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SERVICE DATE – OCTOBER 31, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35749

BOSTON AND MAINE CORPORATION AND
SPRINGFIELD TERMINAL RAILROAD COMPANY—
PETITION FOR DECLARATORY ORDER

Digest:¹ This decision denies a request by the Town of Winchester, Mass., to reconsider the Board's decision declaring that certain zoning decisions issued by the Town, which would ban freight rail transportation to a warehouse in the Town, are preempted by federal law.

Decided: October 30, 2013

In a decision served on July 19, 2013 (July 19 Decision), the Board granted a petition for declaratory order filed by the Boston and Maine Corporation and Springfield Terminal Railway Company (collectively, Pan Am). The July 19 Decision declared that 49 U.S.C. § 10501(b) preempts actions taken by the Town of Winchester, Mass. (the Town), to ban certain freight rail transportation conducted by Pan Am. On August 12, 2013, the Town filed a petition for reconsideration, and Pan Am replied on September 3, 2013. For the reasons discussed below, we will deny the Town's petition for reconsideration.

BACKGROUND

This proceeding involves two railroad tracks adjacent to a warehouse in Winchester operated by Tighe Logistics Group (Tighe). The two tracks lie between the warehouse and a rail line that Pan Am operates as its main line, to which these two tracks connect. Pan Am, a rail common carrier, states that the track immediately adjacent to the warehouse is owned by Tighe, and that the other track is held by Pan Am under an exclusive freight rail easement from the Massachusetts Bay Transportation Authority. Pan Am states that it provides common carrier rail transportation from its main line over these two tracks to the warehouse, where cargo is stored before continuing transportation to distribution centers and, ultimately, to retail customers.²

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).

² Pet. for Declaratory Order 2-3, 16.

Residents living near these tracks filed a complaint with the Town's zoning authorities relating to the use of the tracks, in particular the noise of trains coupling and switching at night. In August 2012, the Town's Zoning Board of Appeal (ZBA) held that the area around the tracks "is being used as a freight yard which is not allowed" under municipal zoning laws.³ Pan Am states that Tighe appealed this decision to state court, but that the parties jointly moved to remand the proceeding to the ZBA for consideration of the preemption issue.⁴ On June 25, 2013, the ZBA submitted to the Town an amended decision after remand, directing that all rail traffic to the warehouse over the lines at issue "immediately cease and desist."⁵ Pan Am thereafter filed its petition for declaratory order with the Board on July 1, 2013.

Pursuant to its discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721, the Board instituted a declaratory order proceeding on July 3, 2013, to resolve the controversy over whether application of the Town's zoning laws is preempted under 49 U.S.C. § 10501(b). In light of the Town's alleged intent to seek a state court injunction to enforce its cease and desist order as early as the week of July 22, 2013, the Board adopted an expedited procedural schedule, with replies to the petition due by July 10, 2013. The Town filed a reply on that date.

As noted, the Board's July 19 Decision granted Pan Am's petition and declared the Town's zoning decisions preempted by 49 U.S.C. § 10501(b). According to the Town, the Superior Court of Middlesex County, Mass., held a hearing on the Town's Motion for Preliminary Injunction (PI Motion) on July 31, 2013, and the court denied the PI Motion as moot based on the Board's July 19 Decision.⁶

DISCUSSION AND CONCLUSIONS

We may grant a petition to reconsider a decision if the petitioner demonstrates material error, new evidence, or substantially changed circumstances that would materially affect the case. 49 U.S.C. § 722(c); 49 C.F.R. § 1115.3; see also Entergy Ark., Inc. v. Union Pac. R.R., NOR 42104, slip op. at 3-4 (STB served Nov. 26, 2012). Here, the Town asserts that the Board committed material error in the July 19 Decision. However, the Town has failed to demonstrate material error and has not met its burden for reconsideration.

The Town argues that, under Younger v. Harris, 401 U.S. 37 (1971), the Board should have abstained from issuing a decision in order to allow the state court proceeding to go forward.⁷ The Younger principle is that a federal court should not enjoin or declare illegal a pending state proceeding that is judicial in nature, involves important state interests, and involves

³ Id., Ex. B at 2.

⁴ Pet. for Declaratory Order 5.

⁵ Id., Ex. B at 4 (Amended Decision After Remand).

⁶ Pet. for Reconsideration 1-2.

⁷ Pet. for Reconsideration 1-4.

specific types of proceedings addressed in Younger and the cases that follow it—typically, a state criminal prosecution or civil enforcement proceeding. See Rumber v. District of Columbia, 595 F.3d 1298, 1301 (D.C. Cir. 2010); Act Now to Stop War v. District of Columbia, 589 F.3d 433, 436 (D.C. Cir. 2009). Here, however, the Town’s own request for relief from the state court was premised on federal involvement, and in particular, a decision from the Board regarding preemption. The Town’s PI Motion filed in state court⁸ stated that the Town:

seeks declaratory and preliminary injunctive relief to enforce an order requiring the Plaintiff to cease and desist all rail traffic to the warehouse . . . pending determination of a claim for federal preemption now before the Surface Transportation Board (“STB”) on the Emergency Petition for Declaratory Order submitted July 1, 2013, by Boston and Maine Corporation and Springfield Terminal Railway Company, STB Finance Docket No: 35749.⁹

Further, the state court PI Motion asserts, “the public interest is served by halting all rail operations to the Tighe facility *until the issue of preemption can be determined by the STB.*”¹⁰

Thus, as the Town’s PI Motion itself makes clear, the Town did not ask the state court to decide the preemption issue on the merits, but instead only to enjoin rail service until *the Board* decided it. As a result, the Board’s issuance of its July 19 Decision was, by definition, not contrary to Younger.¹¹ In short, the state court here did not find the Town’s PI Motion moot because of any action by the Board to enjoin the state court proceeding or declare it illegal; the Board took no such action. Rather, the Town’s PI Motion became moot because the Town itself had sought relief only until the Board issued a preemption determination.

The Town’s related argument that the Board “lacks jurisdiction” to enter the July 19 Decision¹² is likewise without merit. Contrary to the Town’s assertion, the Board did not “exercise . . . control” over the state court.¹³ Rather, Pan Am asked the Board to issue a declaratory order on the question of federal preemption, and that is what the Board did. The Board, like other agencies, has statutory authority to issue such orders. See 5 U.S.C. § 554(e); 49 U.S.C. § 721(a); Intercity Transp. Co. v. United States, 737 F.2d 103 (D.C. Cir. 1984). That the Board did so promptly, before the state court hearing on the Town’s PI Motion, does not mean the Board “exercised control” over the state court.

⁸ The Board takes official notice of the Town’s PI Motion, filed with the Middlesex Superior Court, Commonwealth of Massachusetts, on July 19, 2013.

⁹ PI Motion 1.

¹⁰ Id. at 5 (emphasis added).

¹¹ In addition, the Town cites no authority for the proposition that Younger applies to federal agencies.

¹² Pet. for Reconsideration 5-6.

¹³ Id. at 6.

Moreover, the Town waived these arguments because it did not present claims based on Younger or the Board's alleged lack of jurisdiction until it sought reconsideration.¹⁴ Indeed, the Town participated in the declaratory order proceeding before the Board, and only after receiving an unfavorable decision from the agency did the Town claim for the first time that the Board's proceeding itself constituted undue interference with the Town's request for preliminary relief from the state court (which the Town sought after the Board's proceeding had begun).¹⁵

Thus, the Town's arguments based on Younger abstention and alleged interference with the state court proceeding are without merit.

The Town also argues that, in reaching its July 19 Decision, the Board departed from its precedent without explanation. Specifically, the Town contends that, for federal preemption to apply, the Board's case law requires "transportation" performed by, or under the auspices of, a "rail carrier," and in the July 19 Decision, according to the Town, "[t]he Board did not disagree that Tighe was not a rail carrier."¹⁶ However, as the Board's July 19 Decision made clear, it is Pan Am's common carrier service over the tracks in question that falls within the Board's jurisdiction and gives rise to § 10501(b) preemption. July 19 Decision, slip op. at 4-5. The Board did not need to determine whether any activities of Tighe constitute transportation by a rail carrier, because the "entity in question,"¹⁷ i.e., Pan Am, is a rail carrier conducting freight

¹⁴ See, e.g., Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1), slip op. at 12-13 (STB served Mar. 19, 2008); Guillemard-Ginorio v. Contreras-Gomez, 585 F.3d 508, 517 (1st Cir. 2009).

¹⁵ We note that, in a letter it submitted to the Board on July 3, 2013, the Town argued that "there is no emergency requiring the Board's immediate action," because "no petition for a temporary restraining order or preliminary injunction as yet has been filed with the Middlesex Superior Court" Two days later, however, the Town proceeded to serve its PI Motion, without informing the Board. See PI Motion 7 (indicating service on July 5, 2013). Serving the PI Motion was the first step in the relevant Massachusetts Superior Court procedure. See Mass. Super. Ct. Rule 9A(b)(2), available at <http://www.lawlib.state.ma.us/source/mass/rules/superior/sup9a.html>. If the Town had truly been concerned with any alleged interference by the Board in the state court process, it would have kept the Board apprised of the Town's pursuit of relief through that state court process. We are troubled by the Town's lack of candor in not notifying the Board when the Town served its PI Motion on July 5, thus beginning the process for seeking a state court injunction, after having assured the Board in a letter filed July 3, the prior business day, that there was no emergency requiring prompt Board action because it had not yet filed any petition for injunction. See 49 C.F.R. § 1103.27 (conduct before the Board should be characterized by candor).

¹⁶ Pet. for Reconsideration 7-8.

¹⁷ Pet. for Reconsideration 8. The Town mischaracterizes the Board's decision when it states that the Board declared the entire property at 43 Holton Street to be exempt from local regulation. See id. Rather, the Board's decision declared that Pan Am's provision of common

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rail transportation over these tracks, and Tighe has rights provided by federal law to ask for and receive common carrier rail service. Id. at 3-5.

Accordingly, the Town's petition for reconsideration 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. The petition for reconsideration is denied.
2. This decision is effective on the date of service.

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

(. . . continued)

carrier rail transportation service over the tracks on this property is subject to the Board's jurisdiction and resulting preemption. July 19 Decision, slip op. at 4-5.