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SERVICE DATE – NOVEMBER 6, 2008

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 35157

THE CITY OF ALEXANDRIA, VIRGINIA—PETITION FOR DECLARATORY ORDER

Decided: November 5, 2008

In this decision, the Board institutes a proceeding to determine whether the operation of an ethanol transloading facility within the City of Alexandria, Virginia, constitutes transportation by rail carrier and, therefore, is covered by the preemption provision in 49 U.S.C. 10501(b). Norfolk Southern Railway Company (NS) is directed to submit information in order to provide a more complete record before the Board.

BACKGROUND

NS and RSI Leasing, LLC (RSI) have begun operations of an ethanol transloading facility (the Facility) within the City of Alexandria, VA (Alexandria or the City). On June 17, 2008, Alexandria filed a petition for declaratory order seeking a Board determination that the City's zoning and other regulatory authority are not preempted by section 10501(b) because the Facility is operated independently by RSI and does not constitute "transportation by rail carrier." The City also seeks discovery pursuant to 49 CFR 1114.21 concerning the relationship between RSI and NS. In the alternative, the City asks the Board to direct NS to cease operation of the Facility until NS complies with the Federal operating and safety regulations set forth in 49 CFR 174.304 and 49 CFR 173.10.

On July 2, 2008, NS replied to the City's petition claiming that the transloading operations at the Facility are part of "transportation by rail carrier." NS contends that RSI is a contractor providing its services to NS and that the Facility is NS's alone. As evidence of its position, NS states that RSI does not lease the property and has no right to sell or market the Facility's services. NS included a redacted version of its contract with RSI (the NS-RSI Agreement) in its reply.

On July 11, 2008, the City petitioned for leave to file a reply to a reply and concurrently filed a reply to NS's response. The City alleged that Tariff 9238-D, which was not included in NS's response, shows that RSI operates the Facility independently. Tariff 9238-D states that the Facility is operated by an independent terminal operator and that arrangements for service should be made between the shipper and the terminal operator. Tariff 9238-D also states that charges for the transloading will be determined by the terminal operator on an individual basis, subject to maximum charges set forth in the tariff.

On July 15, 2008, NS filed a response to the City's reply. NS acknowledges that Tariff 9238-D included the Facility in its list of independent terminal operators, but claims that this inclusion was a clerical error and states that it has issued a new tariff, Tariff 9238-E, that does not include the Facility as an independent operator. NS did not include a copy of this tariff with its filing. NS also argues that the NS-RSI Agreement provides that NS sets the rates charged to the shippers for the transloading and Tariff 9238-E governs the operational aspects of the Facility only.

PRELIMINARY MATTERS

In the interest of compiling a full record, the City's petition for leave to file a reply to a reply and NS's petition for leave to respond will be granted. NS states that it does not object to acceptance of the City's reply if its response likewise is accepted. Moreover, the City was unaware of Tariff 9238-D until NS submitted the NS-RSI Agreement that incorporates the tariff as part of NS's July 1, 2008 response to the City's petition for declaratory order. Similarly, NS's response addresses the new evidence submitted by the City in its reply. Therefore, it is appropriate to accept into the record both the City's reply and NS's response. The City's motion to strike extraneous material from NS's response will be denied, although we make no determination at this point whether the information has any probative value. Similarly, the City's request for discovery will be denied.

DISCUSSION

The Board has discretionary authority under 5 U.S.C. 554(e) and 49 U.S.C. 721 to issue a declaratory order to eliminate a controversy or remove uncertainty. The factual issues presented here warrant consideration by the Board because they raise a genuine question whether the scope of federal preemption encompasses the activities occurring at the Facility. Therefore, by this decision, a declaratory order proceeding will be instituted. As discussed below, NS is directed to provide further information needed to allow the agency to address the issues presented. The City is afforded time to reply to NS's additional information. The Board then will address promptly the issue involved here.

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.¹ The Board has jurisdiction over "transportation by rail carrier" under 49 U.S.C. 10501(a). Accordingly, to

¹ 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. See, e.g., 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).

qualify for Federal preemption under section 10501(b), the activities at issue must be “transportation,”² and must be performed by, or under the auspices of, a “rail carrier.”³ Whether a particular activity is part of transportation by rail carrier under section 10501 is a case-by-case, fact-specific determination.

In determining whether the activities come within the Board’s jurisdiction where a third party performs the physical transloading (transferring material to or from rail and truck 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 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 R.R. Corp. v. Vermont, 404 F.3d 638, 640, 642 (2d Cir. 2005) (transloading and temporary storage of bulk salt, cement, and non-bulk foods by a rail carrier 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) (Board jurisdiction did not 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 exclusive responsibility to construct and maintain facilities and to market and bill public for services); 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).

The City maintains that RSI is performing the transloading service at the Facility as an independent business, not as part of rail carrier operations that would qualify for Federal preemption pursuant to section 10501(b). In addition, the City argues that the ethanol operations at the Facility come under regulations of the Pipeline and Hazardous Materials Safety Administration (PHMSA), at 49 CFR 173.10 and 49 CFR 174.304. Alexandria states that the PHMSA regulations at 49 CFR 174.304 cannot be satisfied unless the ethanol tank cars are unloaded by a private operator, not by the railroad. The City’s argument is that, therefore, the

² 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).

³ 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 hire.” 49 U.S.C. 10102(5).

transloading of ethanol at the Facility cannot be part of rail transportation that qualifies for Federal preemption.

NS, on the other hand, claims that RSI is simply a contractor operating on behalf of NS and that the transloading therefore qualifies as “transportation by rail carrier.” NS argues that the PHMSA regulations relied on by the City have no bearing on whether RSI can lawfully act as NS’s agent. NS claims that the PHMSA regulations apply to delivery of rail cars to private track used by a consignee for the storage or unloading of rail cars after the rail cars have been delivered to their final destination, and not to the interim transloading that occurs at the Facility.

The submissions so far have provided some probative evidence on the issue of whether the activities undertaken at the Facility are part of transportation by a rail carrier and therefore come within the Board’s jurisdiction. There is not enough information on this record, however, 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 a decision. To remedy that deficiency, NS is directed to submit the information set forth below for the record. The narrative answers to Items 1 and 4 should be in the form of verified statements with any necessary exhibits.

1. Answers to the following questions: With whom do shippers communicate to arrange transloading at the facilities? Who schedules the transloading, and who collects the fees for the transloading? What is the extent of the involvement of RSI and its affiliates in the ownership and construction of the Facility, delivery of the ethanol to the tank cars, the unloading activities that take place at the Facility, and redelivery of the ethanol to blending facilities? What specific measures does NS take to control, monitor, and supervise the operation of the Facility?
2. A copy of any additional agreements NS has with RSI or any RSI affiliate that relate to the Facility or the transportation of ethanol to the Facility.
3. A copy of Tariff 9238-E and any successor tariff.
4. A list of the shippers, not affiliated with RSI, that have used the Facility since it has opened.

NS should submit the supplemental information set forth in this decision by November 26, 2008, following 49 CFR 1104.14 to segregate materials NS believes are entitled to be kept confidential. NS must file simultaneously a public version of any confidential submission filed with the Board. The City may file a reply by December 8, 2008. The parties should limit these submissions to the issues on which additional information is requested.

Finally, the Board cannot entertain the City’s request for leave in the alternative to direct NS to cease operations at the Facility until NS complies with 49 CFR 174.304 and 49 CFR 173.10. The Board has no jurisdiction over these regulations. Therefore, without any finding as to its merit, this request will be denied.

Because the Board does not interpret regulations outside of its jurisdiction, Alexandria may wish to consider seeking a ruling from PHMSA or the United States Department of Transportation stating whether 49 CFR 174.304 prohibits a railroad from operating a facility for the transloading of ethanol. Copies of any such rulings should be provided to the Board so that, if appropriate, the Board may take them into consideration in future decisions on the merits in this proceeding.

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

It is ordered:

1. A declaratory order proceeding is instituted.
2. The City's petition for leave to file a reply to a reply is granted, and its reply will be considered.
3. NS's motion for leave to respond to the City's reply is granted and its response will be considered.
4. The City's motion to strike material from NS's response is denied.
5. The City's request for discovery is denied.
6. NS is directed to submit the supplemental information set forth in this decision by November 26, 2008, following 49 CFR 1104.14 to segregate materials NS believes are entitled to be kept confidential. NS must file simultaneously a public version of any confidential submission filed with the Board. The City may file a reply by December 8, 2008. The parties should limit these submissions to the issues on which additional information is requested. The City's request for discovery is denied.
7. The City's request to direct NS to cease operations at the Facility until NS complies with 49 CFR 174.304 and 49 CFR 173.10 is denied.
8. This decision is effective on its date of service.

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

Anne K. Quinlan
Acting Secretary