal's business records, inspect the track and the facility, and approve the commodities it handles, but these limited rights do not enable NYAR to exert any real control over Coastal's operations at the facility.

offers to the public.¹² Rather, based on the evidence before us here, Coastal is offering its own services to customers directly, and NYAR's involvement essentially is limited to transporting cars to and from the facility. Because Coastal is the only party that operates the transloading facility and is responsible for it, and because NYAR has assumed no liability or responsibility for Coastal's transloading activities, NYAR's level of involvement with Coastal's transloading operations at the Farmingdale Yard is insufficient to make Coastal's activities an integral part of NYAR's provision of transportation by "rail carrier." Thus, the Board does not have jurisdiction over Coastal's activities, and the Federal preemption in section 10501(b) does not apply.¹³

This decision is consistent with the Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 193, 121 Stat. 1844 (2007), because nothing in this decision authorizes the following activities at any solid waste rail transfer facility: collecting, storing or transferring solid waste outside of its original shipping container; or separating or processing solid waste (including baling, crushing, compacting and shredding). The term 'solid waste' is defined in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903.

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

It is ordered:

1. The petition for declaratory order is granted.
2. Petitioners' request to file additional evidence is denied as moot.
3. Respondents' motion for a protective order is denied as moot.
4. This proceeding is discontinued.

¹² In P&C Dock the ICC found, inter alia, that the railroad "offers P&C Dock's rail/lake transfer as an integral element of its railroad service and states separate charges for it in its tariff." 8 I.C.C.2d at 283.

¹³ Because we find that Coastal's activities are not being performed by, or under the control of, a rail carrier, we need not address whether those activities constitute "transportation."

5. This decision is effective on its service date.

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

Anne K. Quinlan
Acting Secretary