

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35157

THE CITY OF ALEXANDRIA, VIRGINIA—PETITION FOR DECLARATORY ORDER

Decided: February 17, 2009

In this decision, the Board determines that the operation of an ethanol transloading facility owned by Norfolk Southern Railway Company (NS) within the City of Alexandria, VA (Alexandria or the City), constitutes transportation by rail carrier and, therefore, is shielded from most state and local laws, including zoning laws, by the preemption provision in 49 U.S.C. 10501(b).

BACKGROUND

NS has begun operation of an ethanol transloading facility (the Facility) within the City pursuant to an operating agreement with RSI Leasing, LLC (RSI). On June 17, 2008, Alexandria filed a petition for declaratory order (Petition) seeking a Board determination that the City's zoning and other regulatory authorities are not preempted by 49 U.S.C. 10501(b) because the Facility is operated independently by RSI and does not constitute "transportation by rail carrier." On July 2, 2008, NS replied to the City's petition (NS July Reply), maintaining that the transloading operations at the Facility are part of "transportation by rail carrier."

On November 6, 2008, the Board issued a decision instituting this proceeding (November Decision). The Board stated that NS and Alexandria had not provided enough information about the relationship between NS and RSI and their responsibilities to each other and the transloading operations at the Facility for the Board to render an opinion. Therefore, the Board directed NS to submit specific additional information for the record. The City was provided the opportunity to file a reply. The parties made the requested filings.¹ We now have an adequate record upon which to rule.

¹ NS submitted its response to the November Decision on November 26, 2008 (NS November Response), and provided the original signatures for the verified statements and affidavits included in its response on December 1, 2008. The City filed a reply (City Reply) on December 8, 2008, along with a motion for protective order, which was granted in a decision in this proceeding served on December 29, 2008. On December 9, 2008, NS filed a petition for leave to file a reply and a limited reply to the City Reply (NS December Reply). The City consented to NS's filing a reply as part of an agreement on the use of documents obtained through discovery in federal court litigation between the parties. In the interest of compiling a full record, NS's unopposed petition for leave to file a reply to a reply will be granted.

DISCUSSION

At issue in this proceeding is whether the Board has jurisdiction over the transloading operations at the Facility, thus preempting local zoning and regulatory authority.² The Board has jurisdiction over “transportation by rail carrier” under 49 U.S.C. 10501. Accordingly, to qualify for federal preemption under section 10501(b), the activities at issue must constitute “transportation,”³ and must be performed by, or under the auspices of, a “rail carrier.”⁴ Alexandria asserts that the facts here are similar to those in other cases where the Board has found that the relationship between the rail carrier and a third-party service provider was not sufficient to establish that the activities of the third party were part of transportation by rail carrier.⁵ Alexandria also argues that the Facility does not qualify for preemption as a matter of law under regulations promulgated by the Pipeline and Hazardous Materials Safety Administration (PHMSA) at 49 CFR 174.304. We are not persuaded by these arguments for the reasons explained below.

Whether a particular activity is considered part of transportation by rail carrier under section 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 rail at a transloading facility), the Board has looked at such factors as: whether the rail carrier holds out transloading as part of its service; whether the railroad is contractually liable for damage to the shipment during loading or unloading; whether the rail carrier owns the transloading facility; whether the third party is

² 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 many state and local laws, including local zoning and permitting laws and laws that have the effect of managing or governing rail transportation. See, e.g., Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 642 (2d Cir. 2005) (Green Mountain); N.Y. Susquehanna & W. Ry. Corp. v. Jackson, 500 F.3d 238, 252-55 (3d Cir. 2007); 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, slip op. at 7-9 (STB served July 10, 2007) for a discussion of the scope of Federal preemption under section 10501(b).

³ The term “transportation” is defined expansively in the statute 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,” and “services related to that movement, including receipt, delivery, . . . transfer in transit, . . . storage, handling, and interchange of passengers and property.” 49 U.S.C. 10102(9).

⁴ See 49 U.S.C. 10501; Hi Tech Trans, LLC—Petition for Declaratory Order—Newark, NJ, STB Finance Docket No. 34192 (Sub-No. 1), slip op. at 5 (STB served Aug. 14, 2003) (Hi Tech). A rail carrier is a “person providing common carrier railroad transportation for compensation” 49 U.S.C. 10102(5).

⁵ Petition at 6-8. The cases cited by the City are discussed infra.

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 Green Mountain, 404 F.3d at 640 (transloading and temporary storage of bulk salt, cement, and non-bulk foods by a rail carrier found to be part of rail transportation) with Town of Babylon and Pinelawn Cemetery—Petition for Declaratory Order, STB Finance Docket No. 35057 (STB served Feb. 1, 2008 and Sept. 26, 2008) (Babylon) (Board jurisdiction found not to extend to tenant of rail carrier where tenant, not rail carrier itself, had 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); Town of Milford, MA—Petition for Declaratory Order, STB Finance Docket No. 34444 (STB served Aug. 12, 2004) (Milford) (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).

We have carefully examined the record in this case, including the affidavits and documents included in the parties' submissions in response to the November Decision, and we conclude in this case that the Facility is part of NS's rail operations and that RSI is not conducting an independent business. Therefore, the Facility qualifies for federal preemption under section 10501(b).

A. The Relationship Between NS and RSI

Alexandria argues that the facts here are "directly analogous" to the facts in Hi-Tech, Milford and Babylon, where the Board found that transloading facilities were not part of transportation by rail carrier.⁶ We disagree. Unlike those cases, the facts here demonstrate that the transloading services at issue are operated under the auspices of NS and are part of NS's rail transportation service.

To begin with, NS owns the Facility and constructed it with NS's own funds.⁷ By contrast, in Hi-Tech, Milford and Babylon, the third-party contractors constructed or planned to construct the transloading facilities themselves.

Second, the NS-RSI operating agreement does not have any of the characteristics of a lease or license that would be consistent with RSI's conducting an independent business. NS

⁶ Petition at 8.

⁷ Alexandria makes much of the fact that NS consulted with RSI during the construction of the Facility. City Reply at 5-6. However, the fact that NS sought RSI's advice on the design and construction of the Facility does not show that transloading is not part of the service that NS provides to shippers. It is appropriate that RSI, as a company with expertise in ethanol transloading that would perform the physical transloading on behalf of NS, would have input in the design and construction of the Facility.

pays RSI a fee for RSI's services; RSI does not pay any fees for use of the Facility.⁸ In contrast, in Hi-Tech, Milford and Babylon, the transloaders paid rent or fees to the rail carriers for the use of the yard. Moreover, the term of the NS-RSI operating agreement is 2 years, and NS has the right to cancel for any reason on 60 days' notice. In contrast in Hi-Tech, Milford and Babylon, the transloaders had, or contemplated having, leases or licensing agreements that were long-term agreements.

Third, NS holds itself out as offering transloading service at the Alexandria terminal as part of its common carrier service, and transloading is bundled with the transportation services that NS provides to ethanol shippers.⁹ Furthermore, none of the ethanol shippers who are using the Facility are affiliated with RSI.¹⁰ There is no evidence that RSI holds itself out as providing transloading service at the Facility or that RSI has any contractual relationships relating to the Facility with any of the ethanol shippers. Indeed, a provision in the NS-RSI operating agreement specifically provides that RSI does not have the right to market the Facility.¹¹ By contrast, in Hi-Tech, Milford and Babylon, the third-party transloaders held themselves out as providing transloading service and had separate contractual relationships with customers for transloading and other arrangements.

Other evidence supports the conclusion that RSI does not have the rights associated with an independent transloading-related business. For example, the record here shows that RSI does not set, invoice for, or collect transloading fees charged to the shipper; NS retained these rights.¹² RSI receives a flat rate for each gallon of ethanol it transloads, regardless of the fee NS charges the shipper.¹³ RSI neither does, nor has the right to, market the Facility.¹⁴ RSI is not involved in the delivery of ethanol to the tank cars at the point of origin or the delivery of ethanol from the Facility to its final destination.¹⁵

By contrast, in Hi-Tech, Milford and Babylon, the third-party contractors had significant rights to provide transloading service as an independent business. In Hi-Tech, the third-party transloader contracted directly with shippers for the transportation of construction and demolition debris from the shippers' construction sites to the transloading facility and hired the trucks for the hauls. Hi-Tech, slip op. at 2. The third-party contractor set its own rates for the service. There was no evidence that the rail carrier quoted rates or otherwise charged shippers for use of the third-party transloader's facility. Id., slip op. at 7. Similarly, in Milford, the

⁸ NS November Response at 8.

⁹ Id. at 9.

¹⁰ Id. at 4.

¹¹ Id. at 6.

¹² Id. at 5.

¹³ NS December Reply at 3.

¹⁴ NS November Response at 6.

¹⁵ Id. at 9.

third-party was conducting a transloading and steel fabrication business—including delivery of the material to customers’ sites by truck—which it offered directly to customers on its own terms. Milford, slip op. at 3. There was no evidence that the rail carrier intended to hold out transloading as part of its services or that the rail carrier was in any way involved in the business of transloading. Id. Likewise, in Babylon, the third-party transloader was entitled to charge a separate fee for transloading services, conducted all customer negotiations concerning transloading, and billed and collected the transloading fee from customers separately from the transportation charges. The third-party transloader also had the right to enter into separate agreements with customers in its own name for disposition of commodities after rail transportation. Babylon, slip op. at 5.

Moreover, the record here shows that the areas where RSI plays a role in the operations of the Facility are directly related to the physical act of ethanol transloading. RSI coordinates with trucking companies regarding transloading schedules once RSI is aware of incoming shipments, and it directs NS when to move tank cars at the Facility to and from the transloading track.¹⁶ All of RSI’s activities here are consistent with RSI’s providing a contract service that is part of NS’s rail transportation business, which includes transloading in this case. Alexandria has failed to show that the services RSI provides to NS here related to transloading differ from any other type of contract services that a rail carrier might utilize to conduct its business.

Alexandria errs in suggesting that NS should not be able to qualify for federal preemption for the Facility by structuring its relationship with RSI in the way it has here because NS and RSI allegedly have a different relationship at other transloading facilities on NS’s lines. Parties are free to enter into whatever arrangements will suit their needs at a particular facility. The record here shows that the transloading service in Alexandria is conducted as part of NS’s business as a rail carrier. Therefore, the transloading activities at the Facility are part of rail transportation by rail carrier and come within the Board’s jurisdiction.

Federal preemption can apply to a service that is provided to a rail carrier through an agent or a contractor. As noted earlier, the service need only be provided under the auspices of the rail carrier as part of rail transportation. Ethanol shipped by rail necessitates transloading operations like those performed at the Facility. RSI’s role is sufficiently limited to the transloading activities at the Facility and its activities are sufficiently under the control of NS to make its activities part of NS’s rail transportation. Therefore, the activities qualify for federal preemption under 49 U.S.C. 10501(b).

B. Effect of PHMSA Regulations

As noted in the November Decision, slip op. at 3, the City argues that the ethanol operations at the Facility come under PHMSA regulations at 49 CFR 174.304.¹⁷ Alexandria

¹⁶ City Reply at 6; NS November Response at 9.

¹⁷ 49 CFR 174.304 states that “[a] tank car containing a Class 3 (flammable liquid) material, other than liquid road asphalt or tar, may not be transported by rail unless it is originally consigned or subsequently reconsigned to a party having a private track on which it is

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states that those regulations cannot be satisfied unless the ethanol tank cars are unloaded by a private operator, not by the railroad, and that, therefore, the Facility does not fall under the Board's jurisdiction. NS responds that the PHMSA regulations do not apply to the transloading activities that go on at the Facility.

Because the Board has no jurisdiction over PHMSA regulations at issue, we suggested in the November Decision that Alexandria might consider seeking a ruling from PHMSA or the United States Department of Transportation as to whether 49 CFR 174.304 prohibits a railroad from operating a facility for the transloading of ethanol. See November Decision, slip op. at 4-5. The Board provided the City with the opportunity to submit copies of any such rulings so that, if appropriate, we could take them into consideration in reaching our decision on the merits in this proceeding.

On November 12, 2008, NS submitted a letter from the Acting Chief, Standards Development in PHMSA's Office of Hazardous Materials Standards, regarding the application of 49 CFR 174.304. The letter states that section 174.304 is intended to apply to unloading operations at a facility that is the final destination for the material, and does not apply at a transloading facility on the property of a rail carrier where, as here, the material is transferred to other packaging (such as a tank truck) for further transportation to its final destination. The Board will consider this letter as determinative of the issue whether 49 CFR 174.304 applies to the Facility at issue here.

We have found in this decision that the Board has jurisdiction over the operations at the Facility, and, thus, that federal preemption applies to those activities. Consequently, local zoning and other requirements that could interfere with or prevent the transloading activities are preempted. We note, however, that, notwithstanding the finding that federal preemption applies here, historic police powers are retained and state and local government entities can take appropriate action to protect public health and safety so long as their actions do not serve to regulate railroad operations or unreasonably interfere with interstate commerce.

In addition, we encourage rail carriers to contact local officials to inform them of planned transloading activities prior to commencing operations and to update them regarding changes in existing transloading operations, as communications can improve any needed coordination of activities to promote safety and address potential emergency service response concerns in and around a railroad facility. The evidence here reflects that NS did communicate with a number of

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to be delivered and unloaded (see §171.8 of this subchapter) or to a party using railroad siding facilities which are equipped for piping the liquid from the tank car to permanent storage tanks of sufficient capacity to receive the entire contents of the car." 49 CFR 171.8 defines 'private track' as "(i) Track located outside of a carrier's right-of-way, yard, or terminals where the carrier does not own the rails, ties, roadbed, or right-of-way, or (ii) Track leased by a railroad to a lessee, where the lease provides for, and actual practice entails, exclusive use of that trackage by the lessee . . . where the lessor otherwise exercises no control over or responsibility for the trackage or the cars on the trackage."

City officials during this process. We emphasize that a railroad's sharing information with officials of affected local communities before beginning operations would make those officials aware of the activities to be conducted and enable them to take steps to be prepared to respond if a problem should arise.

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

It is ordered:

1. The City's petition for a declaratory order is granted as discussed in this decision.
2. NS's petition for leave to file a reply to a reply is granted.
3. This decision is effective on its date of service.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey. Vice Chairman Mulvey commented with a separate expression.

Anne K. Quinlan
Acting Secretary

VICE CHAIRMAN MULVEY, commenting:

I comment separately to note that the Board typically harmonizes its interpretation and implementation of the Interstate Commerce Act with other federal laws,¹⁸ such as relevant PHMSA regulations. Existing PHMSA regulations apparently do not apply to the circumstances of this proceeding. I urge PHMSA to consider whether it would be advisable to revise 49 CFR 174.304 to apply to rail transloading facilities under the circumstances present in this proceeding -- to the extent it has the authority to do so. If PHMSA does not currently have the authority to revise this regulation, it should consider seeking the authority to do so to close any regulatory gap.

¹⁸ Tyrrell v. Norfolk Southern Ry., 248 F.3d 517, 523 (6th Cir. 2001); Friends of the Aquifer, STB Finance Docket No. 33966, slip op. at 5 (STB served Aug. 15, 2001).