

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 34997

JAMES RIFFIN—PETITION FOR DECLARATORY ORDER

Digest:¹ In light of the Board’s finding in another case that James Riffin is not a rail carrier on a line in Allegany County, Md., the Board finds that Riffin’s activities both on that line and on a parcel in Cockeyville, Md., do not fall under the Board’s jurisdiction and that federal law does not bar state and local regulation of those activities.

Decided: July 11, 2011

This matter is before the Board on remand from the United States Court of Appeals for the District of Columbia Circuit. Riffin v. STB, 592 F.3d 195 (D.C. Cir. 2010). As discussed below, because we have determined in another proceeding that petitioner is not a “rail carrier,” we find that 49 U.S.C. § 10501(b) does not preempt Maryland state and local regulation of petitioner’s activities either on a rail line in Allegany County, Md., once owned by his corporate affiliate, or on a parcel of property he owns in Cockeyville, Md.

BACKGROUND

In 2003, petitioner James Riffin acquired a parcel of land in Cockeyville, Md., adjacent to the Cockeyville Industrial Track (CIT). A portion of the property lies in a floodplain. A waterway runs adjacent to the property and ultimately feeds into a reservoir that serves as the primary water source for metropolitan Baltimore.

In 2004, despite having no right to provide common carrier freight rail service on the CIT (or anywhere else), Riffin began to construct a maintenance-of-way (MOW) facility on the Cockeyville property by, among other things, clearing, filling, and grading land and stockpiling soil. When state and local authorities discovered his activities, they directed him to stop until he obtained the permits required by state and local law. Riffin refused, claiming to be a rail carrier whose activities are immune from state and local environmental laws by virtue of federal preemption. The authorities then obtained a court order requiring Riffin to comply with applicable state and county environmental laws, to cease further excavation, and to take certain

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

steps to prevent the discharge of soil and sediment into the adjacent waterway. Riffin unsuccessfully appealed that order but nevertheless continued his construction activities, leading the court to find him in contempt.

In August 2006, the Board authorized Riffin to acquire a line of railroad about 150 miles away in Allegany County, Md. (the Allegany line). Although a corporate affiliate of Riffin owned the line, title has never been transferred to Riffin, nor has he acquired any legal interest in the line that would enable him to provide rail service on the line. Nevertheless, Riffin states that he determined that the Allegany line needed work to repair sections of track eroded by a creek. According to Riffin, state and local environmental officials told him that he was required to obtain permits before doing any work on the Allegany line, which, like the Cockskeyville property, is partially located in a floodplain.

In 2007, Riffin asserted that he was a rail carrier, and he requested that the Board issue a declaratory order holding that 49 U.S.C. § 10501(b) preempts application of state and local laws to his past and proposed activities allegedly relating to rail transportation at both the Cockskeyville property and the Allegany line. Section 10501(b) provides that “[t]he jurisdiction of the Board over . . . transportation by rail carriers . . . is exclusive” and that “the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal and State law.”

In May 2008, the Board ruled on Riffin’s declaratory order request. James Riffin—Petition for Declaratory Order, FD 34997 (STB served May 2, 2008) (May 2008 decision). The Board did not find that Riffin was a rail carrier with respect to the Allegany line (or any other line). Nevertheless, so that it could conduct the requested preemption analysis, the Board considered “the facts as presented by petitioner,” *id.* at 1, and it assumed for the purposes of that decision that Riffin was a rail carrier with respect to the Allegany line. Within that framework, it found that Riffin’s maintenance work on the Allegany line would constitute part of “transportation by rail carrier,” and thus would be entitled to federal preemption under § 10501(b). *Id.* at 6. However, the Board further concluded that, even assuming Riffin was a rail carrier with respect to the Allegany line, federal preemption would not apply to Riffin’s construction activities at his alleged MOW facility in Cockskeyville because Riffin could not operate as a rail carrier on the CIT; the Cockskeyville property was not connected to any rail line over which Riffin may have authority to operate; and “[e]ven if [Riffin] were to ship his MOW equipment and materials by rail over the CIT to a rail line that he owns or operates, petitioner would have to arrange transportation with another rail carrier,” making Riffin “no more than a shipper on the CIT.” *Id.* at 5.

Riffin sought judicial review of the Board’s May 2008 decision, challenging the finding that his activities at the Cockskeyville property were not entitled to preemption.² The court of

² Maryland and Allegany County also sought judicial review of the Board’s decision to the extent that it assumed Riffin to be a rail carrier. The court of appeals rejected their challenge for lack of standing. Bd. of Comm’rs of Allegany County, Md. v. STB, No. 08-1217, 2009 WL 1065896 (D.C. Cir. Mar. 31, 2009).

appeals vacated the Board's decision, concluding that the May 2008 decision "does not adequately explain why Riffin's activities at the Cockeyville property do not fall under the Board's jurisdiction and within the preemptive ambit of § 10501(b)." Riffin, 592 F.3d at 198. Specifically, the court found that the Board had not adequately addressed Riffin's claim (made at oral argument) that the equipment at his Cockeyville property would be transported by truck to support work done on the Allegany line, and that therefore the activities at Cockeyville would constitute transportation by a rail carrier as to which state and local regulation is preempted.

In May 2009, while judicial review of the May 2008 decision was pending, Riffin filed a petition with the Board asking, in part, that the Board declare that he became a rail carrier with respect to the Allegany line in 2006 when the Board authorized him to be substituted for his corporate affiliate in the purchase of the Allegany line. In September 2009, the Board issued a decision finding that, although Riffin had obtained authority to acquire and operate the Allegany line, he nevertheless was not a rail carrier because he lacked the ability to provide rail service on that line, as he had never acquired suitable legal interest in the property. James Riffin—Petition for Declaratory Order, FD 35245 (STB served Sept. 15, 2009) (September 2009 decision).³ Riffin sought judicial review, and the court of appeals affirmed the Board's determination. Riffin v. STB, No. 09-1277, 2010 WL 4924719 (D.C. Cir. Nov. 30, 2010) (per curiam).

DISCUSSION AND CONCLUSION

The May 2008 decision rested on the assumption, solely for purposes of the case, that Riffin was a rail carrier with respect to the Allegany line and analyzed whether his activities at the Cockeyville property and his proposed activities on the Allegany line would qualify as "transportation" entitling them to federal preemption. The court of appeals considered the Board's analysis of that issue and found it deficient. In the meantime, however, the Board determined in the September 2009 decision that Riffin is not a rail carrier. Given that determination, we need not address the "transportation" issue on remand, because the issue is moot. Because Riffin has specifically been found to be a non-carrier, the Board lacks jurisdiction over his activities at either location, and, accordingly, § 10501(b) does not preempt state and local laws regulating those activities.

To be within the Board's jurisdiction and thus covered by § 10501(b) preemption, 2 separate showings must be made: an activity (1) must constitute "transportation," and (2) must be performed by, or under the auspices of, a "rail carrier." 49 U.S.C. § 10501(a)(1), (b)(1); see N.Y. & Atl. Ry. v. STB, 635 F.3d 66, 71-72 (2d Cir. 2011); Hi Tech Trans, LLC v. New Jersey,

³ In November 2010, the Board authorized Eighteen Thirty Group to acquire the Allegany line from Riffin's bankruptcy estate, which claimed to have equitable title to the line. See Eighteen Thirty Grp., LLC—Acquis. Exemption—In Allegany Cnty., Md., FD 35438, et al. (STB served Nov. 17, 2010). The bankruptcy trustee has since reported to the bankruptcy court that the sale has taken place, with CSXT deeding the line to Eighteen Thirty Group, which paid the estate for the right to acquire legal title to the line. Report of Sale of Property to Eighteen Thirty Group LLC, In re Riffin, No. 10-11248 (Bankr. D. Md.) (filed Mar. 17, 2011) (ECM Doc. 237).

382 F.3d 295, 308 (3d Cir. 2004); Fla. E. Coast Ry. v. City of W. Palm Beach, 266 F.3d 1324 (11th Cir. 2001). Thus, for Riffin’s activities at either the Cockeysville property or the Allegany line to be covered by federal preemption, Riffin must be a rail carrier—a “person providing common carrier railroad transportation for compensation.” 49 U.S.C. § 10102(5). Riffin maintains that he became a rail carrier as a result of the Board having authorized him to acquire the Allegany line in 2006. The Board, however, rejected that argument in the September 2009 decision, finding that Riffin did not become a rail carrier on the Allegany line, and the court of appeals affirmed that decision.⁴ Accordingly, it is now irrelevant how Riffin might move his MOW equipment between the Cockeysville property and the Allegany line. Whether or not Riffin’s activities at either location qualify as “transportation,” they are not transportation by “rail carrier.” Thus, the activities do not qualify for federal preemption.

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

It is ordered:

1. Petitioner’s request to institute a declaratory order proceeding is denied.
2. This decision is effective on its service date.

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

⁴ Nor does the record here show that Riffin is a rail carrier at any other location. Riffin cites 2 other cases to support his claim to rail carrier status, neither of which supports his position. In James Riffin—Acquis. & Operation Exemption—On Raritan Valley Connecting Track, FD 34963 (STB served Dec. 20, 2006), the Board referred to Riffin as a Class III rail carrier based upon the manner that Riffin had characterized his own status in the pleadings he had filed with the Board, but Riffin’s assertion was neither questioned by the parties nor analyzed by the Board. In the other case, the Board ultimately rejected Riffin’s attempt to acquire a rail line. James Riffin—Acquis. & Operation Exemption—In Balt. City, Md., FD 34982 (STB served Oct. 9, 2007).