

Law Offices
of
Mark A. Cuthbertson

434 New York Avenue
Huntington, NY 11743
cuthbertsonlaw.com
P: (631) 351-3501
F: (631) 614-4314

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Of Counsel
Michelle M. Pfeifferberger

Mark A. Cuthbertson
Jessica P. Driscoll
Joseph C. DeJesu

May 23, 2013

VIA ELECTRONIC FILING

Ms. Cynthia Brown
U.S. Surface Transportation Board
395 E. Street, SW
Washington, DC 20423

RE: Pinelawn Cemetery – Petition For Declaratory Order
Finance Docket No. 35468

Dear Ms. Brown:

This office represents Pinelawn Cemetery in the above-referenced matter. Please accept this letter as a brief response to the May 7, 2013 submission by the New York and Atlantic Railway (“NYAR”) (STB Document No. 234169). In its letter, NYAR indicates that the decision issued by the Hon. Daniel J. Martin of the Suffolk County Supreme Court is a “matter . . . in connection with the above-referenced proceeding.” However, the state court decision has no bearing whatsoever on this proceeding.

First, the STB has the sole authority to determine its own jurisdiction. Second, the state court decision is an interpretation of the scope of a state tax exemption under the New York Public Authorities Law, which has no bearing on the scope of the ICCTA. Third, even if it were pertinent that a state court determined that the Property was being used for “transportation purposes” as defined by a state tax exemption statute, the Board has already held on *three* separate occasions that the current operator on the property, Coastal Distribution, LLC (“Coastal”), is not a rail carrier nor is it engaging in rail activity at the Farmingdale Yard, which it constructed in or about 2003. See Town of Babylon and Pinelawn Cemetery – Petition for Declaratory Order, STB Finance Docket No. 35037 (decisions served February 1, 2008, September 26, 2008 and October 15, 2009). In fact, the Board even explicitly rejected the argument by NYAR that the alleged “transportation” occurring on the Property created Board jurisdiction, when it explained:

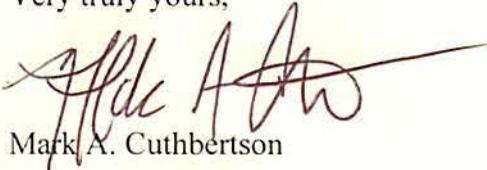
[W]hile section 10501(b)(2) enumerates various transportation activities over which the Board’s jurisdiction is exclusive, section 10501(a)(1) clearly specifies that **the Board’s jurisdiction is over**

“transportation by rail carrier.” Thus, to come within the Board’s jurisdiction and thereby be entitled to preemption under section 10501(b), an activity must constitute “transportation” and must be performed by, or under the auspices of, a “rail carrier.” See New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway—Construction, Acquisition and Operation Exemption—In Wilmington and Woburn, MA, STB Finance Docket No. 34797 (STB served July 10, 2007) (citation omitted). For an activity to be subject to the agency’s jurisdiction, and therefore entitled to preemption, **both jurisdictional prongs of the statutory test must be met, not just one as suggested by NYAR....Simply put, where, as here, a non-rail carrier is operating a transload facility for its own benefit, it is not subject to the Board’s jurisdiction.**

Town of Babylon and Pinelawn Cemetery, STB Finance Docket No. 35057 (served September 26, 2008) at 5-6 (emphasis added). Thus, whether Coastal’s operation is or is not classified as “transportation” has no bearing on the Board’s jurisdiction.

Thank you for your time and attention to this matter.

Very truly yours,



Mark A. Cuthbertson

JPD:djf

cc: David Lazer, Esq.
A. Craig Purcell, Esq.
Jay Safar, Esq.
Ronald Lane, Esq.
James P. Clark, Esq.